



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

BRIDGE  
5' FLANK

FRONT ELEVATION  
OF SCENE WHERE  
ACCIDENT OCCURRED

WALL

# Atlantic reporter

Connecticut. Supreme Court, West Publishing Company, New  
Jersey Supreme Court, Pennsylvania. Superior Court, ...

PERSPECTIVE DRAWING



ERR



HARVARD LAW SCHOOL  
LIBRARY



















National Reporter System.—State Series.

THE  
ATLANTIC REPORTER,  
VOLUME 70,

CONTAINING ALL THE REPORTED DECISIONS OF THE

Supreme Courts of MAINE, NEW HAMPSHIRE, VERMONT, RHODE ISLAND,  
CONNECTICUT, and PENNSYLVANIA; Court of Errors and Appeals,  
Court of Chancery, and Supreme and Prerogative Courts  
of NEW JERSEY; Supreme Court, Court of Chancery,  
Superior Court, Court of General Sessions, and  
Court of Oyer and Terminer of DELAWARE;  
and Court of Appeals of MARYLAND.

PERMANENT EDITION.

JULY 30—DECEMBER 3, 1908.

ST. PAUL:  
WEST PUBLISHING CO.  
1908.

KF  
135  
117  
A8

**COPYRIGHT, 1906,**  
**BY**  
**WEST PUBLISHING COMPANY.**  
**(70 ATL.)**

ATLANTIC REPORTER, VOLUME 70.

JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

---

CONNECTICUT—Supreme Court of Errors.

SIMEON E. BALDWIN, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

WILLIAM HAMERSLEY. <sup>1</sup>	SAMUEL O. PRENTICE.
FREDERICK B. HALL.	JOHN M. THAYER.
A. T. RORABACK. <sup>2</sup>	

DELAWARE—Supreme Court.

JOHN R. NICHOLSON, CHANCELLOR.

CHARLES B. LORE, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

WILLIAM C. SPRUANCE.	JAMES PENNEWILL.
IGNATIUS C. GRUBB.	WILLIAM H. BOYCE.

Court of Chancery.

JOHN R. NICHOLSON, CHANCELLOR.

MAINE—Supreme Judicial Court.

LUCILIUS A. EMERY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

WM. PENN WHITEHOUSE.	ALBERT M. SPEAR.
SEWALL C. STROUT. <sup>3</sup>	LESLIE C. CORNISH.
ALBERT R. SAVAGE.	ARNO W. KING.
HENRY C. PEABODY.	GEORGE E. BIRD. <sup>4</sup>

MARYLAND—Court of Appeals.

A. HUNTER BOYD, CHIEF JUDGE.

ASSOCIATE JUDGES.

JOHN P. BRISCOE.	N. CHARLES BURKE.
HENRY PAGE. <sup>5</sup>	WILLIAM H. THOMAS.
JAMES A. PEARCE.	GLENN H. WORTHINGTON.
SAMUEL D. SCHMUCKER.	W. LAIRD HENRY. <sup>6</sup>

NEW HAMPSHIRE—Supreme Court.

FRANK N. PARSONS, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

REUBEN E. WALKER.	JOHN E. YOUNG.
GEORGE H. BINGHAM.	ROBERT J. PEASLEE.

<sup>1</sup> Retired September 9, 1908.

<sup>2</sup> Appointed to succeed Hamersley, J.

<sup>3</sup> Term expired April 12, 1908.

<sup>4</sup> Appointed to succeed Strout, J., April, 1908.

<sup>5</sup> Retired by Act of Legislature of 1908.

<sup>6</sup> Commissioned May 1, 1908.

**NEW JERSEY—Court of Errors and Appeals.**

**MAHLON PITNEY, CHANCELLOR.**  
**WILLIAM S. GUMMERE, CHIEF JUSTICE.**

**JUSTICES.**

<b>CHARLES G. GARRISON.</b>	<b>CHARLES W. PARKER.</b>
<b>FRANCIS J. SWAYZE.</b>	<b>JAMES J. BERGEN.</b>
<b>ALFRED REED.</b>	<b>WILLARD P. VOORHEES.</b>
<b>THOMAS W. TRENCHARD.</b>	<b>JAMES F. MINTURN.</b>

**JUDGES.**

<b>JOHN W. BOGERT.</b>	<b>GEORGE R. GRAY.</b>
<b>WILLIAM H. VREDENBURGH.</b>	<b>ELMER E. GREEN.</b>
<b>G. D. W. VROOM.</b>	<b>JAMES B. DILL.</b>

**Court of Chancery.**

**MAHLON PITNEY, CHANCELLOR.**

**VICE CHANCELLORS.**

<b>JOHN R. EMERY.</b>	<b>LINDLEY M. GARRISON.</b>
<b>FREDERIC W. STEVENS.</b>	<b>EDMUND B. LEAMING.</b>
<b>EUGENE STEVENSON.</b>	<b>JAMES E. HOWELL.</b>
<b>EDWIN ROBERT WALKER.</b>	

**Supreme Court.**

**WILLIAM S. GUMMERE, CHIEF JUSTICE.**

**ASSOCIATE JUSTICES.**

<b>CHARLES G. GARRISON.</b>	<b>THOMAS W. TRENCHARD.</b>
<b>FRANCIS J. SWAYZE.</b>	<b>WILLARD P. VOORHEES.</b>
<b>ALFRED REED.</b>	<b>JAMES F. MINTURN.</b>
<b>CHARLES W. PARKER.</b>	<b>JAMES J. BERGEN.</b>

**Prerogative Court.**

**MAHLON PITNEY, ORDINARY.**

**VICE ORDINARY.**

**EDWIN ROBERT WALKER.**

**PENNSYLVANIA—Supreme Court.**

**JAMES T. MITCHELL, CHIEF JUSTICE.**

**JUSTICES.**

<b>D. NEWLIN FELL.</b>	<b>WILLIAM P. POTTER.</b>
<b>J. HAY BROWN.</b>	<b>JOHN P. ELKIN.</b>
<b>S. LESLIE MESTREZAT.</b>	<b>JOHN STEWART.</b>

**RHODE ISLAND—Supreme Court.**

**WILLIAM W. DOUGLAS, CHIEF JUSTICE.\***

**ASSOCIATE JUSTICES.**

<b>EDWARD C. DUBOIS.</b>	<b>CLARKE H. JOHNSON.</b>
<b>JOHN T. BLODGETT.</b>	<b>CHRISTOPHER FRANCIS PARKHURST.</b>

\* Resigned July 12, 1902.

**JUDGES OF THE COURTS.**

7

**VERMONT—Supreme Court.**

**JOHN W. ROWELL, CHIEF JUDGE.**

**ASSOCIATE JUDGES.**

**JAMES M. TYLER.**

**LOVELAND MUNSON.**

**JOHN HENRY WATSON.**



# REVISED RULES.

## SUPREME JUDICIAL COURT OF MAINE.

At the June term, A. D. 1908, of the Supreme Judicial Court held at Portland for the state, all the Justices of the court being present,

Ordered—That the following rules and orders be established and recorded as the rules respecting the modes of trial and the conduct of business in suits at law and in equity.

### SUITS AT LAW AND IN THE LAW COURT.

#### I.

##### ADMISSION OF ATTORNEYS OF THE COURTS OF OTHER STATES.

Members of the bar of other states may be admitted to practice in the manner and upon the conditions prescribed by statute.

#### II.

##### TIME OF THE ENTRY OF ACTIONS.

No civil action shall be entered after the first day of the term, unless by consent of the adverse party and by leave of the court; or unless the court shall allow the same upon proof that the entry was prevented by inevitable accident or other sufficient causes; and in all cases the Christian and surname of the parties and of each trustee shall be entered upon the docket. Writs are to be filed before entry of the action and shall not be taken from the files, except by special leave of court. Any action may be made a misentry at any time during the first term, upon proof that the action was settled before the sitting of the court.

#### III.

##### ENTRY OF THE ATTORNEY'S NAME ON THE CLERK'S DOCKET. CHANGE OF ATTORNEY.

Upon the entry of every action or appeal, the name of the plaintiff's or appellant's attorney shall be entered at the same time on the docket; and after entry of the action or appeal, and within the time allowed by law, the attorney of the defendant or appellee shall cause his name to be entered on the same docket as such attorney, and if it be not so entered, the defendant or appellee may

be defaulted. If either party shall change his attorney, pending the suit, the name of the new attorney shall be substituted on the docket for that of the former attorney and notice thereof given to the adverse party in writing. Until such notice of the change of an attorney, all notices given to or by the attorney first appointed shall be considered in all respects as notice to or from his client, excepting only such cases in which by law the notice is required to be given to the party personally. Nothing in this rule, however, shall be construed to prevent either party from appearing for himself in the manner provided by law, but subject to all the rules governing attorneys in like cases so far as applicable.

#### IV.

##### AMENDMENTS IN MATTERS OF FORM.

Amendments in matters of form will be allowed, as of course, on motion; but if the defect or want of form be shown as cause of demurrer, the court will impose terms on the party amending.

#### V.

##### AMENDMENTS IN MATTERS OF SUBSTANCE.

Amendments in matters of substance may be made, in the discretion of the court, on payment of costs or such other terms as the court shall impose; but if applied for after joinder of an issue of fact or law, the court will in its discretion refuse the application or grant it upon special terms; and when either party amends, the other party shall be entitled to amend, if his case requires it. No new count nor amendment of a declaration will be allowed, unless it be consistent with the original declaration and for the same cause of action.

#### VI.

##### PLEAS AND MOTIONS IN ABATEMENT.

Pleas and motions in abatement, or to the jurisdiction in actions originally brought in this court, must be filed within two days after the entry of the action, the day of the entry to be reckoned as one, and if alleging matter of fact not apparent on the face of the record, shall be verified by affidavit.



## VII.

## OBTAINING A RULE TO PLEAD.

Either party may obtain a rule on the other to plead, reply, rejoin, etc., within a given time to be prescribed by the court; and if the party so required neglect to file his pleadings at the time, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require, unless the court for good cause shown shall enlarge the rule.

## VIII.

## TIME OF FILING AMENDMENTS OR PLEADINGS.

When an action shall be continued with leave to amend the declaration or pleadings, or for the purpose of making a special plea, replication, etc., if no time be expressly assigned for filing such amendment or pleadings, the same shall be filed in the clerk's office by the middle of the vacation after the term when the order is made; and, in such case, the adverse party shall file his plea to the amended declaration, or his answer to the plea, replication, etc., as the case may be, by the first day of the term to which the action is continued. If either party neglect to comply with this rule, all his prior pleadings shall be struck out and judgment entered of nonsuit or default, as the case may require, unless the court for good cause shown, shall allow further time for filing such amendment, or other pleadings.

## IX.

## SPECIFICATIONS OF DEFENSE.

Parties pleading the general issue, may be required to file, in addition thereto, a brief specification of the nature and grounds of their defense; and shall, in all cases, be confined on the trial of the action to the grounds of defense therein set forth; and all matters set forth in the writ and declaration, which are not specifically denied, shall be regarded as admitted for the purposes of the trial.

## X.

## DENIAL OF SIGNATURES, AND PARTNERSHIPS.

No party shall be permitted at the trial of any cause to call for proof of the signature or execution of any paper declared on or filed in set-off, or mentioned in specifications filed by either party, or of the existence of a partnership alleged in the writ, declaration or specifications of defense, when the names of the members thereof are set forth, unless such party, at least ten days before such trial, shall make and file affidavit that he has reason to believe, and does believe, that such signature or execution is not genuine, or that said paper has been mutilated or altered since it was executed, or that such partnership does not exist. A witness examined in chief only as to the signature to or

execution of a paper, shall be cross-examined by the adverse party only as to such signature or execution.

## XI.

## SPECIFICATIONS BY PLAINTIFF.

In actions of assumpsit on the common counts, a specification of the matters to be proved in support thereof shall be filed, on motion of the defendant, within such time as the court orders. One copy of such specification, and one copy of the account in actions on account annexed, shall be furnished for the court, one for the jury and one for the adverse party.

## XII.

## TRUSTEE DISCLOSURES.

In cases commenced by trustee process, when any trustee shall present himself for examination, he or his attorney shall give written notice thereof to the attorney for the plaintiff, or in his absence cause the same to be noted on the docket; and, upon motion, the court may fix a time for the disclosure to be made. Before the disclosure is presented to the court for adjudication, there shall be minuted upon the back thereof the names of the counsel for the plaintiff, and for such trustee, with the date of the service of the writ upon him, and the number of the action upon the docket.

## XIII.

## COSTS UPON CONTINUANCE.

Unless for cause shown, no costs shall be allowed either party for any term at nisi prius when a case is continued by agreement of parties entered on the docket. When a case is under an order of reference to a referee or auditor, costs shall be allowed for the terms at which the rule is issued and the report filed, but not for the intervening terms. Costs shall be allowed for only one term in the law court.

## XIV.

## TIME FOR MAKING MOTIONS FOR CONTINUANCE.

Motions for continuance of any civil action shall be made at the opening of the court on the morning of the second day of the term unless the cause shall come in course to be disposed of in the order of the docket on the first day. But when the cause or ground of the motion shall first exist or become known to the party after the time prescribed by this rule, the motion shall be made as soon afterward as it can be made, according to the course of the court; and whenever an action is continued on such motion, after the time above prescribed, the party making the motion shall not be allowed any costs for his travel and attendance for that term, unless the continuance is or

dered on account of some fault or misconduct in the adverse party.

### XV.

#### AFFIDAVITS TO SUPPORT MOTIONS FOR CONTINUANCE.

No motion for a continuance, based on the want of material testimony, will be sustained, unless supported by an affidavit which shall state the name of the witness, if known, whose testimony is wanted, the particular facts he is expected to prove, with the grounds of such expectation, and the endeavors and means which have been used to procure his attendance or deposition, to the end that the court may judge whether due diligence has been used for that purpose.

No counter affidavit shall be admitted to contradict the statement of what the absent witness is expected to prove; but any of the other facts stated in such affidavit may be disproved by the party objecting to the continuance. No action shall be continued on such motion if the adverse party will admit that the absent witness would, if present, testify to the facts stated in the affidavit and will agree that the same shall be received and considered as evidence on the trial, in like manner as if the witness were present and had testified thereto. Such agreement shall be made in writing at the foot of the affidavit, and signed by the party, or his attorney. The same rule shall apply, *mutatis mutandis*, when the motion is based on the want of any other material evidence that might be used on the trial.

### XVI.

#### EVIDENCE TO SUPPORT MOTIONS BASED ON FACTS.

No motion based on facts will be heard unless the facts are verified by affidavit, or are apparent from the record or from the papers on file in the case, or are agreed and stated in writing signed by the parties or their attorneys. The same rule will be applied as to all facts relied on in opposing any motion.

### XVII.

#### MOTIONS FOR NEW TRIALS.

Motions for new trials must be in writing and assign the reasons therefor.

When a motion is made to have a verdict set aside as against law or the evidence, it must be filed during the term at which the verdict is rendered. The party making it shall cause a report of the whole evidence in the case to be prepared and present the same to the presiding justice for his signature within such time as he shall by special order direct, and, if no such special order is made, it must be done within ten days after the adjournment of the court; if not so done, the justice shall not be required to sign

it and the motion may be regarded as withdrawn, and the clerk, at a subsequent term, may be directed to enter judgment on the verdict.

When a motion for new trial is made for any other cause, it may be filed with the clerk at any time before final judgment, and the clerk shall give immediate written notice thereof by mail or otherwise to the adverse party or his attorney. The evidence in support thereof shall be taken within such time and in such manner as the court at the next ensuing term shall order, or the motion will be regarded as withdrawn.

### XVIII.

#### EXCEPTIONS.

Exceptions to the admission or exclusion of evidence must be noted at the time the ruling is made, or all objections thereto will be regarded as waived.

Exceptions to any opinion, direction or omission of the presiding justice in his charge to the jury must be noted before the jury retire, or all objections thereto will be regarded as waived.

### XIX.

#### MOTIONS IN ARREST OF JUDGMENT IN CRIMINAL CASES.

Motions in arrest of judgment in criminal cases shall be filed and presented to the court for adjudication during the term at which the accused has been found guilty, whether exceptions be or be not filed and allowed; and if not so presented, the right to file the same shall be considered as waived.

### XX.

#### TIME OF FILING MOTIONS, PRESENTING PETITIONS, ETC.

Motions, petitions, reports of referees, applications for commissioners to take depositions, surveys, or for views by the jury in cases touching the realty, and all like applications, shall be made and presented at the opening of the court on the morning of the second day of the term; provided, that when the cause or ground of such motion or other application shall first exist or become known to the party after the time in this rule appointed for making the same, it may be made at any subsequent time. But motions or applications, such as from their nature require no notice previous to granting the same, may be made at the opening of the court on the morning of each day.

### XXI.

#### OBJECTIONS TO REPORTS.

Objections to any report offered to the court for acceptance shall be made in writing and filed with the clerk, and shall set forth specifically the grounds of the objections;

and these only shall be considered by the court.

## XXII.

### NOTICE PREVIOUS TO MOTIONS.

When any motion is made in relation to any civil action at the times specifically assigned for such motions by these rules, no previous notice need be given to the adverse party. But, if notice has not been given, the court will allow time to oppose the motion if the case shall require it. When, however, for any special cause, such motion may be made at a subsequent time, it will not be heard unless seasonable notice thereof shall have been given to the adverse party.

## XXIII.

### DEPOSITIONS TAKEN IN TERM TIME.

Depositions may be taken for the causes and in the manner by law prescribed, in term time, as well as in vacation; provided, they be taken in the town in which the court is holden, and at an hour when the court is not actually in session. Neither party shall be required during term time to attend the taking of a deposition, at any other time than is above provided, unless the court, upon good cause shown, shall specially order the deposition to be taken.

## XXIV.

### COMMISSIONS TO TAKE DEPOSITIONS.

The court will grant commissions to take the depositions of witnesses and will appoint the commissioners. In vacation a commission may be issued upon application to any justice of the court, in the same manner as may be granted in term time; or either party, upon application to the clerk, may obtain a like commission; but, in the latter case, unless the parties shall agree on the person to whom the commission shall issue, the commission shall be directed to any judge of any court of record. In each case the evidence, by the testimony of witnesses, shall be taken upon interrogatories to be filed in the clerk's office by the party applying for the commission, and upon such cross interrogatories as shall be filed by the adverse party. A copy of all the interrogatories shall be annexed to the deposition. No such commission shall issue except upon interrogatories filed as aforesaid by the party applying and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within fourteen days from the service of such notice.

No deposition taken out of the state without such commission shall be admitted in evidence unless the same was taken by some justice of the peace, notary public, or other officer legally empowered to take depositions or affidavits in the state or county in which

the deposition was taken, or unless the adverse party was present, or was duly and seasonably notified, but unreasonably neglected to attend.

## XXV.

### FILING DEPOSITIONS.

Depositions shall be opened and filed by the clerk at the term for which they are taken. If the action in which they are to be used shall be continued, such depositions shall remain on file and be subject to objections when offered at the trial as at the term when filed; and if not so left on the files they shall not be used by the party who originally produced them. The party producing a deposition may, if he see fit, withdraw it during the same term in which it is originally filed, in which case it shall not be used by either party.

## XXVI.

### USE OF COPIES OF DEEDS.

In actions touching the realty, office copies of deeds material to the issue, from the registry of deeds, may be read in evidence without proof of their execution where the party offering the same is not a grantee in the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs.

## XXVII.

### NOTICE TO PRODUCE WRITTEN EVIDENCE.

Where written evidence is in the hands of the adverse party, no evidence of its contents will be admitted unless previous notice to produce it on trial shall have been given to such adverse party or his attorney, nor will counsel be allowed to comment upon a refusal to produce such evidence, without first proving such notice.

## XXVIII.

### TRIAL LIST AND ORDER OF TRIALS.

Immediately after the call of the continued docket, a trial list of all actions to be tried by the jury shall be made, and a time assigned for the trial of each action upon the list, and all other actions shall be tried or otherwise disposed of in the order in which they stand upon the docket. Any action shall be considered in order for trial at the return term, when the party desiring it shall have given written notice thereof to the adverse party. Such notice must be given by a plaintiff thirty days, and by a defendant ten days, before the sitting of the court. Cases brought up from an inferior court by appeal or by removal shall be in order for trial at the term of entry without such notice.

## XXIX.

### COPIES FOR THE LAW COURT.

No cause standing for oral argument on the law docket will be heard until each of

the sitting justices has been furnished with a copy of the case, printed, or fairly and legibly written or typewritten on good paper of the size of 8x10 1-2 inches, containing the substance of all the material pleadings, facts and documents on which the parties rely.

One copy only of the case will be required in cases submitted upon written arguments or briefs not read to the court.

In cases of facts agreed and stated by the parties, or reported by consent of the parties, it shall be the duty of the plaintiff to furnish the papers or abstracts for the court; and in all other cases, the same shall be done by the party who moves for a new trial, or who holds the affirmative upon the question to be argued. If the party whose duty it is to furnish the papers neglects so to do, the adverse party may furnish them. If the party whose duty it is neglects to furnish them, as required by this rule, he shall not have any costs for that term, and further he shall be liable to be nonsuited, defaulted, or have judgment entered against him for want of prosecution, or such other judgment as the case may require.

### XXX.

#### BRIEFS FOR THE LAW COURT BEFORE ORAL ARGUMENT.

Counsel for each party, before or at the commencement of the oral argument of each case shall furnish to each sitting justice and also to the reporter of decisions, a concise, succinct and separate brief or summary of all the points of law to be made in the argument, noting under each point the authorities to be cited to sustain it; and, in cases on report, facts agreed, or on a motion for a new trial, or on appeal in equity, a concise brief or summary of the facts as claimed, but not a recital of the evidence.

Such briefs and all written arguments shall be printed or fairly and legibly written or typewritten, on good paper, of the size of 8x10 1-2 inches.

In cases standing for oral argument, each party shall also file a copy of such brief or summary, for the use of the adverse party, with the clerk of the law court, or furnish the same to opposing counsel within the following times: for the Augusta and Bangor terms, two days before the opening of court; for the Portland term, two days before the opening of the term in cases from Androscoggin, Aroostook, Cumberland, Franklin, Hancock and Kennebec counties; on or before the fifth day of the term in cases from Knox, Lincoln, Oxford, Penobscot and Piscataquis counties; and on or before the tenth day of the term in cases from Sagadahoc, Somerset, Waldo, Washington and York counties; unless in any case the time is extended by the court for good cause.

If both parties have neglected to comply with this rule, the case, when it is reached in

its order on the docket, will be continued, or the parties will be ordered to argue in writing, or judgment will be immediately entered at the discretion of the court. If one party has complied with the rule, and the other has not, only the party complying will be heard in oral argument, and the other party will be ordered to argue in writing, or the case may be decided without argument by the other party, at the discretion of the court.

### XXXI.

#### TAXATION OF COSTS.

Bills of costs shall be taxed by the clerk upon a bill to be made out by the party entitled to them, if he shall present such bill; otherwise upon inspection of the proceedings and files. No costs shall be taxed without notice to the adverse party to be present, provided he shall have notified the clerk in writing, of his desire to be present at the taxation thereof.

### XXXII.

#### DAY OF RENDITION OF JUDGMENT.

All judgments on whatever day given shall date and be entered as of the last day of the term unless upon written motion stating the reason therefor an earlier day be specially ordered.

### XXXIII.

#### CUSTODY OF PAPERS BY THE CLERK.

The clerk shall be answerable for all records and papers filed in court, or in his office; and they shall not be lent by him, nor taken from his custody, unless by special order of court; but the parties may at all times have copies. No original writ or process filed in the clerk's office shall be taken from the files for the purpose of service, but attested copies thereof shall be made for that purpose, and the expense thereof shall be included in the taxable costs. Depositions may be withdrawn by the party producing them at the same term at which they are filed; but while remaining on the files they shall be open to the inspection of either party at all reasonable hours.

### XXXIV.

#### FILING PAPERS AND RECORDING JUDGMENTS.

In order to enable the clerks to make up and complete their records within the time prescribed by law, it shall be the duty of the prevailing party forthwith to file with the clerk all papers and documents necessary to enable him to make up and enter the judgment and to complete the record of the case. If the same are not so filed within three months after judgment shall have been ordered, the clerk shall make a memorandum of the fact on the record, and the judgment shall not be afterwards recorded unless upon a petition to the court at a subsequent

term and after notice to the adverse party, the court shall order it to be recorded. No execution shall issue until the papers are filed as aforesaid. When a judgment shall be recorded upon such petition the clerk shall enter the same, together with the order of court for recording it, among the records of the term in which the order is passed with apt references in the index and book of records of the term in which the judgment was awarded, so that the same may be readily found. When so recorded the judgment shall be considered in all respects as of the term in which it was originally awarded. The party delinquent in such case shall pay to the clerk the costs of recording the judgment anew, the costs on the petition and also the costs of the adverse party if he shall attend to answer thereto.

## XXXV.

## WRITS OF VENIRE FACIAS.

Every venire facias shall be made returnable into the clerk's office by ten o'clock in the forenoon of the first day of the term, and the jurors shall be required to attend at that time, unless some justice of the court shall designate a different day or hour, and in such case the venire shall specify such day and hour. Venires issued in term time may be made returnable forthwith or upon any day or hour as ordered by the court.

## XXXVI.

## CAPIAS UPON INDIOTMENTS AND SCIRE FACIAS UPON RECOGNIZANCES.

On indictments found by the grand jury, the clerk shall, ex-officio, issue a capias without delay. In vacation, he shall also issue capias against respondents not under bail, when requested by the county attorney. When a respondent has been sentenced to imprisonment, but the mittimus has been stayed pending exceptions, or when a prisoner has been admitted to bail awaiting the decision of the law court on his exceptions, the clerk, upon receipt of the certificate of decision of the law court overruling the exceptions, shall issue the mittimus forthwith.

When default is made by any party under recognizance in any criminal proceeding, the clerk shall in like manner issue a scire facias thereon, returnable to the next term unless the court shall make a special order to the contrary, and when not otherwise provided by statute.

## XXXVII.

## DECISION OF CASES WHERE THERE IS DISAGREEMENT.

In case of a disagreement of the members of the court in a cause argued orally or otherwise, the papers in the case shall be submitted to the members of the court not present at the term; and the decision shall be made by all the members of the court, unless

the counsel, or either of them, at the term when the case is entered, shall enter their dissent thereto upon the docket.

## XXXVIII.

## EXAMINATION OF WITNESSES, ETC.

The examination and cross-examination of each witness shall be conducted by one counsel only on each side, except by special leave of the court, and counsel shall stand while so examining or cross-examining unless otherwise permitted by the court.

The re-examination of a witness, whether direct or cross, shall be limited to matters brought out in the last examination by the other party, unless by special leave of the court.

## XXXIX.

## ORDER OF EVIDENCE.

A party having rested his case cannot afterward introduce further evidence except in rebuttal unless by leave of the court.

## XL.

## LIMITATION OF TIME FOR ARGUMENT.

In all trials of causes, whether by jury or by the court, the closing arguments of the counsel of the respective parties shall be limited to one hour on each side, unless before the commencement of the arguments, for good cause, the court shall allow further time, which shall in all cases be fixed and definite.

Oral arguments before the law court, including the reading of briefs, and arguments in reply, are limited to one hour for each side, unless for cause shown the court shall fix a longer time before the arguments are begun.

## XLI.

## ATTORNEYS NOT TO BE BAIL NOR WITNESSES.

No attorney shall give bail nor recognize as principal or surety in any criminal matter in which he is employed as counsel or attorney, nor shall he become bail in any civil suit.

No attorney or counsellor shall be permitted to take any part in the conduct of a cause before a jury in which he is a witness for his client, except by special leave of the court.

## XLII.

## ASSESSMENT OF DAMAGES BY CLERK.

When the defendant is defaulted by agreement to be heard in damages by the clerk or an assessor instead of the presiding justice or a jury, the clerk or assessor may, on reasonable notice, hear the parties in vacation and assess the damages; and judgment may be entered on such assessment as of the term of the default without the right of a party aggrieved to have the assessment returned to the next term for acceptance or rejection, unless such right is reserved.

## XLIII.

## ESTABLISHING TRUTH OF EXCEPTIONS.

A party desiring to establish before the law court the truth of exceptions presented to a justice at nisi prius and not allowed by him, shall within ten days after notice of refusal to allow them, file in the court where they were taken his petition supported by affidavit and setting forth in full the bill of exceptions presented and all material facts relating thereto, and give a copy thereof to the opposite party or his attorney of record. A transcript of so much of the official stenographer's notes as relates to the exceptions must be filed with the petition. The affidavit may be made by the party or his attorney of record but must be positive, based upon actual knowledge and not upon information or belief.

Within ten days after being served with a copy of the petition the opposite party may if he desire file in the same court an answer verified by a similar affidavit and setting forth any material facts against the petition.

Upon motion of either party any justice of the court may appoint a commissioner to take the depositions of such witnesses as may be produced by either party, the depositions to be filed in the court where the exceptions were taken.

The case thus made shall be entered and heard at the next law term upon certified copies as in other cases. If the truth of the exceptions be established they will be heard and judgment rendered thereon as if originally allowed.

## XLIV.

## DISPOSITION OF DORMANT CASES, ETC.

Cases remaining on the docket for a period of two years or more with nothing done, shall be dismissed for want of prosecution unless good cause be shown to the contrary. Motions for further continuance for judgment after the term of the default, must be in writing stating the reasons therefor. Motions for renewal of orders of notice must also be in writing stating the reasons why the former order was not complied with.

## XLV.

## STIPULATIONS IN RULES OF REFERENCE.

In references of cases by rule of court no stipulation will be allowed for a review by the court of the decision of the referee upon any question of law or fact submitted; but the referee may find the facts and report questions of law for decision by the court.

## XLVI.

## NATURALIZATION.

The second day of each term of the court for any county is fixed as the stated day on

70 A.—b

which final action may be had on petitions for naturalization as provided by act of Congress approved June 29, 1906.

## SCHEDULE OF FEES.

## ATTORNEYS.

Writ of attachment, including power of attorney, declaration, attorney's fee and blank,	\$3.54
Libel, petition or complaint,	3.50
Writ of replevin and bond,	4.58
Travel: For every ten miles to and from court, observing the rule prescribed in R. S., chap. 117, sec. 14,	.33
Attendance: For each term until the action is disposed of, except as otherwise provided in these rules,	3.50
No costs shall be allowed after a defendant is defaulted and the action continued for judgment.	

Law court: Travel and attendance as at nisi prius terms, but for one term only.

If the plaintiff prevails, he may tax one attorney's fee in addition to that embraced in his writ.

If the defendant prevails, he may tax one attorney's fee for the issue in fact, and one for the issue in law.

Transcripts of cases made by the official stenographer and printed copies, certified by the clerks to the law court, may be taxed in the bill of costs at the rate paid to the stenographers and the printers, respectively, together with compensation to the clerks for preparing manuscripts and correcting proof at the rate of 10 cents per printed page.

## CLERK.

## For use of Counties.

Copy of writ, libel or other process, or abstract thereof, together with copy of order of notice thereon,	\$1.00
Entry, nisi prius,	.60
Exemplifying copies, not less than	1.00
Commission to referee, auditor, surveyor or other officer appointed by the court,	.50
Warrant to make partition,	1.00
Process to enforce a lien on personal property,	1.00
Each certificate attached to renewed execution,	.25
Copy of decree of divorce or certificate of same,	1.00
Computing damages and taxing costs,	.25
Writ of execution,	.15
Execution for possession,	.25
Writ of restitution,	.40
Writ of supersedeas,	.50
Writ of protection,	1.00
Writ of seisin of dower,	1.00
Subpoena,	.10

## MISCELLANEOUS.

Service as taxed by the officer, subject to correction.

Surveyors, commissioners and other officers appointed by the court, fees as charged by them subject to correction.

Costs of reference as reported by the referee. For hearing in damages or in costs, the clerk shall have such reasonable compensation as a justice of the court may allow, and the same shall be taxed in the bill of costs.

Advertising notices, the amount paid to the publisher, subject to correction.

Witnesses: Fees as per certificate filed and depositions as taxed by the magistrate, subject to correction.

When the register of probate, register of deeds or clerk of courts by request bring their books or papers into court to be used on the trial of a cause instead of copies, the usual witness fee may be taxed for him.

Appeals: In cases brought up by appeal, the prevailing party in this court will be allowed costs as taxed in the court below, subject to revision if objected to, together with additional costs of this court.

Defendant: When the defendant recovers costs he may tax the same fees and charges as are specified in the foregoing schedule so far as the same may apply.

## EQUITY RULES.

### I.

#### THE COURT.

The court held by one justice may sit in equity in any county on any day not prohibited by statute.

### II.

#### THE CLERK.

The clerks of the court shall act as clerks in chancery and may, as of course, issue such processes and make and enter such orders as do not require the consideration of the court. They may keep for equity causes a separate docket upon which they shall minute in detail all proceedings in the cause, with the date, and by whom each order is made.

### III.

#### RULE DAYS.

Rule days shall be held the first Tuesday of each month at ten o'clock in the forenoon at the court house in each county for the proper despatch of equity business, when and where all processes shall be returnable, unless otherwise ordered by the court or directed by statuta.

### IV.

#### THE BILL.

Bills shall be drawn succinctly and in paragraphs numbered seriatim, and without prolixity or unnecessary repetition. The confederacy clause, the charging part, and the jurisdictional clauses may be omitted.

The prayer for answer may be omitted, unless discovery is sought or answer upon oath is desired. The prayer for relief shall state the specific relief sought, and may also ask for general relief. The prayer for process shall contain sufficient information for the proper frame thereof.

Bills shall be addressed:

"To the Supreme Judicial Court. In Equity. A. B., of \_\_\_\_\_, complains against C. D., of \_\_\_\_\_, and says:  
First:—" etc.

### V.

#### VERIFICATION.

Bills for discovery and those praying for injunction must be verified by oath.

### VI.

#### PROCESS.

Process shall not issue until the bill is filed, unless the bill is inserted in a writ, when no special process shall issue until the writ is filed.

Upon the filing of a bill, subpoena shall issue and be returnable as provided by statute, or as the court may order.

### VII.

#### SERVICE ON NONRESIDENTS.

When it shall appear that a defendant is and resides out of the state, the clerk on application of the plaintiff at any time after filing the bill shall enter an order for the defendant to appear and answer the bill, if in any of the states of the United States, or the territory of Arizona or New Mexico, or in any of the Provinces of the Dominion of Canada, within one month; if in any other part of North America including the West India Islands, or in Europe or Egypt, within two months; if in any other part of the world, within three months, after the date of the service of the order upon him, if personally served, or after the last publication of the order, if served by publication only. A copy of the order and of the bill attested by the clerk shall be served on such defendant in person within three months from the date of the order by an officer qualified to serve civil processes in the place where served, or in any foreign country by such officer, or by any consul, vice-consul or consular agent of the United States in such foreign country, or by any person specially appointed by the court to serve the order; or the order and attested copy of the bill shall be published three times in different weeks, all

within thirty days after the date of the order, in some newspaper published in the county where the suit is pending. The return of personal service shall be verified by the affidavit of the person making the service. In case of service by an officer, his authority shall be certified by the clerk of a court of record, if within the United States or any of its possessions, and if without the United States or its possessions, by such a clerk, or by a United States consul, vice-consul or consular agent.

### VIII.

#### APPEARANCE.

Appearance shall be entered on the docket by the party or his counsel or filed with the clerk.

### IX.

#### PLEADINGS IN DEFENSE.

Pleadings in defense may omit formal clauses not essential to the merits of the cause.

### X.

#### ANSWERS.

Answers shall be concise and direct in statement, and shall fully and particularly answer each paragraph of the bill; and shall be paragraphed and numbered to conform thereto so far as may be. Answers not in compliance with this rule may be stricken from the files and a new answer ordered with costs, or the bill may be taken pro confesso for want of an answer.

Answers shall be entitled:

"In the Supreme Judicial Court, in Equity,  
A. B. v. C. D.

The answer of C. D., who answers and says:  
First:—" etc.

### XI.

#### JURY TRIALS.

If the defendant desires any issues of fact submitted to a jury, he shall at the close of his answer make such claim, and succinctly state such issues. If the plaintiff desires any issues of fact submitted to a jury, he shall make such claim at the end of his replication, and succinctly state the issues.

### XII.

#### JURATS.

Oaths to bills and answers shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, that he believes his information to be true.

### XIII.

#### DISCOVERY, ETC.

Discovery and answer, when necessary to the entering of a proper decree, may be required; and to enforce the same a writ of attachment may issue by special order of the

court, on which the defendant will be bailable on a bond with sufficient sureties given to the plaintiff in such sum as the court may order, which is to be returned with the writ. In case of neglect of the defendant to enter his appearance according to the statute, the bond shall be forfeited, and may be enforced by petition and notice thereon; and on a summary hearing, damages may be assessed and an execution issue therefor; and a new writ of attachment may issue on a special order therefor, on which he will not be bailable.

### XIV.

#### DEMURRERS AND PLEAS.

Defenses by demurrer or plea may be inserted in an answer; and unless the plaintiff sets such defenses for hearing before a single justice in order that proper amendments may be speedily had, (and such defenses prevail in the law court,) no amendment on account thereof shall then be allowed, except upon terms.

### XV.

#### CERTIFICATIONS.

Demurrers and pleas shall not be filed until certified by counsel to be in good faith and not intended for delay; and if pleas, that they are true in fact.

### XVI.

#### ANSWERS TO CROSS-BILLS.

The answer to a cross-bill shall not be required before answer is made to the original bill.

### XVII.

#### REPLICATIONS.

The replication shall state in substance that the allegations in the bill are true and that those in the answer are not true.

### XVIII.

#### SIGNATURE OF COUNSEL.

Counsel shall sign all pleadings as a guaranty of good faith.

### XIX.

#### EXCEPTIONS TO BILLS.

Exceptions to bills may be filed within twenty days after return day, and to answers within ten days after notice that they have been filed, and shall be disposed of by reference to a master, or otherwise, as the court may direct. Costs, double and treble, may be awarded on exceptions and execution issued therefor as the court may order.

### XX.

#### AMENDMENTS.

Amendments as to parties shall be made under order of court. Other amendments may be made before issue as of course. Aft-



er issue, amendments may be allowed by the court with or without terms.

## XXI.

### BILLS OF REVIVOR.

Amendments may serve the purpose of bills of revivor or bills supplemental or bills of that nature, but they shall be served as such bills should be served.

## XXII.

### SETTING CASES FOR HEARING.

When a demurrer is filed, the court upon motion of either party may set the cause for hearing upon bill and demurrer at any time. When a plea and answer is filed, the court upon motion of the plaintiff may set the cause for hearing upon bill and plea or bill and answer at any time. When a replication is filed to a plea or answer the court upon motion of either party may set the cause for hearing upon bill, plea or answer, and evidence, but such hearing shall not be had until after sixty days from the filing of the replication unless by consent. If a jury trial has been duly asked for in the answer or replication and is moved for in the motion for a hearing, the court in setting the cause for hearing may in its discretion order a jury trial and frame the issues therefor. The cause shall in such case be in order for trial at the jury term next after such sixty days in the county where the case is pending. Any time fixed for hearing or trial may be extended for good cause shown.

## XXIII.

### OVERRULED DEFENSES.

A defense interposed in one form and overruled shall not afterwards be sustained upon subsequent pleadings in the same case.

## XXIV.

### ORAL EVIDENCE.

At any hearing or trial in equity the evidence of witnesses may be presented by oral testimony or by depositions or both. When oral testimony is given it shall be reduced to writing by the court stenographer, certified by him and filed with the depositions.

## XXV.

### DOCUMENTARY EVIDENCE.

Deeds and other instruments in writing or copies of them certified by counsel may be filed with the clerk and notice given twenty days before the hearing or trial, and may then be admitted in evidence without proof of execution if otherwise admissible, unless the execution is denied, or fraud in relation thereto be alleged, and notice given within ten days after notice that they are filed.

Copies of any votes, entries or other records upon the books of any corporation, or

of any papers on its files attested by its clerk may be received as evidence, instead of the books and papers unless it shall appear that the opposite party or counsel has been denied access to them at reasonable hours.

## XXVI.

### PRODUCTION OF DOCUMENTS.

When books, papers or written instruments material to the issue are in possession of the opposite party and access thereto is refused, the court upon motion, notice and hearing, may require their production for inspection. Extracts from any books, papers or instruments thus produced, verified by counsel, may be filed as documentary evidence by either party, instead of the originals.

## XXVII.

### ALLEGATIONS NOT TRAVERSED.

All allegations of fact well pleaded in bill, answer or plea, when not traversed, shall be taken as true.

## XXVIII.

### DECREEES.

When a party is entitled to a decree in his favor, he shall draw the same and file it, and give notice.

If corrections are desired they shall be filed within five days after receipt of notice. If the corrections are adopted, a new draft shall be prepared and submitted to the justice, who heard the case, for approval. If they are not adopted, notice shall be given of the time and place, when and where the matter will be submitted to such justice for decision, and he shall settle and sign the decree.

When the law court has certified its decision upon an appeal or exceptions from a final decree, and a decree has been entered therein by a single justice as in accordance with the certificate and opinion of the law court, a party aggrieved by the form of such last named decree may within ten days take exceptions thereto. Such exceptions and the record connected therewith, including a copy of the opinion of the court, shall be transmitted to the chief justice and be argued in writing on both sides within thirty days thereafter and they shall be considered and decided by the justices as soon as may be. If the decision is adverse to the excepting party, treble costs on these exceptions may be allowed to the prevailing party.

## XXIX.

### FORMS OF DECREES.

Drafts of orders and decrees shall be entitled with the name of the county, the date of the hearing, the docket number of the cause, and the names of the parties, and may then proceed substantially as follows:

"This cause came on to be heard (or, to be further heard, as the case may be), this day and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed, as follows, viz.: (Here insert order or decree.)"

No part of the pleadings, the master's report, or any prior proceeding, need be recited or stated.

### XXX.

#### MASTER.

When any matter shall be referred to a master, he shall, upon the application of either party, assign a time and place for a hearing, which shall be not less than ten days thereafter; and the party obtaining the reference shall serve the adverse party, at least seven days before the time appointed for the hearing, with a summons signed by the master requiring his attendance at such time and place, and make proof thereof to the master; and thereupon, if the party summoned shall not appear to show cause to the contrary, the master may proceed *ex parte*; and if the party obtaining the reference shall not appear at the time and place, or show cause why he does not, the master may either proceed *ex parte*, or the party obtaining the reference shall lose the benefit of the same at the election of the adverse party.

### XXXI.

#### COMPENSATION OF MASTER.

The compensation to be allowed to masters for their services shall be fixed by the court in its discretion in each case, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation, but when it is allowed he shall be entitled to an attachment for the amount against the party ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

### XXXII.

#### EXCEPTIONS TO MASTER'S REPORT.

When exceptions shall be taken to the report of a master, they shall be filed with the clerk at once and notice thereof be forthwith given to the adverse party, and the exceptions shall then be set for argument. In every case the exceptions shall briefly and clearly specify the matter excepted to and the cause thereof; and the exceptions shall not be valid as to any matter not so specified.

### XXXIII.

#### COSTS.

When a party is entitled to costs, his counsel shall tax each item of the bill in a fair handwriting, referring to the documents on

file or inclosed with it as proofs, and give notice thereof. The opposing counsel may, within two days after notice, make his objections to the same in writing and give notice. A reply may be made in writing and the bill filed with the inclosed papers for the decision of the clerk, who will make his decision in writing, from which either party may appeal and submit the papers to a justice of the court for decision. The clerk may regard costs as correctly taxed, when the opposing counsel certifies in writing on the back of the bill that he does not find cause to object, or when no objections are made within two days after notice of taxation.

### XXXIV.

#### RESPONSIBILITIES OF ATTORNEY.

The attorney making the application shall be personally responsible for the payment of fees to commissioners, examiners, stenographers, or magistrates; taking testimony; to the clerk for his fees; and for costs imposed as terms of amendment or relief. When it shall be made to appear by the affidavit of a person interested, that an attorney who is so liable has, after request, neglected to pay, he shall, unless good cause is shown for such neglect, be suspended from practice in equity cases, until payment is made. When any attorney or counsel shall violate the great confidence reposed in him by these rules, he will be suspended in like manner, until the further order of court.

### XXXV.

#### VERIFICATION OF COPIES.

Copies required by these rules may be verified by signature of counsel, who will be held responsible for the accuracy thereof.

### XXXVI.

#### NOTICES.

Notices required by these rules shall be served in writing, signed by counsel, and delivered to the opposing counsel, or left at his office, when he has one in the same city or village; and in other cases shall be properly directed to him and placed in the post office and postage paid. Copies are to be preserved and produced, and the original will in all cases be regarded as received when the counsel giving the notice produces a memorandum, made at the time on the copy retained, of its having been delivered or sent by mail on a day certain, unless the reception is positively, and not for a want of recollection denied on affidavit. Either party may designate on the docket the name of his counsel to whom notices are to be given, and in such case none will be good unless given to him. In case of a change of such counsel, notice will be given thereof, and the change noted on the docket.

## XXXVII.

## APPLICATIONS ACTED UPON.

When an application for an injunction, or for any order or decree under the statute or these rules, is made to one justice of the court and the same has been acted upon by him, it shall not be presented to any other justice.

## XXXVIII.

## WRITS OF INJUNCTION.

Writs of injunction, preliminary, pending the suit, or perpetual, may be granted according to the principles of equity procedure and as authorized by the statute and may be in the form annexed with such changes as the case may demand.

## XXXIX.

## REHEARINGS.

Applications to the discretion of the court for a rehearing may be made on petition, verified as required by rule XII, setting forth particularly the facts, the name of each witness, and the testimony expected from him. The petitioner can examine only witnesses named, except to rebut the opposing testimony. The petition having been presented to a justice of the court and by him allowed, may be filed and the same proceedings had thereon as on an original bill. If the decree has not been executed, such justice of the court may suspend its execution until the further order of court, by a writ of superseas or order, on the petitioner's filing a bond, with sufficient sureties, in such sum and approved in such manner, as he may direct, conditioned to perform the original decree in case it shall not be materially modified or reversed, and pay all intermediate damages and costs.

## XL.

## INTERLOCUTORY HEARINGS.

When the decision of a justice is desired upon any interlocutory matter, the clerk shall forward to him the papers in the cause and enter his decision as soon as received.

## XLI.

## OTHER PROCEDURE.

All equity proceedings not provided for by statute or these rules shall be according to the usual course of proceedings in equity.

## FORMS.

*Writ of Attachment.*

State of Maine.

[Seal.]

To the sheriffs of our counties and their deputies:

We command you to attach the body of A. B., of \_\_\_\_\_, in our county of \_\_\_\_\_, so that you

have him before our Supreme Judicial Court, at \_\_\_\_\_, within and for our county of \_\_\_\_\_, on the \_\_\_\_\_ of \_\_\_\_\_ next, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, to answer for an alleged contempt in not [here insert the cause], and you may take a \*bond with sufficient sureties to C. D., the party injured, in the sum of \_\_\_\_\_, conditioned that he then and there appear and abide the order of court.

Hereof fail not and make due return of this writ, with your doings thereon, at the time and place aforesaid.

Witness, \_\_\_\_\_, justice of our said court, the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord nineteen hundred and \_\_\_\_\_.

\_\_\_\_\_, Clerk.

(\*When the party is not entitled to bail, that part of the writ is to be omitted.)

*Writ of Injunction.*

State of Maine.

[Seal.]

\_\_\_\_\_, ss.

To the sheriffs of our counties and their deputies:

We command you to make known to A. B., of \_\_\_\_\_, in our county of \_\_\_\_\_, that C. D., of \_\_\_\_\_, in the county of \_\_\_\_\_, has filed his bill in equity before our Supreme Judicial Court, in the county of \_\_\_\_\_, therein alleging [here insert the allegations in the bill showing the cause for issuing the writ], and that in consideration thereof, he, the said A. B., and his attorneys and agents, are strictly enjoined and commanded by our said court, under the penalty of fine or imprisonment as the court may order therein, absolutely to desist and refrain from [here insert the acts enjoined] and from all attempts, directly or indirectly, to accomplish such object until the further order of our said court.

Hereof fail not and forthwith make due return of this writ, with your doings thereon, to our court, where the bill is pending.

Witness, \_\_\_\_\_, justice of our said court, the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord nineteen hundred and \_\_\_\_\_.

\_\_\_\_\_, Clerk.

(When the injunction is to be perpetual, the writ is to be varied accordingly.)

*Subpoena.*

State of Maine.

[Seal.]

\_\_\_\_\_, ss.

To A. B., of \_\_\_\_\_

Greeting.

We command you to appear before our Supreme Judicial Court, at \_\_\_\_\_, in the county of \_\_\_\_\_, on \_\_\_\_\_ rules, viz., Tuesday, the \_\_\_\_\_ day of \_\_\_\_\_ next (instant), then and there to answer to a bill of complaint, there exhibited against you by C. D., of \_\_\_\_\_, and abide the judgment of said court thereon.

And we further command you to file with the clerk of said court for said county of \_\_\_\_\_, within \_\_\_\_\_ days after the day above-named for your appearance, your demurrer, plea or answer to said bill, if any you have.

Hereof fail not under the pains and penalties of the law in that behalf provided.

Witness, \_\_\_\_\_, justice of our said court, at \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord \_\_\_\_\_.

\_\_\_\_\_, Clerk.

*Oath.*

\_\_\_\_\_, ss.

\_\_\_\_\_ 19\_\_\_\_.

Then personally appeared \_\_\_\_\_ and made oath that he has read the above \_\_\_\_\_ and

knows the contents thereof, and that the same is true of his own knowledge, except the matters stated to be on information and belief, and that, as to those matters, he believes them to be true.

Before me, \_\_\_\_\_.

*Summons to Show Cause.*

State of Maine.

[Seal.]

\_\_\_\_\_, ss.

To the sheriffs of our several counties, or either of their deputies:

Greeting.

We command you that you summon \_\_\_\_\_ (if he may be found in your precinct), to appear before \_\_\_\_\_, the Supreme Judicial Court of the state of Maine, to be holden \_\_\_\_\_, at \_\_\_\_\_, in the state of Maine, on \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, then and there to show cause, if any he have, why an injunction \_\_\_\_\_ should not be granted as prayed for in the bill of complaint \_\_\_\_\_ of \_\_\_\_\_.

Hereof fail not, and make due return of this writ, with your doings thereon, into our said court.

Witness, \_\_\_\_\_, justice of said court, at \_\_\_\_\_ aforesaid, the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord one thousand nine hundred and \_\_\_\_\_.

\_\_\_\_\_, Clerk.

## EQUITY FEE BILL.

### ATTORNEYS.

Drawing and filing bill or answer, including attorney fee,	\$5.00
Drawing amendment to bill or answer when such amendment is occasioned by an amendment by the opposing party,	2.50
Drawing and filing formal decree dismissing bill,	1.00
Drawing and filing other decrees when not requiring material alteration, each,	5.00
Drawing each rule,	.50
Drawing interrogatories, each set,	1.00
Drawing demurrer or plea,	2.00

Travel: For each ten miles to and from court in filing bill, answer, replication or decree, and in attending each hearing before a justice or master, observing the rule prescribed in R. S., Chap. 117, Section 14,	33
Attendance: For attendance at each hearing before a justice or master, For each jurat attached to bill, answer, or necessary paper,	3.50 25

### LAW COURT.

For travel and attendance, the same fees as for attending a hearing before a justice or master, but for one term only. If the plaintiff prevails, he may tax one attorney's fee in addition to that embraced in his bill. If the defendant prevails, he may be allowed one attorney's fee in addition to that in his answer.

### CLERK.

Entry and filing bill,	\$ .60
Copies, for each 224 words,	.12
Subpœna,	.25
Copies for same, each,	.25
Each notice given,	.25
Summons to show cause,	1.00
Writ of injunction,	1.00
With ten cents for each 100 words of the allegations in the bill incorporated therein.	
Commission to receivers, masters and other officers appointed by the court,	1.00
Taxing costs,	.25

### OFFICERS, MASTERS, RECEIVERS AND OTHERS.

Fees as taxed and allowed by the court.

The foregoing rules, including fee bills and forms, shall be recorded in Vol. 103 of the Maine Reports, and shall take effect and repeal all former rules on the first Tuesday of December, in the year nineteen hundred and eight.

BY ALL THE JUSTICES.

ATTEST: LUCILIUS A. EMERY,  
Chief Justice Presiding.



# CASES REPORTED.

	Page		Page
Achenberg, Creachen v. (N. J. Sup.).....	160	Bauer v. Fabel (Pa.).....	558
Adams' Estate, In re (Pa.).....	436	Bayonne, Morris & Cummings Dredging Co. v. (N. J.).....	134
Adams v. Hubbard (Pa.).....	835	Bazeley, Kingsbury v. (N. H.).....	910
Adelson v. Keller (R. I.).....	1103	Beisel v. Gerlach (Pa.).....	721
Ætna Life Ins. Co., Sloss-Sheffield Steel & Iron Co. v. (N. J. Ch.).....	380	Belleville Land & Improvement Co. v. Atlas Mfg. Co. (N. J.).....	1100
Agens v. Koch (N. J. Ch.).....	348	Bentz's Estate, In re (Pa.).....	788
A. J. Foster & Co., St. Pierre v. (N. H.).....	289	Bergen v. Rogers (N. J.).....	1100
Albert v. Haeberly (N. J.).....	1100	Bernadeky v. Erie R. Co. (N. J.).....	189
Alderman v. New Haven (Conn.).....	623	Bernheimer Bros. v. Bager (Md.).....	91
Aldrich's Will, In re (Vt.).....	566	Berry v. De Maris (N. J. Sup.).....	337
Alexander v. Fidelity & Deposit Co. (Md.).....	209	Bertels, Feuerstein v. (Pa.).....	804
Alexandria Water Co., American Car & Foundry Co. v. (Pa.).....	867	Betz v. Rhode Island Co. (R. I.).....	1058
Allegheny Valley R. Co. v. Pittsburg (Pa.).....	271	Bijur v. Standard Distilling and Distributing Co. (N. J. Ch.).....	934
Allen, Appeal of (Pa.).....	784	Bilotta v. Media, M., A. & C. Electric R. Co. (Pa.).....	123
Allen, Canole v. (Pa.).....	1053	Birkbeck v. Wadsworth (Pa.).....	993
Almeda v. E. R. Randall & Co. (R. I.).....	1043	Bishop v. Bishop (It. I.).....	966
American Car & Foundry Co. v. Alexandria Water Co. (Pa.).....	867	Blackmar v. Rhodes (R. I.).....	1059
American Exp. Co., James v. (N. J.).....	181	Blanchard & Sons Co., Hobbs v. (N. H.).....	1082
American Ice Co. v. Lynch (N. J. Ch.).....	138	Blessing v. Smith (N. J. Ch.).....	933
American Locomotive Co., Carr v. (R. I.).....	196	Bloodgood, Appeal of (Pa.).....	737
American Pipe Mfg. Co., Hess v. (Pa.).....	204	Board of Chosen Freeholders of Atlantic County v. Lee (N. J. Sup.).....	925
American Surety Co. v. Pacific Surety Co. (Conn.).....	584	Board of Education of City of Hoboken, Wendel v. (N. J.).....	152
Anderson, Appeal of (Pa.).....	1005	Board of Equalization of Taxes of New Jersey, Royal Mfg. Co. v. (N. J. Sup.).....	978
Anderson, Simpeon v. (N. J. Ch.).....	696	Board of Excise Com'rs of Jersey City, Meehan v. (N. J.).....	363
Anderson v. Stewart (Md.).....	228	Boettger, Gerhardt v. (N. J.).....	173
Anderson v. Wilmington (Del.).....	204	Bonnot, Van Wagenen v. (N. J.).....	143
Andrews, Stuart v. (Me.).....	1069	Boonton, Burnett v. (N. J. Sup.).....	67
Arsonia, Nichols v. (Conn.).....	636	Booth v. McLean Contracting Co. (Md.).....	104
Armour & Co., Tomlinson v. (N. J.).....	314	Borden, Thomas v. (Pa.).....	1051
Armstrong, Metropolitan Life Ins. Co. v. (R. I.).....	1108	Boston & M. R. R., Charrier v. (N. H.).....	1078
Arnd v. Heckert (Md.).....	416	Bottum, Harris v. (Vt.).....	560
Associated Realties Corp., Atlantic City v. (N. J.).....	345	Bowes, Trustees of Stevens Institute of Technology v. (N. J. Sup.).....	730
Atlantic City v. Associated Realties Corp. (N. J.).....	345	Bowler v. Emery (R. I.).....	7
Atlantic City v. France (N. J.).....	163	Bowler v. Osborne (N. J.).....	149
Atlantic City Gas & Water Co. v. Consumers' Gas & Fuel Co. (N. J.).....	1100	Boynton, Starrett v. (N. J.).....	183
Atlantic City v. Hemsley (N. J. Sup.).....	322	Bray, Lew v. (Conn.).....	628
Atlantic City R. Co., Clark v. (N. J.).....	1100	Brethauer v. Schorer (Conn.).....	592
Atlas Mfg. Co., Belleville Land & Improvement Co. v. (N. J.).....	1100	Bridgeport, Park City Yacht Club v. (Conn.).....	631
Audette, State v. (Vt.).....	833	Bridgeport Hydraulic Co., City of Bridgeport v. (Conn.).....	650
Avery, White v. (Conn.).....	1065	Bridport, Otis v. (Vt.).....	1061
Avoca Coal Co., Cavanaugh v. (Pa.).....	997	Brigham v. H. G. Mulock Co. (N. J. Ch.).....	183
Avonmore Land & Improvement Co., Girard Trust Co. v. (Pa.).....	266	Brigham-Hopkins Co., Francis v. (Md.).....	95
Axel v. Kraemer (N. J.).....	367	Brightman Bros. v. George M. Griffin & Co. (R. I.).....	1057
Bager, Bernheimer Bros. v. (Md.).....	91	Brindley v. Walker (Pa.).....	794
Baker v. Baker (Md.).....	418	Britt v. Lewis (R. I.).....	1043
Ballantine v. Cummings (Pa.).....	546	Brock, Scoville v. (Vt.).....	1014
Ballantine v. Young (N. J. Ch.).....	668	Brock, Wilkins v. (Vt.).....	572
Ballantine & Sons v. Public Service Corp. of New Jersey (N. J. Sup.).....	167	Brokaw, Williams v. (N. J. Ch.).....	663
Bank Com'rs v. Watertown Sav. Bank (Conn.).....	1038	Brotman, Seff v. (Md.).....	106
Bank of North America, McNeely v. (Pa.).....	891	Brown, Foote v. (Conn.).....	699
Barber, Safford v. (N. J. Ch.).....	371	Brown v. Gaskill (N. J. Ch.).....	665
Barbieri, D'Auria v. (N. J. Ch.).....	154	Brown, Rogers v. (Me.).....	206
Barnes' Estate, In re (Pa.).....	790	Brown v. Thompson (N. J.).....	172
Barnum v. Morton (N. J. Prerog.).....	640	Brownell, Oviatt v. (Pa.).....	785
Barrington, Rice v. (N. J.).....	169	Bulkley v. Norwich & W. R. Co. (Conn.).....	1021
Barron v. Smith (Md.).....	225	Bumsted v. Henry (N. J.).....	1103
Barry v. McCollom (Conn.).....	1035	Burnett v. Boonton (N. J. Sup.).....	67
Bartlett v. Sears (Conn.).....	33	Burns v. Eckert (N. J.).....	1100
Bassett v. United States Cast Iron Pipe & Foundry Co. (N. J. Ch.).....	929	Burns v. Lehigh Valley R. Co. (N. J.).....	1100
Bathgate v. North Jersey St. R. Co. (N. J.).....	132	Burrell v. Middleton (N. J.).....	1100
		Burt v. Burt (Pa.).....	710

	Page		Page
Butler v. Commonwealth Tobacco Co. (N. J.)	319	Craighead, Swift v. (N. J. Ch.)	666
Butterworth v. Todd (N. J. Sup.)	139	Crawford County, Hubbard v. (Pa.)	805
Cadwell v. Canton (Conn.)	1025	Crawford's Estate, In re (Pa.)	582
Caffrey v. Caffrey (N. J.)	922	Creachen v. Achenberg (N. J. Sup.)	160
Caldwell, Hickey v. (Pa.)	835	Cridland v. Crow (Pa.)	888
Cameron v. Lewiston, B. & B. St. Ry. (Me.)	534	Crocheron v. Fleming (N. J. Ch.)	691
Canavan, Keystone Brewing Co. v. (Pa.)	785	Crocheron v. Savage (N. J. Ch.)	353
Canole v. Allen (Pa.)	1053	Croftut, Dunning v. (Conn.)	630
Canton, Cadwell v. (Conn.)	1025	Crow, Cridland v. (Pa.)	888
Carr v. American Locomotive Co. (R. I.)	196	Cuirczak v. Keron (N. J. Sup.)	366
Carroll v. George Waters & Co. (Md.)	422	Cummings, Ballantine v. (Pa.)	546
Carver, Knoup v. (N. J.)	660	Cunningham, Eastern Trust & Banking Co. v. (Me.)	17
Cavagnaro v. Johnson (N. J. Ch.)	995	Cunningham v. Frankfort (Me.)	441
Cavanaugh v. Avoca Coal Co. (Pa.)	997	Dalands, In re (Conn.)	449
Cecil, Modern Woodmen of America v. (Md.)	331	Dame v. Wood (N. H.)	1081
Central Board of Education of City of Pittsburg, Palmer v. (Pa.)	483	Danbury, Hincley v. (Pa.)	590
Champlin v. Church (N. J.)	138	Danville & B. St. R. Co., Delaware, L. & W. R. Co. v. (Pa.)	578
Chapman, Stuart v. (Me.)	1063	D'Auria v. Barbiere (N. J. Ch.)	154
Charlton, Jeffries v. (N. J.)	145	Davis, Harrison v. (Vt.)	567
Charrier v. Boston & M. R. R. (N. H.)	1078	Davis, Poland v. (Me.)	22
Chessman, Walker v. (N. H.)	248	Davis & Farnham Mfg. Co. v. Dunbar (Vt.)	562
Chess v. Vockroth (N. J.)	73	Dayton, Stephens v. (Pa.)	127
Chester City, Hendricks v. (Pa.)	552	Deauce Fruit Co. v. Fox (N. J.)	460
Chester City v. White (Pa.)	125	Deidrick, Commonwealth v. (Pa.)	275
Child v. Shaw, two cases (Vt.)	566	De Ladsen, Searles v. (Conn.)	589
Chittenden, Morton Trust Co. v. (Conn.)	648	Delaney, State v. (N. J.)	311
Church, Champlin v. (N. J.)	138	Delaware, L. & W. R. Co. v. Danville & B. St. R. Co. (Pa.)	578
City of Bridgeport v. Bridgeport Hydraulic Co. (Conn.)	650	Delaware, L. & W. R. Co., Kocher v. (Pa.)	769
City of Erie v. Erie Traction Co. (Pa.)	904	Delaware, L. & W. R. Co. v. Monroe County Water Power & Supply Co. (Pa.)	797
City of Hoboken v. Hoboken & M. R. Co. (N. J. Ch.)	928	De Maris, Berry v. (N. J. Sup.)	337
City of Manchester v. Duggan (N. H.)	1075	Denis v. Lewiston, B. & B. St. R. Co. (Me.)	1047
City of Newark v. East Side Coal Co. (N. J. Sup.)	734	Dentz v. Pennsylvania R. Co. (N. J.)	164
City of Paterson v. East Jersey Water Co. (N. J. Ch.)	472	Det Farenede Dampskibsselskab, Harris v. (N. J.)	155
Clampitt v. Doyle (N. J.)	129	De Vito, Hansen v. (N. J. Sup.)	668
Claremont Nat. Bank, State v. (N. H.)	542	Dillen v. Dillen (Pa.)	806
Clark v. Atlantic City R. Co. (N. J.)	1100	Dillon v. Hegarty (Pa.)	998
Clark v. Morehous (N. J. Ch.)	307	Dinnan, Moline Jewelry Co. v. (Conn.)	634
Clark v. Star of Hope Lodge No. 12, Order of Shepherds of Bethlehem (Conn.)	588	Diocese of Trenton v. Toman (N. J. Ch.)	606
Clarke, White River Lumber Co. v. (N. H.)	247	Diocese of Trenton v. Toman (N. J. Ch.)	881
Clay v. Western Maryland R. Co. (Pa.)	807	Dobbins' Estate In re (Pa.)	727
Cochran, Excelsior Sav. Fund v. (Pa.)	432	Dobbins' Estate, In re (Pa.)	730
Cochran v. Preston (Md.)	113	Dodge Clothespin Co., Godsoe v. (N. H.)	1073
Colebaugh, Rogers v. (N. J.)	299	Dougherty, State v. (Del. Gen. Sess.)	16
Colledesky, Harris v. (Conn.)	614	Dowe, Voigt v. (N. J. Ch.)	344
Cole, Van Dyke v. (Vt.)	593	Doyle, Clampitt v. (N. J.)	129
Cole, Van Dyke v. (Vt.)	1103	Dresser v. Hartford Life Ins. Co. (Conn.)	39
College Tract Residence Co., Appeal of (Pa.)	582	Drown v. New England Telephone & Telegraph Co. (Vt.)	599
Collins, Waters v. (N. J. Ch.)	984	Du Bois v. Walnut (Pa.)	798
Collins v. West Jersey Exp. Co. (N. J.)	344	Duggan, City of Manchester v. (N. H.)	1075
Colloty v. Schuman (N. J.)	190	Dunbar, Davis & Farnham Mfg. Co. v. (Vt.)	562
Commonwealth v. Deltrick (Pa.)	275	Duncan, Robeson v. (N. J. Ch.)	685
Commonwealth v. Emmers (Pa.)	762	Dunham v. Cox (Conn.)	1033
Commonwealth v. Fisher (Pa.)	865	Dunn, Appeal of (Conn.)	703
Commonwealth v. Harvey (Pa.)	1093	Dunn v. Grant (Conn.)	703
Commonwealth v. Kessler (Pa.)	941	Dunning v. Croftut (Conn.)	630
Commonwealth v. Lombardi (Pa.)	122	Durrell v. Woodbury (N. J.)	1100
Commonwealth v. McKWayne (Pa.)	809	Eastern Coal Co., State v. (R. I.)	1
Commonwealth v. Shults (Pa.)	823	Eastern Trust & Banking Co. v. Cunningham (Me.)	17
Commonwealth v. Smith (Pa.)	850	East Jersey Water Co., City of Paterson v. (N. J. Ch.)	472
Commonwealth Tobacco Co., Butler v. (N. J.)	819	Easton Transit Co., Singley v. (Pa.)	718
Congress Hall Hotel Co., Harris v. (N. J. Sup.)	330	East Orange, Meeker v. (N. J. Sup.)	360
Connecticut Breweries Co. v. Murphy (Conn.)	450	East Side Coal Co., City of Newark v. (N. J. Sup.)	734
Conroy v. Pittston (Pa.)	944	Eatontown Tp. in Monmouth County, Monmouth County Electric Co. v. (N. J. Ch.)	994
Consumers' Gas & Fuel Co., Atlantic City Gas & Water Co. v. (N. J.)	1100	Eckert, Burns v. (N. J.)	1100
Cook, John Nugent & Son v. (R. I.)	865	Edison v. Mills-Edisona (N. J. Ch.)	191
Cook v. Lewis (R. I.)	1041	Edsall v. Jersey Shore Borough (Pa.)	429
Coolbaugh v. Herman (Pa.)	830	Edward, Oliphant v. (N. J. Sup.)	337
Cool, Schrage v. (Pa.)	889	Ege v. Hering (Md.)	221
Corn Exch. Nat. Bank, Snyder v. (Pa.)	876	Egen, Fellbush v. (Pa.)	816
Cox, Dunham v. (Conn.)	1033	Einstein v. Raritan Woolen Mills (N. J. Ch.)	295

Page	Page		
Elk Tanning Co., Gilbert v. (Pa.).....	719	Greensboro Gas Co. v. Home Oil & Gas	
Ely v. Newark (N. J.).....	159	Co. (Pa.).....	940
Emery, Bowler v. (R. I.).....	7	Griffin & Co., Brightman Bros. v. (R. I.)..	1057
Emmers, Commonwealth v. (Pa.).....	762	Grove, Appeal of (Pa.).....	1006
Enfield Village Fire Dist., Town of Ca-			
naan v. (N. H.).....	250	Haeberly, Albert v. (N. J.).....	1100
Engelhardt v. Engelhardt (N. J.).....	145	Hageman v. North Jersey St. R. Co.	
Enos v. Rhode Island Suburban R. Co.		(N. J.) .....	1101
(R. I.).....	1011	Hall, Appeal of (Pa.).....	860
Equitable Trust Co., Wheeler v. (Pa.)....	750	Halstead v. Halstead (N. J. Ch.).....	928
Erie R. Co., Bernadsky v. (N. J.).....	189	Hamilton, Metropolitan Life Ins. Co. v.	
Erie Traction Co., City of Erie v. (Pa.)..	904	(N. J. Ch.).....	677
E. R. Randall & Co., Almeda v. (R. I.)..	1043	Hanhauser, Lehigh & N. E. R. Co. v. (Pa.)	1089
Ervin v. Wohlfert (N. J. Sup.).....	153	Hanlon v. Lehigh Valley R. Co. (Pa.)....	821
Escher v. Southwark Mills Co. (Pa.).....	714	Hannum v. Media, M., A. & C. Electric Ry.	
Eshelman, Sechler v. (Pa.).....	910	Co. (Pa.).....	847
Eshelman v. Union Stockyards Co. (Pa.)..	899	Hanover Cordage Co., Sullivan v. (Pa.)..	909
Excelsior Sav. Fund v. Cochran (Pa.)....	432	Hansen v. De Vito (N. J. Sup.).....	668
		Harman, Stewart & Co. v. (Md.).....	833
Fabel, Bauer v. (Pa.).....	558	Harris v. Bottom (Vt.).....	560
Faber, Pagnacco v. (Pa.).....	754	Harris v. Coledzky (Conn.).....	614
Fahey, State v. (Md.).....	218	Harris v. Congress Hall Hotel Co. (N. J.	
Fales v. Fales (R. I.).....	965	Sup.) .....	330
Farnsworth v. Miller (N. J.).....	1100	Harris v. Det Farenede Dampskibsselskab	
Feinberg v. Feinberg (N. J.).....	1100	(N. J.).....	155
Feldman, Goldberg v. (Md.).....	245	Harrison v. Davis (Vt.).....	567
Fellbush v. Egen (Pa.).....	816	Harrison v. McLaughlin Bros. (Md.)....	424
Ferris, State v. (Conn.).....	587	Harrison's Estate, In re (Pa.).....	827
Fensterstein v. Bertels (Pa.).....	804	Hartford, Katzenstein v. (Conn.).....	23
Fidelity Trust Co. v. Kline (N. J.).....	151	Hartford Life Ins. Co., Dresser v. (Conn.)	39
Fidelity & Deposit Co. v. Alexander (Md.)	209	Hartman, Schmuck v. (Pa.).....	1001
Fisher, Commonwealth v. (Pa.).....	863	Hartman, Taylor & McCoy Coal & Coke	
Fleming, Crocheron v. (N. J. Ch.).....	691	Co. v. (Pa.).....	1001
Flynn, Jersey City v. (N. J. Ch.).....	497	Harvey, Commonwealth v. (Pa.).....	1093
Foltz, Marshall v. (Pa.).....	857	Harvey, Shreve v. (N. J. Ch.).....	671
Foot v. Brown (Conn.).....	699	Haslam v. Jordan, two cases (Me.).....	1066
Forbes v. Suffield (Conn.).....	1023	Haslett, Nixon v. (N. J. Ch.).....	987
Foster & Co., St. Pierre v. (N. H.).....	289	Hatheway, Wolfe v. (Conn.).....	645
Fowler v. Wick (N. J. Ch.).....	682	Haverford Electric Light Co., Weir v. (Pa.)	874
Fox, Defiance Fruit Co. v. (N. J.).....	460	Head & Dowst Co. v. New England Breed-	
Fox's Estate, In re (Pa.).....	954	ers' Club (N. H.).....	248
France, Atlantic City v. (N. J.).....	163	Heckert, Arnd v. (Md.).....	416
Francis v. Brigham-Hopkins Co. (Md.)....	95	Hegarty, Dillon v. (Pa.).....	998
Frankfort, Cunningham v. (Me.).....	441	Helio Match Co., Passaic Match Co. v.	
Franklin Trust Co. v. Philadelphia, B. &		(N. J. Ch.).....	466
W. R. Co. (Pa.).....	949	Hemsley, Atlantic City v. (N. J. Sup.)....	322
Frederick v. Margwarth (Pa.).....	797	Hendrickson v. Chester City (Pa.).....	552
Frelinghuysen v. Morristown (N. J. Sup.)..	77	Henry, Bumsted v. (N. J.).....	1103
Fuller's Estate, In re (Pa.).....	1005	Henry Martin Brick Mach. Mfg. Co.,	
Funk v. H. S. Kerbaugh (Pa.).....	953	Spring City Brick Co. v. (Pa.).....	774
		Hering, Ege v. (Md.).....	221
Gabell, Appeal of (Pa.).....	954	Herman, Coolbaugh v. (Pa.).....	830
Gardner, Appeal of (Conn.).....	658	Hess v. American Pipe Mfg. Co. (Pa.)....	294
Gardner v. Philadelphia (Pa.).....	721	H. G. Mulock Co., Brigham v. (N. J. Ch.)	185
Garrison, Schock v. (N. J. Ch.).....	147	Hickey v. Caldwell (Pa.).....	855
Gaskill, Brown v. (N. J. Ch.).....	695	Hilliard v. Sterlingworth Ry. Supply Co.	
Gelb, Traurig v. (N. J.).....	352	(Pa.) .....	819
George M. Griffin & Co., Brightman Bros.		Hiltner, Appeal of (Pa.).....	1000
v. (R. I.).....	1057	Hilton, McGraw v. (Pa.).....	851
George Waters & Co., Carroll v. (Md.)....	422	Hinckley v. Danbury (Conn.).....	590
George W. Blanchard & Sons Co., Hobbs		Hinmon v. Somers Brick Co. (N. J.).....	166
v. (N. H.).....	1082	Hoban, Krauczunas v. (Pa.).....	740
Gerhardt v. Boettger (N. J.).....	173	Hobbs v. George W. Blanchard & Sons Co.	
Gerlach, Beisel v. (Pa.).....	721	(N. H.).....	1082
Gibson v. Snow (N. H.).....	120	Hoboken & M. R. Co., City of Hoboken	
Gilbert v. Elk Tanning Co. (Pa.).....	719	v. (N. J. Ch.).....	926
Girard Trust Co. v. Avonmore Land & Im-		Holbert v. Philadelphia (Pa.).....	746
provement Co. (Pa.).....	266	Hollis v. Widener (Pa.).....	287
Gladney v. Pennsylvania R. Co. (N. J.)....	835	Home Oil & Gas Co., Greensboro Gas Co.	
Glenn, Maryland Apartment House Co. of		v. (Pa.).....	940
Baltimore City v. (Md.).....	216	Hood v. Pennsylvania Soc. to Protect Chil-	
Glentworth's Estate, In re (Pa.).....	756	dren from Cruelty (Pa.).....	845
Glick v. Lehigh Valley Coal Co. (Pa.)....	810	Hostetter's Estate, In re (Pa.).....	1006
Godsoe v. Dodge Clothespin Co. (N. H.)..	1073	Hotel Ritz Co., Smith v. (N. J. Ch.)....	137
Goldberg v. Feldman (Md.).....	245	H. S. Kerbaugh, Funk v. (Pa.).....	953
Goldberg, Pelton v. (Conn.).....	1020	Hubbard, Adams v. (Pa.).....	835
Grand Lodge A. O. U. W. of Connecticut		Hubbard v. Crawford County (Pa.).....	805
v. Grand Lodge A. O. U. W. of Massa-		Hubley Mfg. & Supply Co. v. Ives (Conn.)	615
chusetts (Conn.).....	617	Huidekoper, Speer v. (Pa.).....	802
Grand Lodge A. O. U. W. of Massachu-		Hunn v. Pennsylvania Institution for In-	
setts, Grand Lodge A. O. U. W. of Con-		struction of the Blind (Pa.).....	812
necticut v. (Conn.).....	617	Hunt, Weed v. (Vt.).....	564
Grant, Dunn v. (Conn.).....	703	Hutchins v. Lewis (Me.).....	293
Gray v. Meadville & C. S. S. R. Co. (Pa.)..	1103		
Gray, Pryor v. (N. J.).....	341	Inhabitants of Rockport v. Searsmont (Me.)	444



	Page		Page
Inhabitants of York v. Stewart (Me.)	207	Lazarus v. Lehigh & Wilkes-Barre Coal Co. (Pa.)	817
International Dynelectron Co., Tingley v. (N. J. Ch.)	919	Lee, Board of Chosen Freeholders of Atlantic County v. (N. J. Sup.)	925
Ives, Hubley Mfg. & Supply Co. v. (Conn.)	615	Lehigh Coal & Navigation Co., Rahn Tp. School Dist. v. (Pa.)	551
Jackson v. Thomson (Pa.)	1095	Lehigh Valley Coal Co., Glick v. (Pa.)	810
James v. American Exp. Co. (N. J.)	131	Lehigh Valley R. Co., Burns v. (N. J.)	100
James v. Penn Tanning Co. (Pa.)	885	Lehigh Valley R. Co., Hanlon v. (Pa.)	821
Jeffries v. Charlton (N. J.)	145	Lehigh Valley R. Co., Kasarda v. (Pa.)	943
Jersey City v. Flynn (N. J. Ch.)	497	Lehigh & N. E. R. Co. v. Hanhauser (Pa.)	1089
Jersey City, H. & P. St. R. Co., Migans v. (N. J.)	168	Lehigh & Wilkes-Barre Coal Co., Lazarus v. (Pa.)	817
Jersey Shore Borough, Edsall v. (Pa.)	429	Lenahan v. Pittston Coal Min. Co. (Pa.)	884
John Nugent & Son v. Cook (R. I.)	865	Lerner v. Philadelphia (Pa.)	755
Johnson, Cavagnaro v. (N. J. Ch.)	995	Lew v. Bray (Conn.)	628
Johnson, Newman v. (Md.)	116	Lewis, Britt v. (R. I.)	1043
Johnson, Van Syckel v. (N. J. Ch.)	657	Lewis, Cook v. (R. I.)	1041
Johnston v. O'Reilly (N. J.)	312	Lewis, Hutchins v. (Me.)	203
Jones, In re (Del. Gen. Sess.)	15	Lewis v. Link-Belt Co. (Pa.)	967
Jones' Estate, In re (N. J.)	1101	Lewis, McCleery v. (Me.)	540
Jones, Jones Cold Store Door Co. of Washington County v. (Md.)	88	Lewiston, B. & B. St. Ry., Cameron v. (Me.)	534
Jones, Robinson v. (Pa.)	948	Lewiston, B. & B. St. R. Co., Denis v. (Conn.)	1047
Jones Cold Store Door Co. of Washington County v. Jones (Md.)	88	Light v. Light (Pa.)	553
Jones & Laughlin Steel Co., Sullivan v. (Pa.)	775	Line's Estate, In re (Pa.)	791
Jordan, Haslam, two cases v. (Me.)	1068	Link-Belt Co., Lewis v. (Pa.)	967
Joseph v. Union R. Co. (R. I.)	1	Lithuanian Brotherhelp Soc. St. Wicentus v. Tunila (Conn.)	25
Juan F. Portuondo Cigar Mfg. Co. v. Vicente Portuondo Cigar Mfg. Co. (Pa.)	968	Lockport Felt Co. v. United Box Board & Paper Co. (N. J. Ch.)	980
Judd v. New Britain (Conn.)	1028	Lombardi, Commonwealth v. (Pa.)	122
Kasarda v. Lehigh Valley R. Co. (Pa.)	943	Lumb Knitting Co., Taylor v. (R. I.)	1008
Katzenstein v. Hartford (Conn.)	23	Lumpkin v. Lumpkin (Md.)	238
Kaufmann v. Kaufmann (Pa.)	956	Lydston v. Rockingham County Light & Power Co. (N. H.)	385
Keeler, Schlicher v. (N. J.)	1101	Lynch, American Ice Co. v. (N. J. Ch.)	139
Keene Nat. Bank, State v. (N. H.)	542	Lynch v. Lynch (Pa.)	804
Keene's Estate, In re (Pa.)	706	McCahan's Estate, In re, two cases (Pa.)	711
Kehoe v. Rutherford (N. J.)	352	McCarter v. Vineland Light & Power Co. (N. J.)	177
Keller, Adelson v. (R. I.)	1103	McCleery v. Lewis (Me.)	540
Kelley v. Killourey (Conn.)	1031	McClellan's Estate, In re (Pa.)	737
Kelley, Lackawanna Lumber Co. v. (Pa.)	724	McClure's Estate, In re (Pa.)	860
Kelley v. Toomey (R. I.)	1108	McCollom, Barry v. (Conn.)	1035
Kelly, State v. (N. J.)	342	McCown's Estate, In re (Pa.)	784
Kerbaugh, Funk v. (Pa.)	953	McCoy v. Niblick (Pa.)	577
Keron, Cuirczak v. (N. J. Sup.)	368	McGraw v. Hilton (Pa.)	851
Kessler, Commonwealth v. (Pa.)	941	McKinney v. Pennsylvania R. Co. (Pa.)	946
Kessler's Estate, In re (Pa.)	770	McKwayne, Commonwealth v. (Pa.)	809
Keystone Brewing Co. v. Canavan (Pa.)	785	McLaughlin Bros., Harrison v. (Md.)	424
Kilduff, O'Neill v. (Conn.)	640	McLean Contracting Co., Booth v. (Md.)	104
Killourey, Kelley v. (Conn.)	1031	McManus-Kelly Co. v. Pope Mfg. Co. (N. J. Ch.)	297
Kingsbury v. Bazeley (N. H.)	916	McManus, Watson v. (Pa.)	263
Kingsland Brick Co., Sturtevant Mill Co. v. (N. J.)	732	McMurtrie, Appeal of (Pa.)	727
Kingston Coal Co., St. Vincent's Roman Catholic Congregation of Plymouth v. (Pa.)	838	McNamara, McWilliams v. (Conn.)	1043
Kirby v. Wylie (Md.)	218	McNeely Co. v. Bank of North America (Pa.)	891
Kistler, Mantz v. (Pa.)	545	McNichol v. Townsend (N. J. Ch.)	965
Kline, Fidelity Trust Co. v. (N. J.)	151	McVaugh v. Philadelphia Rapid Transit Co. (Pa.)	822
Knickerbocker Trust Co. v. O'Rourke Engineering Const. Co. (N. J. Sup.)	735	McWilliams v. McNamara (Conn.)	1043
Knikel v. Spitz (N. J. Ch.)	992	Maine Creamery Co. v. Reeves (R. I.)	1103
Knoup v. Carver (N. J.)	660	Manayunk Trust Co. v. Platt (Pa.)	721
Koch, Agens v. (N. J. Ch.)	348	Mann, Rogers v. (R. I.)	1057
Kocher v. Delaware, L. & W. R. Co. (Pa.)	769	Mantz v. Kistler (Pa.)	545
Kough v. Pennsylvania R. Co. (Pa.)	1004	March v. Phoenixville (Pa.)	274
Kraemer, Axel v. (N. J.)	367	Margwarth, Frederick v. (Pa.)	797
Krauczunas v. Hoban (Pa.)	740	Markley, Stevenson v. (N. J.)	1102
Krauss v. Krauss (N. J.)	305	Maroney v. La Barre (N. J.)	156
Krickbaum's Contested Election, In re (Pa.)	852	Marr v. Marr (N. J.)	375
La Barre, Maroney v. (N. J.)	156	Marshall v. Foltz (Pa.)	857
La Belle Coke Co. v. Smith (Pa.)	894	Marsh v. Platt (Pa.)	802
Lackawanna Lumber Co. v. Kelley (Pa.)	724	Martin Brick Mach. Mfg. Co., Spring City Brick Co. v. (Pa.)	774
Lackawanna & W. V. R. Co., Yevsack v. (Pa.)	837	Maryland Apartment House Co. of Baltimore City v. Glenn (Md.)	216
Lafayette Worsted Mill, Venbuur v. (R. I.)	1043	Maymon, Staples v. (R. I.)	1059
Lake v. Weaver (N. J. Ch.)	81	Meadon's Estate, In re (Vt.)	1064
Larraway v. Tillotson (Vt.)	1063	Meadville & C. S. S. R. Co., Gray v. (Pa.)	1103
Lathron, Root v. (Conn.)	614	Media, M., A. & C. Electric R. Co., Bilot-ta v. (Pa.)	123
Latsha v. Shamokin & E. Electric R. Co. (Pa.)	1002		

	Page		Page
Media, M., A. & C. Electric R. Co., Hannum v. (Pa.).....	847	Nugent & Son v. Cook (R. I.).....	865
Media, M., A. & C. Electric R. Co., Rea v. (Pa.).....	554	O'Bold's Estate, In re (Pa.).....	555
Meehan v. Board of Excise Com'rs of Jersey City (N. J.).....	363	Ocean City Land Co. v. Ocean City (N. J.).....	1101
Meeker v. East Orange (N. J. Sup.).....	360	Ocean City, Ocean City Land Co. v. (N. J.).....	1101
Merchants' & Miners' Transp. Co. v. State (Md.).....	413	Old Dominion Copper Mining & Smelting Co., Pierce v. (N. J.).....	1101
Metropolitan Life Ins. Co. v. Armstrong (R. I.).....	1103	Oliphant v. Edward (N. J. Sup.).....	337
Metropolitan Life Ins. Co. v. Hamilton (N. J. Ch.).....	677	O'Malley v. Rhode Island Co. (R. I.).....	915
Meyer, Wolf v. (N. J.).....	1103	O'Neill v. Kilduff (Conn.).....	640
Middleton, Burrell v. (N. J.).....	1100	O'Reilly, Johnston v. (N. J.).....	312
Migans v. Jersey City, H. & P. St. R. Co. (N. J.).....	168	O'Rourke Engineering Const. Co., Knickerbocker Trust Co. v. (N. J. Sup.).....	735
Mika v. Passaic Print Works (N. J.).....	327	Osborne, Bowler v. (N. J.).....	149
Miller, Farnsworth v. (N. J.).....	1100	Otis v. Bridport (Vt.).....	1061
Miller v. West Jersey & S. R. Co. (N. J. Sup.).....	175	Ott v. Seward (Pa.).....	882
Mills-Edisonia, Edison v. (N. J. Ch.).....	191	Oviatt v. Brownell (Pa.).....	785
Millville Imp. Co., State Mut. Bldg. & Loan Ass'n of New Jersey v. (N. J. Ch.).....	300	Pacific Surety Co., American Surety Co. v. (Conn.).....	584
Mittleman v. Philadelphia Rapid Transit Co. (Pa.).....	828	Pagnacco v. Faber (Pa.).....	754
Modern Woodmen of America v. Cecil (Md.).....	331	Palisade Const. Co., Polo v. (N. J.).....	161
Moline Jewelry Co. v. Dinnan (Conn.).....	634	Palmer v. Central Board of Education of City of Pittsburg (Pa.).....	433
Monmouth County Electric Co. v. Eatontown Tp. in Monmouth County (N. J. Ch.).....	994	Park City Yacht Club v. Bridgeport (Conn.).....	631
Monroe County Water Power & Supply Co., Delaware, L. & W. R. Co. v. (Pa.).....	797	Passaic Match Co. v. Helio Match Co. (N. J. Ch.).....	466
Monroe County Water Power & Supply Co., S. Morgan Smith Co. v. (Pa.).....	738	Passaic Print Works, Mika v. (N. J.).....	327
Moore v. Moore (N. J. Ch.).....	684	Patterson, Slotter v. (Pa.).....	236
Morehous, Clark v. (N. J. Ch.).....	307	Paxson's Estate, In re (Pa.).....	280
Morgan Smith Co. v. Monroe County Water Power & Supply Co. (Pa.).....	738	Paxson, Stayman v. (Pa.).....	808
Morris, Prudential Ins. Co. of America v. (N. J. Ch.).....	924	P. Ballantine & Sons v. Public Service Corp. of New Jersey (N. J. Sup.).....	167
Morristown, Frelinghuysen v. (N. J. Sup.).....	77	Peffer v. Pennsylvania Water Co. (Pa.).....	870
Morris & Cummings Dredging Co. v. Bayonne (N. J.).....	134	Pelton v. Goldberg (Conn.).....	1020
Morris & E. R. Co. v. Newark (N. J.).....	194	Pemigewasset Power Co., Wright v. (N. H.).....	290
Morton, Barnum v. (N. J. Prerog.).....	680	Pence v. Poet (Pa.).....	832
Morton's Estate, In re (N. J. Prerog.).....	680	Pennsylvania Cement Co., Ridgeway Dynamo & Engine Co. v. (Pa.).....	557
Morton Trust Co. v. Chittenden (Conn.).....	648	Pennsylvania Institution for Instruction of the Blind, Hunn v. (Pa.).....	812
Moyer v. United Traction Co. (Pa.).....	551	Pennsylvania, N. J. & N. Y. R. Co. v. Schwarz (N. J.).....	134
Mullin, Tonks v. (N. J.).....	1102	Pennsylvania R. Co., Dentz v. (N. J.).....	164
Mullock Co., Brigham v. (N. J. Ch.).....	185	Pennsylvania R. Co., Gladney v. (N. J.).....	835
Murphy, Connecticut Breweries Co. v. (Conn.).....	450	Pennsylvania R. Co., Kough v. (Pa.).....	1004
Mutual Life Ins. Co. of Baltimore v. Rain (Md.).....	87	Pennsylvania R. Co., McKinney v. (Pa.).....	946
Negley v. New York Life Ins. Co. (N. J.).....	129	Pennsylvania R. Co. v. Pittsburg (Pa.).....	271
Neill's Estate, In re (Pa.).....	942	Pennsylvania R. Co., Piver v. (N. J.).....	834
Newark, Ely v. (N. J.).....	159	Pennsylvania R. Co., Potter v. (Pa.).....	852
Newark, Morris & E. R. Co. v. (N. J.).....	194	Pennsylvania R. Co. v. Southwestern St. R. Co. (Pa.).....	818
Newark School Board, In re (N. J. Sup.).....	881	Pennsylvania R. Co., Walsh v. (Pa.).....	1088
New Britain, Judd v. (Conn.).....	1028	Pennsylvania Soc. to Protect Children from Cruelty, Hood v. (Pa.).....	845
New England Breeders' Club, Head & Dowst Co. v. (N. H.).....	248	Pennsylvania Water Co., Peffer v. (Pa.).....	870
New England Telephone & Telegraph Co., Drown v. (Vt.).....	599	Penn Tanning Co., James v. (Pa.).....	885
New Haven, Alderman v. (Conn.).....	626	People's Nat. Bank, State v. (N. H.).....	542
New Jersey Worsted Spinning Co., Rhobovsky v. (N. J.).....	170	Perth Amboy Shipbuilding & Engineering Co., Ramsey v. (N. J.).....	1101
Newman v. Johnson (Md.).....	116	Philadelphia, Gardner v. (Pa.).....	721
New York Life Ins. Co., Negley v. (N. J.).....	129	Philadelphia, Holbert v. (Pa.).....	746
New York, N. H. & H. R. Co., Appeal of (Conn.).....	26	Philadelphia, Lerner v. (Pa.).....	755
Niblick, McCoy v. (Pa.).....	577	Philadelphia, Reynolds v. (Pa.).....	125
Nichols v. Ansonia (Conn.).....	636	Philadelphia, Truitt v. (Pa.).....	757
Nixon v. Haslett (N. J. Ch.).....	987	Philadelphia, B. & W. R. Co., Franklin Trust Co. v. (Pa.).....	949
Northern Cent. R. Co., Tilburg v. (Pa.).....	723	Philadelphia Rapid Transit Co., McVaugh v. (Pa.).....	822
North Jersey St. R. Co., Bathgate v. (N. J.).....	132	Philadelphia Rapid Transit Co., Mittleman v. (Pa.).....	828
North Jersey St. R. Co., Hageman v. (N. J.).....	1101	Philadelphia & R. R. Co., Powell v. (Pa.).....	268
North Jersey St. R. Co., St. Columba's Church v. (N. J. Ch.).....	692	Phillips, Seaboard Air Line R. Co. v. (Md.).....	232
Northrop v. Waterbury (Conn.).....	1024	Phoenixville, March v. (Pa.).....	274
Norwich & W. R. Co., Bulkley v. (Conn.).....	1021	Pierce v. Old Dominion Copper Mining & Smelting Co. (N. J.).....	1101
		Pittsburg, Allegheny Valley R. Co. v. (Pa.).....	271
		Pittsburg, Pennsylvania R. Co. v. (Pa.).....	271
		Pittsburg R. Co., Walsh v. (Pa.).....	826
		Pittston Coal Min. Co., Lenahan v. (Pa.).....	884
		Pittston, Conroy v. (Pa.).....	944
		Piver v. Pennsylvania R. Co. (N. J.).....	834
		Platt, Manayunk Trust Co. v. (Pa.).....	721
		Platt, Marsh v. (Pa.).....	802
		Plaut v. Plaut (Conn.).....	52

	Page		Page
Plehm, State v. (N. J.).....	1102	Schlicher v. Keeler (N. J.).....	1101
Poet, Pence v. (Pa.).....	832	Schmidt, Schneider v. (N. J. Ch.).....	688
Poland v. Davis (Me.).....	22	Schmuck v. Hartman (Pa.).....	1091
Polo v. Palisade Const. Co. (N. J.).....	161	Schneider v. Schmidt (N. J. Ch.).....	688
Pope Mfg. Co., McManus-Kelly Co. v. (N. J. Ch.).....	297	Schneider v. Winkler (N. J. Sup.).....	731
Portuondo Cigar Mfg. Co. v. Vicente Portuondo Cigar Mfg. Co. (Pa.).....	968	Schock v. Garrison (N. J. Ch.).....	147
Portuondo Cigar Mfg. Co., Juan F. Portuondo Cigar Mfg. Co. v. (Pa.).....	968	Schorer, Brethauer v. (Conn.).....	592
Potter v. Pennsylvania R. Co. (Pa.).....	852	Schrager v. Cool (Pa.).....	889
Powell v. Philadelphia & R. R. Co. (Pa.).....	268	Schroeder, Reber v. (Pa.).....	556
Preston, Cochran v. (Md.).....	113	Schuman, Colloty v. (N. J.).....	190
Prudential Ins. Co. of America v. Morris (N. J. Ch.).....	924	Schusler, Appeal of (Conn.).....	1029
Pruner's Estate, In re (Pa.).....	1000	Schwarz, Pennsylvania, N. J. & N. Y. R. Co. v. (N. J.).....	134
Pryor v. Gray (N. J.).....	341	Scoville v. Brock (Vt.).....	1014
Public Service Corp. of New Jersey, P. Ballantine & Sons v. (N. J. Sup.).....	167	Scrymser v. Seabright Electric Light Co. (N. J. Ch.).....	977
Purnell v. Purnell (N. J.).....	187	Seaboard Air Line R. Co. v. Phillips (Md.).....	232
		Seabright Electric Light Co., Scrymser v. (N. J. Ch.).....	977
Rademacher v. Rademacher (N. J. Ch.).....	687	Searles v. De Ladson (Conn.).....	589
Rahn Tp. School Dist. v. Lehigh Coal & Navigation Co. (Pa.).....	551	Sears, Bartlett v. (Conn.).....	33
Rain, Mutual Life Ins. Co. of Baltimore v. (Md.).....	87	Searsmont, Inhabitants of Rockport v. (Me.).....	444
Ramsey v. Perth Amboy Shipbuilding & Engineering Co. (N. J.).....	1101	Sechler v. Eshelman (Pa.).....	910
Randall & Co., Almeda v. (R. I.).....	1043	Seff v. Brotman (Md.).....	106
Raritan Woolen Mills, Einstein v. (N. J.).....	295	Seldel v. Woodbury (Conn.).....	58
Rea v. Media, M. A. & C. Electric R. Co. (Pa.).....	554	Seward, Ott v. (Pa.).....	882
Reber v. Schroeder (Pa.).....	556	Shamokin & E. Electric R. Co., Latsha v. (Pa.).....	1002
Reed, Smith v. (N. J. Ch.).....	961	Sharp, State v. (N. J.).....	1102
Reeves, Maine Creamery Co. v. (R. I.).....	1103	Shaw, Child v., two cases (Vt.).....	566
Remington, Riley v. (Pa.).....	552	Shedaker, In re (N. J. Prerog.).....	659
Reynolds v. Philadelphia (Pa.).....	125	Shoenberger's Estate, In re (Pa.).....	579
Rhobovsky v. New Jersey Worsted Spinning Co. (N. J.).....	170	Shomo, Appeal of (Pa.).....	749
Rhode Island Co., Betz v. (R. I.).....	1058	Shreve v. Harvey (N. J. Ch.).....	671
Rhode Island Co., O'Malley v. (R. I.).....	915	Shulta, Commonwealth v. (Pa.).....	823
Rhode Island Co., Washington v. (R. I.).....	913	Silverman, State v. (N. H.).....	1076
Rhode Island Co., Wilcox v. (R. I.).....	913	Simpson v. Anderson (N. J. Ch.).....	696
Rhode Island Suburban R. Co., Enos v. (R. I.).....	1011	Singley v. Easton Transit Co. (Pa.).....	718
Rhodes, Blackmar v. (R. I.).....	1059	Skilman, State v. (N. J. Sup.).....	83
Rice v. Barrington (N. J.).....	169	Sloss-Sheffield Steel & Iron Co. v. Aetna Life Ins. Co. (N. J. Ch.).....	390
Richards v. Walp (Pa.).....	815	Slotter v. Patterson (Pa.).....	236
Ricker, State v. (Vt.).....	1059	Smith, Barron v. (Md.).....	225
Ridgeway Dynamo & Engine Co. v. Pennsylvania Cement Co. (Pa.).....	557	Smith, Blessing v. (N. J. Ch.).....	933
Rielly v. Stephenson (Pa.).....	1097	Smith, Commonwealth v. (Pa.).....	850
Riley v. Remington (Pa.).....	552	Smith v. Hotel Ritz Co. (N. J. Ch.).....	137
Roberts v. Rowe (N. H.).....	1074	Smith, La Belle Coke Co. v. (Pa.).....	894
Robeson v. Duncan (N. J. Ch.).....	685	Smith v. Reed (N. J. Ch.).....	961
Robinson v. Jones (Pa.).....	948	Smith v. Stannard (Vt.).....	563
Robinson's Estate, In re (Pa.).....	966	Smith v. Weaver (N. J.).....	1101
Rockingham County Light & Power Co., Lydston v. (N. H.).....	385	Smith v. Wigler (N. J.).....	136
Rogers, Bergen v. (N. J.).....	1100	Smith, Wirsing v. (Pa.).....	906
Rogers v. Brown (Me.).....	206	S. Morgan Smith Co. v. Monroe County Water Power & Supply Co. (Pa.).....	738
Rogers v. Colebaugh (N. J.).....	299	Snow, Ex parte (N. H.).....	120
Rogers v. Mann (R. I.).....	1057	Snow, Gibson v. (N. H.).....	120
Root v. Lathrop (Conn.).....	614	Snyder v. Corn Exch. Nat. Bank (Pa.).....	876
Rosenbaum, State v. (N. J.).....	1102	Somers Brick Co., Hinnon v. (N. J.).....	166
Rosenkovitz v. United Railways & Electric Co. of Baltimore City (Md.).....	108	Somers Brick Co. v. Souder (N. J.).....	158
Ross, Sparks v. (N. J. Ch.).....	679	Souder, Somers Brick Co. v. (N. J.).....	158
Rowe, Roberts v. (N. H.).....	1074	Southwark Mills Co., Escher v. (Pa.).....	714
Royal Mfg. Co. v. Board of Equalization of Taxes of New Jersey (N. J. Sup.).....	978	Southwestern St. R. Co., Pennsylvania R. Co. v. (Pa.).....	818
Rubincam, Appeal of (Pa.).....	756	Sparks v. Ross (N. J. Ch.).....	679
Rutherford, Kehoe v. (N. J.).....	352	Speer v. Huidekoper (Pa.).....	802
Ryer v. Turkel (N. J.).....	68	Spence v. Spence (N. J. Ch.).....	990
		Spitz, Knikel v. (N. J. Ch.).....	992
Safford v. Barber (N. J. Ch.).....	871	Spring City Brick Co. v. Henry Martin Brick Mach. Mfg. Co. (Pa.).....	774
St. Columba's Church v. North Jersey St. R. Co. (N. J. Ch.).....	692	Standard Distilling & Distributing Co., Bijur v. (N. J. Ch.).....	934
St. Margaret Memorial Hospital, Appeal of (Pa.).....	579	Stannard, Smith v. (Vt.).....	568
St. Pierre v. A. J. Foster & Co. (N. H.).....	289	Staples v. Maymon (R. I.).....	1059
St. Vincent's Roman Catholic Congregation of Plymouth v. Kingston Coal Co. (Pa.).....	838	Star Of Hope Lodge No. 12, Order of Shepherds of Bethlehem, Clark v. (Conn.).....	588
Sarson v. Sarson (N. J. Ch.).....	663	Starrett v. Boynton (N. J.).....	183
Savage, Crocheron v. (N. J. Ch.).....	353	State v. Audette (Vt.).....	833
		State v. Claremont Nat. Bank (N. H.).....	542
		State v. Delaney (N. J.).....	311
		State v. Dougherty (Del. Gen. Sess.).....	16
		State v. Eastern Coal Co. (R. I.).....	1
		State v. Fahey (Md.).....	218
		State v. Ferris (Conn.).....	587
		State v. Keene Nat. Bank (N. H.).....	542
		State v. Kelly (N. J.).....	342

	Page		Page
State, Merchants' & Miners' Transp. Co. v. (Md.)	413	United Railways & Electric Co. of Baltimore City, Rosenkovitz v. (Md.)	108
State v. People's Nat. Bank (N. H.)	542	United States Cast Iron Pipe & Foundry Co., Bassett v. (N. J. Ch.)	929
State v. Plickm (N. J.)	1102	United States Exp. Co., Stevenson v. (Pa.)	275
State v. Ricker (Vt.)	1059	United States, Voorhees v. (N. J.)	1101
State v. Rosenbaum (N. J.)	1102	United Traction Co., Moyer v. (Pa.)	551
State v. Sharp (N. J.)	1102	Van Dyke v. Cole (Vt.)	593
State v. Silverman (N. H.)	1070	Van Dyke v. Cole (Vt.)	1103
State v. Skillman (N. J. Sup.)	83	Van Horne, In re (N. J. Ch.)	986
State v. Stern (N. J.)	1102	Van Leer v. Van Leer (Pa.)	716
State v. Stevens (Vt.)	1060	Van Syckel v. Johnson (N. J. Ch.)	657
State v. Suffield & Thompsonville Bridge Co. (Conn.)	55	Van Wagenen v. Bonnot (N. J.)	143
State v. Warren (R. I.)	1	Venbuur v. Lafayette Worsted Mills (R. I.)	1043
State v. Washelesky (Conn.)	62	Vicente Portuondo Cigar Mfg. Co., Juan F. Portuondo Cigar Mfg. Co. v. (Pa.)	963
State Board of Equalization, Wyatt v. (N. H.)	387	Vineland Light & Power Co., McCarter v. (N. J.)	177
State Mut. Bldg. & Loan Ass'n of New Jersey v. Millville Imp. Co. (N. J. Ch.)	300	Vockroth, Chess v. (N. J.)	73
Stayman v. Paxson (Pa.)	803	Voigt v. Dowe (N. J. Ch.)	344
Steelman v. Wheaton (N. J.)	1102	Voorhees v. United States (N. J.)	1101
Stevens v. Dayton (Pa.)	127	Wadsworth, Birkbeck v. (Pa.)	998
Stephenson, Rielly v. (Pa.)	1097	Walker, Brindley v. (Pa.)	794
Sterlingworth Ry. Supply Co., Hilliard v. (Pa.)	819	Walker v. Chessman (N. H.)	248
Stern, State v. (N. J.)	1102	Walnut, Du Bois v. (Pa.)	796
Stevens, State v. (Vt.)	1060	Walp, Richards v. (Pa.)	815
Stevens v. Stevens (N. H.)	1056	Walsh v. Pennsylvania R. Co. (Pa.)	1088
Stevenson v. Markley (N. J.)	1102	Walsh v. Pittsburg R. Co. (Pa.)	826
Stevenson v. United States Exp. Co. (Pa.)	275	Walter v. Westinghouse, Church, Kerr & Co. (N. J.)	1102
Stewart, Appeal of (Pa.)	770	Warren, State v. (R. I.)	1
Stewart, Anderson v. (Md.)	228	Washelesky, State v. (Conn.)	62
Stewart, Inhabitants of York v. (Me.)	207	Washington v. Rhode Island Co. (R. I.)	913
Stewart & Co. v. Harman (Md.)	333	Waterbury, Northrop v. (Conn.)	1024
Stitzel's Estate, In re (Pa.)	749	Waterman, Stone v. (R. I.)	1009
Stone v. Waterman (R. I.)	1009	Waters v. Collins (N. J. Ch.)	984
Stuart v. Andrews (Me.)	1069	Waters & Co., Carroll v. (Md.)	422
Stuart v. Chapman (Me.)	1069	Watertown Sav. Bank, Bank Com'rs v. (Conn.)	1038
Sturtevant Mill Co. v. Kingsland Brick Co. (N. J.)	732	Watson v. McManus (Pa.)	263
Suffield, Forbes v. (Conn.)	1023	Watts, Worth v. (N. J. Ch.)	357
Suffield & Thompsonville Bridge Co., State v. (Conn.)	55	Weaver, Lake v. (N. J. Ch.)	81
Sulk, In re (N. J. Ch.)	661	Weaver, Smith v. (N. J.)	1101
Sullivan v. Hanover Cordage Co. (Pa.)	909	Weed v. Hunt (Vt.)	564
Sullivan v. Jones & Laughlin Steel Co. (Pa.)	775	Weir v. Haverford Electric Light Co. (Pa.)	874
Swift v. Craighead (N. J. Ch.)	666	Wells, Tripp v. (Me.)	533
Sworoski v. Sworoski (N. H.)	116	Wendel v. Board of Education of City of Hoboken (N. J.)	152
Taussig's Appeal, In re (Pa.)	294	Western Maryland R. Co., Clay v. (Pa.)	807
Taylor v. Lumb Knitting Co. (R. I.)	1008	Westinghouse, Church, Kerr & Co., Walter v. (N. J.)	1102
Taylor v. Taylor (N. J.)	323	West Jersey Exp. Co., Collins v. (N. J.)	344
Taylor, Williams v. (Conn.)	643	West Jersey & S. R. Co., Miller v. (N. J. Sup.)	175
Taylor & McCoy Coal & Coke Co. v. Hartman (Pa.)	1001	Wheaton, Steelman v. (N. J.)	1102
Thomas v. Borden (Pa.)	1051	Wheeler v. Equitable Trust Co. (Pa.)	750
Thompson, Brown v. (N. J.)	172	White v. Avery (Conn.)	1065
Thomson, Jackson v. (Pa.)	1095	White, Chester City v. (Pa.)	125
Tilburg v. Northern Cent. R. Co. (Pa.)	723	White River Lumber Co. v. Clarke (N. H.)	247
Tillotson, Larraway v. (Vt.)	1063	White Spring Paper Co., Worthen & Aldrich v. (N. J. Ch.)	468
Tingley v. International Dynelectron Co. (N. J. Ch.)	919	Wick, Fowler v. (N. J. Ch.)	682
Todd, Butterworth v. (N. J. Sup.)	139	Widener, Hollis v. (Pa.)	287
Toman, Diocese of Trenton v. (N. J. Ch.)	606	Wigler, Smith v. (N. J.)	136
Toman, Diocese of Trenton v. (N. J. Ch.)	881	Wilcox v. Rhode Island Co. (R. I.)	913
Tomlinson v. Armour & Co. (N. J.)	314	Wilkins v. Brock (Vt.)	572
Tonks v. Mullin (N. J.)	1102	Williams v. Brokaw (N. J. Ch.)	665
Toomey, Kelley v. (R. I.)	1103	Williams v. Taylor (Conn.)	643
Town of Canaan v. Enfield Village Fire Dist. (N. H.)	250	Williams, Willson v. (Md.)	409
Townsend, McNichol v. (N. J. Ch.)	965	Willson v. Williams (Md.)	409
Traurig v. Gelb (N. J.)	352	Wilmington, Anderson v. (Del.)	204
Tripp v. Wells (Me.)	533	Winkler, Schneider v. (N. J. Sup.)	731
Truitt v. Philadelphia (Pa.)	757	Wirsing v. Smith (Pa.)	906
Trustees of Stevens Institute of Technology v. Bowes (N. J. Sup.)	730	Wohlfert, Ervin v. (N. J. Sup.)	153
Tunila, Lithuanian Brotherhelp Soc. St. Vincentus v. (Conn.)	25	Wolfe v. Hatheway (Conn.)	645
Turkel, Ryer v. (N. J.)	68	Wolf v. Meyer (N. J.)	1103
Union R. Co., Joseph v. (R. I.)	1	Wood, Dame v. (N. H.)	1081
Union Stockyards Co., Eshelman v. (Pa.)	899	Woodbury, Durrell v. (N. J.)	1100
United Box Board & Paper Co., Lockport Felt Co. v. (N. J. Ch.)	980	Woodbury, Seidel v. (Conn.)	58
		Woodward, Appeal of (Conn.)	453
		Worthen & Aldrich v. White Spring Paper Co. (N. J. Ch.)	468
		Worth v. Watts (N. J. Ch.)	357

	Page		Page
Wright v. Pemigewasset Power Co. (N. H.)	290	Yevsack v. Lackawanna & W. V. R. Co.	
Wyatt v. State Board of Equalization (N. H.)	387	(Pa.)	837
Wylie, Kirby v. (Md.)	213	Young, Ballantine v. (N. J. Ch.)	668

†

# THE ATLANTIC REPORTER.

VOLUME 70.

## JOSEPH v. UNION R. CO.

(Supreme Court of Rhode Island. June 30, 1908.)

### APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT.

Where, in an action by a passenger for injuries, the evidence decidedly preponderates to the effect that the car did not stop at the switch where plaintiff left it, but that she stepped or jumped from the car while it was in motion, a verdict for plaintiff will be reversed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3938-3943.]

Appeal from Superior Court, Providence County.

Action by Flora Joseph against the Union Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Cooney & Cahill, for plaintiff. Henry W. Hayes and Frank T. Easton, for defendant.

**PER CURIAM.** The evidence very decidedly preponderates to the effect that the car did not stop at the switch where the plaintiff left it, but that she stepped or jumped from the car while it was in motion. Her claim, therefore, that the accident was caused by the defendant's negligence, is not sustained.

The defendant's exception to the refusal of its motion for a new trial, on the ground that the verdict was against the evidence, is sustained, and the cause is remitted to the superior court for a new trial.

(29 R. I. 254)

## STATE v. EASTERN COAL CO. et al.

### SAME v. WARREN et al.

(Supreme Court of Rhode Island. June 29, 1908.)

### 1. CONSPIRACY—CRIMINAL RESPONSIBILITY—ELEMENTS—"CRIMINAL CONSPIRACY."

Criminal conspiracy is a confederation to do something unlawful, either as a means or an end.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 30-39.

For other definitions, see Words and Phrases, vol. 2, pp. 1745-1746.]

### 2. SAME—COMBINATION—LAWFUL MEANS.

What one person may lawfully do a number of persons may unite in doing, without constituting conspiracy, if the means employed are lawful.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 85.]

### 3. MONOPOLIES—ELEMENTS—DEFINITION.

It is a monopoly when one person alone buys up the whole of one kind of commodity, fixing a price at his own pleasure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 13.

For other definitions, see Words and Phrases, vol. 5, pp. 4570-4573.]

### 4. SAME—COMMON LAW—CRIMINAL LIABILITY.

It was a crime at common law to buy up a large quantity of articles so as to obtain a monopoly of it, for the purpose of selling at an unreasonable price.

### 5. SAME—ENGROSSING—ARTICLES CAPABLE OF BEING ENGROSSED—COAL.

Coal is an article of prime necessity in this state, and this part of the country, so as to be legally capable of being engrossed.

### 6. SAME—COMMON LAW—CONSIDERATIONS IN ENFORCEMENT.

Gen. Laws 1896, c. 284, § 1, provides that every act and omission which is an offense at common law, and for which no punishment is prescribed by this title, be punished as an offense at common law; and the same provision is contained in Pub. St. 1882, c. 247, § 1, Gen. St. 1872, c. 235, § 1, Rev. St. 1857, c. 219, § 1, and Pub. St. 1844, p. 61. Section 6 of the act establishing the Digest provides that, when no provision is made either at common law or by the Revised Statutes, such statutes as were introduced before the Declaration of Independence, and as have been considered in force, shall be considered as a part of the common law, and remain in force until otherwise provided by statute. Penal Reform Laws (Dig. 1822, p. 353) § 59, is identical with Dig. 1798, p. 604, § 55, which provides that any common-law offense, for which no punishment is prescribed by this act, shall be punished as a common-law offense. Dig. 1767, pp. 55, 56, provides that all the courts of the colonies shall be governed by criminal statutes of Parliament, so far as they are descriptive of the crime, excepting such statutes as from the nature are confined to Great Britain, and, in the absence of a Colonial law, the laws of England shall be in force. *Held*, that the common-law crime of engrossing is a part of the common law of this state, though dormant, and, when it becomes necessary to enforce it, the law shall be applied with due regard to circumstances and conditions existing at the time of its enforcement.

# 7. MONOPOLIES—ELEMENTS.

A monopoly embraces any combination the tendency of which is to prevent competition in its broad and general sense, and to control prices to the detriment of the public.

# 8. SAME—CRIMINAL LIABILITY—PURPOSE OF MONOPOLY.

It is a criminal offense to obtain a monopoly of a prime necessity of life, as monopolies are contrary to the genius of a free government; and it is immaterial that the article may have been monopolized for a benevolent purpose.

# 9. SAME—ELEMENTS OF MONOPOLY—ACQUISITION OF POWER.

The gravamen of the offense of monopoly consists in combining to acquire power, the exercise of which depends entirely upon the will of those who hold the power, and efforts to acquire the power of monopoly should be prevented.

# 10. INDICTMENT AND INFORMATION—REQUISITES—DIRECTNESS—CHARGES BY IMPLICATION.

Criminal pleading must be clear and definite, and every fact necessary to constitute the crime must be charged directly and positively, and nothing can be charged by implication or inditement or by way of argument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 192.]

# 11. CONSPIRACY—CRIMINAL RESPONSIBILITY—INDICTMENT—SUFFICIENCY—CHARGE BY IMPLICATION.

An indictment for conspiracy charging that defendants unlawfully and fraudulently combined, conspired together, etc., by unlawful means, to regulate and fix the price at which coal was sold in a certain city, to the prejudice of the public, etc., coal then being an article of prime necessity, and that defendants became members of a trust, combination, etc., wrongfully and unlawfully to regulate and fix the price at which coal was sold. *Held*, that the indictment was defective, in that it charged only by implication and inference that defendants conspired to create a monopoly in coal in the city.

# 12. SAME.

The indictment was fatally defective in not showing that defendants were dealers in coal, or otherwise had the power to regulate and fix the price thereof in restraint of trade, and in not charging sufficiently the alleged agreement or combination, or setting out the means or purpose of the alleged combination, but was not insufficient, in that it does not appear that defendants conspired to raise the price of coal, and to fix a price that was unlawful and exorbitant or oppressive.

# 13. SAME—DURATION OF ILLEGAL CONTRACT—NECESSITY OF ALLEGING.

If an indictment for conspiracy to unlawfully fix the price of a commodity and secure a monopoly thereon is otherwise sufficient, it is immaterial that it did not allege the duration of the illegal contract; that not being of the essence of the crime.

# 14. CORPORATIONS—CRIMES—CONSPIRACY.

A corporation can be guilty of the crime of conspiracy.

The Eastern Coal Company and others and George E. Warren and others were indicted for conspiracy, and the cases heard together upon certified questions from the superior court. Questions answered.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARK-HURST, JJ.

William B. Greenough, Atty. Gen., and James C. Collins, Jr., Special Counsel, for the State. Dexter B. Potter, for Curran &

Burton, Inc., and Smith P. Burton, Henry W. Hayes, for John R. White & Son, Inc., and James A. Kinghorn and Merwin White. Frank L. Hinckley, for Eastern Coal Company and George E. Warren. Arthur M. Allen, for Doe & Little Company and Harry C. Clark.

DUBOIS, J. These are indictments charging the defendants with conspiracy. The cases were heard together, and came to this court upon certifications from the superior court for the counties of Providence and Bristol, under Court and Practice Act 1905, § 478.

The material portions of the four counts in each of the indictments set out that the defendants "unlawfully and fraudulently did combine, confederate, and conspire together, by divers unlawful and fraudulent devices, contrivances, and acts, unlawfully to regulate and fix the price at which coal should be sold in the said city of Providence, to the prejudice of the public and of the consumers of said coal, which said coal was then and there an article of prime necessity to the public and the consumers thereof," and that the defendants, "willfully devising and intending to regulate and fix the price of a prime necessity of life in said city of Providence, did unlawfully and maliciously conspire, combine, confederate, and agree together to do an illegal act injurious to the public trade in reference to a prime necessity of life, to wit, to then and there, in restraint of trade, and to the injury of the public trade, unlawfully create, enter into, and become members of and parties to a trust, agreement, combination, confederation, and understanding with each other wrongfully and unlawfully to regulate and fix the price at which coal should be sold in the city of Providence, which said coal was then and there an article of prime necessity to the public and consumers thereof," and also that the defendants "unlawfully, fraudulently, maliciously, wrongfully, and wickedly did conspire and agree together to do an illegal act injurious to the public trade, to wit, to then and there unlawfully regulate and fix the price at which anthracite coal should be sold in the city of Providence, which said anthracite coal was then and there an article of prime necessity to the public and the consumers thereof, and that the defendants did unlawfully and fraudulently fix and regulate the price of anthracite coal in said city of Providence," and, finally, that the defendants "unlawfully, fraudulently, maliciously, wrongfully, and wickedly did conspire and agree together to do an illegal act injurious to the public trade, to wit, to then and there unlawfully regulate and fix the price at which coal should be sold in said city of Providence, which said coal was then and there an article of prime necessity to the said public and consumers thereof."

The following are the questions certified for our determination:

"(1) Is said indictment insufficient in law, in that it does not show that said defendants were dealers in coal or in anthracite coal, or otherwise had any power to regulate and fix the price thereof or to restrain trade therein?"

"(2) Is said indictment insufficient in law, in that it does not show that said defendants conspired to create a monopoly in coal or anthracite coal?"

"(3) Is said indictment insufficient in law, in that it does not appear in and by the same that said defendants conspired to raise the price of coal or to fix a price that was unlawful, exorbitant, unwarranted, or oppressive?"

"(4) Is said indictment insufficient in law, in that it does not appear in and by the same that said alleged agreement to fix and regulate the price of coal was for any appreciable point of time or was an agreement binding on any of the parties thereto?"

"(5) Does an agreement or combination to fix and regulate the price of coal as the same is set forth in the indictment constitute a criminal offense?"

"(6) Is said indictment insufficient in law, in that it does not properly or sufficiently set forth either the means or the purpose of the alleged combination or agreement?"

"(7) Is said indictment insufficient in law, in that it does not set forth the alleged agreement or combination with sufficient precision?"

"(8) Can a corporation be guilty of the crime of conspiracy?"

To answer the questions, it is necessary to consider whether the crime of conspiracy is properly charged in the indictment. We have already defined criminal conspiracy to be a "confederation to do something unlawful either as a means or an end." *State v. Bacon*, 27 R. I. 252, 257, 61 Atl. 653, 654. Is anything unlawful charged either as a means or an end? No unlawful means are alleged in any of the counts. Therefore it must appear that something unlawful is charged against the defendants as an end. The object to be effected, as hereinbefore stated, according to the first count, is "unlawfully to regulate and fix the price at which coal should be sold in the city of Providence, to the prejudice of the public." Under the second count it is "to then and there, in restraint of trade and to the injury of the public trade, unlawfully create, enter into, and become members of and parties to a trust, agreement, combination, confederation, and understanding with each other wrongfully and unlawfully to regulate and fix the price at which coal should be sold in the city of Providence, which coal was then and there an article of prime necessity to the public and consumers thereof." By the third count it is "to do an illegal act injurious to the public trade, to wit, to then and there unlawfully regulate and fix the price at which anthracite coal should be sold in the city of Providence, and that they did fix and regulate the price of anthracite coal in the city of Providence." The object to be effected ac-

cording to the fourth count is to do an illegal act injurious to the public trade, to wit, to then and there unlawfully fix the price at which coal should be sold in the city of Providence." The question may, therefore, be narrowed down to this: Is it unlawful for one person to fix the price at which coal shall be sold within the limits of a city? If it is, then it is necessarily a criminal offense for several persons to combine for that purpose; but, if it is lawful for one, then it does not become unlawful merely because a number are engaged with him in doing it. This doctrine is announced in *Macauley Bros. v. Tierney*, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770 (1895) wherein *Matteson, C. J.*, speaking for the court says (page 264 of 19 R. I., and page 4 of 33 Atl. [37 L. R. A. 455, 61 Am. St. Rep. 770]): "What a person may lawfully do a number of persons may unite with him in doing without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful." Portions of the opinion of *Ball, J.*, in *Chicago, etc., Coal Co. v. People*, 114 Ill. App. 75 (1904), may seem to be in conflict with this doctrine, for on page 111 he reasons: "Counsel for defendants say that any one may lawfully fix the price at which he will sell his product, or he may lawfully refuse to sell it at any price. This is true. The injury to the public, if any, from the acts of an individual, are infinitesimal; and in the long run they correct themselves. Hence the law places few restrictions upon a man in the management of his own affairs. But men can often do by the combination of many what severally no one could accomplish, and even what when done by one would be innocent." *Morris Run v. Barclay*, 68 Pa. 173, 8 Am. Rep. 159. Whenever the act to be done by such a combination necessarily tends to prejudice the public or to oppress individuals, the combination has always been held to be criminal. \* \* \* "There is potency in numbers when combined which the law cannot overlook where injury is the consequence." *Morris Run v. Barclay*, supra."

It is worthy of note that the case then being considered was tried upon an agreed statement of facts and law, from which the judge was able to ascertain the consequences that naturally would flow from the agreement, and that the case of *Morris Run v. Barclay* was heard upon the report of a referee who found that the contract was void by statute and at common law, as against public policy, and that the contracting corporations represented almost the entire body of bituminous coal in the northern part of the state; that by combination between themselves they had the power to control the whole market in the district, and that they did control it by a contract not to ship and sell coal otherwise than as therein provided; and that, in order to destroy competition, they provided for an arrangement with dealers and shippers of anthracite coal. All this information was



not gained from an inspection of the pleadings. As was well said by Agnew, J., in *Morris Run v. Barclay*, 68 Pa. 187, 8 Am. Rep. 159: "If the motives of the confederates be to oppress, the means they use unlawful, or the consequences to others injurious, their confederation will become a conspiracy. Instances are given in *Commonwealth v. Carlisle*, Brightly N. P. (Pa.) 40. Among those mentioned as criminal is a combination of employers to depress the wages of journeymen below what they would be, if there were no resort to artificial means; and a combination of the bakers of a town to hold up the article of bread and by means of the scarcity thus produced to extort an exorbitant price for it. The latter instance is precisely parallel with the present case. It is the effect of the act upon the public which gives that case and this its evil aspect as the result of confederation; for any baker might choose to hold up his own bread or coal operator his coal rather than to sell at ruling prices, but when he destroys competition by a combination with others the public can buy of no one." In *People v. Sheldon et al.*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690 (1893), the court found (page 262 of 139 N. Y., and page 788 of 34 N. E. [23 L. R. A. 221, 36 Am. St. Rep. 690]): "A combination between independent dealers, to prevent competition between themselves in the sale of an article of prime necessity, is, in the contemplation of the law, an act inimical to trade or commerce, whatever may be done under and in pursuance of it, and although the object of the combination is merely the due protection of the parties to it against ruinous rivalry, and no attempt is made to charge undue or excessive prices." The court added (page 263 of 139 N. Y., and page 789 of 34 N. E. [23 L. R. A. 221, 36 Am. St. Rep. 690]): "The question is: Was the agreement, in view of what might have been done under it and the fact that it was an agreement the effect of which was to prevent competition among the coal dealers, one upon which the law affixes the brand of condemnation? It has hitherto been an accepted maxim in political economy that 'competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid." Though the language of these opinions does not lay stress upon this fact, it appears that the objects of the combinations criticised, if they could have been attained by individuals, would have been unlawful. Hence the combination to secure these objects was criminal. In the cases at bar our knowledge of the facts is derived from the allegations in the several counts in the indictments. Is it an inevitable consequence of the conduct charged against the defendants that public trade will be restrained or injured or that the public will be injuriously affected thereby?

To return to the question: Can a person, natural or artificial, lawfully control and fix the price at which coal shall be sold within the limits of the city of Providence? If so, then a number of persons can lawfully combine for that purpose; but, if not, then it becomes a crime to confederate for the purpose of accomplishing such unlawful act. No person can control, regulate, or fix the price at which an article shall be sold without having complete dominion and control of the article itself. To enable a person to fix and control the price, he must be free from competition. In other words, he must have obtained a monopoly of the article. "It is said to be a monopoly when one person alone buys up the whole of one kind of commodity, fixing a price at his own pleasure." Black, Law Dict. The Constitutions of Maryland, North Carolina, and Tennessee declare that "monopolies are contrary to the genius of a free government, and ought not to be allowed." In the Roman law persons who monopolized grain and other produce of the earth were called *dardanarii*, and were variously punished. Dig. 47, 11, 6. It was a crime at common law to buy up such large quantities of an article as to obtain a monopoly of it for the purpose of selling at an unreasonable price. The tendency of modern English law is very decidedly to restrict the application of the law against engrossing, and it is very doubtful if it applies at all except to obtaining a monopoly of provisions. Bouv. Law Dict. There can be no doubt but that coal is an article of prime necessity in that part of the country, and therefore legally capable of being engrossed. Doubtless engrossing is an offense at common law in this state. It is provided in Gen. Laws 1896, c. 284, § 1: "Every act and omission which is an offense at common law, and for which no punishment is prescribed by this title, may be prosecuted and punished as an offense at common law." The same provision is contained in Pub. St. 1882, c. 247, § 1, Gen. St. 1872, c. 235, § 1, and Rev. St. 1857, c. 219, § 1. In Pub. St. 1844, p. 61, by section 6 of the act establishing the Digest, it was provided: "When no provision is made either at common law or by the Revised Statutes, such statutes as were introduced before the Declaration of Independence and as have been continued in force shall be considered as part of the common law, and remain in force until the general assembly provide therefor." The provisions of section 59 of "An act to reform the penal laws," contained in Dig. 1822, p. 353, are identical with those in Dig. 1798, p. 604, being section 55 of "An act to reform the penal laws," which reads as follows: "And be it further enacted that any crime or offense, being such at the common law, and for which no punishment is prescribed by this act, shall and may be prosecuted and tried, adjudged and punished, by fine or imprisonment, or both, as an offense at the common law, anything in this act to the contrary notwithstanding." The Digest

of 1767 (pages 55, 56) contains the following: "Act regulating sundry proceedings in the several courts in this colony. Be it enacted by the General Assembly, and by the authority thereof it is enacted, that all the courts in this colony shall be held to, and governed by, the statutes, laws, and ordinances of this colony, and such Statutes of Parliament as are hereinafter mentioned, that is to say: \* \* \* All statutes, that are against criminal offenders, so far as they are descriptive of the crime, and where the law of this colony hath not described and enjoined the punishment, then that part of the statute that relates to the punishment also; always saving and excepting such statutes as, from the nature of the offenses mentioned in them, are confined to Great Britain only. \* \* \* And be it further enacted by the authority aforesaid, that in all actions, causes, matters and things, whatsoever, where there is no particular law of this colony, or act of Parliament introduced, for the decision and determination of the same, then, and in such cases, the laws of England shall be in force for the decision and determination of the same." As was said by Brayton, J., in *Martin v. Clarke et al.*, 8 R. I. 389, 403, 5 Am. Rep. 586 (1866), referring to another offense: "Suppose, however, that champerty were not an offense at the common law, and were first made illegal by the statute of Westminster I, the answer to the question if it be now an offense here must still be the same. If there had been no legislation here upon the subject, the colonists here, upon their emigration, brought with them, to this country, the law of England as it then existed, as modified by statutes, so far as it was applicable to their condition and circumstances here, and this statute, as part of that law, became a part of the common law of this country."

Although the list of common-law offenses in this state may be said to include that of engrossing, our history does not disclose any prosecutions made thereunder. It may therefore be considered as dormant, but ready to be called into activity whenever the occasion may require. When it becomes necessary, the law relative to engrossing in this state will be applied with due regard to the circumstances and conditions existing at the time of its enforcement. The danger to be apprehended from engrossing is monopoly. A monopoly, as now understood, "embraces any combination the tendency of which is to prevent competition in its broad and general sense and to control prices to the detriment of the public." 20 Ency. of Law, 846. This subject was considered by the court in *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784 (1894), wherein Stiness, J., speaking for the court, said, at page 487 of 18 R. I., and page 973 of 28 Atl. (23 L. R. A. 639, 49 Am. St. Rep. 784): "Undoubtedly there may be combinations so destructive of the right of the people to buy and sell and to pursue their

business freely that they must be declared to be void upon the ground of public policy. In such cases the injury to the public is the controlling consideration; but it does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for mutual advantage which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule." It is a criminal offense for a person to obtain a monopoly of a prime necessity of life. It is no answer to say that the article may have been monopolized for a benevolent purpose. It is the stock excuse of monopolists that their work is beneficent and charitable. It is not safe to allow monopolies of prime necessities of life to exist for any purpose. They are "contrary to the genius of a free government." In order to regulate and fix the price of an article, it is absolutely necessary to have or to acquire the power so to do.

In the case of *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 238, 20 Sup. Ct. 96, 105, 44 L. Ed. 136, Mr. Justice Peckham makes use of the following expressions: "Much evidence is adduced upon affidavit to prove that defendants had no power arbitrarily to fix prices and that they were always obliged to meet competition. To the extent that they could not impose prices on the public in excess of the cost price of pipe with freight from the Atlantic seaboard added, this is true; but within that limit they could fix prices as they choose. The most cogent evidence that they had this power is the fact everywhere apparent in the record that they exercised it. The details of the way in which it was maintained are somewhat obscured by the manner in which the proof was adduced in the court below upon affidavits solely, and without the clarifying effect of cross-examination, but quite enough appears to leave no doubt of the ultimate fact. The defendants were by their combination, therefore, able to deprive the public in a large territory of the advantages otherwise accruing to them from the proximity of defendants' pipe factories, and, by keeping prices just low enough to prevent competition by Eastern manufacturers, to

compel the public to pay an increase over what the price would have been if fixed by competition between defendants nearly equal to the advantage in freight rates enjoyed by defendants over Eastern competitors. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee, and by allowing the highest bidder at the secret 'auction pool' to become the lowest bidder of them at the public letting. Now, the restraint thus imposed on themselves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition and it affected only a part of the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies. In *United States v. E. C. Knight Company*, 156 U. S. 1, 16, 15 Sup. Ct. 249, 253, 39 L. Ed. 325, Chief Justice Fuller, in speaking for the court, said: 'Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.'

A charge of conspiracy that the defendants combined to exercise a certain power must proceed upon the assumption that they have or will have the power to be exercised. Therefore, a charge of conspiracy to exercise a certain power presupposes the acquisition of the power. The gravamen of the offense, however, consists in combining to acquire the power. Whether it shall be exercised or not depends entirely upon the will of those who control it. The danger to be guarded against is possession of the power, and efforts to obtain it should be prevented. "Prosecutions for conspiracy are preventive rather than curative." *State v. Bacon*, 27 R. I. 252, 261, 61 Atl. 653, 656. Conspiracies to exercise power without possessing it must be futile, as if the courtiers of King Canute had conspired to regulate the ocean tide. The charge in each indictment is not that the defendants conspired to create a monopoly in order to regulate and fix the price of coal. The charge is that the defendants combined to do something that can only be done through a monopoly. The act of fixing the price is only an attribute of a monopoly, an indicium by which it may be classified. It is a symptom, but it is not the disease itself. It may be argued that, because the defendants are charged with conspiring to do that which only monopolists can do, therefore, they are charged with conspiracy to create a monopoly itself. The very fact that it requires argument to complete the pleading shows wherein it is defective. Criminal pleading must be clear and definite. "In indictments and informations every fact necessary to constitute the crime charged must be directly and positively alleged. Nothing can be charged by implication or intendment,

nor is it sufficient to change any material matter by way of argument." 22 Cyc. 293, C. We are of the opinion that each count in both indictments is defective in this: It charges by implication, intendment, and inference, that the defendants conspired to create a monopoly in coal in the city of Providence. Having arrived at this conclusion, we answer the questions propounded to us as follows:

The first, second, sixth, and seventh questions we answer in the affirmative. The third and fifth questions we answer in the negative. To the fourth question we answer: If the offense was set out with proper particularity in other respects, we should regard this objection as unimportant, as the duration of the illegal contract is not of the essence of the crime. The eighth question raises the inquiry: Has a corporation the ability to commit this kind of crime? The defendants, in support of their contention that it has not, argue as follows: "We submit that on principle and authority a corporation has not, from its very nature, the capacity to commit this offense. It is too plain to require argument that this intangible entity cannot actually do any act requiring any mental, moral, or spiritual process, or any act, as it is more frequently put, requiring intent. In civil cases the intent of the officer or agent is sometimes imputed to the corporation, it is true, but this doctrine is admittedly a pure legal fiction, based on grounds of public policy. In civil cases a party has been injured and is seeking compensation. Balancing the equities of the plaintiff and the stockholders of the defendant corporation, it has seemed more just that the person injured should be reimbursed than that an individual stockholder should be absolved from liability forced upon him by an officer of the corporation. But in criminal cases the theory is adequate punishment for an offense against the state. The punishment may be out of all proportion to the benefit gained by the commission of the crime and never has any logical relation to it. Oftentimes no advantage is gained by the corporation, so that to punish an innocent stockholder for an offense really committed by an officer of the corporation can have no basis in justice. Furthermore, all the benefit of the preventive objects of the punishment can be accomplished by punishing those who are in fact the wrongdoers."

The following argument in behalf of the affirmative of the question is presented by the Attorney General: "Conspiracy is a misdemeanor at common law, and not a felony. There is nothing peculiar connected with the element of intent involved in the crime of conspiracy which differs from the element of intent in other ordinary misdemeanors. If the contention of the defendants is held to be good, it would seem to necessarily follow that a corporation could not be held guilty of

any of the ordinary crimes where the question of intent was involved. In the early history of corporations, they were held to be without power of action, except through their agents, and therefore they could not be guilty of a crime requiring a criminal intent. It is believed that this theory has long since been exploded both in England and America. At the present time there seems to be very little doubt that corporations may be guilty of most of the common crimes, and that criminal intent will be imputed to the corporation from acts done by its agents. It is still held in some jurisdictions that corporations cannot be guilty of a felony, or crimes where personal violence is involved, but that is as far as any courts, it is believed, will now go in holding that they cannot be guilty of crime. The tendency of the present time is to hold corporations responsible, criminally as well as civilly, for all acts committed by their agents, having any relation to the business of the corporation. It has been repeatedly held that a corporation may be guilty of criminal libel, of maintaining the various kinds of nuisances, and of violations of the various obligations which it owes to the public. Some states even hold them capable of committing the crime of assault and battery and other similar crimes. It is now universally held that corporations may be liable for all kinds of torts, including conspiracy. It is further generally held that a corporation is liable in exemplary or punitive damages, damages which from their very nature are only allowed as punishment for an actual wrong committed, which the law presupposes that the defendant had the volition or initiatory power to commit or not to commit. The intention of the officers and agents of the corporation is imputed to the corporation in these civil cases, but that is what is done in all other cases where a corporation is held criminally liable. Corporations are held amenable for acts of conspiracy in the enforcement of contracts in civil law. Why should there be a distinction in the law with regard to conspiracy between that which is criminal and that which is civil?"

In support of their argument, the defendants also quote 2 Morawetz on Corporations (2d Ed.) § 732: "It is sometimes said that the act of an agent is in law the act of his principal; but it is well to bear in mind that this is a mere fiction. A principal is frequently liable for the acts of his agents, as if he had done the acts himself. The reason of the liability, however, is not always the same. Sometimes the principal is chargeable by reason of his previous consent, sometimes by reason of his subsequent adoption of the act of the agent, and sometimes by reason of a rule of positive law established upon the grounds of public policy, which is the ultimate source of all law. It is for the latter reason that a principal may often be held civilly responsible for the torts of his agents,

though in no manner at fault himself; and this is true, even where the tort involves a malicious intention on the part of the wrongdoer. But public policy certainly does not demand that a person or association should be punished by the state, through criminal proceedings, on account of a wrong committed by another. This would be contrary to the natural sense of justice. Hence it is held that, where the commission of a crime involves the intention of the offender, this intention cannot be imputed by means of a fiction: Actual intention is required. It follows, therefore, that a corporation cannot be charged criminally with a crime involving malice or the intention of the offender. Even though the corporators themselves should unanimously join, with malice aforethought, in committing a crime as a corporate act, yet the malice would be that of the several members of the company, and not actually one malicious intention of the whole company." This doctrine, however, is contrary to that held in *Buffalo Lubricating Oil Company v. Standard Oil Company of New York*, 106 N. Y. 669, 12 N. E. 826 (1887): "We entertain no doubt that an action against a corporation may be maintained to recover damages caused by conspiracy. *Morton v. Metropolitan Life Ins. Co.*, 34 Hun, 366, affirmed 103 N. Y. 645 mem.; *Reed v. Home Savings Bank*, 130 Mass. 443, 39 Am. Rep. 468; *Kruevitz v. Eastern R. R. Co.*, 140 Mass. 575, 5 N. E. 500; *Western News Co. v. Wilmarch*, 33 Kan. 510, 6 Pac. 786. If actions can be maintained against corporations for malicious prosecution, libel, assault, and battery and other torts, we can perceive no reason for holding that actions may not be maintained against them for conspiracy. It is well settled by the authorities cited that the malice and wicked intent needful to sustain such actions may be imputed to corporations." If corporations have the capacity to engage in actionable conspiracy, they have the power to criminally conspire. We are of the opinion that the better reasoning supports the contention that corporations can conspire, and therefore answer the eighth question in the affirmative.

Having thus fully decided the questions certified to us in the cases at bar, we send back the papers in each cause, with our decision certified thereon to the superior court for the counties of Providence and Bristol for further proceedings.

(29 R. I. 310)

BOWLER et al. v. EMERY.

(Supreme Court of Rhode Island. June 25, 1908.)

1. LANDLORD AND TENANT—CREATION—EFFECT OF LEASE—WHAT LAW GOVERNS—PLACE OF CONTRACT.

A perpetual lease executed in Ohio, where all the parties then resided, is to be governed as to its legal effect by the laws of that state.

**2. EXECUTORS AND ADMINISTRATORS—PAYMENT OF CLAIMS—"CONTINGENT CLAIMS"—DEPOSITS BY EXECUTOR—NECESSITY—STATUTES.**

Court and Practice Act 1905, § 1013, provides that if so authorized by will, or if the executor be the residuary legatee, he may give a bond with surety to the probate court to pay the debts, legacies, etc., and in such case the executor need not return an inventory, and an executor who is residuary legatee need not account to the probate court. Section 922 provides that a person who has a contingent claim against a decedent which cannot be proved as a debt within the time allowed for filing claims may file his claim in the office of the clerk of the probate court within the time allowed for filing, and, if upon examination it appears that such claim may become justly due from the estate, the probate court shall order the executor to deposit in the registry of the court, sufficient funds to satisfy such claim, or its proportionate share in case of insolvency. Ohio Rev. St. 1905, § 4181, provides that permanent leaseholds renewable perpetually shall be subject to the same laws of descent as estates in fee. Plaintiffs leased to defendant's testator a lot of land in Ohio, all the parties then residing there, for a term of 99 years, renewable forever, and the lessee, for himself, his heirs and assigns, covenanted to pay the rent, taxes, insurance, etc., and the lessor reserved to herself, her heirs, etc., a lien upon the premises for payment of rent and taxes, with a right of entry on default. The lessee, afterward dying, made his wife sole executrix and residuary legatee, and she gave bond under section 1013. No default in payment of rent, etc., under the lease was made before the lessee's death or since that time, and the estate is solvent, but the lessor seeks to have the executrix of the lessee's estate deposit in the registry of the probate court a sum sufficient to satisfy the rent to become due for the next 75 years. *Held*, that the leasehold estate passed directly to defendant as residuary devisee, and she took no interest in it as executrix, and no privity existed between the lessor and such executrix, and for that reason, and in view of the terms of the lessee's covenant which did not run against the executor, and of the practical impossibility of arriving at a just amount to secure the leasehold in perpetuity, the personal estate of the testator is not liable under the lease, and the lessor can only look to the land, and hence future rents to become due under the lease are not a "contingent claim" within section 922, so as to entitle the lessor to require a deposit to satisfy such claim.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1498-1501.]

**3. SAME.**

Neither do the future installments of rent which may hereafter become due and remain unpaid constitute a "contingent claim" against the estate under section 922 of Court and Practice Act 1905.

**4. SAME—JURISDICTION OF PROBATE COURT.**

Court and Practice Act 1905, § 1013, provides that if so authorized by will, or if the executor be the residuary legatee, he may give a bond to the probate court to pay the debts, legacies, etc., and in such case the executor need not return an inventory, and an executor who is a residuary legatee need not account to the probate court. Section 922 provides that a person who has a contingent claim against a deceased person which cannot be proved as a debt within the time allowed may file his claim in the office of the clerk of the probate court, and, if upon examination it appears that such claim may be justly due from the estate, the probate court shall order the executor to deposit in the registry of the court sufficient funds to satisfy such claim or its proportionate share in case of insolvency. Plaintiffs leased to defendant's testator certain land for a term of 99

years renewable perpetually, and the lessee, afterwards dying, made his wife sole executrix and residuary legatee, and she gave bond under section 1013. No default was made in the payment of rent, etc., under the lease, and the estate was solvent, but the lessor sought to have the defendant, as executrix, deposit sufficient funds to discharge the rent to become due for the next 75 years. *Held*, that the probate court, having accepted ample bond from defendant under section 1013 to pay debts, etc., had no further control over the assets of the estate, and no jurisdiction to require defendant to make any deposit under section 922.

Exceptions from Superior Court, Newport County.

Action by Robert P. Bowler and others against Mary M. Emery, executrix, to have funds of the estate set aside to meet future accruing rentals. Petition for the relief prayed was refused, and plaintiffs except. Exceptions overruled, and cause remitted to the superior court, with instructions to dismiss the appeal.

See 69 Atl. 507.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Hale & Grinnell, for appellants. William Paine Sheffield, Herbert Jenney, and Drausin Wulsin, for appellee.

PARKHURST, J. This cause comes into this court on exceptions of the appellants to the decision of the superior court, sitting at Newport, in favor of the appellee. None of the facts of the case are disputed.

On February 11, 1882, Louisa F. Bowler, the predecessor in title of the appellants, perpetually leased to Thomas J. Emery, the appellee's testator, and to John J. Emery, his brother (as co-lessee), their heirs and assigns, a valuable lot of land situate in the city of Cincinnati, Ohio, upon which there were then, and are now, valuable permanent improvements, for the term of 99 years from February 11, 1882, renewable forever, at an annual rent of \$2,250, payable semiannually. The lessees, for themselves, their heirs, and assigns, covenanted that they, their heirs and assigns, would pay the rent and also pay the taxes and assessments upon the premises, and keep the improvements insured in a specified amount with an agreement contained in the lease in regard to the application of the proceeds in case of loss under the policy. The lessor in the lease reserved to herself, her heirs and assigns, a lien upon the premises for the payment of rents, taxes, assessments, and premiums, with a right of re-entry in case of 60 days' default in the payment of the rents, taxes, or assessments. All of the parties to the lease were at the time of its execution residents of the said city of Cincinnati, Ohio, and all of the covenants of the lease were to be there performed. A copy of this lease is incorporated into the bill of exceptions. Thomas J. Emery, a few years before his death, became a resident of the town of Middletown, R. I., and died testate on January 15, 1906, and his will was on February

21, 1906, duly admitted to probate by the probate court of the town of Middletown. By which will, after making certain specific bequests, he gave all of his residuary estate to his wife, the said Mary M. Emery, whom he appointed sole executrix of his will; and she was by said probate court appointed and duly qualified as such executrix, and is the appellee herein.

Mary M. Emery, being both executrix and residuary legatee, was entitled to give bond under the Court and Practice Act 1905, § 1013, which provides: "Instead of the above bond an executor, if so authorized by the will, or if he be the residuary legatee thereunder, may give a bond to the probate court in a sum and with surety satisfactory to the court, and with condition to pay the funeral charges, debts, and legacies of the testator and such allowance as may be made by the court for the support of the widow and family of the testator. In such case an executor shall not be required to return an inventory, and an executor who is a residuary legatee need not render an account to the probate court." Mrs. Emery at the time of her appointment availed herself of the privileges of the above statute, and on February 28, 1906, she executed a bond in the penal sum of \$300,000 to the probate court of Middletown conditioned to pay the debts, legacies, allowances, etc., on the estate, "and to render upon oath an account of her proceedings thereupon, when thereunto lawfully required," etc. It is admitted in the bill of exceptions that: "(2) At the time of the death of the said Thomas J. Emery, no default had occurred in the performance of any of the covenants of said lease on the part of the said lessees, nor has any default since occurred. (3) That the said John J. Emery, one of the lessees, is still living. (4) That the estate of said Thomas J. Emery, deceased, which has passed to his widow, Mary M. Emery, as residuary legatee and devisee under his will, is wholly solvent, and consists in part of more than \$3,000,000 in value in improved real estate in the city of Cincinnati, county of Hamilton, state of Ohio, in addition to other improved real estate of large value in several other states." On June 21, 1906, the appellants filed in the probate court of said town of Middletown a claim, alleged by them to be contingent, against the appellee, for the rent to accrue under said lease for the next 75 years, in the sum of \$168,750, payable in 150 semiannual installments of \$1,125 "each, on August 11, 1906, and thereafter semiannually until August 11, 1981," and praying that the "court will order the executor or administrator of said estate of said Thomas J. Emery, deceased, to deposit in the registry of said probate court assets sufficient to satisfy said above-described contingent claim or otherwise provide for the same according to law." This claim was rejected by the said probate court, and an appeal was taken by the appellants to the su-

perior court, where the claim was again rejected. A bill of exceptions was taken by the appellants, and the case removed into this court.

The question raised by the bill of exceptions is whether or not the rent not yet due for the unexpired term of the lease is within the meaning of section 922 of the court and practice act of 1905, providing as follows: "Sec. 922. A person who has a contingent claim against a deceased person which cannot be proved as a debt within the time allowed for filing claims may file his claim in the office of the clerk of the probate court within the time allowed for filing claims. If, upon examination, it appears to the court that such claim may become justly due from the estate, the probate court shall order the executor or administrator to deposit in the registry of the court assets sufficient to satisfy such claim or its proportionate share in case of insolvency of the estate." Counsel for the appellants have cited no case in which the words "contingent claim" appearing in this statute, or in any similar statute, have been so construed as to include rent to accrue in future under a lease. They rely apparently upon an analogy attempted to be shown as existing in the English Chancery practice, where the executor, not being a residuary legatee, and having no personal interest in the estate, being called upon to distribute the estate, has asked the protection of the court by decree, allowing the reservation of sufficient assets of the estate in the hands of the executor, or a sufficient indemnity, so as to protect him against future claims for rent under leases held by the testator at the time of his decease. A number of English Chancery cases are cited to show this practice, in the attempt also to show that the English Chancery Courts have treated rent to accrue in future as a "contingent claim," and so that such rent to accrue under the lease here in question is a "contingent claim" under our statute. The cases cited which relate to this practice of protecting the executor are *Simmons v. Bolland*, 3 Merivale, 547; *Fletcher v. Stevenson*, 3 Hare, 360; *Dobson v. Carpenter*, 12 Beavan, 370; *King v. Maltcott*, 9 Hare, 692; *Dodson v. Sammel*, 1 Dr. & Sm. 575; *In re Nixon*, L. R. 1 Ch. Div. 638 (1904). In none of the cases above cited were assets of the estate allowed to remain in the hands of the executor to indemnify him against possible future breaches of covenants to pay rent, make repairs, etc., unless upon the application of the executor himself for his own protection. In none of the cases was such an executor himself the residuary legatee; and in each case where the executor was allowed to retain assets for his own protection it was found by Byrne, J. (*In re Nixon*, supra), after a careful review of the authorities, to be a case where the leasehold interests of the testator vested in the executor, so that there would be

privity of estate between the executor and the lessor.

The only case cited where the lessor directly and on his own behalf made application for administration of the estate and for an order to have assets impounded for his protection against possible future breaches of covenant to pay rent, to make repairs, insurance, etc., was the case of *King v. Malcott*, 9 Hare, 692; and in this case the claim was dismissed. The opinion of Vice Chancellor Turner is so distinctly illuminating as to the principles applicable to a possible future liability under covenants for payment of rent, etc., as distinguished from a strict contingent claim, that we quote freely from said opinion, as follows (pages 694, 695): "The question is whether the plaintiff, who is the assignee of the reversioner on this demise, is now entitled to have the testator's assets thus impounded for securing himself against possible breaches of the covenants. There has hitherto been no breach of covenant upon which any legal debt is due. No action would now lie against the executors for the purpose of compelling payment of any rent in arrear, or any damages for repairs. Not only is there no rent due, but there is no certainty that anything ever will be due on any of these covenants; for, if the rent be paid at the day, and if the other covenants be duly observed, no action will ever lie upon any of them. This case is therefore readily distinguishable from the cases which have been mentioned. Where there has been a bond or covenant for the absolute payment of a certain sum of money, there the money must become due, and must become due on the bond or covenant. \* \* \* Why should the lessor have any such right as he claims in this case? How can it be the result of the relation between landlord and tenant? The landlord has not bargained with his tenant that the tenant's assets, or any fund whatever should be impounded for the purpose of securing his rent, or the due performance of his covenants. He has contracted for no such security. For the rent and for the performance of the covenants he looks to the personal security of the lessee, or to the rights which he has expressly reserved to himself over the subject of the demise; and farther than that he cannot proceed at law. Why should a court of equity give a more extended effect to the obligation contracted between a landlord and tenant than is given by a court of law?" It is not suggested that this case has ever been overruled or even doubted, and it is cited with approval in the late case of *In re Nixon*, L. R. 1 Ch. Div. (1904) 638, 646: "I should feel myself bound to follow an established practice, although there was no authority for it in the way of direct decision, or in the way of statutory enactment; but as matters stand there is no such practice established in a case like the present. Notwithstanding the industry of counsel, no case has been produced by which it can be

shown that assets have ever been retained, unless in a case where there is privity of estate between the executors and the lessors. It is quite true that the real state of the facts in some of the authorities is not positively ascertainable. So far as appears, none of the decisions relate to a case like the present where the executors have no privity of estate with the lessor. It is quite clear that, if the court makes an order distributing this £85,900, the executors will be under no liability to the lessors should they hereafter be sued. It also, I think, may be taken as clear that there is no statute which requires any fund to be set apart for indemnity for the protection of the executors. In my opinion, the authorities only show that it is necessary to do so where there is privity of estate. Then it is suggested (and I have not heard any good argument to the contrary) that the reason why, when there is privity of estate, something is set apart to protect the executors, is because the administration of the estate by the court would not prevent an executor in possession of his testator's leaseholds from being sued as assignee under the lease. That does appear to be a ground for differentiating the one class of case from the other. To adopt a contrary view and to seek to indemnify the executors against possible future action on the part of the lessors, and to set apart such a sum as might be required for that purpose in an estate of this kind, would be, or might be virtually, to lock up a very large fund for an indefinite number of years, really and truly only to preserve a fund in favor of persons who have no present claim. The lessors have not by virtue of their contracts between landlord and tenant bargained for any right to have property retained out of the testator's estate to answer future liabilities. I think, therefore, on the whole I am justified in saying that in a case like the present a fund ought not to be retained to the detriment of the beneficiaries under the will. \* \* \*

The rule laid down in the last case is cited with approval and followed in *Re King*, L. R. 1 Ch. Div. (1907) pp. 72, 80. It is therefore evident that the analogy sought to be established by the appellants between this case and the proceedings in the English Chancery Courts does not appear; on the contrary, no such practice ever did exist or now exists in those courts, and so could not have been "inherited" by the courts of this country, as urged by the appellants.

In view of the rule laid down in the case of *In re Nixon*, supra, to the effect that, in order for a covenant for payment of future rent to be binding upon the executor, there must be privity of estate between the lessor and the executor, it is well to recall for a moment the form of the covenant in the lease here. The lease perpetually demises to the lessees "their heirs and assigns" the property described. The covenants read as fol-



lows: "And the said Thomas J. Emery and John J. Emery, for themselves, their heirs, and assigns, do hereby covenant promise and agree to and with the said Louisa F. Bowler, her heirs and assigns, that the said Thomas J. Emery and John J. Emery, their heirs and assigns, shall well and truly pay to the said Louisa F. Bowler her heirs and assigns" the rent as stated, with further covenants "for themselves their heirs and assigns" to pay taxes, levies and assessments, etc., to effect insurance. Nowhere does the word "executors" appear in the entire instrument. This perpetual lease was made in Ohio, where all the parties then resided, and is to be governed as to its legal effect by the laws of Ohio, which provide, in effect, that such estates "shall be subject to the same laws of descent as estates in fee are subject to by the provisions of this chapter." Section 4181, Ohio Rev. St. 1908. This estate, therefore, passed directly to Mrs. Emery as residuary devisee under her husband's will, and the executor took no interest whatever therein. It did not become assets in the hands of the executor, as in the case of the ordinary lease for years which is commonly made to executors, administrators, and assigns, and never goes to the heir as such at all. We find, then, in this case, that there never was any privity of estate between the lessor or her assigns (the appellants) and Mary M. Emery as executrix. The privity that now exists is between the appellants as assigns of the original lessor and Mary M. Emery as residuary devisee, under the will and tenant under the lease. So that this case comes within the rule laid down in *Re Nixon*, L. R. 1 Ch. Div. 646, *supra*. No case is cited from Ohio where the question of the liability of the executor for payment of future rent is settled. Only two cases from Ohio are cited, viz., *Taylor v. De Bus*, 31 Ohio St. 468, and *Smith v. Harrison*, 42 Ohio St. 180. *Taylor v. De Bus*, *supra*, relates only to the liability of the original lessees under a perpetual lease (similar to the one here under consideration) to pay installments of rent which fell due after the original lessees had assigned the lease. The liability of the personal representatives under the covenants is in no way involved, and is only referred to incidentally by the court. *Smith v. Harrison*, *supra*, is a similar case, involving only the liability of the original lessee to pay the rent after he has assigned his term, and in no way touches the question of the liability of the executor.

The industry of counsel in this case has been such that we feel assured they would have referred us to other Ohio cases covering this point had such cases existed. We are not, however, without authority on this point. It has been repeatedly decided in Pennsylvania that a perpetual covenant to pay ground rent does not survive against executors or administrators (although named in the covenant), except as to the rent which

accrued in the lifetime of the decedent, and that the rents which accrued subsequent to the death of the covenantor are not payable out of his personal estate. In *Quain's Appeal*, 22 Pa. 510, 512, the court says: "*Lowrie, J.* In the distribution of the estate of *Andrew M. Quain*, deceased, the orphans' court allowed a claim for 30 months' ground rent of a lot granted to the decedent on perpetual lease, and which, on his death, descended to his heirs. One year of this rent became due in his lifetime, and was properly charged. The question relating to that which accrued afterwards is not so plain. We are of the opinion that the principle of *Torr's Estate*, 2 Rawle (Pa.) 252, and also the principle of *Dickinson v. Calahan*, 19 Pa. 227, exclude this part of the claim. Does a ground rent covenant survive against executors and administrators? In its usual form it binds heirs, executors, administrators, and assigns; but still this may be satisfied, as to executors and administrators, if they pay the rent which accrued in the decedent's lifetime. It is a perpetual covenant, and it is totally impracticable to require it to be performed by executors and administrators; for their office is not perpetual. If we retain the perpetuity of the covenant as against them, even with the restriction that they are to be liable only when the resort to the land is ineffectual, we still prevent all distribution of the estate in their hands; and, as all the lands of the decedent are assets for the payment of debts, we constructively charge the rent of a single lot upon all his lands. Nor will it do to hold them liable until the final settlement of the estate. If that suggestion means until all other matters are ready to be settled, then it takes away at once the character of perpetuity belonging to the covenant, and makes its duration, as against the personal estate, to depend upon the accident of the administrator's diligence, or of the involved or simple nature of the estate. If it means until the final settlement of the whole estate, then this perpetual covenant postpones it forever. This cannot be; for the law intends the office of executor or administrator to terminate as soon as possible. It cannot be prolonged on account of perpetual covenants. Such a prolongation or such a liability could not have been contemplated at the creation of the ground rent. The grantor of the land cannot be presumed to have then placed any value on such a covenant; for the personal covenant of the original grantee is as nothing in a series of tenants lasting forever. The real security is the covenant running with the land and encumbering it; and this is the essential reliance of the owner of the rent. It is an absolute obligation as against the administrators, or it does not bind them at all. Suppose it absolute; then the duty must be fully performed by perpetual payment, or else it must be discharged by a satisfaction or commutation, and in this latter case the rent would be discharged and



the heir released, a result which is certainly unintended. It is a covenant payable, in the contemplation of the parties, out of the profits of the land; and it would be entirely unreasonable that the law should hold the administrator for the rent when it gives the land to the heir." The doctrine of this case was considered and affirmed in *Williams's Appeal*, 47 P. 283, 289 et seq., although holding that, as the executor was named in the covenant, suit might be brought against him for subsequent breaches; but the recovery would be restricted to the land bound by the covenant. It therefore fully affirms the doctrine of *Quain's Appeal* that the personal estate of the covenantor is not liable. We think the doctrine of these cases is fully applicable to the rights of the appellants under this lease, that the personal estate of the testator is not liable for future rent, and that the lessor or her assigns can only look to the land bound by the covenants upon which a preferred lien is expressly reserved in the lease, and to the heirs and assigns of the lessee hereafter, in case rent should remain unpaid in violation of the covenant. If, then, the executor as such, and through the executor the personal estate, is not liable, there is no ground for the application made by the appellants for the retention of assets by the executor, as claimed in these proceedings.

Furthermore, we are of the opinion that the future installments of rent which may become due and remain unpaid hereafter do not constitute a "contingent claim against a deceased person," under section 922, Court and Practice Act. All installments of rent due under the lease have been paid, and there has been no default under the lease up to the time of the hearing. It will be noticed that the last clause of section 922 reads: "If upon examination it appears to the court that such claim may become justly due from the estate, the probate court shall order the executor or administrator to deposit in the registry of the court assets sufficient to satisfy such claim, or its proportionate share in case of insolvency of the estate." We have already seen that the claim here made cannot "become justly due from the estate," but can only be maintained against "heirs and assigns," if it ever arises in the future. But it is also to be noted that the statute provides for the "case of insolvency of the estate." It has been repeatedly decided that rents to accrue cannot be proven against a bankrupt's estate under the right given in the bankruptcy acts to prove "uncertain or contingent demands." In *Deane v. Caldwell*, 127 Mass. 242, a claim was presented in an insolvent estate (1) for rent due and unpaid at the time of the death of the intestate; (2) for damages (treating the lease as broken at the time) estimated at the difference between the rent reserved and the value of the lease for the rest of the term; (3) if this claim for damages was not possible, then for the rent due to the time of the presentation of the

claim to the commissioners and for damages for loss of rent. The court, by the Honorable Horace Gray, C. J., said (page 244 of 127 Mass.): "Before the day at which rent is covenanted to be paid, it is in no sense a debt. It is neither debitum nor solvendum; for, if the lessee is evicted before that day, it never becomes payable. *Bordman v. Osborn*, 23 Pick. (Mass.) 295. It is not within the provision of a bankrupt act, allowing 'uncertain or contingent demands' to be proved against the estate of a bankrupt, because it is not an existing demand the cause of action on which depends upon a contingency, but the very existence of the demand depends upon a contingency." See, also, *Bosler v. Kuhn*, 8 Watts & S. 183, 186; *Mills v. Auriol*, 1 Sm. L. C. pt. 2, p. 1255; *Auriol v. Mills*, 4 Term Rep. (D. & E.) 94; *Savory v. Stocking*, 4 Cush. (Mass.) 607, 608; *Riggin v. Magwire*, 15 Wall. (U. S.) 549, 551, 21 L. Ed. 232. And the same rule has been applied in cases of proofs of claim against receivers. *Fidelity, etc., Company v. Armstrong* (C. C.) 35 Fed. 567, and *Brown v. Schleier* (C. C.) 112 Fed. 577, affirmed 118 Fed. 981, 55 C. C. A. 475. We see no reason why the construction of the words "uncertain or contingent demands," used in the above cited statutes, is not equally applicable to the words "contingent claim" in our statute (section 922, Court and Practice Act 1905). Statutes of bankruptcy or insolvency are just as much intended for the speedy and certain administration of estates as are probate statutes. They are all intended to effect a speedy distribution of assets among those justly entitled thereto. Our statute (section 922) is by its express terms applicable to insolvent as well as solvent estates; and it would be, in our opinion, impossible to so distinguish between "contingent" claims as to say that one class of claims might, within the provisions of the same section, be good as against a solvent estate, but could not be proved against an insolvent estate. The statute does not in terms make any such distinction, and in our opinion no such distinction was intended or even thought of.

Another reason in our opinion why the claim for future rent to accrue under this lease cannot be classed as a "contingent claim" under our statute is the practical impossibility of arriving at a just amount. It is true that the claim only asks for a sum sufficient to cover a term of 75 years. But the lease itself is perpetual and is renewable forever, and the covenants run with the lease so long as tenancy thereunder continues. There are also other covenants for repairs, for payment of taxes, levies, and assessments, and for insurance which run with the lease; so that all the covenants are or may be perpetual. If the appellants are entitled to protection for 75 years, they are equally entitled to it forever on all the other covenants as well as in the covenant for rent. But there is no certainty that any

of the covenants will ever be broken. It is also uncertain whether or not the tenants may be evicted, through a paramount title, or by the exercise of the rights of eminent domain, or in some other way, so that all their covenants may be discharged. It would be absolutely impracticable to fix any sum "that may be justly due," in respect of any of the covenants, either for rent, or for repairs, taxes, insurance, etc., in fact, the whole case presents, not a "contingent claim," but a mass of uncertainties, giving rise to more possibilities, as to which no court can arrive at any just computation for the purpose of giving indemnity. And in this connection, as the lease expressly gives a preferred lien upon all the real estate and improvements, with right of entry and absolute annulment of the lease for any breach of any covenant, upon 60 days' default, it would be due to the laches of the appellants or their successors in title, if in the future any such accumulation of unpaid rent or damages for breach of other covenants should accrue as would render the leasehold property inadequate as security. Certain cases arising under statutes of other states relating to proof of contingent claims have been cited by the appellee, viz.: *Clark v. Winchell*, 53 Vt. 408; *Hantzsch v. Massolt*, 61 Minn. 361, 63 N. W. 1069; *Kavanaugh v. Shaugnessy*, 41 Mo. App. 660; *Stichter v. Cox*, 52 Neb. 532, 72 N. W. 848. An examination of these cases shows that the provisions of the statutes are so different from ours, and the questions raised are also so different from those in this case that they afford little aid in the construction of our statute. So far as they go, they seem to be to the general effect that claims of this character are not "contingent claims" in the sense here contended for by the appellants.

Another and final reason why the petition of the appellants cannot be granted is that by the proceedings prior to the petition all of the assets of the Emery estate had passed over to and become the property of Mary M. Emery as residuary devisee, and were no longer subject to the control of the probate court. By the terms of the will of Thomas J. Emery, Mary M. Emery was both executrix and residuary legatee, and the testator desired that "no bond be required." By the provisions of Court and Practice Act 1905, § 1015, such a request only exempts the executor from giving surety, and the probate court may therefore, under such a will, accept the personal bond of the executor without surety; and this was accordingly done in this case. After providing for the form of administration bond usually given by executors and administrators, Court and Practice Act 1905, § 1013, provides as follows: "Instead of the above bond an executor, if so authorized by the will, or if he be the residuary legatee thereunder, may give a bond to the probate court in a sum and with surety satisfactory to the court, and with condition to pay the

funeral charges, debts, and legacies of the testator and such allowance as may be made by the court for the support of the widow and family of the testator. In such case an executor shall not be required to return an inventory, and an executor who is a residuary legatee need not render an account to the probate court." Mrs. Emery at the time of her appointment availed herself of the privileges of the above statute, and on February 26, 1906, she executed a bond in the penal sum of \$300,000 to the probate court of Middletown conditioned to pay the debts, legacies, allowances, etc., on the estate, "and to render upon oath an account of her proceedings thereupon, when thereunto lawfully required," etc. It is to be noted that this latter provision of the bond, relative to rendering an account, "when thereunto lawfully required," is absolutely nugatory in this case, as the statute above quoted expressly relieves an executor, who is also residuary legatee from rendering any account.

It is contended by the executrix that, with the execution of the bond and its approval by the probate court, the estate was merged in the bond, and that thereafter the probate court had no further jurisdiction over the estate. In *Adams v. Probate Court*, 26 R. I. 239, 244, 58 Atl. 782, 784, the court, speaking of such a bond, says: "An executor who is also residuary legatee may give bond to pay the funeral charges, debts and legacies, and, having done this, he may take possession of the assets as his own property, and dispose of them as he sees fit to his own use. He may pay the debts and legacies either out of the assets or out of his own estate. Neither the court nor the legatees are concerned with his management of the estate or with its fortunes, or can call him to account therefor after it passes into his hands. If losses occur, the executor must bear them. If the property increases in value, the profit is his. To all intents and purposes the bond stands in place of the estate." And on page 245 of 26 R. I., and page 784 of 58 Atl., the court says further: "The nominal parties to this proceeding are the probate court and the executor, but the real parties in interest are the creditors of the estate and the legatees under the will on the one hand, and the executor and his surety on the other. If the executor chooses to give the ordinary bond, the creditors and the legatees have the right to demand an inventory of the estate and to be heard upon propositions to dispose of the assets and matters of management and administration generally. If the executor chooses to give the bond to pay funeral charges, debts, and legacies, none of the parties interested have anything to do with the executor except to enforce the obligations covered by his bond. The real parties interested in the choice which the executor should make on the 12th day of September, 1900 [the date on which the bond

was made], were the creditors and legatees and the executor, and neither the probate court, nor the creditors, nor the legatees had any right to dictate or control his choice. Their only right in the matter was to see that the amount of the bond and surety were satisfactory."

In this case the complainant, having found after giving bond that the estate was insolvent, asked leave to have a bond in ordinary form substituted *nunc pro tunc* for the bond to pay debts and legacies, so as to bring himself again within the jurisdiction of the probate court, so that he could file his inventory and account in order to administer the estate as insolvent. His request was refused. This decision shows conclusively that the probate court after accepting a bond to pay debts, legacies, etc., has no further jurisdiction over the estate, except that it may possibly, under other provisions of the statute, require sureties to be given or may require increase of the bond or a new bond upon a proper case made. No such case is made here, for the bond is for \$300,000, the obligor is conceded to be amply solvent and responsible, and no suggestion is made that the amount of the bond is not ample; nor does this proceeding in any way relate to this bond. The appellants, however, attempt to limit the effect of *Adams v. Probate Court*, *supra*, to a mere denial of the right of the executor "to change his mind" after having given bond to pay debts and legacies, and to substitute the ordinary bond; thus ignoring the broad grounds upon which the opinion is based. They have attempted to show that under a similar statute in Massachusetts and the decisions thereunder the probate court does not lose jurisdiction upon the acceptance of such a bond. The statute of Massachusetts relating to such bond (2 Rev. Laws Mass. c. 149, § 2, p. 1333) is as follows: "Sec. 2. If the executor of a will or an administrator with the will annexed is residuary legatee thereunder, and it appears that the bond required of him in the preceding section is not necessary for the protection of any person interested in the estate, the court may permit such executor or administrator with the will annexed, instead of giving such bond, to give bond in a sum and with sureties to the satisfaction of the court, and with condition to pay all debts and legacies of the testator and such amounts as may be allowed by the court to the widow or minor children for necessities. In such case he shall not be required to return an inventory. The giving of such bond shall not discharge the lien on the real property of the testator for the payment of his debts, except on such part as may be sold by the executor or administrator with the will annexed to a purchaser in good faith and for a valuable consideration; and all property not so sold may be taken on execution by a creditor not otherwise satisfied, in like manner as if a bond had been given in the other form." This statute differs from that of

Rhode Island, in that the bond is optional with the court, and that the lien of creditors on real estate is not lost. But the provisions as to personal property remain the same. In *Thayer v. Winchester*, 133 Mass. 447, which was an action brought by the widow of one of the devisees to vindicate her right of dower, the executor, who was residuary legatee, had given bond to pay the debts and legacies. The court afterwards granted leave to sell real estate, and the widow of the devisee claimed that this was in violation of her right. The court held that, upon the giving of the bond, the real estate passed immediately to the devisee, and that the decree of the probate court granting leave to sell real estate was beyond its jurisdiction and void. Speaking of the effect of the bond, the court says, on page 449 of 133 Mass.: "The bond which a residuary legatee may give to pay debts and legacies, if the judge of probate permits, is a conclusive admission of assets for those purposes and the executor is not bound to return an inventory or an account to the probate court. It takes the place of the property in providing for the payment of debts and legacies, and is for the protection, not merely of all to whom they are immediately due, but of all who are legally interested that they shall be paid, and who are damaged if they are not so paid." In a case decided in Massachusetts in 1872—*Divol, Adm'r, v. Com'rs of Lechmore*, 1 Dane's Abr. p. 574, § 2—it was held that the executor, having given bond to pay debts and legacies and having taken the estate of the testator into his hands and used it as his own, had administered on the estate, and the testator's cattle, etc., had become the property of the executor, and so was changed. The position taken in *Thayer v. Winchester*, *supra*, is supported by *Thompson v. Brown*, 16 Mass. 172, and *Clarke v. Tufts*, 5 Pick. (Mass.) 337, both holding, in effect, and as the ground of the decision, that an executor, who is a residuary devisee, by giving bond in the probate office for the payment of all debts and legacies, acquires an absolute title in the estate devised, and, of course, may convey an indefeasible title to a bona fide purchaser. *Alger v. Colwell*, 2 Gray (Mass.) 404, simply decides that a bond of this character cannot be surrendered and canceled, and supports the decision in *Adams v. Probate Court*, *supra*. *Holden v. Fletcher*, 6 Cush. (Mass.) 235, relates solely to the application of the statute of limitations to a suit for damages against the executor for breach of the testator's covenant of warranty where the breach occurred more than four years after notice of appointment. The case of *Jenkins v. Wood*, 134 Mass. 115, *Id.*, 140 Mass. 66, 2 N. E. 780, *Id.*, 144 Mass. 238, 10 N. E. 818, relates to a series of attempts to collect a balance of a debt due from the testator in suits against the executor who had given bond to pay debts and legacies, and deals in the first instance with the statute of lim-

itations; in the second instance, denying the right to maintain suit against the executor personally; and in the third instance, allowing recovery under a statute similar to our own (Court and Practice Act, § 991 et seq.) upon scire facias upon suggestion of waste. *Bank v. Stanton*, 116 Mass. 435, deals with the question of the liability of an executor and residuary devisee, who, having given bond to pay debts, etc., and having failed to give bond in a larger sum, upon order of the probate court had been removed, and an administrator de bonis non had been appointed. It was held that suit could not be further maintained against the original executor; that the administrator de bonis non might defend the action and interpose the defense of the statute of limitations, which would have been a good defense to either the executor or the administrator. The gist of the opinion was that the executrix might be lawfully removed for failure to give the required bond. It does not deal at all with the question of what property was vested in her upon giving the original bond, and it expressly reserves the question of her liability upon that bond, if sued thereon. None of the cases cited from Massachusetts, to any extent, disturb our conclusion that the probate court in this case, having accepted an ample bond to pay debts, legacies, etc., under our statute, has no further control over the assets of the estate, and no jurisdiction to require the executrix to make any such deposit in the registry of the court or to give any such bond as asked for in this proceeding. So far as the Massachusetts cases go, they fully support the doctrine of *Adams v. Probate Court*, supra.

For the reasons above set forth, the exceptions of the appellants are overruled, and the cause is remitted to the superior court for the county of Newport, with instruction to enter its decree dismissing the appeal, and to certify the same to the probate court of the town of Middletown.

(6 Pen. 463)

In re JONES et al.

(Court of General Sessions of Delaware.  
Sussex. Oct. 16, 1907.)

### 1. HIGHWAYS — ESTABLISHMENT — EXCEPTION TO COMMISSIONERS' RETURN.

Where exceptions to the return of the commissioners appointed to lay out a public road are based wholly or in part upon facts supported by affidavit of exceptants, it is sufficient if the exceptions are signed by their counsel.

### 2. WITNESSES — COMPETENCY — ATTORNEY AND CLIENT.

On exceptions to the return of commissioners appointed to lay out a public road, exceptants' attorney was not incompetent to make an affidavit that "Burton B. Deputy," named as exceptant in the exceptions and in the affidavit supporting the exceptions, and "Benjamin B. Deputy," who signed the affidavit, were the same person; no confidential relation between counsel and client being thereby violated.

### 3. HIGHWAYS — ESTABLISHMENT — NOTICE OF INTENDED APPLICATION — SERVICE — LIFE TENANTS.

Service of notice of an intention to apply for the establishment of a public road upon him holding legal title to lands across which the road is to run is sufficient, though another has a life interest therein; it being unnecessary to serve notice upon the life tenant or tenant in possession.

### 4. SAME.

That no return of the commissioners appointed by the Court of General Sessions, under a petition for the establishment of a public road, was made on or before the first day of the term after the appointment, and no application was made within such time for an extension of time for making the return, is no ground for exception to the return; the petition having been marked by the court "Continued" at that term.

### 5. SAME.

It appearing, on exceptions to the return of commissioners appointed to lay out a public road, that they did not assess damages of all the owners or holders of land across which the road is to run, nor state in such report that they assessed no damages to certain owners and holders, considering all circumstances of benefit or injury which might accrue therefrom, but assessed damages only to the person who would be least damaged thereby, the return will be remanded to the commissioners for amendment.

Petition by Medford Jones and others for a public road. Benjamin B. Deputy and others excepted to the return of the commissioners appointed to lay out the road, and the petitioners move to dismiss the exceptions. Motion denied, first, second, fifth, sixth, and seventh exceptions overruled, fourth exception not passed upon, and return remanded for amendment on fourth exception.

Exceptions to petition for new road in Cedar Creek hundred, Sussex county. The following exceptions were filed to the return of the commissioners appointed to lay out said public road, namely:

"First. For that notice of the intended application and petition to said court for said public road has not been served upon Burton B. Deputy, who is owner and holder of lands across which said proposed road is to run, he having a life interest therein and present possession thereof, according to the act of assembly in that behalf.

"Second. For that no return of the commission appointed by this honorable court in accordance with said petition was made on or before the first day of the term next after its appointment, according to the act of assembly in that behalf, nor application made to this honorable court within said time for an enlargement of said required time.

"Third. For that the commissioners appointed as aforesaid did not assess damages to every the owners or holders of the land across which said road is to run, and state the same in their report, filed in this honorable court at this present term, nor state in their said report that they assessed no damages to certain of said owners and holders, considering all circumstances of benefit or injury which might accrue therefrom, but as-

essed damages only to the person who would be least damaged thereby.

"Fourth. For that said road is proposed to be laid out across a part of a graveyard or cemetery, wantonly and without sufficient reason therefor.

"Fifth. For that said proposed road described in said petition and report, or return, do not exactly correspond with the notice aforesaid of the intended application to this honorable court.

"Sixth. For that said petition does not disclose with reasonable precision the beginning and terminl of said proposed road, as required by the act of assembly in that behalf.

"Seventh. For that Burton B. Deputy aforesaid is not a petitioner for said proposed public road, and has not been notified of the intended application to this honorable court for said new road, according to the act of assembly in that behalf.

"For these and other good reasons and causes these exceptants pray your honors not to confirm the report of the commissioners aforesaid, and to dismiss the petition aforesaid.

A. D. Marshall,

"Attorney for Exceptants.

"State of Delaware, Sussex County—sa.:

"Personally came this 11th day of October, A. D. 1907, before me, the subscriber, one of the justices of the peace in and for the county aforesaid, Hester A. Marshall and Burton B. Deputy, above named, who, being duly affirmed according to law, do solemnly affirm that the facts set forth in the foregoing exceptions are true, to the best of their knowledge and belief.

"Benjamin B. Deputy.

"Hester A. Marshall."

The above affidavit was duly attested by the justice of the peace.

Argued before LORE, C. J., and GRUBB and BOYCE, JJ.

W. Watson Harrington, for petitioners. A. D. Marshall, for exceptants.

Petitioners moved to dismiss the exceptions, on the ground that said exceptions were not signed by the exceptants, but only by their counsel.

THE COURT held that, where the exceptions were based wholly or in part upon facts which were supported by affidavit of the persons who were exceptants, it was sufficient if said exceptions were signed by their counsel.

Petitioners then moved that the exceptions be dismissed upon the further ground that "Burton B. Deputy" appeared in the body of the exceptions as one of the exceptants, while the affidavit accompanying the same was signed by "Benjamin B. Deputy."

Exceptants thereupon filed a supplementary affidavit, signed by himself, setting forth that Burton B. Deputy, named as exceptant in the body of the exceptions and in the body

of the affidavit, and Benjamin B. Deputy, whose signature appeared to the affidavit, was one and the same person.

Petitioners objected to the supplementary affidavit, on the ground that the affidavit was made by counsel, who could not testify, either by affidavit or otherwise in the case, under the well-established practice of the courts.

THE COURT held that the supplementary affidavit was sufficient, and that counsel could testify to prove identity or service; that the confidential relation between counsel and client was not thereby violated.

As to the first and seventh exceptions, above set forth, THE COURT held that service upon the person who held the legal title to the lands, though another had a life interest therein, was sufficient, and that notice need not be served upon the latter, or tenant in possession.

THE COURT held that the matters raised by the second exception were stare decisis; the court having marked the petition "Continued" at the April term, 1907.

THE COURT further held that the description of said proposed road in said petition and report or return corresponded with reasonable exactness to the notice of the intended application, and therefore held that the fifth and sixth exceptions, raising said point, were insufficient.

The fourth exception was not passed upon.

Upon the third exception the court remanded the return to the commissioners for amendment.

(6 Pen. 398)

#### STATE v. DOUGHERTY.

(Court of General Sessions of Delaware. New Castle. May 18, 1906.)

#### CRIMINAL LAW — FORMER JEOPARDY — ELEMENTS—INDICTMENT.

Defendant was indicted for stealing certain goods, alleged in the indictment as the property of "J. B. & Sons' Company," and on trial the first witness testified that he did not know whether the firm name alleged was the exact name of the company, and the state then proved by the docket of corporate certificates that the name of the corporation was "J. B. & Sons' Company," whereupon the state entered a nolle and indicted defendant for stealing the same articles from the latter company. *Held*, that defendant was not put in jeopardy by the original indictment, within the Constitution of this state, and hence could be again indicted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 326, 327.]

Lore, C. J., dissenting.

John W. Dougherty was indicted for larceny, and he moves to quash the indictment. Motion refused.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Daniel O. Hastings, Deputy Atty. Gen., for the State. John Biggs, for defendant.

Indictments for larceny (Nos. 38 and 51, May term, 1906). The above-named defendant was indicted at this term for the larceny of certain goods, laid in the indictment as the property of "Joseph Bancroft's Sons' Company." At the trial the first witness produced by the state testified that he was not sure whether the corporate name of the owner of the property alleged to have been stolen was "Joseph Bancroft's Sons' Company" or "Joseph Bancroft & Sons' Company." The state then proved by the docket of certificates of corporations from the office of the recorder of deeds that the name of said corporation was "Joseph Bancroft & Sons' Company."

Mr. Biggs, for defendant, thereupon asked the court to instruct the jury to render a verdict of not guilty, on the ground of a fatal variance between the proof and the allegations in the indictment.

Deputy Attorney General Hastings, asked that a juror be withdrawn and the defendant held until he could be reindicted.

Mr. Biggs opposed this application as contrary to the general practice of the courts in criminal cases, contending that the defendant had been put on trial, and, as he could not be convicted under a defective indictment, he should be discharged.

Mr. Hastings contended that the mere swearing of the jury was not a trial, and that, as the first question asked of the first witness disclosed that the indictment was faulty in respect to the allegation of the name of the company whose property was alleged to have been stolen by the defendant, it was no hardship upon the defendant at this time, before any evidence going to the merits of the case had been given to the jury, to pass upon the fact whether or not the defendant was guilty, to withdraw a juror and ask that the defendant be held until reindicted.

LORE, C. J. Is your application to have a nolle prosequi entered?

Mr. Hastings: Yes, sir; I enter a nolle prosequi.

LORE, C. J. We think you are entitled to enter a nolle prosequi in this case. The better practice is generally to order the jury to return a verdict of not guilty. Let a nolle prosequi be entered.

Thereupon the Deputy Attorney General framed a new indictment against the defendant, charging therein that the stolen articles were the goods and chattels of the "Joseph Bancroft & Sons' Company," which indictment was returned "A true bill" by the grand jury.

And on the 21st of the same month Mr. Biggs, for defendant, before the same court as above, moved to quash the indictment, on the ground that the defendant was put in jeopardy for the same offense in the case of the state against himself, being No. 38 to the May term, 1906; citing Heard's Criminal Pleading, p. 281; 1 Bishop on Criminal

Procedure, 960; U. S. v. Shoemaker, 2 McLean, 114, Fed. Cas. No. 16,279; State v. Connor, 45 Tenn. 311; People v. Barrett and Ward, 2 Caines, 303, 2 Am. Dec. 239; Commonwealth v. Tuck, 20 Pick. (Mass.) 356 (365); Mount v. State, 14 Ohio, 295, 302, 45 Am. Dec. 542; State v. Callendine, 8 Iowa, 288 (290); Knox v. State, 89 Ga. 259, 15 S. E. 308; Blair v. State, 81 Ga. 628, 7 S. E. 855.

Deputy Attorney General Hastings replied, contending that the present indictment was a different one from the first indictment, the description of the company whose property was alleged to have been stolen being a different corporation from that laid in the first indictment, although the taking is averred in the same manner, and that the cases cited by the counsel for the defendant did not apply to the case at bar; citing in support of his right to reindict the defendant the following authorities: Bishop, Criminal Law, § 1052; Clark, Criminal Procedure, p. 389; Hite v. State, 9 Yerg. (Tenn.) 357; State v. Williams, 45 La. Ann. 936, 12 South. 932; Thompson v. Commonwealth (Ky.) 25 S. W. 1059; Commonwealth v. Clair, 7 Allen (Mass.) 525; People v. Warren, 1 Parker Cr. R. (N. Y.) 336; Commonwealth v. Wade, 17 Pick. (Mass.) 395, 400.

THE COURT held the matter under advisement until the 28th of May, and thereupon rendered the following decision:

LORE, C. J. A majority of the court, consisting of Judges GRUBB and PENNEWILL, are of the opinion that the defendant, Dougherty, was not in jeopardy under the original indictment within the contemplation of the Constitution of this state. I do not agree with that view, but it is the view of the majority of the court, and therefore the motion to quash is refused.

(103 Me. 455)

# EASTERN TRUST & BANKING CO. v. CUNNINGHAM.

(Supreme Judicial Court of Maine. Feb. 20, 1908.)

## 1. FRAUD—ELEMENTS OF—"ACTION FOR DECEIT."

To support an action for deceit, the plaintiff must show that the defendant intentionally made false representations to him, with the intent that he should act upon them, or in such a manner as would naturally induce him to act upon them; that the representations were material, and that they were known to the defendant to be false, or, being of matters susceptible of knowledge, were made as of a fact of his own knowledge; that the plaintiff was thereby induced to give credit or part with property; that he was deceived; and that he was injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 1-5.

For other definitions, see Words and Phrases, vol. 1, pp. 141-142.]

## 2. SAME—DRAWING CHECK—IMPLIED REPRESENTATION.

When the drawer of a check delivers it to the payee, or when he deposits to the credit of his account in one bank his own check drawn upon another bank, a representation is ordina-

rily implied that there are funds in the drawee bank to meet it, and, because of this implied representation, it is a fraud on the part of the drawer to draw and deliver such a check.

### 3. CORPORATIONS — OFFICERS — WRONGFUL ACTS.

If the drawer of a check is the treasurer of a corporation and signs it as such, the implied representation that there are funds in the drawee bank to meet it is his own, for which he is personally responsible; and he is so responsible, though he only signs the check in blank, and leaves it with another person to fill out and deliver or deposit.

### 4. FRAUD—"KITING" CHECKS.

In the case at bar the corporation of which the defendant was treasurer had an account in the plaintiff bank in Bangor, and another in a bank in Gardiner, in both of which places it was engaged in business. For many months prior to the drawing of the checks which are the basis of this action, the defendant had practiced what is known as "kiting" checks between the plaintiff bank and the bank in Gardiner. He deposited daily in each bank checks drawn on the other bank to meet which the defendant knew were no sufficient available funds in the drawee bank, and which he knew could only be met by the deposit of other similar checks. The bank at Gardiner discovered the practice, and finally refused payment of a check drawn upon itself, which the defendant had deposited in the plaintiff bank, and which had been forwarded for collection, and caused it to be protested. Before the plaintiff bank had notice of the non-payment and protest, it had accepted two other similar checks, credited them to the account of the defendant's corporation, and forwarded them for collection. Payment of these checks was refused, and they were in their turn protested. The result was that the plaintiff bank lost the amount of the three checks, less a small balance which was to the credit of the corporation, when notice of nonpayment was first received. The court is of opinion that the evidence does not warrant a finding that the officers of the plaintiff bank knew of the "kiting" practice. On the contrary, it is considered that the plaintiff was induced to give credit to the defendant's corporation by his implied representation, which was false, and that it was deceived thereby. Upon these facts, *held*, that the defendant is liable in an action for deceit.

### 5. SAME—DUTY TO INVESTIGATE.

If the plaintiff's officers were negligent in not discovering the fraud, that fact would not afford a defense. When one party has been guilty of an intentional and deliberate fraud by which to his knowledge another party has been misled or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by showing that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 19, 20.]

(Official.)

Report from Supreme Judicial Court, Penobscot County.

Action by the Eastern Trust & Banking Company against Andrew W. Cunningham. Case reported to the law court. Judgment for plaintiff.

Action on the case for deceit brought by the plaintiff bank against the defendant in his individual capacity to recover a certain amount of money alleged to have been lost by the plaintiff bank on account of checks deposited in the plaintiff bank, drawn upon the Gardiner National Bank by the defendant in

his capacity as treasurer of the Harmon Produce Company against a fund which, it was alleged, did not exist in the said Gardiner National Bank, with the alleged intent on the part of the defendant to deceive and defraud the plaintiff bank. The plaintiff's declaration contains 17 counts and fills 40 printed pages of the size of this page. Plea, the general issue.

The action came on for trial at the April term, 1907, of the Supreme Judicial Court, Penobscot county. At the conclusion of the evidence, it was agreed that the case should be reported to the law court, and that upon so much of the evidence as was legally admissible the law court should "render such judgment as the law and the evidence require."

The case fully appears in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, CORNISH, and KING, JJ.

Charles A. Bailey and Matthew Laughlin, for plaintiff. George W. Heselton, for defendant.

SAVAGE, J. Action on the case for deceit. The case is before us on report. The particular transactions complained of are these: The Harmon Produce Company, a corporation doing business and having stores both at Bangor and Gardiner, on October 6, 1905, deposited in the plaintiff bank in Bangor its check dated October 5th, signed by the defendant as its treasurer on the Gardiner National Bank at Gardiner for the sum of \$764.58. This deposit, with other cash items amounting in all to \$860, was received by the plaintiff and credited to the account of the produce company. The check in the regular course of business was forwarded for collection through Boston, and reached the Gardiner bank on October 9th. The latter bank declined to honor it, but caused it to be protested. Information of the protest reached the plaintiff by telegram from Boston October 10th, and the formal notice was received the following day.

Meanwhile, on October 7th, a like check for \$1,042.21, with other cash items, was deposited by the company in the plaintiff bank, was received and credited, was forwarded for collection through Boston, was received at Gardiner, and protested for nonpayment October 10th, of which the plaintiff had notice October 12th. Still another check for \$961.95, with other cash items, was deposited and credited October 9th, went through the same channels, and was received at Gardiner and protested October 11th. Notice of the protest was received by the plaintiff October 13th. Thus the plaintiff had credited to the account of the produce company on account of these checks the sum of \$2,768.74 before it had any information of the nonpayment of any of the checks. While these checks were severally proceeding along their course to final protest, the plaintiff honored and paid

the produce company's checks drawn on itself, including three which had been deposited in the Gardiner bank, amounting to \$2,649.10, to the extent that on October 11th, when the first protested check came back, there was standing to the credit of the company only \$440.79. This amount was appropriated towards that check. The balance, \$323.79, of the first check, and the amount of the second and third checks and the protest fees, being \$1,042.21, \$961.95, and \$4.56, respectively, amounting in all to \$2,332.51, the plaintiff seeks to recover in this action.

It appears that the balance to the credit of the produce company on the books of the Gardiner National Bank on October 6th, the date when the first of these checks was deposited in the plaintiff bank, was \$69.28. October 7th it was \$24.89. October 9th, the day when the first check was received at the Gardiner bank, it was \$771.34. This last amount included, however, the company's check for \$728 drawn on the plaintiff bank, and that day deposited. The Gardiner bank did not regard the check as available funds out of which to pay the company's checks until it was collected, and for that reason declined to honor the \$764.58 check in question. As a matter of fact, the \$728 check on the plaintiff was never collected, but was protested by the plaintiff bank for nonpayment. The company's balance on the books of the Gardiner bank continued in the same condition through October 10th and 11th, and on October 12th, it would seem from an inspection of the balances, that the \$728 check was charged back, or in some other way taken out of the account. It appears, then, neither on the days when these three checks in question were severally deposited in the plaintiff bank, nor on the days when they were presented for payment to the Gardiner bank in the regular course of business, did the company have available funds in the latter bank to meet them.

But the defenses set up, which we shall presently consider, make it necessary to state with considerable detail the previous history of the dealings of the Harmon Produce Company with the plaintiff bank. It appears that the produce company for two years or more previously had been engaged in the practice of what is known in banking parlance as "kiting" checks, and that the checks in question were drawn and deposited in pursuance of that practice. It had an account in the plaintiff bank and one in the Gardiner National Bank. It was doing a large business on seemingly insufficient capital. For the express purpose of getting the use of more money in its business, it adopted the following method: It would deposit its check on the Gardiner bank in the plaintiff bank. By the usual methods of collection through Boston, the check would reach Gardiner in two days or three, if Sunday intervened. On the day when it would be expected at the Gardiner

bank the company would deposit in the Gardiner bank a check on the plaintiff bank of sufficient size, with the other deposits, to pay the first check. Then in two or three days the Gardiner check would be due to reach the plaintiff bank, and the company would deposit there another check to meet that, and so on ad infinitum. By starting a check each day from each end of the route they were enabled to keep six checks in the air all of the time, to pay none of which were there available funds in either bank, unless new kited checks should be accepted and credited. The scheme could continue only as long as both banks were either ignorant or indulgent, or one ignorant and the other indulgent. The plaintiff claims that it was ignorant and the Gardiner bank was indulgent. The defendant claims that both banks had knowledge, and were indulgent. It was inevitable that, if either bank chanced at any time to stop payment on these checks, the other would stand to lose the amount of three checks.

The defendant was treasurer of the Harmon Produce Company. He lived at Gardiner. He did not personally deposit any of the checks in the plaintiff bank, and perhaps none in Gardiner; but he was well aware of the practice of kiting checks which was being followed, and of the purpose of it. His custom was to sign checks in blank and give them to the bookkeepers in the two stores. They filled out the signed blank checks from day to day as exigencies required and deposited them in the banks, having ascertained by correspondence between themselves daily the amounts which would be necessary to meet checks to arrive. The defendant so signed in blank the three checks in question and sent them to the Bangor store, intending them to be used in the kiting practice. He made the Bangor bookkeeper his agent for the purpose of filling out and depositing the checks; so that his responsibility is the same as if he personally had deposited the checks and procured the credit in the plaintiff bank.

It is incumbent upon the plaintiff to show that the defendant intentionally made false representations to it, with the intent that it should act upon them, or in such a manner as would naturally induce it to act upon them, that the representations were material, and that they were known to the defendant to be false, or, being of matters susceptible of knowledge, were made as of a fact of his own knowledge; that the plaintiff was thereby induced to give credit to the produce company; that it was deceived; and that it was injured. These principles are well settled. In the recent case of *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 245, this language was used: "Where a person states of his own knowledge material facts which are susceptible of knowledge, and the statement is made with an intent that another party should act upon it, or in such a manner as would naturally induce



him to act upon it, the statement so made, if false, is fraudulent both in morals and law." And if the other party is induced thereby to act, and is deceived and injured, he has a cause of action for the deceit. A fraudulent purpose may be inferred from a willfully false statement in relation to a material fact. *Wheelden v. Lowell*, 50 Me. 499; *Braley v. Powers*, 92 Me. 203, 42 Atl. 362. And, when the necessary consequences of a transaction is the defrauding of another, fraud may be inferred, and the transaction held to be fraudulent. *Gardiner Sav. Inst. v. Emerson*, 91 Me. 535, 40 Atl. 551; *Whitehouse v. Bolster*, 95 Me. 458, 50 Atl. 240.

The false representation relied upon here is the representation, which ordinarily is implied by the drawer of a check when he delivers it to the payee, that it is drawn against available funds, or that there are funds in the drawee bank to meet it. The same implied representation arises when one deposits to the credit of his account in one bank his own check drawn upon another bank. Because of this implied representation, it is a fraud on the part of the drawer to draw a check upon a bank where there are no funds to meet it. *True v. Thomas*, 16 Me. 87, and cases cited in *Hamlin v. Simpson*, 105 Iowa, 125, 74 N. W. 906, 44 L. R. A. 397. Such an implied representation was made by the defendant when the bookkeeper for him filled out and deposited each of the signed blank checks furnished by him for that express purpose. The representation went with his signature. Although he signed as treasurer, the implied representation was his own, for which he was personally responsible. 7 *Thomp. Corp.* § 8569; 21 A. & E. Ency. of Law (2d Ed.) 890; *Cole v. Cassidy*, 138 Mass. 437, 52 Am. Rep. 284. As shown, there were no available funds in the Gardiner bank to meet either of these checks when it was drawn nor when it was presented. Nor would the drawing and depositing a check under such circumstances be any less a fraud, even if the depositor had succeeded later in having funds in the Gardiner bank to meet it when presented, though in that case the plaintiff would not have been injured. The defendant, in fact, knew that there were no funds in the Gardiner bank to meet these checks when they were drawn. He knew that the only hope of the checks being honored was his ability to get credit at the Gardiner bank by depositing similar checks on the plaintiff. He knew that the Gardiner bank was then cognizant of the character of the checks. He had been notified by it that he must stop drawing them, and he had no reason to suppose that the Gardiner bank would not any day put a stop to the practice by refusing to give credit for the produce company's checks on the plaintiff. So that, even if the defendant's reasonable expectations of being able to meet the checks when presented would constitute a defense, as they would not, yet those expectations in this

case were not sufficiently well founded to be reasonable.

Taking the facts thus far presented, we think the plaintiff has clearly shown that the defendant's implied material representations as to funds in the Gardiner bank to meet the checks were false, that they were known to the defendant to be false, and that they were made with an intent that the plaintiff should act upon them, or in such a manner as would naturally induce it to act upon them. *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 245. It remains to inquire whether the plaintiff was induced thereby to act to its injury, and whether it was deceived.

The defendant answers these questions in the negative. He says that the practice of kiting checks between the two banks had been carried on so long, so continuously, and so openly that the only reasonable conclusion is that it was known to the responsible officers of the plaintiff bank. He claims that the inferences of their knowledge are so strong and overwhelming as to overbear the denials in testimony of the officers themselves. If the fact be as claimed, the defense is made out. If the officers of the plaintiff knew of this kiting practice at the times the three checks in question were received, and knew or believed that there were no funds in the Gardiner bank to meet them, and expected that these checks would be provided for by other like checks deposited there, we should not say that the plaintiff was induced to act by the defendant's representations, nor should we say that it was deceived.

The kiting practice was begun in June, 1903, between the plaintiff bank and the Oakland National Bank of Gardiner, where the Harmon Produce Company then kept its Gardiner account, and so continued until some time in October, 1904, when the officers of the Oakland bank, having discovered the practice, declined to keep the account longer. The account was then transferred to the Gardiner National Bank, and the practice was continued until these checks were protested for nonpayment in October, 1905. The defendant, however, was not treasurer until September, 1903. After he became treasurer, he seems for many months to have done no acts as treasurer, except to sign blank checks for the bookkeepers to use, and he did not discover the kiting practice until July, 1904. From June, 1903, to October, 1905, there were 968 kited checks used, 472 deposited in the plaintiff bank payable at one of the other of the Gardiner banks, and 496 deposited in the Gardiner banks payable at the plaintiff bank. These checks amounted to \$660,275.44. They varied in amount from less than \$100 to more than \$1,400, ranging in the last month from about \$600 to about \$1,100. Usually the checks were drawn for odd amounts, dollars and cents. They were never, as far as we can discover, alike on any two days. They sometimes varied by hundreds of dollars

from one day to another. Nor were the amounts of the checks deposited day by day the same as of those which they were deposited to meet. To illustrate the last statement, we refer to some dates just previous to the drawing of the checks in question. On October 2d a check for \$750.17 was deposited in Bangor. It reached Gardiner October 5th, on which day a check on Bangor for \$939.06 was deposited in Gardiner. A check deposited in Bangor October 3d, for \$965.14 was met in Gardiner three days later by a check deposited for \$972. A check deposited at Bangor October 4th for \$1,104.85 was met at Gardiner October 7th by a \$750 check on Bangor.

Besides the magnitude and incessant continuity of the practice, as evidence to show actual knowledge, the defendant claims that the plaintiff's books show that the produce company's account was almost constantly overdrawn, and that this fact must have quickened the apprehension of the plaintiff's officers and given them notice of the hollow-ness of the produce company's credit. But the books do not show overdrafts except in rare and explainable instances. The overdrafts claimed by the defendant are not shown except by excluding from the account the kited checks, which were deposited.

In reply to the defendant's contention, the plaintiff's treasurer and its clerks who had to do with the produce company's deposits and accounts have testified and each has denied that he ever discovered, or in any way knew, that the produce company was kiting checks. The case shows that the plaintiff bank was an institution with about \$3,000,000 deposits and about 3,000 depositors. The treasurer had the general control and management, and sometimes acted as paying teller. There were four or five clerks. One of these was a receiving teller. In the regular course of business he received the deposits from the produce company. Accompanying a deposit was a deposit slip, on which the deposit was itemized bills, coins, and checks on various banks, including one on the Gardiner bank. His duty was to check up the slip and see that the footings were correct, examine the signatures, and count the bills and coin. He put the check on Gardiner in a pigeonhole, from which it was taken by another clerk and caused to be sent for collection through Boston. The deposit slip was taken to the bookkeeper who entered the total, but not the items, on the produce company's account to its credit. The slip was then filed away. The check then entered into the accounts with the bank's Boston correspondent, and its identity was lost, unless it was protested.

On the other hand, a check deposited in the Gardiner bank on the plaintiff bank went to Boston, and then came back to Bangor. It was the bookkeeper's duty to open the Boston mail, which he did. He then credited the

check to the Boston correspondent, and charged it to the produce company, on the bank's books. No other officer or clerk had any duty with that check. The bookkeeper was the only employé whose duties required him to have any knowledge of both sides of the account, the credits and charges, and of the credits or deposits he had no duty except to know the total, and his books showed no more.

While the treasurer was in general charge of the bank, and doubtless had a duty to have some knowledge of the general run of depositors and deposits for the protection of the bank and the promotion of its interests, there is no evidence that his attention was ever called specifically to any suspicious facts respecting the produce company's account, though he undoubtedly knew that sometimes the company deposited their own checks on the Gardiner bank. He testifies that he did not ever open the letters containing the checks received through Boston from the Gardiner bank, and that he did not see the checks themselves. He examined the depositors' ledger occasionally to notice the balances. It was the duty of the bookkeeper to notify him if there were any overdrafts, but with rare exceptions none appeared on the books. There is no fact shown on which can be properly based an inference of knowledge on his part, except his general duties, and the long continued practice itself. One thing lends an air of great improbability to the defendant's contention. We think we may assume that no one of the officers of the plaintiff bank had ever complained to the produce company of the practice; for, if such had been the fact, it would undoubtedly have been offered as evidence of the plaintiff's knowledge. No such fact appears. Assuming the defendant's contention to be true, we are therefore face to face with the proposition that the officers of the bank, knowing the practice, permitted it to go on for days or weeks, or perhaps years, without finding any fault about it, and without taking the trouble even to speak about it. This improbability is so great as materially to strengthen the effect of the sworn denials of the bank's officers and employées. The improbability is made even stronger when we consider that these officers must have known that, if the Gardiner bank discovered the practice and dishonored the checks first, the plaintiff bank must inevitably lose.

Upon a careful study of the whole case we do not think we are warranted in holding that the plaintiff bank had knowledge of the kiting practice. On the contrary, we think the evidence requires us to find that the bank was induced to give credit to the produce company by the implied representation of the defendant, and that it was deceived thereby.

Doubtless an analysis of the account, and perhaps a not very critical one, would have disclosed the practice. In the case of a

smaller bank, where a single official or clerk receives the deposits and also keeps the accounts or personally oversees them, it would have been easier to discover it, as it was discovered in both the banks at Gardiner. But ability to discover is not discovery, and, in respect to the question of actual knowledge, the situation is not helped unless there was a discovery.

But the defendant contends further, that, if the plaintiff did not know, it ought to have known, and would have known but for its own negligence. We think this defense cannot avail. There are cases which hold that where one carelessly relies upon a pretense of inherent absurdity and incredibility upon mere idle talk, or upon a device so shadowy as not to be capable of imposing upon any one, he must bear his misfortune, if injured. He must not shut his eyes to what is palpably before him. But that doctrine, if sound, is not applicable here. We think the well-settled rule to be applied here is that if one intentionally misrepresents to another facts particularly within his own knowledge, with an intent that the other shall act upon them, and he does so act, he cannot afterwards excuse himself by saying, "You were foolish to believe me." It does not lie in his mouth to say that the one trusting him was negligent. In this case the fact whether or not there were funds in the Gardiner bank to meet the checks was peculiarly within the knowledge of the defendant. The rule is stated in Pollock on Torts, § 252, as follows: "It is now settled law that one who chooses to make positive assertions without warrant shall not excuse himself by saying that the other party need not have relied upon them. He must show that his representation was not in fact relied upon. In short, nothing will excuse a culpable misrepresentation short of proof that it was not relied upon, either because the other party knew the truth, or because he relied wholly on his own investigations, or because the alleged fact did not influence his action at all." In *Linington v. Strong*, 107 Ill. 295, we find this language: "The doctrine is well settled that as a rule a party guilty of fraudulent conduct shall not be allowed to cry 'negligence' as against his own deliberate fraud. \* \* \* While the law does require of all parties the exercise of reasonable prudence in the business of life, and does not permit one to rest indifferent in reliance upon the interested representations of an adverse party, still, as before suggested, there is a certain limitation to this rule; and, as between the original parties to the transaction, we consider that, when it appears that one party has been guilty of an intentional and deliberate fraud by which to his knowledge the other party has been misled or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived

exercised reasonable diligence and care." See *Griffin v. Roanoke R. & Lumber Co.*, 140 N. C. 514, 53 S. E. 307, 6 L. R. A. (N. S.) 463.

Finally, the defendant's counsel in argument contends that the plaintiff, by its own conduct—that is, by receiving and crediting these checks for so long a time—gave the defendant cause to believe, and that he did believe, that the kiting was done with the knowledge, approval, and consent of the plaintiff. This ground, of course, could be available only by way of estoppel. But, since the defendant has not testified that he so believed, and as there is no evidence that he so believed, or that he was misled by the plaintiff's conduct, ignorant or otherwise, it is unnecessary to consider this proposition further.

Judgment for the plaintiff for \$2,332.51 and interest from the date of the writ.

(103 Me. 472)

POLAND v. DAVIS et al.

(Supreme Judicial Court of Maine. Feb. 25, 1908.)

**COSTS—PLEAS IN BAR—PREVAILING PARTY.**

When, in a real action for the recovery of land, the defendant files a plea puis darrein continuance and the plaintiff accepts such plea, the plaintiff is the prevailing party up to the time of filing the plea, and is entitled to costs up to that time. After that time the defendant is the prevailing party, and is thereafter entitled to costs.

(Official.)

Exceptions from Supreme Judicial Court, Knox County.

Real action by Luther O. Poland against Alwilda S. Davis and James B. Davis to recover certain real estate. On exceptions by defendants. Exceptions overruled.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, and KING, JJ.

Frank B. Miller and Arthur S. Littlefield, for plaintiff. David N. Mortland, for defendants.

SPEAR, J. The defendants' exceptions state the case.

"Real action, brought to recover the possession of the whole of a parcel of land described in the writ.

"At a former trial, April term, 1904, the general issue was pleaded, at which time a verdict was ordered for the plaintiff, to which ruling the defendants took exception, which exceptions were sustained. Said action was then continued from term to term till the April term, 1907, at which time the action was heard by the court with leave to except. At said trial defendants filed a plea puis darrein continuance, to which plea plaintiff filed a general demurrer, which was joined and overruled, and judgment was ordered for the plaintiff 'for his costs up to the date

of filing the last plea of defendants,' and judgment was ordered for the defendants, that 'the action be discontinued and for their costs after last plea filed,' to which ruling and judgments exceptions were filed by both plaintiff and defendants. August 31, 1907, the following order from the law court was received and filed: 'Plaintiff's exceptions sustained. Demurrer sustained. Plea bad. Repleader nunc pro tunc awarded on payment of costs since filing the plea.'

"At this term defendants filed a repleader, and paid plaintiff's costs, amounting to \$25.43, and judgment was ordered as follows: 'Judgment for plaintiff for his costs up to time of filing last plea in bar, which is filed as of April term, 1907, in accordance with mandate of law court, judgment for the defendants that the action be discontinued'—to which ruling and judgment defendants except, and respectfully pray that their exceptions be allowed."

The defendants' exceptions proceed upon the ground that the defendants in the end were the prevailing party, and by the general rule were entitled to costs. But this does not mean that such party shall recover full legal costs from the beginning to the end of the suit. The course of pleading may, and often does, materially modify the uniformity of the rule. The present case illustrates an exception. While in this case the party finally prevailing is entitled to costs, yet it is only those costs which accumulate after a certain stage of the pleadings, the costs previous to that time having been awarded to the other party, because he has prevailed upon an intervening issue presented by the defendants' plea. That is, the plaintiff, having accepted the plea puis darrein continuance, was the prevailing party up to this time, and entitled to costs. The defendant was the prevailing party after this time and entitled to costs thereafter. We understand this to be precisely in accord with the well-established rule in this state. In *Hilliker v. Simpson*, 92 Me. 600, 43 Atl. 495, 497, the court say: "It is a well-settled rule of pleading that a plea puis darrein continuance operates as an abandonment of all former pleas, on which no proceedings are afterwards had. After the filing of such a plea in contemplation of law, all previous pleas are stricken from the record, and everything is confessed except the matter contested by this plea."

This case settles the effect of this plea in practice, and *Leavitt v. School District*, 78 Me. 579, 7 Atl. 600, 601, determines the effect upon costs: "In one sense such a plea may be said to divide the suit into two actions, in the first of which the plaintiff is the prevailing party and entitled to costs, and in the second of which the defendant is the prevailing party and entitled to costs."

It seems to us that the case at bar fairly comes within the scope of these decisions.

Exceptions overruled.

(80 Conn. 663)

# KATZENSTEIN et al. v. CITY OF HARTFORD.

(Supreme Court of Errors of Connecticut. June 2, 1908.)

## 1. MUNICIPAL CORPORATIONS — TORTS — OBSTRUCTIONS IN SEWERS.

A city, whose charter requires it to cause prompt repairs of public sewers, is not an insurer against injuries to property from obstruction in a sewer; and, where property is damaged by a setback of sewage through a lateral drain, by reason of a stoppage in the main sewer, and the owner incurs expenses to demonstrate to the city's agents that his lateral drain is clear, he cannot recover the damages and expenses resulting from the city's failure to remove the obstruction, unless the city negligently failed to make the necessary repairs after it had notice of such obstruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1782.]

## 2. SAME—ACTIONS—PLEADING—EVIDENCE ADMISSIBLE.

Where it was not claimed that defendant's main sewer was insufficient or defective, evidence of other obstructions than those which caused the injuries complained of was inadmissible.

## 3. SAME.

Evidence of the character of an obstruction in a sewer is admissible to show that the city was not negligent in failing to remove the obstruction.

Appeal from Court of Common Pleas, Hartford County; John Coats, Judge.

Action by Benjamin Katzenstein and others against the city of Hartford. From a judgment for plaintiffs, defendant appeals. Reversed.

Arthur L. Shipman, for appellant. Albert C. Bill, for appellees.

HALL, J. After allegations, which are admitted by the answer, that the defendant, under the powers conferred by its charter, constructed in a certain highway in Hartford a sufficient public sewer, for which the plaintiffs' property was duly assessed, and with which the plaintiffs lawfully connected their land and building, paragraph 4 of the complaint contains these averments: "On or about January 1, 1907, said sewer became stopped at a point about 25 feet east of, and at a lower grade than, the property of the plaintiffs, thereby causing the filth and water accumulated in said sewer to be forced through the plaintiffs' opening into said sewer, thereby flooding and filling the cellar with said sewage." After describing the loss and damage thereby caused to the plaintiffs and their property, paragraphs 6 and 7 of the complaint contain these allegations: "(6) On or about the 15th day of January, 1907, the said defendant was duly notified of the condition of said premises by reason of the stoppage in said sewer, but took no means to relieve the plaintiffs from said nuisance and injuries resulting from said sewer, for a long period of time thereafter. (7) That by reasons aforesaid, and the defendant's wrongful neglect and omission, the plaintiffs were

obliged to expend" certain named sums, amounting to about \$100, in digging up the street, and endeavoring to prevent the water and sewage from setting back upon their premises, and in making certain stated repairs.

It was undisputed at the trial that the sewer was constructed by the city long before the injuries complained of; that on or before February 26, 1907 (the plaintiffs claimed on the 15th of February), it became obstructed by an accumulation, which forced the sewage through the plaintiffs' lateral drain into their cellar, to a depth of more than two feet; that on said day the plaintiffs sent this writing to the superintendent of public streets: "Mr. Hansling—Dear Sir: The sewer at 31 Russell street is stuffed up. Kindly attend to the same at once"; that Hansling thereupon went to the premises and saw the conditions, and told the plaintiffs to ascertain whether the lateral drain was obstructed, and, if necessary, to dig it up for that purpose; that until that was done the city would do nothing, and that the city would reimburse them if it was found that the main sewer was obstructed; that the plaintiffs, at the expense of \$41.10, uncovered the lateral drain, when Hansling became satisfied that the obstruction was in the public sewer, and found and removed it some time in March (the plaintiffs claimed on the 13th). The plaintiffs claimed to have proved that they gave verbal notice to the city of the obstructed condition of the sewer, prior to said written notice of February 26th. The defendant denied having had any knowledge or notice of said obstructions previous to said written notice, and claimed that, immediately upon receiving it, Hansling visited the premises, and informed the plaintiffs that in his opinion the obstruction was in the lateral or house drain, and that the rule of the street department in such cases, where there was a difference of opinion as to the cause of the setback, was that the property owner must show that the house drain is clear before the city would open the main sewer, and that, if it was so shown, the city would reimburse the owner for the expense of opening it; that Hansling closely observed the plaintiffs' work in opening the lateral sewer, and that, when on March 7th he became satisfied that the obstruction was in the main sewer, he proceeded to uncover it and remove the obstruction.

The defendant requested the trial judge to charge the jury that omission to make proper repairs of a sewer does not in itself constitute negligence; that the mere fact that a stoppage in a sewer exists, and causes damage, does not in itself constitute negligence of the city, and render it liable for such damage; that to hold the city liable the jury must find that the city unreasonably neglected to make the necessary repairs after notice of the obstruction. The trial judge should have

charged the jury in accordance with these requests. He instructed the jury as follows: "In the case where the city has constructed and put into use a main sewer, which, but for an obstruction therein, would be adequate at all ordinary times to take care of and convey away the sewage flowing therein, without setting it back through lateral drains, and the property owner situated like the plaintiff is without fault, the city ought, in law, to be held by you as liable in damages for any injury which may result from a setback of sewage from a mere obstruction in the main sewer. \* \* \* A duty rests upon the city to keep its main sewer free from dangerous obstructions, and that duty does not remain dormant until the city has been notified of the obstruction. \* \* \* In a case where it is doubtful whether an obstruction exists in the main sewer or in the lateral drain, both the city and the owners act at their own peril in respect to the removal of the obstruction. \* \* \* If the city compels a property owner to demonstrate the city's liability before it will do its duty, the reasonable cost of the demonstration rests upon the party thereby proved to be in fault."

This instruction entirely overlooks the element of negligence, which plaintiffs' counsel say in their brief is the ground of their action, and imposes upon the city the liability of an insurer against an injury caused as this was. The law imposes upon the defendant city no such absolute liability for the injury so sustained by the plaintiffs. That the defendant has by its charter the exclusive power to lay out, construct, and alter public sewers, within its limits, and that it is made the duty of its board of street commissioners to cause the prompt completion of all necessary repairs of public sewers, does not render it liable for the injury to the plaintiffs' property, caused by an obstruction in a public sewer, which obstruction was neither caused, either negligently or otherwise, by the city or its agents, nor suffered to remain by their negligence.

The only ground upon which the plaintiffs can recover in this case is that the city was guilty of negligence (*Judd v. Hartford*, 72 Conn. 350, 44 Atl. 510, 77 Am. St. Rep. 312; *Burnside v. Everett*, 186 Mass. 4, 71 N. E. 82; *Smith v. Mayor*, 66 N. Y. 295, 23 Am. Rep. 53), and guilty of the negligence described in the complaint. That it would be liable upon proof of such negligence is apparently not questioned by the defendant. The only negligence of the defendant charged in the complaint is its failure to remove the obstruction from the sewer after notice of its existence. It is conceded that the sewer was properly constructed. The complaint alleges that it was ample and sufficient. There is no averment that the city or its workmen, either negligently or otherwise, caused the obstruction, nor that the city negligently failed to cause the sewer to be properly inspect-

ed, or to keep it in repair, or that it negligently failed to perform any duty prior to the time that it was notified of the existence of the obstruction. The only alleged negligence of the defendant is described in paragraphs 6 and 7 of the complaint, as "the defendant's wrongful neglect and omission" in having, after due notice of the stoppage in the sewer, taken "no means to relieve the plaintiffs from said nuisance, and injuries resulting from said sewer for a long period of time thereafter." Under this averment the plaintiffs could only recover for damages and expenses resulting from the negligent failure of the defendant to remove the obstruction after it had received or become chargeable with notice of such obstruction. Upon failure to prove the alleged negligence they could not recover in this action the expense incurred by them at the request of the city.

As it is not claimed that the sewer was insufficient or defective, evidence of other obstructions than that which caused the injuries complained of was inadmissible.

Evidence of the character of the obstruction was admissible, in so far as it tended to show that the defendant was not negligent as alleged.

There is error and a new trial is ordered. The other judges concurred.

(30 Conn. 442)

**LITHUANIAN BROTHERHELP SOCIETY  
ST. WICENTUS v. TUNILA.**

(Supreme Court of Errors of Connecticut. June 2, 1908.)

**1. JUDGMENT—EQUITABLE RELIEF—GROUNDS.**

In an action to set aside a default judgment on the ground of lack of notice, and to enjoin its enforcement, the complaint alleged that plaintiff's secretary, at whose residence a copy of the complaint was left in his absence, and who was a foreigner, and did not well understand English, and could not read it, was informed by his wife that the complaint left in service was a notice to call at defendant's attorney's office, and that he called there, and was told by the attorney that he had a claim against plaintiff society to collect, but was not informed that any suit had been brought upon it, but was given to believe that the society would better settle the claim without litigation. *Held*, that the facts alleged could properly be given in evidence to show that plaintiff's failure to defend the suit was due either to a mistake, or to the wrongful conduct of defendant's attorney, and a motion to expunge them from the complaint was properly denied.

**2. SAME—PROCEEDINGS—COMPLAINT—SUFFICIENCY OF ALLEGATIONS.**

In an action to enjoin a default judgment, an allegation in the complaint that defendant's attorney had given plaintiff's secretary to understand that no action had been or would be commenced was sufficient, without stating the precise language by which plaintiff's secretary was misled.

**3. SAME.**

In an action to enjoin a default judgment, a complaint, alleging that plaintiff had no knowledge of the action, and that its secretary did not understand that an action had been commenced, is sufficient to admit proof that plaintiff's secretary, upon whom alone service of the complaint was made, from a misunderstanding,

which was contributed to, if not caused by, the conduct of defendant's attorney, and without negligence on his own part, or on the part of plaintiff society, failed to appear, or to have any one appear, at the trial of the action.

**4. SAME—GROUNDS.**

It was not essential to plaintiff's right to equitable relief against a default judgment that defendant's attorney should have intentionally or fraudulently misled plaintiff's secretary, but if he did so innocently, it would be sufficient ground.

**5. SAME—COMPLAINT.**

An allegation, in the complaint in an action to enjoin a default judgment, that plaintiff had a good defense to the suit, together with an averment that plaintiff's secretary had told defendant's attorney that defendant had no claim against plaintiff for benefits, because under plaintiff's constitution and by-laws he was required to procure a physician's certificate that he was unable to perform manual labor, which certificate he was unable to obtain, was an averment of a sufficient defense to the suit and of the nature of it.

**6. SAME—GROUNDS—FRAUD—ACCIDENT—MISTAKE—SURPRISE.**

Fraud, accident, mistake, and surprise are recognized grounds for equitable interference, when one, without his own negligence, has lost an opportunity to present a meritorious defense to an action, and the enforcement of the judgment so obtained against him would be against equity and good conscience, and there is no adequate remedy at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 836-840.]

**7. JUSTICES OF THE PEACE—NEW TRIAL—POWER OF COURT.**

Under Gen. St. 1902, § 816, providing that, when a judgment has been rendered by a justice of the peace against a defendant, absent from the state until after the trial, without notice of the suit, he may, within six months after his return, bring a complaint to the court in the county to which an appeal might have been taken, for a new trial, which the court may grant if it appears that the judgment was wrongfully obtained, and he had a good defense. The court of common pleas has no jurisdiction to grant a new trial where such a judgment was obtained while defendant was within the state.

Appeal from Court of Common Pleas, Litchfield County; Gideon H. Welch, Judge.

Action by the Lithuanian Brotherhelp Society St. Wicentus against Joseph Tunila to have a judgment set aside, and defendant enjoined from enforcing it. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas J. Wall, for appellant. Samuel A. Herman, for appellee.

**HALL, J.** The plaintiff is a voluntary association, of which the defendant is a member. The complaint alleges, substantially, these facts: The defendant brought an action against this plaintiff to recover alleged "sick benefits," returnable before a justice of the peace on the 12th of June, 1907, the complaint in which was not otherwise served than by leaving, on the 7th of said June, an attested copy at the place of abode of one Petrofski, the secretary of the society, and obtained judgment therein by default, on said return day, for \$50 damages and \$5.76 costs, which he threatens to enforce. The said secretary of the plaintiff society was a foreigner,

and did not well understand and could not read English. He understood from his wife, and from what she informed him the officer leaving the copy had told her, that the copy was a notice to call at the office of the attorney for the defendant, Tunila, which he did. The attorney informed him that he had the claim in question against the society for collection, but did not inform him that any suit had been brought upon it, but led Petrofski to believe that the society had better consider the matter, and settle the claim without litigation. At the same time Petrofski informed the attorney that Tunila had no legal claim against the society, for the reason that, under the constitution and by-laws of the society, it was necessary for Tunila to procure the certificate of one or more reputable physicians that he had been unable to perform manual labor, and was therefore entitled to benefits, and that the physicians would not so certify, but had stated that Tunila was not entitled to benefits. The plaintiff had no knowledge of the pendency of said action before the justice of the peace, nor that said judgment had been rendered, until after June 12th, when he asked said attorney to permit the default to be opened, and to allow the society to present its defense, which the attorney refused to do. The plaintiff society has a good defense against the claim of Tunila, and it would be inequitable to enforce said judgment against it. The complaint asks that the judgment be annulled and set aside, and that the defendant be enjoined from enforcing it.

The trial court properly denied the defendant's motion to expunge the allegations that Petrofski understood, and was informed by his wife, that the copy of the complaint left in service was a notice to call at the attorney's office, and that he called and had the conversation with said attorney as alleged. The facts so alleged were proper evidence that the plaintiff's failure to defend the justice suit was due either to a mistake, or to the wrongful conduct of the defendant's attorney.

The averment, in effect, that defendant's attorney at the described interview gave Petrofski to understand that no action had been or would be commenced was sufficient, without stating the precise language by which he was misled. The motion to make the averment more specific, by setting forth the statements which led Petrofski to so believe was rightly denied.

The defendant's demurrer to the complaint and prayer for relief was properly overruled.

If the plaintiff or Petrofski had failed to appear before the justice of the peace, having knowledge of the pendency of the justice suit, the mere fact that the service of the copy upon Petrofski was defective in point of time, would not have given the plaintiff any claim for equitable relief. *Gallop v. Manning*, 48 Conn. 25, 30. But the complaint alleges, and the demurrer admits, that the plaintiff had no knowledge, and its secretary did not un-

derstand, that an action had been commenced. The averments are sufficient to admit of proof that the plaintiff's secretary, upon whom alone service of the complaint was made, from a misunderstanding which was contributed to, if not caused by, the conduct of the defendant's attorney, without negligence on his own part, or on the part of the society, failed to appear, or to have any one appear, before the justice in behalf of the society. It was not necessary for the plaintiff to allege that the defendant's attorney fraudulently or intentionally misled Petrofski. Proof that he did so innocently might entitle the plaintiff to equitable relief. *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316, 321, 79 Am. Dec. 250.

The allegation that the plaintiff had a good defense to the justice suit, with the averment of what Petrofski told the defendant's attorney as the reason why Tunila had no legal claim against the society, was an averment of a sufficient defense to the justice suit, and of the nature of it.

Fraud, accident, mistake, and surprise are recognized grounds for equitable interference, when one, without his own negligence, has lost an opportunity to present a meritorious defense to an action, and the enforcement of the judgment so obtained against him would be against equity and good conscience, and there is no adequate remedy at law. *Allis v. Hall*, 76 Conn. 322, 330, 56 Atl. 637.

The plaintiff should not, as claimed by the defendant, have asked for a new trial. The court of common pleas had no jurisdiction to grant a new trial of an action brought before a justice of the peace, excepting under the provisions of section 816 of the General Statutes of 1902, which we do not apply to this case.

There is no error. The other Judges concurred.

(80 Conn. 623)

Appeal of NEW YORK, N. H. & H. R. CO.  
(Supreme Court of Errors of Connecticut. June 2, 1908.)

# 1. MUNICIPAL CORPORATIONS—CONTROL OF STREETS—USE FOR STREET RAILWAYS—ELECTRIC CONDUCTORS—STATUTORY PROVISIONS.

In view of the history of legislation fixing the general rule of policy that municipalities shall be bound to maintain public highways, and invested with the power of protecting the public safety in their use, appearing in its final form in Gen. St. 1902, c. 125, §§ 2012-2089, and the legislation as to occupation of highways in aid of public uses, giving municipal authorities control of the placing and maintenance of electric lines and conductors, leading up to Gen. St. 1902, § 3905, providing that the common council of any city shall have full direction and control over the placing, erection, and maintenance of any wires, conductors, etc., of any company engaged in using any electric wire or conductor for any purpose, and may make all orders necessary for the exercise of such power and direction of control, and especially in view of the history of legislation on the subject of railways along the highways, and the control by local authorities, appearing in Gen. St. 1902,

§ 3824, providing that the mayor and council of each city shall have exclusive control over the placing or locating of tracks, wires, conductors, etc., subject to the right of appeal to the railway commissioners, the placing of electric wires and conductors in a highway by a street railway company, for the purpose of applying electricity as the motive power for the operation of its railway, is subject to the direction of the local municipal authorities, which may direct that such wires and conductors shall be placed underground or overhead as they may deem proper for the safety of the public; and there is no exemption from such municipal control by force of Sp. Laws 1905, p. 711, § 3, amending the charter of the New York, New Haven & Hartford Railroad Company, and authorizing it to establish and maintain conductors over, on, or under any street, highway, or public grounds, subject to the general provisions of sections 3904-3907, inclusive, of the General Statutes of 1902, relating to control by the local authorities, etc., and to transmit electricity thereby in such manner, etc., as said corporation shall find necessary for the best conduct of its business, for the power given the company is subject to all general laws, and especially to the laws mentioned in the amendment; and, in the absence of action by the railroad commissioners, the local authorities may exercise full direction and control given by the statute in respect to placing electric conductors in the highways by a street railway company, subject to the final action of the railroad commissioners.

**2. SAME—REVIEW OF DECISION OF MUNICIPAL AUTHORITIES—APPEAL TO RAILROAD COMMISSIONERS—APPEAL TO SUPERIOR COURT—STATUTORY PROVISIONS.**

Under Gen. St. 1902, § 3832, providing that whenever the mayor and common council of any city shall make any decision, denial, order, or direction with respect to any matter relating to street railways, any company affected thereby may appeal to the railroad commissioners from such decision, etc., and section 3834, providing that any party to any proceeding relating to street railways, brought before said commissioners, either upon original application or by appeal, may appeal therefrom to the superior court, and section 3905, providing that the common council of any city may make all orders necessary to the exercise of the power of control over the placing of electric conductors, etc., subject to the right of appeal by such company to a judge of the district court, any action taken by the common council of a city, with respect to matters relating to street railways in respect to the placing of electrical conductors, may be retried and determined by the railroad commissioners, and any one injured in his legal rights, by unlawful action of the local authorities in the exercise of specified administrative powers, may apply to the superior court or a judge thereof sitting in chambers, through the original process called "appeal," for such appropriate relief as comes within the judicial power vested in the court, and this process will run against the municipal board when the actual injury complained of results from the unlawful action of that board.

**3. SAME.**

Under Gen. St. 1902, § 3905, authorizing an appeal to a judge of the superior court from orders of the common council of a city, relating to the placing of conductors of electricity, purely legislative and administrative powers or duties are not transferred to the superior court for performance in such matters, and the action of the board charged with their performance is final; and, where the common council of a city denies an application to erect overhead wires for the conducting of electricity from an electric street railway power plant to a substation, on the ground that it is unsafe, a judge of the superior court has no authority to reverse the

order, and authorize the erection of such conductor in the manner desired by the company.

Appeal from Superior Court, New London County; Joel H. Reed, Judge.

Application by the New York, New Haven & Hartford Railroad Company to the mayor and common council of New London, for authority to erect an overhead line for the transmission of electricity from its power station to a substation in New London, where the electricity was to be used and applied by its street railway lines. From a judgment of a judge of the superior court adjudging that the railroad company might erect and maintain an overhead conductor, and revoking an order of the city council denying an application for such authority, on the ground that the street committee, to whom the matter was referred, did not consider it safe to grant the petition unless the wires were placed underground, the mayor and common council of New London appeal. Reversed and remanded.

Benjamin I. Spock, for appellant. John C. Geary, for appellee.

HAMERSLEY, J. The proceeding before Judge Reed, in which the judgment appealed from was rendered, is an application by the New York, New Haven & Hartford Railroad Company, being a street railway company (hereinafter called the plaintiff), asking that the action of the mayor and court of common council of the city of New London (hereinafter called the defendant), in making an order for preserving in a safe condition for public use the highways, for whose maintenance in a safe condition the city is charged by law as the agent of the state for that purpose, may be revoked, because the action complained of is illegal, without authority of law, and injurious to the rights and property of the plaintiff. The application is an original process, called "appeal," for invoking the exercise of judicial power, and is made to a judge of the superior court sitting in chambers, in the exercise of the judicial power vested in that court. *Norwalk Street Ry. Co.'s Appeal*, 69 Conn. 576, 599, 602, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794.

The reasons for appeal assign three errors. They are, in substance, two: First, in holding that the defendant had no power to make the order complained of; second, in holding that the superior court or a judge in chambers could entertain an application for determining the question of power before the subject-matter of the order had been passed upon by the railroad commissioners. If either assignment of error is well taken, its determination finally disposes of this case; but the errors are so related that it is impracticable to thoroughly discuss the grounds on which any one assignment can be sustained without, in a measure, determining all. The plaintiff has authority from the Legislature, for the purpose of operating an electric rail-



way, to generate electricity, and for the purpose of using and applying the same as a motive power for the operation of its railway, to transmit electricity from the place of generation to the place where it is to be so used and applied, and in such transmission to place electric wires and conductors over, on, or under any highway, having first obtained consent of owners of land abutting on the highway, and such placing being subject to the full direction and control, including the relocating or removal of the same, of the cities or other agents of the state charged with the duty and invested with the power of protecting the public safety against the dangers incident to the use of the highways for such wires and conductors. Sp. Laws 1905, pp. 706-711. The precise controversy between the plaintiff and defendant is this: The defendant claims that in the exercise of its power of full control and direction, it has the power to order such electric wires and conductors to be placed in conduits under the highways. The plaintiff claims that it alone is authorized to decide whether such wires and conductors shall be placed over or under the highways, and that neither the city nor any other agent of the state, charged with protecting public safety in the use of the highways, has any power to direct that these electric wires and conductors shall be placed under ground. A determination of this question depends upon the meaning of existing legislation relating to highways, to the duties and powers of the agents of the state charged with their maintenance, and with the protection of the public in their use as highways, and to their occupation in aid of some public use other than that of a public highway.

The existing law, as contained in the Revision of 1902, is to be found under various heads of legislation, sometimes covering, in a little different form, the same ground, and all intended to give effect to substantially the same public policy. This law is the result of distinct but closely related lines of legislation. One fixes the general rule of policy, namely, that towns, cities, and boroughs shall be charged with the burden of maintaining public highways, and invested with the power of protecting the public safety in their use. This policy was recognized in 1672 (Acts 1672, p. 7), and has remained substantially unchanged. Rev. 1902, §§ 2012-2080.

Shortly after the invention of the telegraph, lines of telegraph were recognized as furnishing such public advantages as justified some use of the highway in aid of such a public use. In 1846 a company was chartered "to construct and use lines of telegraph" under the Morse patents. 4 Sp. Laws, p. 1212. In 1848 special provisions were made for the incorporation of telegraph companies, and such companies were authorized to condemn private lands, and to use highways

for their necessary fixtures, provided the same shall not be so constructed as to interfere with the public use of said highways. In 1849, recognizing such use of the highway as an additional servitude on the land of the adjoining owner, it was provided that no telegraph company could place any post, etc., on the highway without consent of the adjoining owner, and providing for a taking of the right by condemnation if such consent were refused; and in 1853 these privileges in the construction of telegraph lines were extended to all associations and persons who shall extend lines from beyond the state to any point within the state. Comp. Laws 1854, pp. 210-213, tit. 3, c. 12. In 1860 the privileges in the construction of telegraph lines were recognized as extending to all owners of telegraph lines, foreign and domestic. Provision was also made for the removal of any poles which might become an annoyance to the public in the use of the highway, or to an individual in the use of his property, and specific power was given to cities and boroughs to compel companies to furnish such poles of the style and finish as the municipal authorities might determine, and provisions were also made for the appraisal of damages to which any person might be entitled by reason of such use of the highway. Pub. Acts 1860, p. 52, c. 66. The foregoing provisions were substantially incorporated in the Revision of 1866, under the heading "Telegraph Companies" (Rev. 1866, p. 208, tit. 7, c. 7); and the same provisions were incorporated in the Revision of 1875, under the same heading (Rev. 1875, tit. 17, c. 2, pt. 10, p. 341).

In 1879 the existing law, being part of chapter 2 of title 17 of the Revision of 1875, was amended, by adding after the word "telegraph," wherever the same may occur the words, "or telephone." Pub. Acts 1879, p. 381, c. 36. In 1881 an electric light company was authorized to make and sell electric light and electricity, and in 1882 a telephone company was chartered. 9 Sp. Laws, pp. 212, 605. The following year a "Light and Power Company" was chartered, authorized to make and sell electricity for light and power; and from 1885 to 1889 a large number of electric light companies were chartered. 10 Sp. Laws, *passim*. In 1884 an act provided that every person, who shall place any telegraph or telephone pole in, upon, or over any highway without consent of the adjoining owner (or condemnation proceedings), or who shall willfully injure any tree in such highway for the purpose of maintaining therein any telegraph or telephone fixtures, without consent of adjoining owner, shall be fined or imprisoned. Pub. Acts 1884, p. 370, c. 96. In 1886 an act provided that no telegraph, electric light, or telephone company shall cause to be injured any tree growing on the highway, for the purpose of constructing or maintaining therein any tele-

graph or telephone fixtures or wires, without consent of adjoining owner, under penalty of a fine for each offense. Pub. Acts 1886, p. 617, c. 118.

The law, as thus established, was as follows: The public use for which highways were established did not include their use for telegraph or telephone lines. Telegraph and telephone lines were treated as of sufficient benefit to the public to justify a limited use of the highway and the condemnation of private rights for such a public use. Every telegraph and telephone company was authorized, in the construction of its line, to use any highway in such way as not to incommode public travel, nor injure private property without the owner's consent. Every telegraph or telephone pole, which became an annoyance to the public in the use of the highway, was treated as a nuisance, subject to removal. The municipal authorities of cities and boroughs could compel the use of such poles as they might prescribe. No telegraph or telephone company could place any pole or fixture in or upon any highway without the consent of the abutting landowner or a condemnation of his right. Provisions for such condemnation were made. The placing of any telegraph or telephone pole, and other injury to private property in violation of these provisions was made a criminal offense.

In 1887 by "An Act Concerning Electric Companies" (Pub. Acts 1887, p. 676, c. 33), the Legislature classed lines, for the distribution of electric light and power, with telegraph and telephone lines, as serving a similar public use, and so entitled to the same restricted privileges in the use of public highways; and under the common name of "electric companies" gave to the owners of all such lines the same privileges, under the same restrictions, in the use of highways. The great increase of such lines, and the still greater increase impending, called for more specific and stringent regulations in support of the recognized municipal control of highways, that should make clear the municipal power of directing the placing of these multiplied wires and dangerous conductors, either over or under the highway, as they should deem the convenience and safety of the public, in the use of the highway, required. The only distinction made between these so-called "electric companies" is that every telegraph and telephone company, organized under the joint-stock law, may be entitled to the powers and privileges enumerated in the act, but no electric light or power company so organized shall be so entitled without special authority from the General Assembly. Section 1 of the act, in connection with sections 3 and 4, applies, to all electric companies, the existing provisions, in respect to telegraph and telephone companies for the protection of an abutting landowner against placing in the highway, by any such companies, any of their structures

or apparatus without his consent or a condemnation of his right. Section 1 is as follows: "No telegraph, telephone or electric light company or association, nor any company or association engaged in distributing electricity by wires or similar conductors, or in using an electric wire or conductor for any purpose, may hereafter exercise any powers which may have been conferred upon it to erect or place wires, conductors, fixtures, structures, or apparatus of any kind over, on, or under any highway or public grounds or to change the location of the same, without the consent of the adjoining proprietors, or in case such consent cannot be obtained, without the consent in writing of two county commissioners of that county, which shall be given only after a hearing upon due notice to such proprietors, and the fees of such commissioner shall be paid by such company." Section 2 of the act recognized and established full municipal control of the highways as the fundamental condition upon which any use of them, for the structures of electric companies, is permitted. Section 2 is as follows: "The selectmen of any town, the common council of any city, and the warden and burgesses of any borough, shall, subject to the provisions of the preceding section, within their respective jurisdictions, have full direction and control over the placing, erection, and maintenance of any such wires, conductors, fixtures, structures, or apparatus, including the relocating or removal of the same, and including the power of designating the kind, quality, and finish thereof, and may make all orders necessary to the exercise of such power of direction and control, which orders shall be in writing and recorded in the records of their respective communities, but shall be subject, nevertheless, to the right of appeal by said company to a judge of the superior court, who, after a hearing, upon due notice to all parties in interest, shall as speedily as possible determine the matter in question, and affirm, modify, or revoke said orders." Sections 9 and 10 (page 678) of the act amend the acts of 1834 and 1886, imposing penalties for unauthorized placing of structures in the highway so as to include every "telegraph, telephone, electric light or power company." The law as established by the act of 1887 is included unchanged in the Revision of 1888, under the chapter dealing with "Telegraph, Telephone and Electric Light or Power Companies" (sections 3943-3954), and is included unchanged in the Revision of 1902, under the chapter dealing with "Telegraph, Telephone and Electric Light or Power Companies" (sections 3903-3916), and is the law in force to-day.

In view of this legislation we think it clear that the full direction and control given to municipal authorities over the use of highways, and especially in section 2 of the act of 1887, being section 3905 of the Revision of

1902, includes the power to direct any telegraph, telephone, or electric light company, and any company engaged in using electric wires or conductors, to place underground such wires or conductors as may be used within the limits of a highway. The defendant, however, claims that its power, in respect to the wires and conductors which the plaintiff desires to place in the highways, is not only derived from the general municipal control of highways, to be found in the chapter of the General Statutes of 1902 dealing with highways (sections 2012-2089) and from the specific power over highways, to be found in the chapter dealing with "Telegraph, Telephone and Electric Light or Power Companies" (sections 3903-3916), but is also derived from the specific power over highways to be found in the chapter dealing with "Street Railway Companies" (sections 3823-3875). And this suggests the consideration of another line of legislation, closely related to and covering some of the same ground as those we have already considered. Shortly prior to 1860 the use of the tramway as an appropriate means of facilitating the public use of highways became a practical question. In 1859 the first horse railroad company was chartered. It was given the powers given by law to (steam) railroads, was authorized to lay its track along highways, but only with consent of the towns having charge of the highways, and to transport persons and property by use of motive power other than steam, and was given the right of eminent domain (5 Sp. Laws, p. 306), and within the next five or six years nine other companies were chartered, with varying provisions in each charter. Unlike telegraph lines, horse railroads were treated as not necessarily imposing a new servitude on the highway in which they might be laid, and therefore as not, generally, requiring the assent of abutting owners or a condemnation of such owners' rights before the tracks could be laid. *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 176, 36 Atl. 1107. They did, however, involve a peculiar and new use of the highway for the profit of private persons, and more or less inconsistent with use by the general public. And so, from the beginning, the general municipal control over highways was recognized as including control over the methods of this peculiar use. Ordinarily the charter of each company contained some provisions requiring the assent of towns in some form before such tracks could be laid, and the towns could and in some instances did give this assent, upon conditions which secured their control. The first statutory regulation was contained in "An Act Relating to Horse Railroads," which gave to towns the power to prescribe the forms of rails and some other matters, and required each railroad company to keep in repair certain portions of the highway, giving to the towns power to enforce such duty. Pub. Acts 1863, p. 22, c. 31. In

1864 all horse railroad companies were forbidden to use steam for motive power. Pub. Acts 1864, p. 37, c. 21. In 1865 an act prescribed the same rules in respect to petitions for incorporation of horse railroad companies as in the case of a (steam) railroad company, required annual reports to the General Assembly, and declared that no horse railroad company hereafter chartered should have power to lay its rails upon any highway, except in such manner and under such restrictions as the municipal authorities may impose, giving to any such company a right of appeal to the superior court. Pub. Acts 1865, p. 98, c. 102.

The law as thus settled was incorporated in the Revision of 1866, under the general heading of "Railroads," and special heading of "Horse Railroads." Its main features are, briefly, these: No condemnation of rights of abutting owners in the highway as a necessary condition precedent, in every case, to laying the tracks. No tracks shall be laid in any highway except in such manner, and under such restrictions, as municipal authorities may impose, but an aggrieved company may appeal to the superior court. Every railroad company shall keep a prescribed portion of the highway in repair. No company shall use steam as a motive power. In 1873 municipal authorities were authorized to permit the use of any improved motive power or motor (except steam) for the traction or propelling of street railway cars, subject to such restrictions, regulations, and conditions as said local authorities may impose, and subject to revocation, at any time, in the manner specified by the authority granting the same. Pub. Acts 1873, p. 128, c. 8. The law as stated in the Revision of 1866 and modified by the act of 1873 was incorporated, substantially unchanged, in the Revision of 1875, in the article entitled "Horse Railroads," being the third article in the part dealing with railroad companies. Rev. 1875, p. 339, tit. 17, c. 2, pt. 9, §§ 1-12. And the same provisions, substantially unchanged, were included in the Revision of 1888, under the title dealing with "Railroads" and the chapter in said title dealing with "Horse Railroads" (sections 3594-3602).

Prior to and including the year 1893, the use of electricity as a motive power and the number of chartered street railway companies greatly increased. In that year, for the purpose of securing uniformity in the treatment of all street railway companies, of extending and enforcing the existing law as to municipal control, and of bringing street railways to some extent within the supervision of the railroad commissioners, the important sections of the Revision of 1888 were repealed and re-enacted, with additional provisions in an act entitled "An Act Concerning Street Railways." Pub. Acts 1893, pp. 307-315, 395, cc. 169, 240. And an act was also passed authorizing any railroad company, including

steam railroads and horse railroads, to operate its railroad by electricity, in addition to the motive power already employed. Pub. Acts 1893, p. 361, c. 193. The act concerning street railway companies was in section 17 expressly made an amendment to the charter of all existing railway companies (except steam railroads), and it was expressly provided that all such railway companies hereafter chartered shall be subject to the provisions of the act. The provisions of the existing law authorizing municipalities to permit the use of electricity subject to such regulations and conditions as they might prescribe, and to prescribe the conditions upon which any railway company should lay its tracks upon a highway, were re-enacted in different parts of the act, and especially in section 2. Under this section the power of the municipality to modify any proposed plan for the use of its streets extended to the motive power to be used, and the method and manner of applying it, and included the power of requiring electric wires to be placed under ground when necessary to protect the ordinary uses of the highway. *Central Ry. & Elec. Co.'s Appeal*, 67 Conn. 197, 211, 35 Atl. 32. But the extent of municipal control implied in section 2 and other parts of the act is made more clear, specific, and complete by the provisions of section 3. The language of this section substantially follows that of section 2 of the act of 1887, concerning electric companies as incorporated in section 3946 of the Revision of 1888, and the full "direction and control" given by the last-mentioned section over the placing of any electric wires and conductors by any electric company, or any company using an electric wire or conductor for any purpose, is also included in the "exclusive direction," over the placing of any wires or conductors by any street railway company, given to municipal authorities by section 3 of the act of 1893.

We think, therefore, that whether we look to section 2 of the act of 1887 concerning electric companies, now in force as section 3905 of the revision of 1902, or to section 3 of the act of 1893 concerning street railways, now in force as section 3824 of the Revision of 1902, the placing of electric wires and conductors in a highway by a street railway company, for the purpose of applying electricity as a motive power for the operation of its railway, is subject to the direction of the local municipal authority, which may direct that such wires and conductors shall be placed under ground or overhead. We think this interpretation is justified by the language used in the statutes mentioned, especially when such language is read, as it must be, in the light of all the legislation determining the purpose, use, and control of highways and of the established public policy as to the use of highways which that legislation plainly indicates, and which the Legislature intended to enforce through the enactment of the statutes in question.

The plaintiff claims that it is exempt from this municipal control by force of an act amending its charter, and especially by force of section 3 of that act. Sp. Laws 1905, p. 711. The section is as follows: "Sec. 3. The said corporation whose charter is herein amended is hereby authorized and empowered to acquire and develop water powers for the generation of electricity, and to construct and acquire or hold, use, and operate plants for the generation of electricity by means of water power or steam or both or by any other means, and also to establish and maintain upon any private lands, and across, over, or under any streams or waters, and, subject to the provisions of sections 3904, 3905, 3906 and 3907 of the General Statutes of 1902 along or across and upon, above or under the streets, highways, and public grounds upon which it shall lawfully operate an electric railway, or which shall form a part of its route adopted for the transmission of electricity from any place where it is generated or developed to any part of any lines of railroads or railways where such electricity is to be used or applied, suitably constructed and supported conductors, including lines or poles and wires and underground conduits and wires, and properly supported cables, and including all proper fixtures and appurtenances, and also to transmit therewith, thereby, or therein electricity in such manner and of such quantities and pressures as said corporation shall find necessary for the best conduct of its business." The plaintiff's charter purports to authorize it to operate the lines of some 24 chartered street railway companies, through the highways mentioned in these charters, and upon a multitude of other specified highways, and for the purpose of operating such lines of railways, to establish anywhere within the state plants for the generation of electricity, and to transmit by wires and conductors the electricity so generated to any part of any line of railway where such electricity is to be used or applied, and to place these wires or conductors across or along all streets and highways within the line of transmission. The claim is that, in granting this charter, the Legislature has enacted a law which authorizes this plaintiff to use the highways indicated, which may include every highway within the limits of the state, for the maintenance of electric wires and conductors, and to place these conductors of electric power at its own will, either over or under the highway, uncontrolled in the exercise of its will by the authority of municipalities, or of railroad commissioners, or of any agent of the state. This claim is unfounded. The power given in the plaintiff's charter to construct and operate street railways is given subject to all general laws governing the construction of railways in highways, and the power given in section 3 to use highways in the transmission of electricity is only given subject to the provisions of section 3905, establishing the exclusive direction of the municipality

in the mode of placing the wires and conductors for such transmission. The language of the charter, with its reference to the General Statutes, indicates the legislative intent that the municipality or other agent of the state, and not the plaintiff, shall determine whether the electric wires and conductors occupying a highway shall be placed under or over the surface of the highway.

The rapid and marvelous increase in the use of street railways, especially in their adaptation to through travel, which followed the legislation of 1903, indicated the necessity of additional legislation, directed chiefly to two objects: First, to place street railway companies, as well as steam railroad companies, under the supervision and control of the board of railroad commissioners in respect to their operation and fulfillment of their duties to the public; second, to make the existing control, belonging to municipalities in the use of highways by street railways, subject to the ultimate and supreme authority of the railroad commissioners. These objects were sought to be accomplished in "An Act Concerning the Railroad Commissioners." Pub. Acts 1901, p. 1330, c. 156. Sections 1, 2, 12, 14, and 15 of the act are directed to the former object, and the remaining sections to the latter object. The act was both consistent and inconsistent with much existing legislation, and did not attempt to specify the legislation which was impliedly repealed, and that which was left in force. Some light is thrown on this question by the Revision of 1902, in which the act of 1901 is incorporated, together with other prior legislation, especially in the act of 1893, covering the same ground. We had occasion to consider the act of 1901 and its effect upon the act of 1893, and to determine its construction in certain particulars, in *Hartford v. Hartford Street Ry. Co.*, 75 Conn. 471, 53 Atl. 1010. As the law now stands the control of the use of highways for street railways as it existed prior to 1901 remains undiminished. The municipal authorities are still the agents of the state in the exercise of that control, but jointly with the railroad commissioners, who, in some particulars, exercise the control through original and exclusive action, and may exercise it in all particulars, either through original or appellate and final action. Whatever doubt may arise in some cases whether the municipality can act in the first instance or in the absence of action by the railroad commissioners, we think it clear that it may so act in a case like the one before us; that is, the local authorities may, in the absence of action by the railroad commissioners, exercise the full direction and control given by statute in respect to placing electric wires and conductors in the highways by a street railway company, for the purpose of transmitting and applying electricity as the motive power for operating its railway, subject, however, to final action of the railroad commissioners.

There is another consideration, affecting the legislation of 1901, especially as applicable to the present case. The judicial power vested in the superior court extends to the protection of rights of person or property that may be invaded by executive officers or administrative boards in the unlawful exercise of administrative powers conferred upon them. The power of the court for this purpose may be invoked through any appropriate process authorized by our common or statute law. For many years our law has recognized a peculiar and informal process for invoking this power called "appeal." The process has never been formally recognized as one applicable to every case where its use may seem appropriate, but it has been specially authorized in many cases, covering most of the instances where important legislative or executive functions have been conferred on administrative boards. During the colonial period of our government, all power was vested in the General Court or Assembly, and every exercise of power by subordinate officers or tribunals could be reviewed by an appeal to the General Court; and subordinate courts and tribunals exercised both judicial and administrative power, which might, in some instances, be invoked by appeal from acts of executive officers. This condition continued until 1818, when our Constitution, which distributed the powers delegated by it to three distinct and separate departments of government, was adopted; but, after the adoption of the Constitution, the informal process of appeal was retained, as a convenient means, in certain cases, of invoking the judicial power, and occasionally the law authorizing this process purported also to impose upon the court legislative or administrative duties. Such an act was that of 1895, which authorized the process of appeal for invoking the judicial power in protection of rights of property, invaded by the unlawful exercise of the administrative power vested in city councils in respect to street railways by the act of 1893, and further purported to authorize the superior court to exercise all the purely legislative and administrative powers conferred upon the city councils. Pub. Acts 1895, p. 630, c. 283. We held that so much of this act as purported to confer upon the superior court powers essentially and merely legislative was inoperative. *Norwalk Street Ry. Co.'s Appeal*, 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794; *Halmo's Appeal*, 72 Conn. 4, 43 Atl. 485. At the session of the Legislature following these decisions, the act of 1901, above considered, was passed. In connection with one main purpose of that act—i. e., to secure more uniformity in the regulations of the use of highways by street railways—the act of 1895 was repealed, and section 5 of the act of 1901 provided for an appeal from any decision, denial, order, or direction of local municipal authorities, with respect to any matter relating to street railways, to the railroad commissioners, and up-

on such appeal the commissioners tried, de novo, all matters brought before them, and determined the administrative questions involved. *Hartford v. Hartford Street Ry. Co.*, 75 Conn. 476, 53 Atl. 1010. And in order to retain the process of appeal for invoking the judicial power, as authorized by the act of 1895, section 8 of the act of 1901 authorized an appeal from any action of the railroad commissioners, either original or appellate, in the manner provided under the provisions of section 3518 of the General Statutes (Revision 1888). The section referred to was construed in *Spencer's Appeal*, 78 Conn. 301, 61 Atl. 1010, and was held to authorize a process for invoking the power of the superior court for protection against action of the commissioners unauthorized in law or based upon a misconception by the commissioners of the law or of their powers and duty, but that the portions of the section imposing upon the court the strictly administrative duties of the commissioners were inoperative. These provisions of the act of 1901 appear in the Revision of 1902 as sections 3832 and 3834.

We think the intent of the Legislature expressed in these sections, in connection with other sections relating to the same subject-matter, and especially in connection with section 2 of the act of 1887 (now section 3905 of the Revision of 1902), so far as it affects the case before us, is that any action, authorized with respect to any matter relating to street railways that shall be taken by local municipal authorities, may be retried and determined by the railroad commissioners, and that one injured in his legal rights by unlawful action (whether of the municipal board or of the board of street commissioners), in the exercise of the specified administrative powers, may apply to the superior court or a judge thereof sitting in chambers, through the original process called "appeal," for such appropriate relief as comes within the judicial power vested in the court, and this process runs against the municipal board when the actual injury complained of results from the unlawful action of that board. But, as was said in *Norwalk Street Ry. Co.'s Appeal* and *Spencer's Appeal*, supra, the statute does not transfer the purely legislative and administrative powers or duties, either of the city council or of the railroad commissioners, to the superior court for performance by that court. In such matters the action of the board charged with their performance is final.

In the present case, the actual injury complained of resulted from an order made by the city council, in the exercise of its power of regulation, which the plaintiff claims is, as to itself, unlawful, and an injurious invasion of its legal rights, whether made by the city council or the railroad commissioners. It follows that the trial judge did not err in entertaining the plaintiff's application, but did err in holding that the city council had no power to make the order complained

of, and erred in not rendering judgment that the defendant recover its costs.

There is error, the judgment appealed from is reversed, and the cause is remanded, in order that the trial judge may render judgment for defendant in accordance with this opinion. The other Judges concurred.

(81 Conn. 34)

# BARTLETT v. SEARS et al.

(Supreme Court of Errors of Connecticut. June 25, 1903.)

## 1. WILLS—ACTIONS TO CONSTRUCT—JURISDICTION.

A suit by a trustee under a will, for construction of the will concerning the disposition of a trust fund established thereby, is properly brought in the county of the testator's residence, where the will was probated, notwithstanding none of the parties reside in the state.

## 2. SAME—CONSTRUCTION—DESIGNATION OF DEVISEES—"ISSUE"—"IMMEDIATE ISSUE."

The primary and usual meaning of the term "issue," when used as a word of purchase, is descendants of every degree, and is not equivalent to "immediate issue," which, by the settled construction of the statute against perpetuities, means only children.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1087, 1088.

For other definitions, see Words and Phrases, vol. 4, pp. 3396, 3782-3792; vol. 8, p. 7693.]

## 3. SAME—WORD OF PURCHASE OR LIMITATION.

A will provided for a trust fund, the income, or such portion thereof as the trustee might consider best, to go to C., and upon her death, if she should survive testator, leaving issue, otherwise, upon testator's death, if C. should leave issue surviving him, the trust fund proper was to be paid over and distributed among and in trust for C.'s issue, in pursuance of the terms of any instrument in the nature of a will executed by C., or, in the absence of such instrument, equally among such issue, but if C. should die before testator, leaving no issue surviving him, or should survive him and die leaving no issue surviving her, other disposition was to be made of the fund. The testator was 69 years old when the will was made and C. was then 13. *Held*, that the word "issue" was used by the testator as a word of purchase, and not of limitation.

## 4. SAME—GENERAL RULES—MEANING OF LANGUAGE.

The primary and usual meaning of a term used in a will is to govern, unless the context shows that the testator employed it in a different sense; and, in the will in question, it was the obvious intent of the testator to secure to C. and her descendants, if any, who might survive her, the entire benefit of the trust fund, subject to the trust created by the testator as to C., and such as C. might establish as to her descendants; and the facts did not preclude the testator's intending the use of the word "issue" in its ordinary sense, so as to include grandchildren of C., whether the distribution was to be per stirpes or per capita.

## 5. SAME—EFFECT OF RESULTING CONDITIONS ON CONSTRUCTION.

The object to be accomplished in construing a will is to ascertain the testator's intention from the language used, uninfluenced by any desire to protect interests which, as events turned out, he may, under the rules of law, have left unprotected, for a will cannot be differently construed according to the conditions at the time of distribution; and, while the event of a contingency may determine that a bequest shall take effect, while a different event would require a disposition which would be

contrary to law and void, and thus affect the operation of the will, it cannot affect its construction.

**6. PERPETUITIES—REMOTENESS OF LIMITATION—BEQUEST OF REMAINDER TO ISSUE.**

Where a will gave the income from a trust fund to C., then 13 years of age, for life, and the fund proper to her issue to be distributed in pursuance of the terms of any instrument in the nature of a will executed by her, and in the absence of such instrument, the fund to be divided equally among such issue, the disposition of the remainder, in the absence of an exercise of the power of appointment, would be void, as against the statute of perpetuities in force at the time of making the will and at the testator's death.

**7. WILLS—CONSTRUCTION—ESTATES CREATED—LIFE ESTATE—EFFECT OF VOID PROVISIONS AS TO REMAINDER.**

The invalidity of the provision for the issue of C., if she did not execute the power of appointment, would not affect the validity of C.'s life interest; that being clearly separable.

**8. PERPETUITIES—REMOTENESS OF LIMITATION—POWER OF APPOINTMENT—VALIDITY OF EXERCISE OF POWER.**

The invalidity of the provision for issue of C., in case she did not exercise the power of appointment, would not destroy her power of appointment among her issue, provided she did not violate the provisions of the statute, for the power could only be exercised by an act during her life, taking effect on her death, and the term would not necessarily be too remote under the common-law rule against perpetuities, and a power, which cannot be exercised except within the limits of that rule, is not invalid because the instrument creating it purports to authorize, not only an appointment good under that rule, but one which would be void under that rule, since, in legal effect, a power is to do what is lawful, and not what is unlawful.

**9. POWERS—POWER OF APPOINTMENT—VALIDITY OF APPOINTMENT BY WILL.**

Whenever a power of appointing beneficiaries under a will is exercised, the validity of the appointment is determined by the same rule as if the testator, who created the power, had made the provision in his will in favor of the same appointee.

**10. PERPETUITIES—REMOTENESS OF LIMITATION—POWER OF APPOINTMENT.**

S. willed the income of a certain fund to C. for life, and the fund proper to the issue of C., and C. was given power to control, by will, the distribution among such issue. *Held*, that the power was a special one, and the remoteness of the estates which it purported to give must be measured with respect to the common-law rule against perpetuities, from the death of S., when it was created.

**11. SAME—EXECUTION OF POWER OF APPOINTMENT—VALIDITY.**

C.'s will recited the power given by the will of S., and appointed the fund to her husband in trust, to divide it into so many equal shares as there should be living, at her decease, child or children of C., or issue of any then deceased, and thereupon to transfer to the issue of deceased children the respective shares by representation of their parents, and the share set apart for every surviving child of C. to be held in trust during his or her natural life, and paid to him or her as the husband might consider best, etc., with full power to pay over and convey in fee simple, to any such child of full age, any part or all of the share held for him or her, free from the trust, and upon the decease of every such child, to transfer the share held for him or her to such persons as such child might appoint by will after reaching the age of 21 years, and, in default of such appointment, to such persons as would take in case of intestacy. *Held*, that while the trust as to C.'s children was active, and no

child could absolutely demand any part of the principal, the appointment of C., as to her children, was not void for remoteness, since the share of each was set apart from the death of C., who was living at the death of S.

**12. SAME.**

The life estate to C.'s children, being given to the immediate issue of C., who was in being at the death of S., would not be affected by the statute of perpetuities in force at his death.

**13. SAME—STATUTORY PROVISIONS—EFFECT.**

The provisions for the children of C.'s children not surviving her, not being for her immediate issue, would be void under the statute of perpetuities, in existence at the death of S., notwithstanding its repeal during C.'s life, for the statute limited the testamentary rights of S.

**14. WILLS—CONSTRUCTION—BEQUEST TO CLASS—EFFECT OF INCAPACITY OF SOME OF CLASS.**

A bequest to a class, to be equally divided among them, inures to the sole benefit of such as are competent to receive it; and, where C. had two children surviving, they would each take one-half of the life interest in the income under the appointment in her will, subject to the trust provisions, notwithstanding the invalidity of the provision as to the children of C.'s children not surviving her.

**15. PERPETUITIES—REMOTENESS OF LIMITATION—APPOINTMENT OF REMAINDER.**

The appointment, in the will of C., of the remainder after the death of each of C.'s surviving children, was void, for it was not necessarily to vest until the death of C.'s surviving children, which might be more than 21 years after the death of C.

**16. WILLS—VOID BEQUESTS—RIGHTS OF RESIDUARY LEGATEE.**

Void bequests of personal property inure to the benefit of a residuary legatee; and, where the income of a trust fund was willed to C., with power to appoint the beneficiaries of the remainder, but the execution of the power was void in part as against the statute of perpetuities, the portion disposed of by the invalid appointment would become a part of a residuary bequest.

**17. SAME—ACTIONS TO CONSTRUER—JURISDICTION—APPOINTMENTS BY WILL OF NONRESIDENT DONEE OF POWER.**

Where a trust fund is created by the will of a resident testator, and a power of appointment of the beneficiaries is attempted to be exercised by a nonresident donee of the power, and part of the funds have been invested in real estate in other states, the court of the testator's domicile has authority to construe the will as to the execution of the trust and the validity of the execution of the power.

Case Reserved from Superior Court, New London County; George W. Wheeler, Judge.

Suit by Francis Bartlett, trustee, against Herbert M. Sears, trustee and executor, and others, for the construction of the will of John F. Slater. Reserved, on a finding of facts, for the advice of the Supreme Court of Errors.

Suit by a trustee under the will of John F. Slater, late of Norwich, deceased, who died in 1884, for the construction of certain provisions in the will, which was made shortly before his decease, and admitted to probate shortly after it. The action was brought to the superior court in New London county, and reserved on a finding of facts for the advice of this court at its term, to be held in the Second judicial district in October, 1908. By stipulation under Gen.



St. 1902, § 483, the cause was then transferred for trial at the June term, 1908, in the Third judicial district, and heard there. Advice that none of the estate affected by said provisions is intestate. The will is printed in full in the report of *Bartlett v. Slater*, 53 Conn. 102, 22 Atl. 678, 55 Am. Rep. 73.

Charles C. Russ, for plaintiff, Francis Bartlett, trustee. Walter S. Schutz and Stanley W. Edwards, for Herbert M. Sears, trustee under will of Caroline B. Sears. Anson T. McCook, for Herbert M. Sears, executor. William F. Henney, for Elizabeth and Phyllis Sears, minors. Edward M. Day, for executor and residuary legatee.

BALDWIN, C. J. (after stating the facts as above). None of the parties in this cause reside in this state, but it was properly brought in New London county, since it concerns the disposition of a trust fund established by the will of a citizen of Norwich, admitted to probate by the court of probate for the district of Norwich; and all the defendants have entered appearances. John F. Slater, the testator, bequeathed to the plaintiff \$1,000,000 in trust, "to hold, sell, invest and reinvest the same at public or private sale from time to time in such manner as he may deem prudent, and to pay the income arising therefrom or such portion thereof as he may consider best, and at such times as he sees fit to my granddaughter Caroline Bartlett during her natural life. Any portion of said income which shall not be so paid over to her by said trustee shall be invested by him and form part of said trust estate with like powers as to investment, sale and reinvestment." At the date of the will the testator was 69 years old, and Caroline Bartlett was 13 years old. This granddaughter and his son, William A. Slater, were his only heirs at law. She afterward became the wife of Herbert M. Sears, and died in 1908, leaving two minor daughters as her sole surviving issue. The will contained this further provision: "Upon the decease of my said grand daughter if she shall survive me leaving issue, otherwise upon my death if my said grand daughter shall leave issue surviving me, then to pay over and distribute said trust fund and any undistributed income thereof to and among and in trust for such issue of my deceased grand daughter in pursuance of the terms of any instrument in the nature of a will executed by such deceased grand daughter according to the laws of this state, or in the absence of such instrument executed by her, then to pay over and distribute the same equally among such issue. If my said grand daughter shall die before me leaving no issue surviving me or shall survive me and die leaving no issue surviving her, then upon the happening of either contingency three hundred thousand dollars of said trust fund shall be paid to said Francis Bartlett as and for

his own estate, and the remainder of said trust fund, principal and interest shall be paid over and distributed by said trustee to my heirs-at-law." The trustee asks us whether these dispositions of the remainder are valid.

The primary and usual meaning of the term "issue," when used as a word of purchase, is descendants of every degree. *Dayenport v. Hanbury*, 3 Ves. Jr. 258; *Leigh v. Norbury*, 13 Ves. Jr. 340; *Hawkins on the Interpretation of Wills*, \*87; *Soper v. Brown*, 136 N. Y. 244, 32 N. E. 768, 32 Am. St. Rep. 731; *Pearce v. Rickard*, 18 R. I. 142, 28 Atl. 38, 19 L. R. A. 472, 49 Am. St. Rep. 755. It was used by the testator as a word of purchase, and not of limitation. His granddaughter had no full life estate, since the trustee, at his discretion, could withhold any part of the income from her, and her issue, should she leave any surviving her, were to take a very different estate, proceeding from her exercise of a power, or in default of that, from a direct bequest. The primary and usual meaning of a term used in a will is to govern, unless the context shows that the testator employed it in a different sense, if, thus construed, the provisions of the will, as applied to his estate, have an intelligible and sensible import. *Leake v. Watson*, 60 Conn. 498, 506, 21 Atl. 1075; *Connecticut T. & S. D. Co. v. Chase*, 75 Conn. 683, 692, 55 Atl. 171. It was obviously the intention of the testator, in the will now in question, to secure to Caroline Bartlett and her descendants, if any, who might survive her, the entire benefit of the trust fund, subject to the trusts which he had established as to her, and she might establish as to them. Such an intention was natural and reasonable.

There are but two clauses in the will which, by possibility, could be considered as indicating an intention to use "issue" otherwise than as expressive of its primary and usual meaning. One is that providing for the event of his granddaughter's dying before him leaving issue. It is argued that while a man of 69 might well anticipate the marriage of a girl of 13, and the contingency of her death, leaving children, during his own lifetime, it is highly improbable that he should contemplate living to see her have grandchildren. That event, however, might have occurred within 20 years from the date of the will, and, "All men think all men mortal, but themselves." It is also coupled with the provision for her dying after him leaving issue, and her dying after him leaving only grandchildren, or leaving children and the issue of deceased children, was an event which he must have considered as not improbable. The other clause to be particularly considered is that creating the ultimate remainder in favor of her surviving issue equally, in the absence of an instrument of appointment. An equal distribution, however, is as natural a provision in the case of grandchildren as



of children, and this clause is fully consistent with an intent to use the word "issue" in its primary and usual sense, whether it be construed as requiring a distribution per capita or per stirpes. See *Raymond v. Hillhouse*, 45 Conn. 467, 29 Am. Rep. 688; *Heath v. Bracraft*, 49 Conn. 220; *Soper v. Brown*, 136 N. Y. 244, 32 N. E. 768, 32 Am. St. Rep. 731.

The general intent of the testator is plain. It was to secure the whole of this fund to Caroline Bartlett, and those of her descendants who might survive her. Had she died leaving as such two grandchildren, instead of two daughters, it cannot reasonably be supposed that the testator would have wished to divert the fund in part to their father, and the balance to his own heirs at law. Those heirs were their uncle and their mother. Such a division, if she had died insolvent, might have left them penniless, and in any event would have excluded them from any direct benefit as purchasers under the will. It was suggested at the bar that a will providing for future contingencies might properly be differently construed according to what in fact might be the event. On the contrary, the only endeavor of the court must be to ascertain the testator's intention from the language which he used, uninfluenced by any desire to protect interests which, as things turned out, he may, under the rules of law, have left unprotected. *Jackson v. Alsop*, 67 Conn. 249, 34 Atl. 1106. The event of a contingency may determine that a bequest shall take effect, although in another event a different disposition of the property was, under the terms of the will, to have been made, which would have been contrary to law and void. *Thresher's Appeal*, 74 Conn. 40, 49 Atl. 861. Such events may thus affect the operation of the will, but never its construction. *White v. Allen*, 76 Conn. 185, 189, 56 Atl. 519.

As, then, the word "issue" in Mr. Slater's will must receive its primary and usual meaning, it follows that, under the statute of perpetuities in force when it was made and at the death of the testator, the gift in remainder to the issue of Mrs. Sears, in the absence of an instrument exercising her power of appointment, was void. "Issue" is not equivalent to "immediate issue"; and "immediate issue," by the settled construction of that statute, meant only children. *Tingler v. Chamberlin*, 71 Conn. 466, 42 Atl. 718. The invalidity of this provision for the issue of Mrs. Sears did not affect the validity of her life interest under the trust; that being clearly a separable part of the testator's scheme of disposition. *Andrews v. Rice*, 53 Conn. 506, 5 Atl. 823. Nor did it destroy her power of appointment, provided it should be exercised with due regard to the prohibitions of the statute. The appointment could only be by an act done during her life, and taking effect upon her death. The time for making

it was therefore not too remote under the common-law rule against perpetuities. A power which cannot be exercised, except at a time within the limits of that rule, is not invalid because the instrument creating it purports to authorize, not only an appointment which would be good under that rule, but one that would be void under that rule. *Gray on Perpetuities* (2d Ed.) pp. 376, 399.

Every testamentary power of appointment by will, in favor of the issue of a certain person, would on its face appear to authorize its exercise in favor of the issue of the remotest generation. In legal effect, however, it is a power to do what is lawful, and not what is unlawful. *Hillen v. Iselin*, 144 N. Y. 365, 39 N. E. 368. Whenever such a power is in fact exercised, the validity of the appointment is determined by precisely the same rule as if the original testator, who created the power, had made in his own will the same provision in favor of the same appointee. *Gray on Perpetuities* (2d Ed.) § 526b; *Albert v. Albert*, 68 Md. 352, 12 Atl. 11; *Graham v. Whitridge*, 99 Md. 249, 57 Atl. 609, 58 Atl. 36, 66 L. R. A. 408. This must be true, since the appointee really takes from the original testator; the donee of the power acting as a mere conduit of the former's bounty.

Mrs. Sears left a will, which has been duly admitted to probate in Essex county, Mass. of which she was an inhabitant. It is an instrument executed according to the laws of this state concerning the execution of wills. In this will she recited the power given her in the will of her grandfather, and then gave, devised, and appointed the trust fund to her husband in trust "to divide said fund and property into so many equal shares as there shall be living at my decease child or children of mine, or issue of any then deceased, and thereupon to transfer, pay over and convey, in fee simple, one of said shares to or among the then living issue of every then deceased child of mine by representation of its parent. And the share so set apart for every then living child of mine to continue to hold in trust during his or her natural life, and to pay to him or her the net income arising therefrom or such portion only thereof as my said husband may consider best and at such times as he may see fit, or to apply the same to the support and education of such child, and any of said income which shall not be paid over to any such child, or so applied, shall be added to the principal or capital of the trust fund then held for him or her as part thereof thenceforth. And I give to my husband full power in his absolute and uncontrolled discretion to pay over, transfer and convey in fee simple to any such child who has arrived at full age any part or the whole of the principal or capital of the share then held in trust for such child, free and discharged thenceforth from any trust. But the power so to retain and add to the capital such part of

such income as he shall see fit and also the power to pay over, transfer and convey to any child of full age any part or the whole of the principal or capital of the share then held in trust for such child are given to my said husband only and not to any other trustee. And every other trustee than my said husband shall pay the whole net income of every trust fund unto that child of mine for whose benefit the same is held in trust, or to his or her guardian, if any, but without any power of alienation or anticipation on the part of any such child, and none of the said income shall be subject to the claims or control of any husband, wife or creditor of any such child. And upon the decease of every such child of mine, to transfer, pay over and convey the principal or capital of the trust property then held for his or her benefit unto such person or persons, and to such uses, as he or she shall direct or appoint by any last will or instrument in the nature of a last will, executed and attested as such after arrival at the age of twenty-one years; but in default of such appointment, then to the same persons, for the same estates and in the same proportions, as would have taken the same if such child had died owning the same property in his or her own right and intestate."

The power which it was thus sought to exercise was a special one. The remoteness of the estates which it purports to give must therefore be measured from the time when it was created—that is, from the death of John F. Slater—so far as respects the common-law rule against perpetuities. *Lawrence's Appeal*, 136 Pa. 345, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925. Upon the decease of Mrs. Sears the estates in favor of the then living issue of any of her children who might die before her were to become vested, the legal title absolutely, and the beneficial interest immediately and unalterably. The legal title supporting the estates in favor of her children was likewise then to become absolutely vested, as well as the beneficial interests in the income for the life of each child; but it was not so with the interests in remainder after each life estate. The trust was an active one. Neither child had an absolute right to demand any part of the principal from the trustee during her life; and in default of any appointment by will her share was to go to others, not by descent, but as purchasers under the power given to her mother by the will of John F. Slater. It was, however, set apart, as hers, from the date of her mother's death, and a certain interest for life in the income was then created in her favor. This interest, having thus vested immediately after the expiration of a life which was in being at the death of John F. Slater, fell within the limits of time fixed by the common-law rule, and was therefore, so far as concerns that, not void for remoteness. *Connecticut T. & S. D. Co. v. Hollister*, 74 Conn. 228, 232, 50 Atl. Co. v. *Hollister*, 74 Conn. 228, 232, 50 Atl. 750; *Pullitzer v. Livingstone*, 89 Me. 359, 36 Atl. 634; *Johnston's Estate*, 185 Pa. 179, 185,

39 Atl. 879, 64 Am. St. Rep. 621. It was also an estate given to the immediate issue of one in being at the death of John F. Slater, and so, considered by itself, was not affected by the statute of perpetuities which was in force at his death.

Was it affected, either by the rule or the statute, on account of the manner in which it was linked in the exercise of the power, with other interests more remote in character? Here again the test must be the effect which would properly have been given to the will of John F. Slater had he, in lieu of the provisions which have been quoted, bequeathed the principal of the trust fund in remainder to those to whom Mrs. Sears has attempted to send it by her will; for, although the statute was repealed before this will was executed, it limited the testamentary right of Mr. Slater, and it is that right upon which hers depends and by which it is exactly measured. One to whom a power of appointment is given by will stands to the testator substantially in the position of an agent toward his principal. An agent cannot do that which the principal cannot do. Such a bequest by John F. Slater would have been to such children of his granddaughter as might survive her, "or" the issue of any child of hers who might have died before her; the fund to be divided into a corresponding number of equal shares, one of which was to pass at once to the issue of any deceased child, and each of which, in the case of a surviving child, was to be held upon a long trust, with remainder over. As this would contemplate a provision, both for children and grandchildren of Mrs. Sears, should she leave grandchildren by a deceased child, it is plain that, so far as the interest in the grandchildren is concerned, it would be too remote under the statute. The word "or" cannot fairly be understood as an alternative provision, under which grandchildren by a deceased child would take only if there were no children.

A class gift, however, might have been created by Mr. Slater, in which the class, as described, contained some members who were, and others who were not, capable of taking the estate bequeathed to them, with the result that the entire estate would pass to those of the former description. Mrs. Sears for certain purposes could, in effect, make a will for him. The language of her will, with respect to those purposes, may fairly be read as intended for the benefit of such a class. In 1903, when she executed it, she had two daughters, as the only issue of her marriage. One was 10 years old, and the other 8. She would naturally wish, under such circumstances, to provide for her children whether their number should be increased or not, without discrimination, and to let the issue of any who might not survive her take as the representatives of their parent. To accomplish this purpose she formed a class consisting of her children, who would be competent to take, and of the issue of any de-

ceased children, who would be incompetent to take. The fund was a unit. The number of shares into which it was to be divided could only be ascertained upon her decease, and when then ascertained was unalterable. A bequest to such a class, to be equally divided among them, inures to the sole benefit of such as are competent to receive it. *Downing v. Marshall*, 23 N. Y. 366, 373, 80 Am. Dec. 290. The trust fund is therefore to be divided into two shares, only; the class, as formed upon the decease of Mrs. Sears, consisting of the two daughters, who were living when she made her will. Each of these, being her "immediate issue," was competent to take under the statute against perpetuities, and took within the time allowed by the common-law rule against perpetuities. Being competent to take, all the provisions in their favor which were to take full effect during their lives are valid. The terms of the trust, to endure for their lives, are not beyond the authority given by the will of Mr. Slater. Their father, in his discretion as trustee, may give to each her full share of the fund at her majority, for if she reaches full age, it must be within 21 years from her mother's decease, and her mother was in being when John F. Slater died. The will of Mrs. Sears is to receive the same construction in these respects as if she had designated her two daughters by their individual names. *Gray on Perpetuities* (2d Ed.) §§ 523c, 523d.

Different considerations apply to the remainder interests, which Mrs. Sears attempted to create, to take effect after the decease of each child. No estate in the principal of the fund was given by her to either child. There was no such general power of appointment, by either deed or will, as might have been construed to carry an equitable title. *Gray on Perpetuities*, § 524. The trustee may or may not exercise his discretion in favor of either at her majority, should she reach that age, and should he be then living. During the life of each daughter, she can do no act immediately affecting the principal of her share. It is to devolve on persons to be first determined on her death, which may occur far later than 21 years after the decease of her mother. The vesting of the beneficial interests in the principal could not have been so long postponed by any direct provision in the will of John F. Slater, and therefore could not be under the testamentary power granted by him to Mrs. Sears. *Gray on Perpetuities* (2d Ed.) §§ 514-516. It is also, by reason of the statute of perpetuities, fatal to the alternative remainder in favor of those who would take by law intestate estate of a child, dying without exercising her power of appointment, that this might send the fund to those neither in being at the death of John F. Slater nor the children of such persons. It follows that the power of appointment given in the will of Mrs. Sears, and also the remainder over in default of an appointment under that power, are void. These provi-

sions, however, do not necessarily defeat or abridge the prior estates, which were to take full effect during the lives of her children. They are separable from these, and, to carry the scheme of disposition fund in the will of Mrs. Sears into effect, as far as may be, comports best with her manifest intention. The will of John F. Slater purported to require the trustee, upon the death of Mrs. Sears, to pay over and distribute the trust fund to and among and in trust for her issue, "in pursuance of the terms of any instrument in the nature of a will executed by her according to the laws of this state, or, in the absence of such instrument executed by her, then to pay over and distribute the same equally among such issue." She has left an instrument of the kind described, but its terms can be given effect only in part. This does not present the case of the absence of such an instrument. The instrument exists, and is effectual to convey valuable interests to those whom it was intended to benefit. To support it as far as may be carries out, pro tanto, the manifest intent of John F. Slater, as well as of Mrs. Sears, and prevents the occurrence of a contingency, upon which his will purported to create a void remainder.

Void bequests of personal property inure to the benefit of a residuary legatee. *Bristol v. Bristol*, 53 Conn. 242, 255, 5 Atl. 687. The residuary bequest to William A. Slater invested him with the equitable title to the share of the trust fund to be set apart for each of the daughters of Mrs. Sears, subject to the interests created in her favor during her life by her mother's will, and to the power of her father, as trustee, to transfer to her, at her majority, all or any part of the principal. Mr. Slater has filed a brief, making no claim as residuary legatee, but stating his belief that in his father's will the word "issue" was employed in the sense of "children," and that the testator meant to provide for the children only of Mrs. Sears by his provision for the disposition of the remainder, in the absence of a testamentary instrument in which she effectually exercised her power of appointment. The court, while fully appreciating the motives leading the residuary legatee to pursue this course, must take the will of John F. Slater as it is written, and be guided solely by the rules of law in giving it its true construction.

The plaintiff has, as trustee, from time to time, purchased and now holds real estate in New York, Illinois, and Missouri, paid for out of the trust fund. The fund has, under his administration, been considerably increased, and none of the parties in interest have challenged in this proceeding the propriety of these investments. Notwithstanding this conversion of personality into realty, as the plaintiff is accountable before the courts of Connecticut for the execution of this trust, which was created by the will of a domiciled inhabitant of Connecticut, it is within our province to advise, without reserve, as to the construc-

tion of that will, and also as to that of Mrs. Sears, though she was a domiciled inhabitant of another state, so far as she attempted to exercise her power of appointment. Clarke's Appeal, 70 Conn. 195, 210, 218, 39 Atl. 155; Clarke v. Clarke, 178 U. S. 186, 192, 20 Sup. Ct. 873, 44 L. Ed. 1028.

The superior court is advised that (1) Mrs. Caroline B. Sears exceeded her power of appointment; (2) the limitation of both the statute and rule against perpetuities began to run from the death of John F. Slater; (3) the terms of the appointment made by Mrs. Sears created, in certain respects, a perpetuity; (4) the appointment is severable, and not wholly bad; (5) so much thereof is valid as provides for a trust during the life of each daughter of Mrs. Sears, subject to a right in the present trustee, in his discretion, to transfer all or any part of her share in the fund to her, on her majority; (6) none of the trust fund is intestate estate of John F. Slater; (7) the beneficial interest in the fund belongs to William A. Slater as residuary legatee of John F. Slater, subject to the life interest of each of said daughters of Mrs. Sears in her share thereof, and to the right above described of their father, as trustee; (8) the trust fund is no part of the estate of Mrs. Sears; and (9) the plaintiff, as trustee, is accountable before the courts of this state for the entire trust fund, notwithstanding his investments of part thereof in real estate.

No costs will be taxed in this court. The other Judges concurred.

(80 Conn. 681)

DRESSER et al. v. HARTFORD LIFE INS. CO. et al.

(Supreme Court of Errors of Connecticut. June 9, 1908.)

**1. INSURANCE—MUTUAL INSURANCE—REGULATION—ACTION—PARTIES—COMMON INTEREST.**

Certificate holders in the safety fund department of an insurance company were properly joined in a suit for relief for mismanagement, under Gen. St. 1902, § 617, authorizing joinder of persons having a common interest in the subject of the action.

**2. EQUITY — BILL—PARTIES—MULTIFARIOUSNESS.**

Where, in a suit by certificate holders of an insurance company to restrain alleged mismanagement and to have their rights declared, the complaint was sufficiently broad to permit proof of facts showing that the insurance company and its officers, made defendants, jointly participated in the alleged misappropriation of funds and mismanagement of the business of the "safety fund" department in which complainants were interested, and that defendant security company was the custodian of the funds the ownership of which was in controversy, the complaint was not multifarious in joining the insurance company, its officers and directors, and the surety company, under Gen. St. 1902, § 618, authorizing the joinder of persons having an interest in the controversy whose presence is necessary to a complete determination of the controversy.

**3. SAME—MISJOINDER—EFFECT.**

Misjoinder of a party defendant in a suit for equitable relief is not effective to defeat the

action as to other proper parties, but only prevents a recovery against the party improperly joined, as expressly provided by Gen. St. 1902, § 622.

**4. INSURANCE—MUTUAL INSURANCE—REGULATION—ACTION—COMPLAINT—CONSTRUCTION.**

Where a complaint alleged that defendant insurance company, both before and after the issuance of certain certificates of insurance in its safety fund department, made representations and explanations by circulars directed to complainants and circulated in the solicitation of business as to the meaning of the certificates, and thereafter endeavored to suspend such department and terminate the insurance by claiming a construction of the certificates in direct variance with the representations in the circulars, on which complainants relied, the complaint sufficiently charged fraud, and justified the consideration of the circulars to determine the original intention of the parties as evidenced by the language of the certificates.

**5. SAME.**

Where a complaint alleged that plaintiffs accepted certain insurance certificates relying on representations of the insurance company made in certain circulars as to the meaning of the certificates, and that the company fraudulently made the terms of the certificate so obscure that it might afterward successfully place on them an interpretation variant from the language of the circulars, which the company was endeavoring to do, plaintiffs were not required to further allege that they were unable to understand the language of the certificates, or that they were misled by the terms thereof, which were not entirely clear.

**6. SAME—DEPARTMENTS—DISCONTINUANCE.**

Where an insurance company was authorized by its charter to issue insurance on other than the "safety fund" plan, and neither its circulars nor certificates issued on such plan contained any promise to the holders that it would not issue policies on any other plan, or that it would continue to issue "safety fund" certificates longer than it did, it might discontinue issuing such certificates against the protest of the holders.

**7. SAME—INTENT.**

Where an insurance company had a legal right to cease issuing a certain plan of insurance, it was immaterial that its officers, in discontinuing such insurance, were actuated by improper motives.

**8. SAME—LIABILITY OF DIRECTORS—MANAGEMENT—COMPLAINT—WRONGFUL ACTS.**

Where a complaint against an insurance company, its officers and directors, charged that the codefendants, managers, and stockholders during certain years named appropriated to their own use money belonging to the "safety fund" department, in which plaintiffs were interested, to an amount stated, which, by the terms of the insurance certificates entitling plaintiffs to participate in such fund, the insurance company, its managers and stockholders, had no right to do, the complaint was not demurrable for failure to allege that the alleged diversion was wrongfully made.

**9. SAME — CONTRACT — CONSTRUCTION—EXPENSE DUES.**

Where a stock insurance company maintained a mutual safety fund department, in which it issued certificates by which the holders agreed to pay to the company for expenses \$3 per annum on each \$1,000 indemnity so long as the certificates should remain in force, the certificate holders had no interest in the expense dues so paid, which belonged to the insurance company so long as it continued to manage the business of the "safety fund" department, though it ceased to issue new certificates therein.

**10. SAME.**

A complaint against an insurance company and its managers alleged misappropriation, ac-

tual and threatened, of the moneys of a safety fund department in which complainants were insured, one paragraph declaring that after the outstanding insurance had been reduced to \$1,000,000, and defendant had ceased to do business on that plan, it claimed and continued to claim that the safety fund did not belong to the policy holders but to the insurance company, and asserted the right and intention to make demands for mortuary dues and assessments without limit as to number or amount, and to levy and demand such dues and expenses, contrary to the meaning and intent of complainants' certificates, together with the right to forfeit complainants' rights in case of failure to pay such assessments. *Held*, that such paragraph did not describe acts which in themselves constituted a cause of action entitling complainants to relief, but that such allegations were properly in the complaint as a matter of description relevant to the alleged misappropriation.

#### 11. SAME — RELIEF—GROUNDS—THREATENED INJURY.

Where an insurance company maintained a safety fund department in which it wrote certificates on a plan providing that when the outstanding certificates in such department were reduced below \$1,000,000 the safety fund should be divided among the certificate holders, and it was admitted by demurrer to a bill by such holders for construction of the certificates and other relief that the company had ceased to write further insurance in such department, and was claiming that the safety fund belonged to the insurance company, and that the insurance in that department had been diminished some \$60,000,000 since 1897, complainants' suit was not premature because the outstanding certificates at the time the suit was brought amounted to \$40,000,000, as equity may grant relief against a threatened injury where plaintiffs' rights may be prejudiced by delay.

#### 12. SAME—CERTIFICATE—CONSTRUCTION.

Where certificates of insurance in a safety fund department of an insurance company declared that if at any time the insurance company should fail by reason of insufficient membership, or should neglect, if justly and legally due, to pay the maximum indemnity provided for by the terms of any certificate, it should be the duty of the trustee to at once convert the safety fund into money and divide the same among the holders of the certificates then in force, such provision was susceptible, by itself, to a construction that there should be a division of the safety fund among the certificate holders when their number became so reduced that the aggregate amount of their insurance did not exceed \$1,000,000.

#### 13. SAME—"FAIL."

A provision of an insurance certificate required the division of a safety fund if at any time the insurance company should "fail" by reason of insufficient membership or should neglect to pay the maximum indemnity provided for by the terms of any certificate. *Held*, that the word "fail," as so used, did not mean a default in any obligation assumed by the insurance company, but referred to insufficiency of the mortuary fund "by reason of insufficient membership" to pay the certificate claims against the company.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2644, 2645.]

#### 14. SAME—CONSTRUCTION OF POLICY.

Where the construction of an insurance policy is doubtful, that construction most favorable to the insured should be adopted.

#### 15. SAME—MORTUARY CALL—RATES.

An application for insurance which by its terms was made a part of the contract obligated each member to pay "all mortuary calls determined as within set forth." Attached was a mortality table, showing the method of determining mortuary calls, in which the ratios were

graduated according to the ages of the certificate holders for the assessment against each holder of a \$1,000 certificate for the collection of a death loss of \$1,000, the method being based on a minimum outstanding insurance of \$1,000,000. No other method for making mortality calls was provided in case the total outstanding insurance became less than \$1,000,000, and it was expressly stated that the ratios would decrease as the outstanding insurance increased. *Held*, that the insurance company had no right to increase the rate of mortality calls beyond the amount so specified.

#### 16. SAME—RECEIVERS—APPLICATION FOR APPOINTMENT—DUTY OF INSURANCE COMMISSIONER — APPLICATION BY CERTIFICATE HOLDERS.

Gen. St. 1902, §§ 3489, 3490, 3491, 3546, prescribe the powers of the insurance commissioner, requiring him to see that all laws respecting insurance companies are faithfully executed, and authorizing him to examine the methods of business of any company doing insurance business in the state, and, if any company fails to obey any order to discontinue any illegal or improper method of business, to apply for an injunction, or a receiver, or both, etc. *Held*, that where an application for a receiver of an insurance company is made because of alleged mismanagement and misappropriation of assets by its managers and stockholders as authorized by section 3490, such application must be made by the insurance commissioner, and cannot be made by certificate holders except in so far as it is incidental to such an accounting as may be ordered.

#### 17. SAME—ACCOUNTING.

Where an insurance company maintained a safety fund department, and a complaint by certificate holders therein charged that the company had suspended business in such department, and was fraudulently claiming to own the safety fund which defendant had previously represented belonged to the certificate holders, and had changed the investment thereof from United States bonds, as originally contemplated, to other securities, and misappropriated and lost large sums therefrom, such allegations were sufficient to entitle complainants to an accounting.

#### 18. EQUITY—FORFEITURES.

A court of equity will not lend its aid to cause or to enforce a forfeiture of moneys lawfully received by an insurance company from certificate holders, when other adequate relief may be granted for the alleged injuries.

#### 19. INSURANCE—ASSESSMENTS—FORFEITURE—RESCISSION.

Where there has been no rescission of a contract of insurance, and no offer or apparent intention on the part of either party to rescind it, a forfeiture of moneys lawfully received by the insurance company from the certificate holders will not be declared.

#### 20. SAME—OFFICERS OF CORPORATION—MISAPPROPRIATION OF FUNDS—DAMAGES.

Where it was alleged that defendants, officers of a stock insurance company maintaining a safety fund mutual department, had mismanaged the same and misappropriated the funds thereof to their individual benefit, and that of the stockholders of the corporation, to the detriment of the certificate holders in the fund, such allegations were sufficient to permit proof of facts justifying a recovery of money damages against such officers.

#### 21. SAME—SAFETY FUND—RIGHTS OF CERTIFICATE HOLDERS—ACTS OF TRUSTEE.

Where an insurance company maintained a safety fund in the hands of a trust company to secure certificates of life insurance in an assessment department, and agreed that when the insurance in such department was reduced below \$1,000,000 the fund should be divided among the remaining certificate holders, such holders, while the outstanding insurance far exceeded the amount specified, had such an in-

terest in the fund as would entitle them to sue to restrain the trust company from unlawfully changing the securities in which the fund was invested with the consent and procurement of the insurance company.

**22. ACTION—NATURE AND FORM—LEGAL AND EQUITABLE RELIEF.**

Under the express provisions of Gen. St. 1902, § 613, legal and equitable relief may properly be demanded in the same action.

Appeal from Superior Court, New Haven County; Silas A. Robinson, Judge.

Action by Charles H. Dresser and certain other holders of certificates of insurance in the "safety fund" department of the Hartford Life Insurance Company against it and others for an injunction and an accounting, and for damages and other relief on account of the alleged actual and intended misappropriation of the funds and mismanagement of the business of such department. Demurrers were sustained to the bill, and plaintiffs appeal. Reversed and remanded.

The plaintiffs are 31 holders of certificates of insurance issued by the defendant insurance company on or about the 1st of December, 1890. The defendants are the Hartford Insurance Company, its president, secretary, and its directors, who are said to constitute a majority of its stockholders, and the Security Company of Hartford. The first seven paragraphs of the complaint allege that the defendant insurance company was originally chartered in 1866, with a capital stock of \$200,000, under the name of the Hartford Accident Insurance Company; that its charter has since been amended by different acts of the Legislature; that with a capital stock of \$500,000 it now transacts insurance business under various plans, including level premium life insurance, for the benefit of its stockholders, and that prior to 1880 it had invented a plan of assessment life insurance which was published and known as the "safety fund plan," the principal features of which, as set forth in paragraph 8 of the complaint, are the following:

"(8) Each person applying for insurance under the plan was to pay an admission fee of from \$8 to \$40; to pay annually, for the sole purpose of paying the expense of said insurance on said safety fund plan, \$3 for each \$1,000 of insurance; to pay as mortuary payments or assessments to meet death losses an amount graduated according to the policy holder's age when the assessment was made, the amount of his policy, and the total amount of insurance or indemnity in force with the company; to pay \$10 on each \$1,000 of his insurance to make up a 'safety fund.' This safety fund was to be deposited with the defendant, the Security Company of Hartford, Conn., as trustee. As often as the fund composing such sum amounted to a sufficient sum to purchase \$1,000 par value of United States bonds, such trustee was to make investments of such funds therein and register the same in its name as trustee of the 'safety fund' of said insurance company. The earn-

ings of this safety fund after it reached \$300,000, and all contributions to said fund after it reached \$1,000,000 in United States bonds par value, were to be divided up among the remaining certificate holders in proportion to the face amount of their certificates. In case of failure of any certificate holder to make payments in accordance with his agreement, his interest in said safety fund and all his claims were to be forfeited for the benefit of the remaining certificate holders; and, when the face amount of outstanding certificates was less than \$1,000,000, it should be divided among the outstanding certificate holders in proportion to the face amounts of their certificates. Said fund was to belong absolutely to the certificate holders, and the company was to have no interest whatsoever therein, except in its application for the benefit of the certificate holders in accordance with the terms of said plan."

Other material allegations in the several paragraphs of the complaint are as follows:

"(9) Some time in the year 1880 the defendant insurance company adopted said plan, and publicly announced that it would do business on said plan and in accordance with the terms thereof as hereinbefore stated, and particularly announced to the public and all certificate holders that said safety fund was to belong absolutely to the policy holders; that the company had no interest in it except in its application for the benefit of the certificate holders in accordance with the terms of the safety fund plan as above outlined, and that when the insurance outstanding was reduced to \$1,000,000 the principal of said fund would be divided among the remaining certificate holders. Said announcements continued down to about March, 1899. These statements were made in numerous writings and by parol by the officers, managers, and agents of said company to the public, and to all certificate holders, and to all persons contemplating becoming certificate holders as an inducement to take said certificates and make payments thereunder, and particularly said company did in the year 1880 cause to be so published and issued in large numbers a circular of which Exhibit A, hereto annexed, is a copy. And said company continued to so issue such and other similar circulars and make such statements as an inducement to persons to become certificate holders and to make payments under the terms of said certificates, down to about March 19, 1899."

Exhibit A, referred to in paragraph 9, contains, among other statements, the following: "Herewith will be found circulars which unfold to you a system of protection that is destined to become immensely popular, and will supersede the forms of insurance heretofore worked, combining as it does the cheapness of co-operative societies with a strength and soundness unknown in life insurance. \* \* \* Under the safety fund system of protection, \* \* \* by the in-

vesting of \$10.00 on each one thousand dollars of your insurance in United States bonds, registered for yourselves as members, forming a safety fund limited to one million dollars, held by your own trustee, you not only make the insurance as secure as are national bank bills, but in five years your insurance becomes self-sustaining, for by examination you will see that the basis of our graduated assessment table is 1,000 one thousand dollar certificates, that is, one million dollars insurance, and with this number and amount insured, assessments would be sufficient to pay all losses or claims in full, and as the membership increases above 1,000 certificates in force, the assessment rate decreases, or there would be produced more than enough to pay the loss assessed for. But should the membership in after years fall to less than 1,000 certificates in force, that is, to a point where an assessment fails to produce enough to pay a loss in full, then the safety fund would be at once divided to the then members, paying to them the full face of these certificates while living."

"(10) The terms of said certificates were purposely made so involved that it is difficult, if not impossible, for the ordinary person to understand the true meaning and import thereof, in order to enable said company to defraud and impose upon the public and certificate holders, and only a person learned in the technicalities of insurance and law can fully understand the same." (A copy of said circular is attached to said paragraph.)

"(11) The company thereupon represented to the public and to certificate holders, and to all persons contemplating becoming certificate holders, as an inducement to become such certificate holders and to make payments in accordance thereof, that said certificates were in accordance with said 'safety fund' plan in all respects as above stated, and particularly that they did provide in substance that, when said outstanding insurance was reduced to \$1,000,000, the principal of the fund should be divided among the outstanding certificate holders, and that said safety fund belonged wholly to the policy holders, and that the company had no interest therein except in its application for the purposes described in said safety fund plan as above set forth, and that such was the true meaning and construction of said certificates. And in particular did, and in the year 1885 or 1886, issue and distribute in large numbers, for the purpose of inducing persons to accept certificates and make payment thereunder, a certain circular entitled 'The Safety Fund System Explained,' in which was used the following language: 'The Safety Fund System Explained. The rates given in the table of assessment ratios are such that while there is \$1,000,000 or more of insurance in force the assessments will pay all claims in full. Should the amount of insurance in force fall below \$1,000,000,

the division of the safety fund to the then members will pay them the full face of their certificates at once and while living.' \* \* \*

"(12) The plaintiffs, on or about the 1st day of December, 1890, relied upon said representations, and were induced thereby to accept their certificates (a copy of one of which, marked 'Exhibit B,' is attached to said paragraph), and to make the payments called for thereunder, and have made all the payments called for and complied with all the conditions of said certificate, and said certificates are still in force."

Exhibit B consists of the application for insurance, the certificate issued, with copy of agreement between the insurance company and the security company, and the table of graduated mortality ratios for every \$1,000 of death loss on each \$1,000 of a total indemnity in force of \$1,000,000. The following are among the provisions of the certificates:

"Policy Safety Fund Department. Amount, \$1,000.

"In consideration of the representations, agreements, and warranties made in the application herefor, and of the admission fee paid, and of the sum of ten dollars on each \$1,000 of the indemnity herein provided for, to be paid to said company, as herein required, to create a safety fund as herein-after described, and of three dollars, to be paid as hereinafter conditioned, and of the further payment of all mortality calls proportioned to the indemnity herein provided for, levied against the herein named member to form a mortuary fund for the payment of all indemnity matured by deaths of members, which mortality calls to be levied upon all the members in the department wherein this certificate is issued whose certificates are in force at the dates of such deaths, shall be made according to the table of graduated mortality ratios given hereon, and as further determined by their respective ages and the aggregate indemnity at the dates of such deaths, with due allowance for discontinuance of membership, does hereby issue this certificate of membership in its safety fund department to Charles H. Dresser (herein called a member) of Hartford, county of Hartford, state of Connecticut, with the following agreements: \* \* \* That ninety days from the receipt by the president or secretary of said company of satisfactory proofs, \* \* \* upon presentation and surrender of this certificate properly receipted, there shall be due and payable, out of the aforesaid mortuary fund and not otherwise, the indemnity of one thousand dollars. \* \* \* That said company will deposit said sum of ten dollars, when received, with the trustee, named in a contract made with it (of which a copy is printed hereon), as a safety fund in trust for the uses and purposes expressed in said contract; and shall make a semiannual division of the net in-



terest received therefrom by it, pro rata among all the holders of certificates in force in said department at such times, who shall have contributed five years prior to the date of any such division their stipulated proportion of said fund, by applying the same to the payment of their future dues and assessments, and that whenever said fund shall amount to one million dollars, all subsequent receipts therefor shall be divided by the said company in like manner as the interest. Said company further agrees that, if at any time it shall fail by reason of insufficient membership or shall neglect, if justly and legally due, to pay the maximum indemnity provided for by the terms of any certificate issued in said department, and such certificate shall be presented for payment to said trustee by the legal holder thereof, accompanied by satisfactory evidence, as hereinafter provided, of its failure to pay, after demand upon it within the time herein stipulated for limitation of action, then it shall be the duty of said trustee to at once convert said safety fund into money and divide the same (less the reasonable charges and expenses for the management and control of said fund) among the holders of certificates then in force in said department, or their legal representatives, in the proportion which the amount of each of their certificates shall bear to the amount of the whole number of such certificates in force. \* \* \* And said company further agrees that so long as any certificate of membership in its safety fund department shall remain in force, said fund shall be in no wise chargeable or liable for any use or purpose except as above mentioned. And said company further agrees that the aforesaid mortuary fund shall be in no wise chargeable or liable for any use or purposes other than for the settlement of death claims, except as herein mentioned."

The agreement between the insurance company and the security company, after reciting the provisions of the certificate, contains, among others, the following provisions: "Now, therefore, the party of the first part (the defendant insurance company) \* \* \* does hereby appoint the party of the second part trustee as aforesaid and covenants and agrees with it and its successors in said trust to deposit with said trustee, as soon as received, the sum of ten dollars on each thousand dollars of the amount of each and every certificate of membership issued by it in the aforesaid department until said fund shall amount to one million dollars, to be by said trustee held in trust and accumulated as hereinafter agreed, and the income thereof less the reasonable compensation and expenses in said trust to be paid over to the party of the first part, as hereinafter provided, to be used by the party of the first part in accordance with the hereinbefore recited agreements: And when said trustee shall pay the income, as above, to the party of the first part, or shall make any other payments

from said fund, as required by the terms hereof, the liability of said trustee on the amount so paid shall cease; it being understood and agreed that said fund belongs to the party of the first part, subject to the expressed trusts herein provided. And the party of the second part (the defendant security company), for itself and its successors, in consideration of such deposits, and of a reasonable compensation for its services and the necessary expenses of managing said trust, covenants and agrees with the party of the first part and its successors and with each of the holders of the aforesaid certificates that it will receive, hold, manage, and dispose of all said deposits made with it by said insurance company, principal and income, in accordance with the uses and purposes specified in the hereinbefore recited agreements of the party of the first part with its certificate holders. \* \* \* That, as often as the sum composing such fund shall be in amount sufficient to purchase one thousand dollars, par value, of United States bonds, said trustee shall make investments of such funds therein and register the same in its name as trustee of the safety fund of the said insurance company, and provided no default by the party of the first part as hereinbefore recited shall occur, shall accumulate said fund and the income thereof (less the reasonable compensation and expenses) for five years from July 1, 1879, or until such time thereafter as said fund shall amount to three hundred thousand dollars, par value, of the bonds purchased for said fund, when the party of the second part will pay over to the party of the first part, semiannually thereafter, all the further income from said fund (less the accruing and unpaid compensation and expenses), to be by the party of the first part used for the purposes mentioned in the hereinbefore recited agreements; and, unless such default shall occur, will thereafter add to the principal of said fund the deposits thereafter received from the party of the first part, exclusive of the income therefrom, until the whole fund shall amount in such bonds, at their par value, to one million dollars; and in the event of the failure or neglect mentioned in the hereinbefore recited agreements, will convert said fund into money, and divide the same in accordance with the hereinbefore recited agreements, as soon as can reasonably be done after the necessary information of the proper persons and their shares shall have been obtained. \* \* \* It is hereby mutually understood and agreed by both parties hereto that all the hereinbefore recited agreements of the party of the first part with its certificate holders shall constitute the uses and purposes of the trust expressed herein. And it is hereby further understood and agreed that at such time as it shall be shown that all certificates of membership issued by the party of the first part in its safety fund department have been legally settled and sur-



rendered to it, or properly canceled in accordance with their terms, it shall be held and considered that the uses and purposes of said trust have been fully accomplished by said insurance company, and the balance of said fund, if any, shall be paid over to the party of the first part. \* \* \*

"(13) Said company continued to transact business and to issue substantially similar certificates under the same representations and for the same purpose down to about March, 1899, issuing many thousands of such certificates, which were accepted on the faith of such representations, so that at the end of the year 1897 there were outstanding 49,434 certificates, insuring an amount aggregating \$100,731,600, and said 'safety fund' has then accumulated to over \$1,000,000 in value in the hands of said trust company, and said trust company still holds said fund, which is now largely in excess of \$1,000,000 in value, to wit, more than \$1,500,000.

"(14) Said plan was extremely popular, and the number of certificate holders was then rapidly increasing.

"(15) On or about March, 1899, said company, without notice to the outstanding certificate holders, without their consent, and against their will, ceased to issue policies and to transact business under said 'safety fund plan,' and abandoned said plan.

"(16) Said company did this for the fraudulent purpose of depriving the outstanding certificate holders of the benefit of said plan and of the advantages accruing from new membership and new contributions to the safety fund, and also of enabling said company, by reducing the number of those liable to contributions for mortuary payments, to increase the payments of the remaining certificate holders, and hasten the time when it might claim the possession of the safety fund for its own benefit, and that of its managers and stockholders, in the manner set forth in paragraph 30, and also in order that it might divert the payments levied for expenses to its own and their benefit and emolument instead of using them in accordance with the contract for payment of expenses.

"(17) In pursuance of the purposes and intents described in paragraph 16, and for the further fraudulent purpose of diverting the business of said 'safety fund' department to its own benefit and to the special benefit of the other defendants, other than said trust company, and to the benefit of the stock department, the defendant the Hartford Life Insurance Company fraudulently offered various inducements to induce the holders of certificates in said safety fund department to surrender their certificates and take out in place thereof policies in the stock department of said company, and to discontinue all payments for expenses or for death assessments to the safety fund department, and has hereby induced large numbers of the certificate holders to abandon their relation with the

safety fund department and take out policies in the stock department of said company, to the injury of the remaining certificate holders.

"(18) In order to accomplish these ends, said insurance company caused such inducements to be offered in whole or in great part through the same agents employed by it in connection with the safety fund department, and offered special pecuniary inducements to such agents to accomplish such results.

"(19) The defendant insurance company has diverted from the moneys and property of said safety fund department large sums of money, to wit, over ——— million dollars, to the use and benefit of itself and the managers and stockholders of the stock department, and particularly so diverted in the year 1897 the sum of \$68,000, and in the year 1898, \$88,468.07. The plaintiff cannot state the full amount of such fund so diverted because the defendant the Hartford Life Insurance Company has possession of all the books, papers, and information on such subjects.

"(20) In particular, after said March, 1899, down to the present date, defendant insurance company has received and collected a large amount for expenses, to wit, over one million dollars, which it wholly diverted to its own use and benefit, and to the use and benefit of its stockholders, agents, and managers, and that of the stock department, with the exception of a comparatively small sum, not exceeding \$20,000 annually, and not exceeding \$120,000 in all, paid and used for expenses of sending out and collecting assessments, receiving proofs, and making payment, and has also since said date diverted large sums from the safety fund payments and from other funds belonging to said safety fund department, the amount of which plaintiffs cannot state because the books and papers of the company are exclusively in possession of defendant.

"(21) Defendant insurance company has also collected from the certificate holders, without any warrant therefor in the contract, and without right, the sum of ten cents for sending out each notice of mortuary assessment, amounting to many thousands of dollars, and has also collected without right excess payments over the sum of three dollars, per thousand, for expenses to a very large amount, and payments largely in excess of ten dollars per thousand for payments to said safety fund without law or right; which amounts cannot be stated by the plaintiffs, because the defendants have exclusive possession of all the books and papers of said company.

"(22) The said security company, with the consent and procurement of the defendant insurance company, at some time after said safety fund reached the sum of \$1,000,000 in United States bonds par value, without right, and without knowledge or consent of the certificate holders, changed said fund from its investment in United States bonds

to an investment in other bonds and securities, the nature of which is to the plaintiffs unknown.

"(23) As a result of said diversion, losses resulted to said fund amounting to more than \$100,000, the exact amount of which plaintiffs cannot state, because the said insurance company has possession of all the books, papers, and information on that subject.

"(24) Said defendant insurance company has failed to divide the increment of said fund over \$1,000,000 par value in United States bonds among the certificate holders in accordance with the conditions of the policy, although the fund with its increment amounted to more than \$1,000,000 par value in United States bonds.

"(25) The outstanding certificate holders of the company are now reduced in number, as nearly as can be ascertained, to about 20,000, with aggregate insurance amounting to about \$40,000,000.

"(26) Defendants are not managing and administering the funds of said safety fund department economically, but, on the contrary, are improperly and illegally expending unnecessary amounts in connection therewith, to the great loss of the certificate holders.

"(27) Said defendant insurance company, for the purpose of compelling the certificate holders to abandon their certificates and insurance on account of inability to pay mortuary assessments, have been levying assessments excessive and unnecessary in amount and number, and are thereby accumulating a large amount of money for their own fraudulent uses, which is unnecessary for the payment of death losses, and now have in their hands, as the result of such assessment, the sum of over \$325,000, the exact amount of which cannot be stated, because said company has possession of all the books, papers, and information on that subject.

"(28) Said company, acting through the individual defendants as directors and officers, is still continuing to attempt to coerce and induce certificate holders to abandon the safety fund department for the purposes above stated, and is still continuing to divert moneys from said department for its own use, and for the benefit of the stock department, and of the managers and directors.

"(29) After said safety fund reached the sum of \$1,000,000, and after March, 1899, when the said defendant insurance company ceased to do business on said safety fund plan, and ceased to admit new members thereto, it made the claim, and still continues to do so, that said safety fund does not belong to the policy holders, but belongs to said insurance company, and asserts the right and intention to continue to make demands for mortuary dues and assessments without limit as to number or amount, and also claims the right to levy and demand such dues and assessments, and the charges for expenses described in this complaint,

after the amount of outstanding insurance is reduced below \$1,000,000, and on the non-payment thereof to declare the rights of the certificate holders in said fund forfeited, and appropriate the fund to its own benefit, and, in case said assessments are paid, to pay off all said policies and then appropriate the fund to its own benefit. Defendant insurance company claims that it can levy assessments and demands as above described after the outstanding insurance is reduced to \$1,000,000 under said policy, and that the true meaning and effect of said policy is such that it can so levy such assessment for mortuary dues without limit as to amount or number, and it expresses the intention to do so, and said directors and officers, acting officially as such on behalf of said company, still continue to make the same claims.

"(30) The assertion of the claims above stated in paragraphs 28 and 29 is injurious to the interests of such safety fund certificate holders, because it induces certificate holders to refuse to pay assessments and allow their certificates to lapse, thereby causing heavy demands to be made for such mortuary dues upon the remaining certificate holders.

"(31) Defendant George E. Keeney became president, and said Bacall and the other defendants, beside said corporations, directors, of said Hartford Life Insurance Company at some time on or before the year 1899. At exactly what time plaintiffs are unable to state. They took their positions with knowledge of the facts hereinbefore stated, and have adopted the benefits of said fraudulent transactions, and are continuing to divert the money received therefrom to their own benefit and that of the stock department.

"(32) The moneys fraudulently converted, as above stated, to the benefit of the stock department have been largely used for the benefit of said defendant officers and directors in the payment of dividends to stockholders and in the increase of stock, the construction of large buildings for the benefit of the stock department, and other purposes for the benefit of said stock department, and of the defendants, officers, and directors.

"(33) The various fraudulent and wrongful acts and concealments described in the 10th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22d, 23d, 24th, 26th, 27th, and 32d paragraphs of the complaint have been concealed and withheld from the plaintiffs and other certificate holders generally, and have not been ascertained by them until a period within the last two years.

"(34) The defendant the Hartford Life Insurance Company and the security company, on the 31st day of December, A. D. 1879, duly executed and delivered the contract (a copy of which is annexed to Exhibit B and entitled 'Trustee's Contract'), and said security company immediately thereafter entered upon the performance of its duties

thereunder, and has continued to receive from the said Hartford Life Insurance Company moneys under same, and received and held the moneys described in the 22d, 23d, 24th, and 29th paragraphs under said contract."

The prayers for relief are as follows:

"(1) That the true amount of said safety fund be ascertained and declared and adjudicated to be the property of the safety fund certificate holders, and that the said Hartford Life Insurance Company has no property therein; that it be declared and adjudicated that it is the true meaning and intent of said certificates of membership that said safety fund belongs absolutely to the certificate holders, and that, when the amount of the face value of outstanding certificates is reduced by death, lapse, or other causes to the amount of \$1,000,000, said fund is to be distributed among said certificate holders then outstanding in proportion to the face value of their certificates, or that said certificates be amended and reformed so as to convey said meaning.

"(2) That said Hartford Life Insurance Company be enjoined from claiming that said safety fund belongs to it, and from claiming the right to make any assessments for mortuary dues or expenses after the amount of outstanding certificates is reduced to an aggregate face value of \$1,000,000, and from making any such assessments.

"(3) That said trust company be enjoined from turning over any portion of the principal of said fund to said insurance company, except the surplus over \$1,000,000.

"(4) That said insurance company be enjoined from making any demands from the certificate holders for expenses of said safety fund department.

"(5) That a receiver be appointed to take charge of the safety fund department of said insurance company, and to make all necessary calls or assessments for mortuary dues, and make all payments in accordance with said safety fund plan as hereinbefore stated.

"(6) That defendant, the Hartford Life Insurance Company, and said officers, stockholders, and directors, be ordered to account for all moneys received for expenses, and, after deduction of the amount actually used for proper expenses connected with the management of said safety fund department, be ordered to pay over said moneys to said receiver for the benefit of said certificate holders in the safety fund department.

"(7) That said insurance company be ordered to account for and pay over all moneys received from the holders of certificates of the safety fund department since March, 1899, when said insurance company ceased to transact business on said safety fund plan, after deducting the amount actually paid for legitimate expenses and mortuary claims.

"(8) That it be declared and adjudged that said Hartford Life Insurance Company by its acts, heretofore described in this complaint,

in abandoning transaction of business under the safety fund plan without the consent and against the will of the certificate holders, and in causing the safety fund to be diverted from its investment in United States bonds and invested in other securities, and by its other acts, as hereinbefore described, has broken the contract with each and all holders of certificates in such safety fund department, and forfeited all moneys and benefits received from said certificate holders.

"(9) That it be ordered and adjudged that said insurance company, and said defendants as officers and directors thereof, account for and pay over to the said receiver all sums received from said certificate holders in connection with the said safety fund department, except such portions thereof as have been expended in legitimate expenses of conducting said business, and in the payment of losses in said department.

"(10) That said insurance company, and said officers and directors, pay over to the receiver all sums found to be due on said accounting.

"(11) That a general receiver be appointed to take charge and manage the business of said company.

"(12) That a temporary receiver be appointed during the progress of this litigation, and until the court has made further order in the premises.

"(13) Damages in the amount of one million dollars against said defendants except said security company.

"(14) Such other and further relief as in equity may pertain.

"(15) That said security company be adjudged liable for the loss of said safety fund described in paragraphs 22 and 23, and ordered to make up and restore said loss at its own expense."

The court sustained the defendants' demurrers, and rendered judgment for the defendants.

John K. Beach and Talcott H. Russell, for appellants. Charles E. Perkins and Lewis Sperry, for appellees Hartford Life Ins. Co. and others. Charles E. Gross, for appellee Security Co.

HALL, J. (after stating the facts as above). This is an action brought by the plaintiffs as quasi creditors and holders of certificates of mutual assessment insurance issued by the defendant Hartford Life Insurance Company under what is called its "safety fund system," instituted by the named plaintiffs for their own benefit, and for that of all other similarly situated certificate holders, and asking for equitable relief on account of alleged misappropriations and threatened misappropriations by said insurance company and its officers of the moneys of the "safety fund," and of the safety fund department of insurance, which moneys, it is alleged, the plaintiffs and other certificate holders either own or have an interest in, and

asking for the enforcement of the obligations of the insurance contract regarding said funds. The defendant Hartford Insurance Company demurred to the complaint and certain paragraphs thereof and prayers for relief upon 21 grounds, the 10 individual defendants upon 4 grounds, and the defendant security company upon 6 grounds. The rulings of the court sustaining all of these grounds of demurrer are the errors assigned. Most of the questions presented by the appeal may be discussed in considering the rulings of the trial court upon the several grounds of demurrer of the Hartford Life Insurance Company. The grounds of demurrer stated in substance will be considered in their numerical order.

First, to the complaint upon the ground that it is multifarious, since the nine individuals and the security company are joined with the insurance company as defendants, and there is no allegation of a joint liability of the insurance company to the plaintiffs with said other defendants or any of them, and no joint relief prayed for against the insurance company and the other defendants or any of them, excepting the ninth and tenth prayers for relief. This ground of demurrer was erroneously sustained. The plaintiffs have a common interest in the subject of this action and were properly joined. Gen. St. 1902, § 617; *Lewisohn v. Stoddard*, 78 Conn. 575, 63 Atl. 621. The averments of paragraphs 19, 20, 24, 26, 27, 28, 31, 32, and 33 of the complaint are broad enough to permit proof of facts showing that the insurance company, and its officers made defendants, jointly participated in the alleged misappropriation of funds and mismanagement of the business of the "safety fund" department. As the security company is the custodian of the fund the plaintiffs' and the insurance company's present interest in which and future ownership of which is in question, it was not improperly made a party under section 618, Gen. St. 1902, as one having an interest in the controversy or necessary to be made a party for a complete determination or settlement of the questions in controversy. That the security company has such an interest is clearly shown by some of its reasons of demurrer. The relief asked for against the security company itself is incidental to the main relief prayed for, and is properly asked for in this action. *Lewisohn v. Stoddard*, 78 Conn. 604. A misjoinder of the security company or any of the other defendants with the insurance company would not have defeated the action as to all the parties, but in that case the parties improperly joined should have been dropped. Gen. St. 1902, § 622; *Town of Fairfield v. Southport National Bank*, 77 Conn. 423-427, 59 Atl. 513.

Second, to paragraphs 9, 11, and 12 of the complaint, upon the ground that all prior negotiations and representations between the parties were merged in the contract of insurance, and that parol or written representa-

tions are not admissible to change or affect the contract, in the absence of allegations of fraud, accident, or mistake. This ground of demurrer should have been overruled. It is alleged in paragraphs 9, 11, 12, and 13 that the insurance company continued to make said representations and explanations after the plaintiffs' certificates were issued, and until the company ceased to issue such policies in March, 1899. When the paragraphs demurred to are read in connection with paragraph 10 and subsequent paragraphs of the complaint it is clear that fraud is charged. It would be at least constructive fraud for the insurance company, under an interpretation by it of the language of the certificates in direct variance with the representations of these circulars, to use the moneys of the "safety fund" department to the injury of the plaintiffs. This is in effect charged in the complaint. *Palmer et al. v. Hartford Life Ins. Co.*, 54 Conn. 488, 9 Atl. 243; *Rohrschneider v. Knickerbocker Co.*, 76 N. Y. 216, 32 Am. Rep. 290. The alleged written statements of the company would be admissible in evidence as showing, in connection with proof that the plaintiffs relied upon them, the interpretation which the parties themselves placed upon the contract of insurance. They tend to prove that when the plaintiffs received these certificates, and paid from time to time the sums required to be paid by the certificates, both they and the insurance company understood the contract alike. *Home Life Ins. Co. v. Pierce*, 75 Ill. 426; *Bruce v. Continental Life*, 58 Vt. 253, 2 Atl. 710; *Fuller v. Metropolitan Life*, 70 Conn. 647, 671, 41 Atl. 4; *Bray v. Loomer*, 61 Conn. 456-464, 23 Atl. 831; *Elting v. Sturtevant*, 41 Conn. 176-182. They would also be admissible as tending to prove, in connection with proof that the plaintiffs relied upon them, the alleged actual or constructive fraud.

Third, to paragraph 10, upon the ground that it contains no averment that plaintiffs did not understand the terms of the certificates, or that they were misled by them, and upon the ground that it appears upon the face of the certificates that their terms are involved. This should have been overruled. The language of the certificate justified the averment that its terms are, at least, not entirely clear. It was not necessary for the plaintiffs to allege that they were unable to understand the language of the certificates or that they were misled by their terms, since they have in paragraph 12 averred that they accepted them relying upon the representations of the insurance company in Exhibit A and the other described circulars. The manifest purpose of paragraph 10 was to aver that one step in the alleged fraudulent purpose of the insurance company was to make the terms of the certificates so obscure that it might afterwards successfully place upon them an interpretation variant from the language of the circulars, which it is alleged the company is now endeavoring to do.

Fourth, to paragraphs 15, 16, 17, and 18, upon the ground that the insurance company had the legal right to issue policies of insurance upon other than the "safety fund" plan, and to cease issuing certificates under the "safety fund" plan without obtaining the consent of the certificate holders. This ground of demurrer was properly sustained. The insurance company was authorized by its charter to issue insurance on other than the "safety fund" plan. We find neither in the so-called circulars nor in the certificates any promise, either express or implied, by the insurance company to the certificate holders that it would not issue policies on any other than the safety fund plan, or that it would continue to issue safety fund certificates any longer than it did. *Wright v. Minn. Life Ins. Co.*, 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832; *Green v. Hartford Life Ins. Co.*, 139 N. C. 309, 51 S. E. 887, 1 L. R. A. (N. S.) 623. Having a legal right to do the acts complained of in these four paragraphs, neither the insurance company nor its officers are rendered liable even if their action was induced by improper motives as alleged. *Fisher, Brown & Co. v. Fielding*, 67 Conn. 91-106, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. Rep. 270.

Fifth, to paragraph 19, upon the ground that it is not averred that the alleged diversion was wrongfully made. This ground of demurrer should have been overruled. A fair interpretation of the language of paragraph 19, read in connection with that of paragraph 8, is that the insurance company and its managers and stockholders had during the years named appropriated to their own use money to the amount stated, which, by the terms of the contract, they had no right to do. It was unnecessary to expressly characterize such acts as wrongful.

Sixth and seventh, to paragraph 20, upon the ground that it appears by the terms of the contract of insurance (Exhibit B) that the "three dollars per annum on each \$1,000 for expense dues" belongs to the insurance company. We are of the opinion that by the terms of the certificates no part of the three dollars "expense dues" became part of the funds of the "safety fund" department, but that it belonged to the insurance company, to be used for its own benefit and that of its stockholders without accountability to the certificate holders. By the language of the contract, the promise by the certificate holders was "to pay to said company, for expenses, dues of three dollars per annum on each \$1,000 indemnity \* \* \* so long as this certificate shall remain in force." This is an absolute promise to pay a fixed sum for a certain time, without reference to the amount of the actual expenses incurred by the company or to the continued solicitation of new business. The insurance company continues to manage the business of the safety fund department, although it has ceased to issue new certificates. *Security Co. v. Hartford*,

61 Conn. 89-98, 23 Atl. 699. These grounds of demurrer were properly sustained in so far as they apply to the alleged diversion in paragraph 20 of the \$3 expense dues, but, for the reasons above stated regarding the fifth ground of demurrer, they were not rightly sustained in so far as they were directed to the allegation in said paragraph of a diversion of large sums from the safety fund.

Eighth, to a part of paragraph 21. This need not be considered, as the plaintiff has withdrawn its claim under paragraph 21 that the collection by the company of 10 cents for sending notices of mortuary assessment was unauthorized.

Ninth and tenth, to paragraphs 29 and 30, upon the ground that the alleged claims by the insurance company as to the construction of the contract (Exhibit B) do not constitute a cause of action against them in behalf of these plaintiffs. The trial court rightly sustained the defendants' claim that these paragraphs did not describe acts which in themselves constitute a cause of action entitling the plaintiff to any relief asked for. While relief may possibly be granted on account of the acts done, or threatened to be done, by the insurance company to the plaintiffs' injury, under said claimed construction of the terms of the certificates, no facts are alleged entitling them to relief against the mere making of the alleged claim. As a part, however, of the description, in connection with other paragraphs of the complaint, of the alleged misappropriation and threatened misappropriation of the moneys of the "safety fund" department, paragraph 29 properly remains a part of the complaint.

Eleventh and twelfth, to the first prayer for relief, upon the grounds that the action is prematurely brought, since it appears that the plaintiffs have not suffered, and may never suffer, any injury on account of the alleged threatened acts of the insurance company regarding its title to the safety fund, and its right to collect mortuary assessments after the outstanding insurance shall be reduced to \$1,000,000, and upon the further ground that the plaintiffs cannot in this action obtain an amendment of their several certificates. Equity may grant relief against a threatened injury where the plaintiffs' rights may be prejudiced by delay. The demurrer admits that the insurance company asserts the right and the intention to do the acts described in paragraph 29 of the complaint. How soon the amount of the outstanding certificates may be reduced to \$1,000,000 we cannot say. It appears from the averments of paragraphs 12 and 25 that since 1897 the amount of such insurance in the defendant company has diminished some \$60,000,000. The remoteness of the danger of injury to the plaintiffs from the intended acts of the defendants may properly be considered by the trial court in deciding whether equitable relief ought to be granted. It does

not appear from the complaint that such danger is necessarily so remote as to forbid the interference of a court of equity. Whether, in fact, there is a sufficiently substantial injury to the plaintiffs' rights, or such reasonable ground for the apprehension of injury to them from the alleged acts and intended acts of the defendants as will justify equitable interference, may be a question for dispute upon a trial of the case. Should it appear that the plaintiffs' rights are or are likely to be seriously prejudiced by the alleged acts, or intended acts, of the defendants, under their interpretation of the contract of insurance, it would seem to be necessary for the court to place a construction upon the language of the certificate in order to determine whether such acts of the defendants could be justified. It seems to be unquestioned that, by the express terms of the contract, the certificate holders, who for five years have contributed their stipulated proportion of the safety fund, have been and are entitled to have applied upon their future dues the net interest received from the fund, as well as the excess of the fund over \$1,000,000.

The real question in dispute is not so much whether the certificate holders or the insurance company are the present owners of the safety fund, as whether, by the terms of the certificates, the holders are entitled to a distribution of the entire safety fund when the aggregate amount of outstanding certificates shall be reduced to \$1,000,000, as claimed by the plaintiffs, or whether the insurance company, when the amount of the certificates shall be so reduced, may continue to demand dues and assessments from the certificate holders, and upon non-payment appropriate the entire safety fund to itself, as it is alleged in paragraph 29 and stands admitted, it claims a right to do. The defendants, in support of their demurrer to this prayer for relief, contend that it appears upon the face of the contract of insurance, made a part of the complaint, that the plaintiffs' claimed construction of the certificate cannot be adopted. We cannot sustain this contention. We have already said that certain written statements issued by the company would be admissible to aid in ascertaining the true meaning of doubtful provisions of the certificates. But we are also of opinion that, even without the aid of such extraneous evidence, the language of the certificates does not prohibit the construction contended for by the plaintiffs as to the time when the safety fund must be divided. The language of the certificate is that "If at any time it [the insurance company] shall fail by reason of insufficient membership, or shall neglect, if justly and legally due, to pay the maximum indemnity provided for by the terms of any certificate, \* \* \* It shall be the duty of said trustee (the security company) to at once convert

said safety fund into money, and divide the same \* \* \* among the holders of certificates then in force. \* \* \* " The plaintiffs claim that by this provision there must be such a division of the safety fund among the certificate holders, when their number becomes so reduced that the aggregate amount of their insurance does not exceed \$1,000,000, as would be the case when there were but 1,000 holders of certificates at \$1,000 each. The claim of the insurance company, as stated in paragraph 29 and admitted by the demurrer, is that, even after the number of certificate holders are so reduced, it may continue to collect dues and to make mortuary assessments, unlimited in the average amount, and unrestricted by the number of certificate holders, and to declare the rights of certificate holders forfeited who fail to pay such dues and assessments. If the insurance company may so continue to levy assessments unlimited in amount, it is difficult to see when there can be a failure to pay certificates by reason of insufficient membership, or how the certificate holders have much protection from the existence of the so-called safety fund. Which of these constructions is the correct one depends upon what is meant by the provision, if the insurance company shall "fail [to pay the amount of any certificate] by reason of insufficiency of membership." Clearly by the word "fail" is not meant a default in any obligation assumed by the insurance company. While the company undertakes to make the assessments (*Lawler v. Murphy*, 58 Conn. 295, 20 Atl. 457, 8 L. R. A. 118), and to pay the sum collected, its express agreement is to pay the amount of certificates from "the mortuary fund, and not otherwise." If, after an assessment for the payment of the amount due upon a certificate is properly made and the assessment paid, the amount realized proves insufficient to pay the indemnity due, the failure is that of the mortuary fund, and not of the insurance company, and there can be no such failure of the mortuary fund, "by reason of insufficient membership," unless there is a fixed maximum limit of assessment. The certificate fixes such a limit. It provides that the payment of "mortality calls" to form a "mortuary fund" for the payment of "all indemnity matured by the deaths of members" are to be levied "according to the table of graduated mortality ratios given hereon, and as further determined by their respective ages, and the aggregate indemnity at the dates of such deaths. \* \* \* " In the application, which is by its terms made a part of the contract of insurance, each member agrees to pay "all mortality calls determined as within set forth." Attached to Exhibit B is a table showing the method of determining mortuary calls and the ratios graduated according to ages of certificate holders for assessments against each holder

of a \$1,000 certificate, for the collection of a death loss of \$1,000. This method is based upon a minimum outstanding insurance of \$1,000,000. There is no other method provided by the contract, and therefore none for the making of mortality calls after the total amount of outstanding insurance falls below \$1,000,000. It is expressly stated that these ratios will decrease as the total amount of outstanding insurance increases. There is no suggestion that they can ever be increased. It must be held that they cannot. Even if it is doubtful which of the two claimed constructions of the contract should be adopted, the doubt should be resolved in favor of the insured. *Liverpool & L. & G. Ins. Co. v. Kearney*, 180 U. S. 132, 21 Sup. Ct. 328, 45 L. Ed. 460; *Fricke v. U. S. Indemnity Co.*, 78 Conn. 188, 192, 61 Atl. 431. The demurrer to the first prayer for relief in so far as it applies to that part of the prayer which asks that the certificates be construed as providing that when the amount of the face of outstanding certificates is reduced to \$1,000,000 the safety fund is to be distributed among the certificate holders should have been overruled. Since the contract may be construed as above stated, it should not be reformed as requested.

The thirteenth and fourteenth to the second and fourth prayers for relief were properly sustained. They have been sufficiently considered in the discussion of the sixth, seventh, ninth and tenth grounds of demurrer.

Fifteenth, nineteenth, and twentieth, to the fifth, eleventh, and twelfth prayers for relief, upon the grounds that the complaint alleges no sufficient grounds for the appointment of a receiver, and that by the laws of this state the right to apply for the appointment of such receiver is confined exclusively to the insurance commissioner. Sections 3489, 3490, 3491, and 3546 of the General Statutes of 1902 describe some of the powers of the insurance commissioner in matters touching the question raised by these grounds of demurrer. He is to "see that all laws respecting insurance companies are faithfully executed." He may "examine into the methods of business of any company doing any kind or form of insurance in this state \* \* \* and if in his opinion such company \* \* \* is doing business in an illegal or improper manner he may order it to discontinue such illegal or improper method of doing business. \* \* \*" "If any such company \* \* \* shall fail \* \* \* to obey any such order \* \* \* he may apply to a court or judge having jurisdiction, for an injunction or for the appointment of a receiver or for both, \* \* \* and such court or judge may enforce such order of the commissioner by injunction or by appointing a receiver." Under section 3546, if the insurance commissioner finds that the assets of an insurance company incorporated by the laws of this state

are less than its liabilities, or if such company "shall fail to comply with any requirement of law," he may notify it to cease the issue of new policies, or the payment of dividends to stockholders until the deficiency be made good by the law, complied with, and he may, and if the assets of the company are less than three-fourths of its liabilities, must, bring his petition to the superior court or to a judge of the Supreme Court of Errors, praying for the appointment of a receiver, and that the charter of said company may be annulled, and said court or judge is empowered or directed to appoint such receiver, and "to annul the charter and decree the dissolution of such company, and to make all other orders and decrees necessary and proper in reference to winding up the affairs of such company, and the disposition of its property." Section 3351 also provides for the appointment by the superior court of a receiver to wind up the business of any corporation, organized under the laws of this state, upon the application of stockholders owning not less than one-tenth of its capital stock, for certain causes, including fraud and gross mismanagement in the conduct or control of such corporations. The acts of the insurance company complained of in this action are embraced in those described in section 3490, and for such acts the only statutory provision authorizing the appointment of a receiver by the superior court is upon proceeding instituted by the insurance commissioner. We may assume that the peculiar danger of serious injury to the credit and business of such institutions of a public nature, as banks and insurance companies, from the institution of even groundless applications for the appointment of receivers, may have been one reason why the Legislature deemed it proper to place the exclusive power of commencing such proceedings against them in the hands of an experienced and disinterested public officer. While the superior court would not, in an action like the present one, be bound by any construction placed by the insurance commissioner upon the terms of these certificates, and while, under its general equity jurisdiction, it would have the power to appoint a receiver pendente lite for the preservation of any property in question in a suit before it, or as incidental to an accounting ordered, we are of opinion that it was the intention of the Legislature to intrust it solely to the judgment of the insurance commissioner, when an application for the appointment of a receiver should be made for the causes described in section 3490. *Am. Casualty Ins. Co. v. Fyler*, 60 Conn. 448-462, 22 Atl. 494, 25 Am. St. Rep. 337; *Ulmer v. Falmouth Bldg. & Loan Ass'n*, 93 Me. 302, 45 Atl. 32; *Huntington Loan Co. v. Fulk*, 158 Ind. 113, 63 N. E. 123; *Broadwell v. Inter-ocean Loan Co.*, 161 Ill. 327, 43 N. E. 1067. The said fifth, eleventh, and twelfth prayers for relief were

properly held to be insufficient, excepting as, in connection with the sixth and tenth prayers, they ask for the appointment of a receiver as incidental to such accounting as may be ordered.

Sixteenth, to the sixth prayer for relief, upon the ground that the moneys received for expenses belong to the insurance company and that it is not required to account for them. For the reasons stated in discussing the sixth and seventh grounds of demurrer, this ground was properly sustained to the extent that it asks for an accounting for the \$3 annual expense dues.

Seventeenth, to the seventh prayer for relief, on the ground that the allegations of the complaint do not authorize the accounting and payment asked for. This ground of demurrer should have been overruled. Paragraphs 19, 20, 21, 24, 26, 27, and 32 contain allegations sufficiently broad to permit the proof of facts upon which the superior court may, under the sixth, seventh, or tenth prayers for relief, or all of them, order an accounting by the insurance company for moneys unlawfully collected or received by it and its officers, not including the three dollars annual expense dues.

Eighteenth, to the eighth and ninth prayers for relief, upon the grounds that the allegations of the complaint do not justify a declaration by the court that the moneys received by the insurance company from the certificate holders have been forfeited; that courts of equity will not decree forfeitures; and that it is not alleged that the individual defendants have received said moneys. This ground of demurrer was properly sustained upon the first two reasons stated therein. The superior court as a court of equity will not lend its aid to cause or to enforce a forfeiture of the moneys lawfully received by the insurance company from certificate holders when, as in this case, it appears that other adequate relief for the alleged injuries can be granted (*Pomeroy's Equity Jurisprudence*, §§ 459, 460; *Warner v. Bennett*, 31 Conn. 468, 478), and when there has been no rescission of the contract of insurance, and no offer or apparent intention by either party to rescind it. We have already said that it is sufficiently alleged that the individual defendants participated in the alleged wrongful appropriations of funds.

Twenty-first, to the thirteenth prayer for relief, upon the ground that the averments of the complaint do neither justify the awarding of damages, nor show the grounds or amount of such damages, nor from whom they should be recovered. This ground of demurrer should have been overruled. The averments of paragraphs 10, 20, 21, 24, 26, 27, and 32 are sufficient in form and substance to allow the proof of facts which would justify the superior court in adjudging the insurance company and its officers who are defendants liable in money damages to the plaintiffs.

The four grounds of demurrer of each of the ten individual defendants upon the grounds generally that no facts are alleged showing a liability to the plaintiffs of such defendant, either individually or jointly with any of the other defendants, should have been overruled for the reasons above stated in considering the first ground of demurrer of the defendant insurance company.

The defendant security company demurs upon the following grounds: First, second, third, and fourth, to the entire complaint, upon the grounds, in substance, that inasmuch as it is not alleged that the insurance company has failed to pay the maximum indemnity provided by the terms of any certificate, and the plaintiffs admit that the safety fund is not to be divided among the certificate holders until the aggregate outstanding insurance is reduced to \$1,000,000, and it appears from the averments of paragraph 25 of the complaint that the outstanding insurance amounts to about \$40,000,000, the plaintiffs have no right or interest in the safety fund, and therefore no cause of action against this defendant either alone, or jointly with the other defendants; and upon the further ground that there is a misjoinder of causes of action, and that the complaint is multifarious. These demurrers should have been overruled. What we have already said regarding the character and purpose of this action, the joinder of parties, both plaintiffs and defendants, and the remedy for a misjoinder, the construction which the certificates of insurance will admit of, and the power of the court to grant some relief asked for should it conclude upon a hearing of the facts that the rights of the plaintiffs were likely to be prejudiced by the acts, or threatened acts, of the defendants, makes further discussion of these four grounds of demurrer unnecessary.

Fifth, to the third prayer for relief, upon the grounds stated in its first, second, and third demurrers to the complaint. This should have been overruled for the reasons just stated.

Sixth, to the fifteenth prayer for relief, upon the grounds stated in its second and third demurrers, which we have already considered, and upon the further grounds, in substance, that the plaintiffs are not creditors either of the security company or the insurance company, that the contract regarding the safety fund shows that it belongs to the insurance company, and that the insurance company has a legal remedy for the alleged breach of such contract by the insurance company. The question of the right of the security company to change the investments from United States bonds to other securities is not raised by these grounds of demurrer, and they should have been overruled. The agreement of the security company is expressed to be with the insurance company and with each of the certificate holders. Although the plaintiffs are not the present owners of the safety



fund, and may never become so, they have, as we have before stated, such an interest in it as, upon facts which may be proved under the averment of the complaint, would justify the superior court in granting some relief asked for, to save the certificate holders from loss from any unlawful change which the security company, with the consent and procurement of the insurance company, may have made in the securities in which the safety fund was invested. Legal and equitable relief may properly be demanded in the same action. Gen. St. 1902, § 613.

That certain demurrers to particular paragraphs of the complaint and prayers for relief were properly sustained, as above stated, does not finally dispose of this case, since the remaining paragraphs before enumerated, and remaining prayers for relief, are sufficient to permit the proof of facts showing a good cause of action.

There is error, and the judgment is set aside, and the case remanded, with direction to overrule certain of the demurrers as indicated in this opinion, and to proceed with the case according to law. The other Judges concurred.

(30 Conn. 673)

#### PLAUT v. PLAUT et al.

(Supreme Court of Errors of Connecticut. June 4, 1908.)

#### 1. TRUSTS—CREATION—EXPRESS TRUST—SUFFICIENCY OF LANGUAGE—PRECATORY WORDS.

No technical language is necessary for the creation of a trust, and if it is apparent from a deed or will that it was the intent that the property should be dealt with for the benefit of another, a court of equity will affix to it the character of a trust and impose corresponding duties upon the party receiving it, for the intent, if sufficiently clear and apparent, will govern in whatever words expressed, even if they are merely precatory words.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 34-38.]

#### 2. WILLS—CONSTRUCTION—ESTATES CREATED—ABSOLUTE ESTATE WITH QUALIFYING PROVISIONS—TRUSTS.

Although language in a will, standing alone, would be effective to transfer an absolute estate in real and personal property, subsequent qualifying words may cut down the gift by carving out certain rights thereby vested in others, but whether such result will follow in a certain case will depend on the expressed intent of the testator, which is to be gathered from an examination of all parts of the will in connection with the circumstances surrounding the testator; and where such a gift of all testator's property, real and personal, to his children named, and their heirs, was followed by the words "but I desire and direct that my said children shall keep my real estate intact and entire if they can do so, and that the income of all my property, both real and personal, shall be paid to my said daughters above mentioned excepting those who may be married at and after my death until they all are married, or in the event of the aforesaid daughters not marrying, until such time as they shall find in convenient without loss to themselves, my said daughters, to divide the income of all said property equally among all my children named herein, sons, as well as daughters," and there was a further provision, "should my children aforesaid be un-

able to keep said real estate intact and undivided, then it shall be sold, and the income of the proceeds thereof shall be divided among my said daughters in the manner I have described herein, to be afterwards divided in the manner I have directed, should my daughters not marry." Held that, in view of the use of the word "direct," and the imperative form of subsequent statements, it was the testator's intent to impose upon the donees of his property an obligation in favor of the unmarried daughters, and the title to the property stood charged with the trust for the performance thereof.

#### 3. SAME—BENEFICIARIES OF TRUST—UNMARRIED DAUGHTERS.

Under the terms of the will the income of the property should be divided among such of the testator's daughters as should have remained unmarried down to the time when such income was earned, and marriage after the testator's death would deprive a daughter so married of a share in the future income, and no son would be entitled to any part of the income while the trust continued.

#### 4. SAME—TERMINATION OF TRUST.

The trust would terminate upon the marriage of the last of the daughters, but it might also terminate by the concurrence of all the daughters who remained unmarried in a consent that the income should thereafter be divided among all the children.

#### 5. SAME—EFFECT OF TERMINATION OF TRUST.

Upon the termination of the trust the legal and beneficial estates in the property would merge in the owners of the legal estate.

#### 6. SAME—LANGUAGE OF INSTRUMENT—SUBSTITUTION OF WORDS.

The word "in," as it appears in the will before the word "convenient," should be read and construed "it," as such was the manifest intention of the testator, especially where all the parties so agree.

#### 7. TRUSTS—DISPOSITION OF PROPERTY—TESTAMENTARY TRUSTS—SALE UNDER PROVISIONS OF WILL.

The will named a certain daughter as trustee, and she qualified. All of the children are living, of full age, and parties to the action for construction of the will. Held that, if a contingency should arise justifying a sale under the terms of the will, it should be made in accordance with the provisions of the statute regulating the sale of lands held in trust.

#### 8. SAME—DISPOSITION OF PROCEEDS OF SALE.

In the event of a sale, the proceeds should be invested by the trustee according to law, and held in substitution for the realty sold, in the same manner and subject to the same condition and rights as the original personal estate.

Case Reserved from Superior Court, New London County; Alberto T. Roraback, Judge.

Action by Rosa Plaut, trustee, for the construction of the will of Joseph Plaut. On reserved questions. Questions answered.

Joseph Plaut, late of Norwich, died January, 1905, leaving an estate consisting of both real and personal estate and the will here for construction, which has been duly probated. The body of the will reads as follows:

"First. I direct that all my just debts and funeral expenses shall be paid by my executrix hereinafter named.

"Second. I give, devise and bequeath all my property, both real and personal, of every kind and description, to my beloved children, Rosa Plaut, Sarah, Hattie, and Gertie, my daughters, and Louis, Ralph, Eddie and Sey-

mour Plaut, my sons, and to their heirs forever, but I desire and direct that my said children shall keep my real estate intact and entire if they can do so, and that the income of all my property, both real and personal, shall be paid to my said daughters above mentioned excepting those who may be married at and after my death until they all are married, or in the event of the aforesaid daughters not marrying, until such time as they shall find in convenient without loss to themselves my said daughters, to divide the income of all said property equally among all my children named herein sons, as well as daughters. My real estate is thus described: \* \* \* Should my children aforesaid be unable to keep said real estate intact and undivided, then it shall be sold and the income of the proceeds thereof shall be divided among my said daughters in the manner I have described herein, to be afterwards divided in the manner I have directed, should my daughters not marry.

"Third. I hereby appoint my beloved daughter, Rosa Plaut to be the executrix of this my last will and testament and I ask that the Court of Probate require no bonds of her, and I recommend to her to seek the advice when in need of counsel of my beloved nephew Fordy Plaut who will advise her with good counsel."

Rosa Plaut qualified as executrix, and settled the estate, her final account being filed July 30, 1906. September 25, 1906, she was appointed trustee under the will, qualified, and is now acting as such trustee. There came into her hands as such trustee, from herself as executrix, real estate appraised at \$15,197.33, and personal estate, consisting of securities and deposits in bank, appraised at \$21,645.23, making a total of \$36,842.56, and such estate is now in her hands, as is also the income received therefrom. The annual income amounts to about \$2,500. The eight persons named in the second paragraph of the will as the children of the testator are his only children, and all are now alive, of full age, and parties hereto.

The following questions are presented: "(1) Whether a valid trust is created by the terms of paragraph second of said will, or whether there is an absolute gift of all the testator's property, after the payment of debts and funeral expenses and expenses of settlement of his estate, equally to his eight children. (2) If a valid trust is created by said will, when, to whom, and in what amounts should the income from the principal thereof be paid? (3) If a valid trust is created by said will, at what time does such trust terminate, and to whom should the principal of said trust be distributed at its termination? (4) If a valid trust is created by said will, should any of the income therefrom be paid to the testator's sons so long as any of his daughters are unmarried, and, if so, when, and how much? (5) If a valid trust is created by said

will, should any of the income therefrom be paid to the testator's daughters who may be married at or after his death, and, if so, when, and how much? (6) If a valid trust is created by said will, has the trustee power under its terms to sell the whole or any part of the real estate or personal property now forming a part of the principal of said trust, or has the probate court for the district of Norwich the power to order such sale? (7) If a sale of the whole or any part of said real or personal estate can be made either by the trustee under the terms of said will or by order of said probate court, what disposition should be made by the trustee of the proceeds therefrom?"

Wallace S. Allis, for plaintiff. Gardiner Greene, for Rosa and Sarah Plaut. Thomas J. Kelly, for Ralph Plaut and others.

PRENTICE, J. (after stating the facts as above). The testator, in the first part of the second paragraph of his will, uses language which, standing alone, would have been effective to give his eight children all of his property—the real estate in fee simple and the personalty absolutely. This paragraph, however, does not stop with the language noticed. Connected with it in the same sentence by a suggestive "but," and in immediately following sentences, are further expressions used by the testator in his attempt to declare his testamentary purpose. It is urged that the effect of what is here found is to cut down the gift apparently made as the result of the preceding language, and to carve out of it certain rights vested by the will taken as a whole in unmarried daughters. That such might be the effect of subsequent language qualifying words apt for the device or bequest of a fee simple or absolute estate is well settled. Whether or not that result will follow in any given case will depend upon the expressed intent of the testator. *Chesebro v. Palmer*, 68 Conn. 207, 213, 38 Atl. 42; *Phelps v. Bates*, 54 Conn. 11, 13, 5 Atl. 301, 1 Am. St. Rep. 92. And this intent is to be gathered by taking all parts of the will together and examining them in connection with the circumstances surrounding the testator. *Allyn v. Mather*, 9 Conn. 114, 125; *Gold v. Judson*, 21 Conn. 616, 625.

In the portion of his will last referred to, Mr. Plaut expresses his "desire" that his children, who had just been named as the donees of his estate, should keep the real estate intact, if possible, and that the income of all his property, both real and personal, should be paid to unmarried daughters until none remain unmarried or until the happening of another event described by him. He further provides, in substance, that if his children should be unable to keep his realty intact it should be sold, and the income of the proceeds thereof be divided in the same manner as the income of the realty would have been if unsold. Had the testator in these provisions

limited himself to the expression of a "desire," the question would have presented itself as to his intent in using such precatory language. No technical language is necessary for the creation of a trust. If it is clearly apparent from a deed or will that it was the intent of the parties that the property conveyed or carried by it should be held and dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving it. The intent, in whatever words expressed, if sufficiently clear and apparent, will govern, and this intent may be, and frequently is, gathered where only precatory words are used. *Colton v. Colton*, 127 U. S. 300, 312, 8 Sup. Ct. 1164, 32 L. Ed. 138; *Dexter v. Evans*, 63 Conn. 58, 61, 27 Atl. 308, 38 Am. St. Rep. 336; *Bristol v. Austin*, 40 Conn. 438, 447. "The point really to be decided in all these cases is whether, looking at the whole context of the will, the testator has meant to impose an obligation on his legatee to carry his expressed wishes into effect, or whether, having expressed his wishes, he has meant to leave it to the legatee to act on them or not, at his discretion." *Williams v. Williams*, 1 Simons (N. S.) 368, 369. To the same effect, *Harper v. Phelps*, 21 Conn. 257, 269; *Bristol v. Austin*, 40 Conn. 438, 447; *Dexter v. Evans*, 63 Conn. 58, 61, 27 Atl. 308, 38 Am. St. Rep. 336; *Hughes v. Fitzgerald*, 78 Conn. 4, 7, 80 Atl. 694.

But Mr. Plaut did not content himself with the expression of his wishes. He directed. His language was, "but I desire and direct." It is of course conceivable that a testator might use the word "direct" without intending to use it in an imperative sense, and only intending to convey suggestion, advice, or recommendation, and thereby to influence, without taking away discretion. And that such was the intent of the user might be discernible from the context. *Hurd v. Shelton*, 64 Conn. 496, 498, 30 Atl. 766. But "direct" is a word of command, and it is difficult to read the provisions of Mr. Plaut's will into which it enters without coming to the conclusion that he used it in its natural, and therefore presumed, meaning. *Leake v. Watson*, 60 Conn. 508, 21 Atl. 1075. All evidence of a contrary intent is wanting. Nowhere in the will can be found a suggestion that the testator contemplated that a discretion in the matter was reserved to the children. The imperative form of statement runs throughout the paragraph which alone bears upon the subject, and in its closing sentence the provisions in question are characterized as directory. Mr. Plaut's will, when read in its entirety, thus discloses his intention to impose upon the donees of his property an obligation in favor of unmarried daughters, with the result that the title to the property received by them under the will stands charged with a trust for the performance of that obligation.

Our advice is further asked as to the nature and extent of this trust. Its terms are such that the income of the property is to be divided equally among such of the testator's daughters as shall have remained unmarried down to the time when such income was earned. Marriage after the testator's death is as effective to deprive the daughter so married of a right to share in the division of future income as marriage antedating his death would have been. Upon the marriage of the last of the daughters, the trust terminates. The trust may also be terminated prior to the happening of this event by the concurrence of all the daughters who shall have remained unmarried in a consent that the income derived from the property may thereafter be divided among all the children of the testator. Upon the termination of the trust the legal and beneficial estates in the testator's property will merge in the owners of the legal estate. Until this event happens no son will be entitled to any part of the income derived from the property.

In the will the word before "convenient" near the middle of paragraph 2 was written "in." The word intended by the testator was manifestly "it," as all the parties agree. The mistake of the scrivener will be corrected, and the language read and construed as intended. *Phelps v. Bates*, 54 Conn. 11, 16, 5 Atl. 301, 1 Am. St. Rep. 92.

The will directs the testator's children to keep the real estate intact and entire, if they can do so. In anticipation, however, of their inability to carry out his wishes in that regard, he directs a sale in that contingency. Entertaining as he manifestly did very crude notions of legal matters and of the nature and incidents of a trust, he doubtless contemplated that his children would co-operate in carrying out his wishes and directions, and that to that end any necessary sale would be made by their joinder in a conveyance. Were all now exercising the trust by means of which his wishes are being carried into effect, it is quite possible that the will might be fairly construed as confiding to them the power of sale exercisable by them under the conditions named. Under present conditions, however, if a situation should arise in which a sale of any of the realty would be justified under the terms of the will, such sale should be made pursuant to the provisions of statute regulating the sale of lands held in trust. The trust in favor of unmarried daughters embodies in it by force of the provisions of the will the power to sell so much of the corpus as is realty as an incident of the trust created. In the event of a sale the proceeds should be invested by the trustee, as under the law trust funds may be, and, thus invested, held by the trustee in substitution for the realty sold in the same manner, and subject to the same conditions and rights as the personal estate left by Mr. Plaut.

The superior court is advised to render-

judgment in conformity with the views herein expressed.

No costs in this court will be taxed in favor of either party. The other Judges concurred.

(81 Conn. 56)

**STATE v. SUFFIELD & THOMPSONVILLE BRIDGE CO. et al.**

(Supreme Court of Errors of Connecticut. June 30, 1908.)

**1. EMINENT DOMAIN—"PROPERTY" SUBJECT TO APPROPRIATION—FRANCHISES.**

A franchise is property, and, like other property, may be taken for public use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 103.

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

**2. SAME—COMPENSATION—APPROPRIATION TO NEW USE—HIGHWAYS—TOLL BRIDGES.**

A toll bridge highway, as well as a turnpike road, is a public highway established by public authority, and is a public easement, and persons who have been paid damages for property taken in its construction are entitled to no additional damage when it is made by public authority a free highway.

**3. SAME—TOLL BRIDGE PROPERTY—STATUTORY PROVISIONS.**

Charter Suffield & Thompsonville Bridge Company, § 9 (Special Laws 1889, p. 1208, c. 363), provides that, if a committee appointed in pursuance of a vote of certain towns to lay out a public highway over the bridge finds that the highway will be of common convenience and necessity, it shall award to the bridge company as damages the value of the bridge and appurtenant property, and also such amounts as have been paid as damages to the owners of another bridge company and a ferry company by reason of the construction and maintenance of the bridge, and such other damages as the bridge company shall suffer from the taking of the property, but no damages shall be allowed for the franchise created by the charter. Pub. Acts 1907, p. 871, c. 258, provided for a public highway across the bridge and for its condemnation, and that a committee should assess in favor of the owners just compensation for their property, except that no damage should be assessed for the franchise of the bridge company "as provided in the charter of said corporation." *Held*, that the charter determined the elements to be considered in ascertaining "just compensation" when the state authorized the taking of the property for a free public highway, which the act of 1907 recognized; and hence the bridge company was entitled to the amounts it had paid the owner of the ferry and the other bridge company.

**4. SAME—PROCEEDINGS—EVIDENCE—ADMISSIBILITY.**

In proceedings to condemn a toll bridge property for a free public highway, evidence of an agreement and deed for conveyance to the bridge company of certain ferry rights was admissible, as tending to show a payment of damages to the ferry owner, but for no other purpose.

Prentice and Thayer, JJ., dissenting.

Case Reversed from Superior Court, Hartford County; Howard J. Curtis, Judge.

Proceedings by the state against the Suffield & Thompsonville Bridge Company and others to condemn certain toll bridge properties for the purpose of establishing public highways. Case reserved for the Supreme Court upon report of the committee

appointed to assess compensation, and remonstrance of the named defendant to the report. Superior court advised to sustain remonstrance and recommit report for a rehearing de novo, with instructions.

Prior to 1889 the Enfield Bridge Company, chartered in 1798, possessed, by virtue of its charter, the exclusive right, within the limits therein specified, of maintaining a toll bridge across the Connecticut river, connecting the towns of Suffield and Enfield; and there also existed an ancient ferry franchise, owned by private persons, for maintaining a ferry across said river at Thompsonville in said town of Enfield. In 1889 the Legislature granted a charter to the defendant, the Suffield & Thompsonville Bridge Company, authorizing it to construct and maintain a toll bridge across said river connecting the towns of Enfield and Suffield. Sp. Laws 1889, p. 1207. Sections 4, 8, and 9 of said charter were as follows:

"Sec. 4. Said corporation shall pay all damages occasioned to the property of any person or corporation, including the Enfield Bridge Company, or to the proprietors of the ferry at Thompsonville, which they may sustain by reason of the construction and maintenance of said bridge, and unless said damages shall be agreed upon by the parties they shall be assessed by a committee to be appointed by the superior court at Hartford on application of the company hereby incorporated or by any person or corporation sustaining such damages which application shall be accompanied by a summons to be served upon the parties interested as is required in cases of civil processes before said court; provided, however, that in case of amicable agreement, or otherwise, the said Enfield Bridge Company and the proprietors of said ferry may subscribe for and hold capital stock in the company hereby incorporated in amount less or equal to the amount of damages agreed upon or found in each case, and stock so subscribed shall be treated as stock paid for in cash."

"Sec. 8. The towns of Enfield and Suffield may, at legal meetings called for that purpose, vote to lay out a public highway across said bridge and when both said towns shall have so voted the selectmen of said towns shall join in an application to the superior court for Hartford county praying for the laying out of said highway, which application shall be duly served on said corporation and the court shall appoint a committee which shall proceed in the manner provided by statute for the laying out of highways in towns.

"Sec. 9. Said committee shall, if it finds said highway will be of common convenience and necessity, appraise and award to said corporation as damages the value of said bridge and appurtenant property, and also such amounts as have been paid as damages to the owners of said ferry, and said Enfield

Bridge Company, and such other damages as the corporation hereby formed shall suffer from said taking of said property, but no damages shall be allowed to the company for the franchise created by this resolution."

In pursuance of this charter the corporation constructed a toll bridge, which it has since maintained and now owns. In 1907, beside the toll bridge in question, there was a toll bridge across the Connecticut river between East Windsor and Windsor Locks, and one between Middletown and Portland, and also a toll bridge across the Niantic river between East Lyme and Waterford; each being owned by a corporation. In that year the Legislature passed an act for the establishment of free public highways across the Connecticut and Niantic rivers, and for the condemnation of each of said four toll bridges, namely, the bridge between East Windsor and Windsor Locks, the bridge between Portland and Middletown, the bridge between East Lyme and Waterford, and the bridge in question, between Enfield and Suffield. Pub. Acts 1907, p. 871, c. 258. The act provides that the Attorney General shall bring, in the name of the state, petitions to the superior court in the several counties in which said toll bridges are respectively located for the ascertainment of the compensation to be paid each corporation owning each of said four bridges, and prescribes the mode of proceeding, upon each of said petitions. In section 1 the act provides as follows: "Upon such petition said court shall appoint a committee of three disinterested men who, after being sworn and giving reasonable notice to the parties, shall examine the property proposed to be taken, ascertain the value thereof, including the value of the franchise of any corporation the property of which is to be taken, and the damage accruing from such taking to any other property of such corporation, except that no damage shall be assessed for the franchise of the Suffield and Thompsonville Bridge Company as provided in the charter of said corporation, and shall assess such sum in favor of the owners of said property as will justly compensate them therefor." Page 872.

The present proceeding was brought by the Attorney General pursuant to the aforesaid act. Upon due notice, the defendant, the Suffield & Thompsonville Bridge Company, appeared, and all other persons interested in said proceeding made default of appearance. The court, having heard the plaintiff and said defendant, adjudged that the state take said bridge to be its property as and for the purpose provided in said act, and appointed three disinterested men (naming them) "a committee, who, after being sworn and giving reasonable notice to the parties, shall examine the said bridge, its approaches, and appurtenances, the property proposed to be taken, ascertain the value thereof, excluding the franchise of said corporation, as provided in the charter of said corporation, and

the damage, if any, accruing from said taking to any other property of said corporation, other than to its said franchise, and who shall assess in favor of the owners of said bridge, approaches, and appurtenances such sum as will justly compensate them therefor."

On April 25, 1908, the committee filed its report, in which it assesses as compensation and damages to the defendant the sum of \$66,050.73, which amount it finds to be the value of all the property of the defendant proposed to be taken by the state. The report further states that upon the trial the defendant and the Attorney General made certain conflicting claims in respect to the true meaning of the defendant's charter and of the act of 1907, upon which claims the committee made certain rulings, to which the defendant duly excepted. The report further states that upon the trial the defendant offered evidence: (1) Of the payment by it to the Enfield Bridge Company of \$1,250 for damages by reason of the construction and maintenance of the defendant's bridge at Thompsonville, claiming it was entitled to be reimbursed for said sum under the provisions of its charter and the act of 1907. This evidence the committee rejected and the defendant excepted. (2) Of the payment by the defendant of \$9,400 to the proprietors of the Thompsonville Ferry, paid partly in cash and partly in stock, claiming it was entitled to be reimbursed for said sum under its charter and said act of 1907. This evidence the committee rejected, and the defendant excepted. (3) Of a contract between the defendant and the proprietors of the Thompsonville Ferry for the conveyance by said proprietors of all their rights in said ferry to the defendant and of a deed of said ferry rights, claiming that said contract and deed were relevant to the amount of compensation the defendant was entitled to, in connection with evidence that it was still the owner of said ferry rights, which would be taken or destroyed by these condemnation proceedings. The committee received in evidence the contract and deed, but subject to the ability of the defendant to show that the property referred to in the same entered into and became a part of the property to be taken in this proceeding, to wit, the bridge, its approaches, and appurtenances. The defendant excepted to the ruling restricting the admissibility of the evidence. The defendant remonstrated against the acceptance of the committee's report because the committee overruled its claims in respect to the true meaning of its charter and of the act of 1907, and because of the committee's ruling on the admission of evidence, as above stated, and the remonstrance prayed that the committee's report "be not accepted unless amended by adding thereto the amount so paid to the ferry proprietors and the Enfield Bridge Company." No other objection was made by either party to the report or to its acceptance.

Charles H. Briscoe and J. Warren Johnson, for defendant bridge company. Marcus H. Holcomb, Atty. Gen., and Hugh M. Alcorn, for the State.

HAMERSLEY, J. (after stating the facts as above). The superior court adjudged that the state take the bridge of the defendant, with its approaches and its appurtenances, to be the property of the state for the public use of a free public highway, as provided in the act of 1907 for the establishment of free public highways across the Connecticut river and Niantic river (Pub. Acts 1907, p. 871, c. 258), and appointed a committee to assess such sum in favor of the defendant owner of said property as will justly compensate it therefor in pursuance of the provisions of said act. The direction in the order for assessing just compensation purports to follow the act, and we must hold that such is its legal effect. The Attorney General claims that the act and the order of court in pursuance of the act directs the committee, in ascertaining the sum which will justly compensate the owners of the property taken, to consider only the value of the bridge, its approaches, etc., and the damage accruing to any other property of the defendant, and to exclude from consideration the value of the defendant's franchise and the sums paid by the defendant, in pursuance of the requirements of its charter, for the purpose of enabling the state to lawfully establish any bridge highway at that place. The defendant claims that the act of 1907 and the order of court in pursuance thereof directs the committee, in assessing just compensation, to include in the sum assessed such sums as may have been paid by the defendant for said purpose as required by its charter. We think this claim of the defendant is correct. A franchise is property, and, like other property, may be taken for public use. *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 59, 42 Am. Dec. 716. A toll bridge highway, as well as a turnpike road, is a public highway established by public authority, and to be regarded as a public easement; and persons who have been paid damages for property taken in its construction are entitled to no additional damage when it is made by public authority a free highway. *State v. Maine*, 27 Conn. 641, 648, 649, 71 Am. Dec. 89. When the defendant, under authority and requirement of its charter, paid the Enfield Bridge Company and the proprietors of the Thompsonville Ferry damage for injury to their property taken for the establishment of the bridge highway, the rights so acquired inured to the benefit of the public. In granting the defendant's charter, the state stipulated, and, in accepting the charter, the defendant agreed that, when the state (as at any time it lawfully might) should authorize the taking of the defendant's property acquired in pursuance of its charter for the public use of a free public

highway, upon paying just compensation for the property so taken, that such compensation should be ascertained by appraising the value of the bridge and appurtenant property and such amounts as have been paid as damages to the owner of the ferry and the Enfield Bridge Company and other damages the defendant shall suffer, but not including damages for the defendant's franchise created by its charter. Section 10, p. 1208, Sp. Laws. This stipulation and agreement determines the elements to be considered in ascertaining "just compensation," whenever the state may authorize the taking of the defendant's property for a free public highway; and it is immaterial whether the state acts directly in taking the property, or intrusts some public agencies with powers to that effect, such as the towns of Enfield and Suffield.

We think the act of 1907 recognizes these provisions of the charter, and provides for their observance. That act applies to four distinct toll bridges, owned by four distinct corporations. It provides one process and one mode of condemnation for all. It provides that the committee appointed in the proceeding against each corporation shall assess just compensation by ascertaining the value of the property proposed to be taken, including the value of the franchise and the damage accruing to any other property of the corporation except that, in the case of the Suffield & Thompsonville Bridge Company, no damage shall be assessed for its franchise "as provided in the charter of said corporation." There is no such provision in its charter except the one we have already considered, by which the defendant agrees to forego its right to compensation for taking its franchise in consideration of its being awarded as damages the amounts it shall have paid to the owner of the ferry and the Enfield Bridge Company. No other meaning can be given the language used in the act without eliminating the controlling words, "as provided in the charter of said corporation." We think this meaning is too plainly indicated by the language used to require any consideration of the further argument urged in its support, namely, that the different construction claimed by the Attorney General would render the provision invalid. It follows that the committee acted improperly in rejecting evidence of the defendant's payment to the Enfield Bridge Company and to the owners of the Thompsonville Ferry. Evidence of the agreement and deed for conveyance of the ferry rights to the defendant was admissible as tending to show a payment of damages to the ferry owner, but for no other purpose. The rulings of the committee upon conflicting claims of law call for no separate consideration, as they were based upon the same misconception of the defendant's charter and the act of 1907 that lead the committee to reject the evidence offered by the defendant.

The remonstrance alleges this improper conduct of the committee apparent on the face of the report, and claims that the report, for this reason, cannot be accepted. This claim must be allowed. The report must be set aside, and recommitment, in order that the committee may rehear the parties de novo as to the compensation to be awarded, ascertain what, if any, amounts have been paid by the defendant to the owner of the ferry and to the Enfield Bridge Company as damages as provided in the defendant's charter, and include the amounts thus paid in the sum which the committee shall find will justly compensate the defendant for its property taken by the state. It was strongly urged upon argument by the defendant that the interests of the state, as well as of the defendant, demanded an immediate judgment, fixing the amount of just compensation, and that these interests would be greatly jeopardized by any rehearing before the committee. However this may be, the superior court is bound to set aside and recommit the report. What arrangement can or should be made by the parties to secure an immediate judgment is a matter for agreement between them, which we cannot consider or discuss.

The superior court is advised to sustain the remonstrance, to set aside the report of the committee and recommit the same for a rehearing de novo as to the compensation to be awarded, but with instructions to assess the sum which will justly compensate the defendant for its property proposed to be taken by the state, including in that sum such amounts as the committee shall find have been paid by the defendant, as provided in its charter, to the owners of the Thompsonville Ferry and the Enfield Bridge Company as damages. This advice, however, is without prejudice to the right of the defendant to withdraw the remonstrance should it so desire. No costs will be taxed. The other Judges concurred, except PRENTICE and THAYER, JJ., who dissented.

(81 Conn. 65)

#### SEIDEL v. TOWN OF WOODBURY.

(Supreme Court of Errors of Connecticut.  
June 4, 1908.)

#### 1. HIGHWAYS—CONSTRUCTION AND REPAIR—DUTY OF STATE—INJURIES FROM DEFECTS—RIGHT TO INDEMNITY.

The construction and repair of highways is a governmental duty belonging to the state, which can only be performed through agents of the state. Those agents may be state officers designated for that purpose, or may be municipal corporations on whom the performance of the duty is imposed by law, but, in either case, travelers using the highway have no legal right, in the absence of a statute, to indemnity from the state against the dangers of an insufficient highway.

#### 2. SAME—LIABILITY OF TOWN—STATUTES—CONSTRUCTION.

Acts 1672, p. 7, providing that, on the concurrence of certain events, to wit: (1) A defect in the highway; (2) a failure or neglect by the town to make sufficient repair; (3) an injury

caused by means of the defect; and (4) such injury to a person in passing over a highway—a traveler injured in the use of the highway might receive indemnity from the state, and that the town neglecting its statutory duty should, as a penalty for that offense, pay the indemnity, is a penal statute, and cannot be extended by construction beyond the plain meaning of its words, and no liability on the part of a town to pay the penalty can arise unless on the concurrence of all the events fixed by the statute.

#### 3. SAME.

Gen. St. 1902, § 2019, provides that the party bound to maintain any bridge or road shall maintain a sufficient railing or fence on the sides of such bridge, and of such parts of such road as are so raised above the adjoining ground as to endanger the safety of travelers, etc. *Held*, that in view of the language of the statute, of the occasion of its original enactment, of the conditions then existing indicating its purpose, and of cognate legislation, the special specific duty of building fences on the sides of highways is imposed for the purpose of protecting travelers from dangers arising from conditions outside the limits of the highway, and is not imposed on towns generally, but only on a particular town, charged with the maintenance of a particular bridge or highway, parts of which are so constructed, in relation to adjoining land outside its limits, and therefore not within the control of the town, that the safety of travelers is endangered in a manner and to a degree similar to the danger encountered in passing over a bridge; and, therefore, where the regular traveled track and footway of a highway 56 feet wide occupied about 16 feet, the westerly shoulder of the road being raised slightly above the level of the footpath, and the ground falling from the shoulder about 2 feet measured perpendicularly in a horizontal width of about 2½ feet, and then sloping at a slight descending grade for about 20 feet to the west side of the highway, the town was not bound to maintain a railing.

#### 4. SAME.

Gen. St. 1902, § 2013, providing that towns shall, within their respective limits, build and repair all necessary highways and bridges, does not impose on towns the burden of making all highways within their limits secure against the possibility of accidents.

#### 5. EVIDENCE—OPINION EVIDENCE—COMPETENCY OF WITNESS.

In an action against a town for injuries resulting from an alleged defective highway, it was error to permit a witness, who did not qualify as an expert road builder, or as having any special knowledge or skill in the construction of roads, and who had no personal knowledge of the condition of the highway at the time of the accident, to state his opinion as to the safety of the road, in answer to a hypothetical question, which assumed the facts recited therein to be true.

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Action by Joseph Seidel, as administrator, against the town of Woodbury, for damages for the death of plaintiff's intestate. From a judgment for plaintiff, defendant appeals. Error. Judgment reversed, and cause remanded.

John H. Cassidy, for appellant. John O'Neill, for appellee.

HAMERSLEY, J. The construction and repair of highways is a governmental duty belonging to the state. It can only be performed through agents of the state. Those agents may be state officers designated for



that purpose, and may be municipal corporations, upon whom the performance of the duty is imposed by law. In either case, the travelers who use the highway have no legal right to any indemnity from the state against the dangers of an insufficient highway. In 1672, however, such indemnity was provided for, but only in the manner and to the extent specified in the statute. In that year the state imposed upon towns the duty of constructing and maintaining needful highways. Obedience to this mandate might be enforced by indictment, and other means of enforcement were, from time to time, provided. But the statute also provided that, upon the concurrence of certain events, a traveler, injured in the use of the highway, might receive indemnity from the state, and that the town which had neglected its statutory duty should, as a penalty for that offense, pay the indemnity, and that this penalty might be enforced in an action on the statute brought by the injured traveler. Acts 1672, p. 7. The concurring events upon which the town's liability to such a penalty can arise are fixed by statute, and are these: (1) A defect in the highway; i. e., by want of sufficient repair it is unfit for safe use as a highway. (2) A failure or neglect by the town to make such sufficient repair, involving the questions of reasonable notice and knowledge, and reasonable time. (3) An injury caused through or by means of the defect. (4) Such injury to a person in passing over a highway; i. e., while in the lawful use of the way. No liability on the part of a town to pay the statutory penalty can arise unless upon the concurrence of all these events. We have held that the statute imposing this penalty upon towns is a penal one, and cannot be extended by construction beyond the plain meaning of its words. This meaning of the statute is well settled, and has been fully restated in some recent decisions. *Bartram v. Town of Sharon*, 71 Conn. 686, 694, 43 Atl. 143, 46 L. R. A. 144, 71 Am. St. Rep. 225; *Makepeace v. Waterbury*, 74 Conn. 380, 382, 50 Atl. 876; *Upton v. Windham*, 75 Conn. 288, 291, 53 Atl. 660, 96 Am. St. Rep. 197.

The duty imposed upon the town is to construct needful bridges and highways and to maintain in good and sufficient repair such bridges and highways. The governmental duty and penalty for neglect is imposed upon all towns, except in cases where a particular person is bound to keep the highway in repair, and in the case of cities charged by charter with construction and repair of highways, and specially authorized to exercise a judgment in the mode of construction of a quasi judicial character, a structural defect, the result of an error of judgment, may not incur the statutory penalty, unless, indeed, the plan of construction adopted be one which is totally inadmissible. *Hoyt v. City of Danbury*, 69 Conn. 341, 351, 37 Atl. 1051. And in the case of a town whose officers must exercise some discretion in the mode of con-

struction, it is manifest that the question whether or not a highway is defective by reason of inadmissible construction may be affected by considerations somewhat different from those which determine the question of necessary repair.

In the present case the main contested question relates to the existence of a defect. Was the highway at the place and time of the accident in sufficient repair; that is, was it reasonably adapted for safe use as a highway, in view of its location and the amount and kind of travel it was built to serve? The specific facts found by the trial court, and upon which its judgment is based, are set forth in the finding, in the memorandum of decision, which is made a part of the finding. The facts in respect to the construction and repair of the highway at the place of the accident are as follows: The highway runs north and south. For a short distance northerly and southerly of the point where the accident happened the town constructed the highway in the following manner: The highway was 56 feet wide between fences. The regular traveled track and footway occupied about 18 feet, the east side being about 17 feet distant from the east fence of the highway, and the west side about 23 feet distant from the west fence. On the east side of the traveled track was a gutter, from which sloped eastward a bank about 12 feet high. Westerly of the traveled track (which was about 11½ feet wide) was a space 4 or 5 feet wide, with a slight upper grade, upon which was the footpath. Next westerly of the footpath was the westerly shoulder of the road, which was raised slightly above the level of the footpath. From this shoulder the ground fell about 2 feet, measured perpendicularly in a horizontal width of about 2½ feet, and then sloped at a slightly descending grade for about 20 feet, to the west side of the highway. No railing had been erected on the west side of the traveled track at this place to prevent persons, traveling in said track, from going off from the same. At the time of the accident there was nothing about the ground west of the shoulder of the traveled road material to the case, unless a rock, about 1½ feet high, which was some 10 or 12 feet westerly of the west shoulder. And the court finds proven (although not included in the finding) the further fact that the road was thus constructed many years previously, and no complaint had ever been made to the town of danger existing at this part of the highway.

The duty imposed by the act of 1672, now in force as section 2013 of the Revision of 1902, is this: Towns shall build and maintain, in good and sufficient repair, all the needful highways and bridges within their respective townships. If a highway, constructed or maintained in the manner indicated by the specific acts found by the court, violates the duty thus imposed upon towns, then the highway is defective, or insufficient,



within the meaning of that part of the act of 1672 now in force as section 2020 of the General Statutes of 1902. The real question, therefore, arising upon the facts found by the court, was whether a highway 56 feet in width, constructed with a traveled track or worked roadbed running through its central portion, leaving the other parts of the highway unworked, in the manner described, is reasonably safe for travel in view of the purposes for which it is needed and used. A populous city, which worked only a narrow strip through the center of its streets, leaving the remaining portions rough and unworked, would doubtless fail to perform the duty imposed by the act. But not so with country towns, especially with those of large area and small population. In such towns a highway worked throughout its limits is the exception. "Towns are not obliged to keep the whole width of the highways free from all obstructions and in good condition for being driven upon." *Burr v. Town of Plymouth*, 48 Conn. 460, 472. But travelers may be obliged, by reason of events naturally incident to travel, to pass from the wrought to the unwrought part of the highway. And a highway so constructed that such exceptional departure from the traveled track must involve unnecessary and serious danger may be defective within the meaning of the statute. The real question, therefore, in the present case, was whether the difference of 2 feet between the level of the traveled track and that of the unwrought portion of the highway and the slope of the ground, from the former to the latter, was so unnecessarily dangerous to any traveler who might be forced to leave the track that the statute imposed upon the town the duty of providing against such danger, by widening the way, or lessening the slope of the ground, or otherwise. This question the trial court did not decide, and apparently did not consider. The neglect of duty found by the court was not a neglect of the duty imposed by the act of 1672, in force as section 2013 of the General Statutes of 1902, in respect to a highway constructed and situated as this highway was, but a neglect of the special and peculiar duty imposed by an act passed in 1801, now in force as section 2019 of the General Statutes of 1902. This act commanded the doing of a specific, definite act; i. e., the erection of a fence in respect to highways which might be constructed and situated in a manner different from that in which it appears, from the facts found by the court, the highway in question was constructed and situated. This misconception doubtless arose in part from the peculiar allegations of the complaint. It may be that the complaint sufficiently alleges a neglect by the town of the duty imposed upon it by section 2013, but it certainly alleges, as the main, if not the only, neglect charged, a disobedience of the positive mandate of section 2019. The judgment of the court is plainly

based upon a disobedience of this mandate. It is therefore based upon a misconception of the law, which imposes a duty upon the town in respect to the highway in question; and for this reason we think a new trial should be granted.

The effect of the act of 1801 (Gen. St. 1902, § 2019) has never been directly passed upon. In *Beardsley v. City of Hartford*, 50 Conn. 529, 538, 47 Am. Rep. 677, we held that section 2013 might impose a duty upon towns, in the maintenance of a highway, in respect to conditions existing outside the limits of the way, when such conditions actually endanger travel upon the way, and that this duty might require the erection of barricades or other means of protecting travelers, if, in view of all the circumstances, the use of such means could be deemed reasonable and proper, as where, outside of and near the limit of a highway, a pit or excavation renders travel within the highway dangerous, but that the mandatory provisions of section 2019, for erecting fences in the specified instances, did not apply to such case. In *Ud-kin v. City of New Haven*, 80 Conn. 291, 297, 68 Atl. 253, we held that the responsibility of the town for defective conditions, by force of the General Statutes of 1902 (section 2013), was ordinarily limited to conditions existing within the limits of the highway. In *Hewison v. City of New Haven*, 34 Conn. 136, 141, 91 Am. Dec. 718, we held that conditions existing outside of a highway, which endanger travel upon it, do not necessarily constitute a defect in the way, and the opinion suggests that section 2019 of the General Statutes of 1902 applies to conditions existing outside the limits of a highway, and was enacted for the purpose of making it clear that these specified dangerous conditions, existing outside the limits of the way, shall be treated as a defect in the way. We think that, while the provisions of section 2019 apply to conditions existing outside the limits of a highway, they were enacted in 1801 for the purpose of imposing upon towns (so far as towns should be affected by them) a special duty, different and apart from the duty imposed by the act of 1672 (section 2020); and, as the mere imposition of such governmental duty would give no right of action to any one injured by its breach, the act specially provided that whoever shall suffer damage by reason of its breach may recover damages from the town. And from 1801 to the present time the statute imposing this special duty and penalty for its breach has remained upon our statute books as an enactment distinct and separate from that which imposed upon towns the duty of maintaining highways and the penalty for the breach of that duty. This view is confirmed by recalling the occasion for the passage of the act of 1801.

In early times, while there were instances of the imposition upon persons other than

towns of the duty of maintaining a particular highway, such instances were few, but the duty of maintaining particular bridges was more frequently imposed upon persons other than towns. And so the act of 1672 imposed upon towns the duty of maintaining all needful bridges and highways within their respective limits, unless it belonged to a particular person to maintain "such bridge in any particular case." This phraseology was preserved until 1821. This does not negative the fact that occasionally some person, other than a town, was charged with the maintenance of the highway, or a part of the highway, but it does illustrate and emphasize the infrequency of such occasions. After 1784 a considerable change in providing for and maintaining routes of travel set in. The power of the federal Congress in the establishment of postoffices called for mail routes. Congress directed that the public mails be carried by the stages, and thereupon our Legislature enacted a law compelling the selectmen of the towns, through which the stages charged with the mails passed, to immediately mend and repair the bridges and roads used by the stages, and keep the same in good repair. Revision 1786, p. 335. The increase of through travel called for the construction of roadbeds different from and more substantial than could reasonably be expected from towns in the performance of the duty imposed upon them by the act of 1672. This necessity was met by giving to private corporations, known as "turnpike companies," authority to build highways (for private profit, as well as public use) known as "turnpike roads."

Prior to 1784 the doubt whether grants of such corporate franchises would be a violation of our charter of 1662 restrained the Legislature in the exercise of such power, but after the treaty of peace in 1784 recognized our independence, the incorporation of turnpike companies commenced, and increased rapidly, until, in the early part of the nineteenth century, turnpike roads, built for private profit by private corporations, which were charged with the duty of their maintenance and repair, supplied, to a large extent, the facilities for through travel. It was in view of this changed condition that the act of 1801 was framed, for the purpose of imposing the specific duty of erecting and maintaining fences on the sides of each bridge, for protecting travelers against the dangers arising from conditions outside the limits of the bridge highway, and on the sides of such parts of each turnpike road or highway as are so made, above the ground adjoining the road or highway, as to endanger the safety of travelers. The purpose is to impose a specific duty for protection against conditions existing outside the limits of the highway; a duty which is absolute in the case of all bridge highways, and which becomes absolute in the case of such parts of any turnpike road or highway so constructed as to create

similar outside conditions which actually endanger the safety of travelers. The act reads: "The town, corporation, company, or person, which by law is obliged to maintain any bridge, road, or highway, shall erect and maintain a good and sufficient railing or fence on the sides of such bridge, and on the sides of such parts of each road as are so made or raised above the adjoining ground as to endanger the safety of travelers; and if it shall so happen that any person shall suffer any damage in his person or property, by reason of any want of, or defect in any such railing or fence, such town, corporation, company or person shall pay to him, her or them who shall so suffer, double damage." Comp. St. 1808, p. 381, tit. 86, c. 5. This act remained unchanged in language until 1821, and in meaning and legal effect until the present time. It is to be noticed that the duty to maintain highways in sufficient repair is imposed absolutely upon all towns, except in a particular case some particular person shall be charged with the duty. Comp. 1808, p. 120, tit. 29. And the same duty is imposed absolutely upon all towns, with the same exception, by section 2013 of the General Statutes of 1902. But the specific limited duty imposed by the act of 1801 is not imposed upon all towns absolutely, but is imposed upon the town, corporation, company, or person that may be charged with the maintenance of the particular bridge, highway, or road; and this special imposition of a specific duty is made in the same manner in section 2019 of the General Statutes of 1902. That this special imposition of this specific duty was made with particular reference to turnpike roads or highways is further illustrated in the act of 1803, which provides for state commissioners to oversee turnpike roads or highways, and commands them to require suitable railings to be erected, at the expense of the turnpike company, at such places on the turnpike road or highway where the commissioners may consider them necessary. Comp. 1808, p. 667, tit. 166, c. 1. And this provision remained in force until turnpike roads or highways became obsolete, and turnpike legislation disappeared from our statute book in the Revision of 1902. See Gen. St. 1888, § 2733.

In view of the language of the statute, of the occasion of its original enactment, of the conditions then existing indicating its purpose, and of cognate legislation, we think that the special specific duty of building fences on the sides of highways, imposed by section 2019, Gen. St. 1902, is imposed for the purpose of protecting travelers, lawfully using the highway, from dangers arising from conditions outside the limits of the highway, and is not a duty imposed upon towns generally, but only upon a particular town charged with the maintenance of a particular bridge or of a particular highway, parts of which are so constructed, in relation to adjoining land outside its limits, and therefore not within the control of the town, that the

safety of travelers in using the way is endangered in a manner and to a degree similar to the danger encountered in passing over a bridge. It is immaterial to inquire whether or not a causeway or artificial embankment might be constructed within the limits of the highway, although not covering its whole extent, so that the duty of fencing would come within the meaning of section 2019 of the General Statutes of 1902, for the traveled track running through the central portion of the highway as described in the finding is plainly not such a causeway or embankment. The trial court has therefore based its conclusion that the highway in question was defective (the burden of proving it sufficient being, by reason of the default, upon the defendant) upon the neglect of the defendant to perform a specific duty, imposed by section 2019, which duty that section does not impose upon the defendant in this case. This error is vital, and vitiates the judgment, unless, indeed, we can say that it is apparent upon the face of the record that the court should have found that the defendant neglected to perform the duty of repair imposed upon it by section 2013. We certainly cannot say this, nor can we assume that the court would have found one way or the other upon a question of fact which the court apparently did not consider, and could not have fairly determined while controlled by its misconception of the statute. As, for instance, the court in the finding treats the fact that in some way an accident did happen as raising a presumption that the situation of the highway was in violation of the statute, it is manifest that the mere possibility of an accident thus proved might have a weight in determining a violation of section 2019, to which it clearly would not be entitled in determining the violation of section 2013. The duty imposed by the latter section does not place upon towns the intolerable burden of making all highways within their limits secure against the possibility of accidents. *Campbell v. City of New Haven*, 78 Conn. 394-396, 62 Atl. 665; *Goodspeed's Appeal*, 75 Conn. 271, 274, 53 Atl. 728; *Udlin v. City of New Haven*, 80 Conn. 291, 296, 68 Atl. 253. This error is substantially and, in view of the peculiar circumstances of the hearing, sufficiently suggested in the reasons of appeal.

The court also erred in permitting the witness Sanford to state his opinion as to the safety of the road, in answer to a hypothetical question, which assumed the facts recited therein to be true. The witness did not qualify as an expert road builder, or as having any special knowledge or skill in the construction of roads, and had no personal knowledge of the condition of the highway at the time of the accident. His opinion was not admissible, either under the rule permitting expert testimony, or under our practice of permitting nonexperts to state an opinion in respect to conditions they have seen and have

described in their testimony. *Taylor v. Town of Monroe*, 43 Conn. 38, 43; *Sydeleman v. Beckwith*, 43 Conn. 1, 12; *Ryan v. Town of Bristol*, 63 Conn. 26, 38, 27 Atl. 309; *Campbell v. City of New Haven*, 78 Conn. 394, 395, 62 Atl. 665. But the mistake belongs rather to that class of harmless mistakes, liable to occur in passing upon questions of relevancy, more or less remote, and which cannot ordinarily furnish ground for a new trial. *Leonard v. Gillette*, 79 Conn. 664, 668, 66 Atl. 502.

There is error, and the judgment of the superior court is reversed, and the cause remanded, for further proceedings according to law. The other Judges concurred.

(81 Conn. 22)

#### STATE v. WASHELESKY.

(Supreme Court of Errors of Connecticut.  
June 16, 1908. On Motion, June 25, 1908.)

##### 1. CRIMINAL LAW—EVIDENCE—WEIGHT AND SUFFICIENCY—QUESTION FOR JURY.

The weight to be given to evidence in a murder case, and whether it established facts claimed by the prosecution, were questions for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1713.]

##### 2. HOMICIDE—APPEAL—REVIEW—VERDICT—APPROVAL BY TRIAL COURT.

Great weight is to be given to the action of the trial court in granting or refusing a motion to set aside a verdict especially in a capital case, where it must be presumed that he gave the matter most serious consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 704.]

##### 3. SAME—MURDER—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to sustain a conviction of murder in the first degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 518-522.]

##### 4. CRIMINAL LAW—TRIAL—INSTRUCTIONS—SUFFICIENCY.

The sufficiency of instructions is to be determined from a consideration of the charge as a whole, and hence, in a murder case, where the court clearly stated that the state was bound to prove that the person with whose murder accused was charged was dead, that his death was caused by human agency, that the burden was on the state to prove beyond a reasonable doubt that the dead body found was the body of the person alleged to have been murdered, and on failure to so prove accused should be acquitted, and called attention to accused's claim that the body found was not proved to be that of the person alleged to have been murdered, the charge was not erroneous as assuming that the corpus delicti had been established because the court, for the most part in the portions stating the state's and accused's claims, used isolated sentences which might be construed as an assumption that the corpus delicti had been established.

##### 5. SAME—SUFFICIENCY OF EVIDENCE—STATUTORY PROVISIONS.

Under Gen. St. 1902, § 1508, providing that no person shall be convicted of any crime punishable by death without the testimony of at least two witnesses or that which is equivalent thereto, testimony of two witnesses is not necessary, but it is enough if the testimony is in the minds of the jury, equivalent to that, nor need there be two witnesses to every important fact, but if two or more witnesses each testifying to

different parts of the same transaction or to different circumstances surrounding the case tend directly to show accused's guilt, it is sufficient.

**6. SAME—APPEAL—RECORD—QUESTIONS PRESENTED FOR REVIEW—NEW TRIAL—FAILURE TO ASK, IN TRIAL COURT.**

It is only in very flagrant cases of abuse of the state's attorney's privilege of argument that the court will on appeal grant a new trial on that ground where the aggrieved party has failed to move for it in the court below, or to call that court's attention to the objectionable remarks.

**7. SAME.**

A state's attorney in a murder case in closing his argument said: "The grand jurors of the county charge to you in behalf of the commonwealth that \* \* \* the prisoner at the bar is guilty of murder in the first degree. That is the law of the land. You must uphold it." He had just before stated that the evidence showed that accused had willfully killed decedent, and after using the language complained of urged the jury to bring in a verdict consistent with the evidence. *Held* that, when considered as a whole, the argument was that accused was guilty of murder, in the first degree under the evidence, that the grand jury had charged that crime in the indictment, and that the jury should by a verdict consistent with the evidence sustain the charge, and such argument was not ground for a new trial, on appeal, where no objection was made in the lower court, and no motion for a new trial made, especially where the jury were carefully cautioned that in determining the question of accused's guilt they should take the testimony as they had heard it from the witnesses, and the law from the court.

**8. HOMICIDE—MURDER—EVIDENCE—CORPUS DELICTI.**

The corpus delicti is established by proof that one person has been killed and that another person has killed him, though the identity of neither the perpetrator nor the victim has yet been shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 471-476.]

**9. CRIMINAL LAW—TRIAL—ORDER OF PROOF.**

As the law fixes no rule as to the order of proof of the identity of the perpetrator of a homicide and of the person killed, it lies within the discretion of the court, and hence it was not error to admit evidence tending to connect accused with the alleged crime before the identity of the victim was shown, where, before offering the evidence, the fact that he had been unlawfully killed by some one was proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1609-1612.]

**10. SAME.**

In a murder case the court acted within its discretion in admitting in evidence an identification card of an account in a savings bank before the foundation for it had been laid upon the assurance of the state's attorney that it would be properly connected with decedent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1609-1612.]

**11. HOMICIDE—EVIDENCE.**

In a murder case, it was not error to exclude evidence that, on the night that decedent disappeared, he came alone to witness' house carrying a weapon, offered on the theory that if armed he might later have met somebody and been killed, since the inference from the fact that he was armed either that some other person than accused killed him or that if accused killed him, it was under circumstances justifying, excusing, or mitigating the crime, was so remote as to leave the admission of the evidence within the discretion of the court.

On Motion of State's Attorney for Appointment of Time for Execution of Death Sentence.

**12. CRIMINAL LAW—SENTENCE—REPRIVE—FIXING DATE OF EXECUTION AFTER DATE ORIGINALLY FIXED—STATUTORY PROVISIONS.**

Gen. St. 1902, § 1522, as amended by Pub. Acts 1905, p. 295, c. 70, providing that when, by reason of the pendency of an appeal to the Supreme Court of Errors from a judgment of sentence to death, the judgment shall not be executed at the time assigned therefor, if no error be found the court shall appoint the time of execution, and its clerk shall issue a writ of execution accordingly, does not apply where a reprieve has been granted by the Governor, and the decision of affirmance on appeal is announced before the expiration of the time for which the reprieve was granted, as the time fixed by the reprieve became the time legally assigned for the execution, and the warrant of execution is to be issued upon it by the clerk of the superior court.

Appeal from Superior Court, New Haven County; Silas A. Robinson, Judge.

John Washelesky, alias John Wiszniski, was convicted of murder in the first degree, and he appeals. Affirmed.

Howard C. Webb and Levi N. Blydenburgh, for appellant. William H. Williams, State's Atty., Arnon A. Alling, and Edward A. Hariman, for the State.

THAYER, J. The defendant was found guilty of murder in the first degree, and moved that the verdict be set aside as against the evidence. The motion was overruled. His exceptions to this ruling are founded upon two grounds: First, that the evidence failed to establish the death of Peter Lucaszewicz, for the murder of whom he was indicted, and, second, that the evidence failed to so connect the defendant with such death, if it had been proved, as to exclude every reasonable hypothesis of his innocence. The evidence by which the state claimed to prove that the body was that of Lucaszewicz was wholly circumstantial, came from a large number of witnesses, and we shall not undertake to review it. It is sufficient to say that there was positive evidence tending to prove a large number of independent facts from which the inference could be logically drawn that the dead body, which when found was so decomposed as to be unrecognizable, was that of Lucaszewicz. This evidence was practically uncontradicted. We think that, from the facts thus claimed to be proved, the jury might reasonably be satisfied beyond reasonable doubt that the body was his. The weight to be given to the evidence, and whether it established the facts claimed by the state, were matters to be determined by the jury.

Having offered evidence to prove the death, and also proof that it was caused by human agency, the state offered evidence to prove that the defendant was the agent who caused it. One witness was produced who attempted to connect the defendant with Lucaszewicz on the night of the latter's disappearance, and to show that, after having been assault-

ed by the defendant, Lucaszewicz, when last seen, was being pursued by the defendant, who was armed with a fence picket. This witness was not positive in her identification. Other evidence connecting the defendant with the crime tended to show previous quarrels between the parties, threats, motive, declarations subsequent to the disappearance of Lucaszewicz showing guilty knowledge, flight, and other guilty conduct by the defendant. This evidence, also, was substantially uncontradicted. It was evidence to be weighed by the jury. If they were satisfied that the witness who testified to the assault upon Lucaszewicz was truthful, and that she was correct in her belief that the person who committed the assault was the defendant, and were also satisfied as to the existence of the motive for the crime, and of the fact of the previous threats and subsequent declarations, then there was very strong evidence upon which to find the guilt of the accused. It was the province of the jury to determine the value of this evidence tending to connect him with the crime, and to say whether it was equivalent to the testimony of two witnesses and therefore sufficient to establish his guilt of murder in the first degree. They were fully instructed as to the law bearing upon these matters, and have found him guilty of murder in the first degree. The trial judge who heard and saw the witnesses has refused to set aside the verdict. As we have repeatedly said, great weight is to be given to the action of the trial court in any case in granting or refusing a motion to set aside a verdict. This is especially true in a capital case, where it must be presumed that he gave the matter most serious consideration before passing upon the motion. We have carefully read the testimony, and think that the jury were warranted in finding the verdict which they did.

The defendant complains that, in view of his claim upon the trial, that the state had failed to prove the death of Lucaszewicz, or that it was the latter's body which had been found, and the claim that his mere disappearance was not of itself sufficient proof of the corpus delicti, the charge of the court upon this branch of the case was not only inadequate for the instruction of the jury, but was injurious to the accused, in that it assumed throughout that the corpus delicti was established. But the court very clearly stated to the jury that the state was bound to prove that Lucaszewicz was dead, and that his death was caused by human agency. And after saying to the jury that the state claimed to have established these facts, it continued: "The burden is upon the state to prove beyond a reasonable doubt that the dead body found, as claimed in the testimony for the state, was the body of Peter Lucaszewicz. This is one of the facts necessary to be established to warrant the conviction of the accused. This is necessary to be proven

in order to establish the death of Peter, to establish the death of the man claimed to have been killed; a failure on the part of the state to establish such death beyond a reasonable doubt should be followed of course by an acquittal of the accused." The court then, after having stated and commented upon the other claims of the state, called the jury's attention to the claims of the defendant, and among them to his claim that it had not been proven that the dead body was that of Lucaszewicz. The jury could not have understood from the charge given them that the court assumed that the corpus delicti had been established; on the contrary, they could not have failed to understand that the parties were at issue upon the facts essential to its establishment, and that they, the jury, were to determine from the evidence whether those facts had been proved. The isolated sentences or parts of sentences to which reference is made in the defendant's brief as showing the court's assumption that the death of Lucaszewicz had been established, are found for the most part in those portions of the charge wherein the court is stating the state's, or defendant's, claims, and not the court's own opinion as to what had been established by the evidence. The remarks criticised are to be considered in connection with the context and with the charge as a whole. *State v. Rathbun*, 74 Conn. 524, 531, 51 Atl. 540. So considered, the charge presents no grounds for the criticisms mentioned.

Complaint is made of the court's charge as to the amount of evidence required to justify a verdict of murder in the first degree. The court having told the jury in the language of section 1508 of the General Statutes of 1902 that "no person shall be convicted of any crime punishable by death without the testimony of at least two witnesses or that which is equivalent thereto," instructed them that murder in the first degree is so punishable and that the statute applies to convictions for that crime. He then said: "You will observe that the requirements of this statute are not confined to the testimony of two witnesses. It goes further, and adds, 'or that which is equivalent thereto;' that is, equivalent to the testimony of two witnesses. It is enough if the testimony is, in the minds of the jury, equivalent to that. Neither is it required that there should be two witnesses to every important fact. If there are two or more witnesses, each testifying to different parts of the same transaction, or to different circumstances surrounding the case, tending directly to show the guilt of the accused, it may be regarded as a sufficient compliance with the statute, although there may not be two witnesses to any one fact or circumstance." This was a correct statement of the law. *State v. Smith*, 49 Conn. 376, 385; *State v. Bailey*, 79 Conn. 589, 596, 65 Atl. 951; *State v. Marx*, 78 Conn. 18, 22, 23, 60 Atl.

690; *State v. Kelly*, 77 Conn. 266, 274, 58 Atl. 705. It was adapted to the case, and there was nothing in the facts or claims of the parties calling for any further or different statement. The statute does not require, as claimed by the defendant, that there shall be "testimony of two witnesses to the homicidal act." *State v. Smith*, 49 Conn. 376.

The defendant complains of certain remarks made by the state's attorney in closing his argument to the jury, and assigns as one of the reasons of appeal and grounds for a new trial that the court erred in permitting these remarks to be made. The words complained of are, "The grand jurors of the county charge to you in behalf of this commonwealth that John Washelesky, the prisoner at the bar, is guilty of murder in the first degree. That is the law of the land. You must uphold it." It does not appear, nor is it claimed, that the defendant or his counsel objected to the remarks when made or called the court's attention to them until after the verdict and judgment in the case had been rendered. Nor was the court below asked to grant a new trial because of these remarks of the state's attorney. While this court may in very flagrant cases of abuse of the state's attorney's privilege grant a new trial although the aggrieved party has failed to move for it in the court below, or to call that court's attention to the objectionable remarks, it is only in flagrant cases that it will do so. Ordinarily, unless such action has been taken in the trial court, such utterances afford no ground for an appeal or application to this court for a new trial. *State v. Laudano*, 74 Conn. 688, 645, 51 Atl. 860; *Hennessy v. Metropolitan Ins. Co.*, 74 Conn. 699, 710, 52 Atl. 490. We do not agree with the defendant's counsel that the state's attorney's conduct here complained of presents such a case. They say that he, by this utterance, in effect told the jury that the grand jury by its indictment had found the defendant guilty and that it was the jury's duty to uphold the finding of the grand jury. We think that the language standing alone is not susceptible of this construction. He said to them, not that the grand jury had found the defendant guilty, but that they charged him in the indictment with murder in the first degree. But we must look to what precedes and follows the remark to understand what it was intended should be understood by it and what probably was understood. The record shows that the attorney had just stated, as the conclusions to be drawn from the evidence, that the defendant killed *Lucaszewicz*, that it was a willful and not an accidental killing, that the defendant had been led on and on to the deed by his hatred of the deceased, that he killed him through hatred and malice, that he attempted to conceal the crime, but had been overtaken by the law. The language complained of was then used, and was followed by language urging

the jury to bring in a verdict consistent with the evidence. From the entire passage the jury must have understood the state's attorney's statement to be that by the law of the land such a willful, deliberate, and premeditated killing with actual malice as he had just described, as disclosed by the evidence, was murder in the first degree, that the grand jury had charged that crime in the indictment, and that the jury ought, by a verdict consistent with the evidence, to sustain the charge. The language used was not well chosen in all its parts to express the thought which it is apparent the state's attorney had in mind to express. But in framing thoughts into phrases in the heat of extemporaneous argument, it is inevitable that some lapses will occur and it not infrequently happens that by the omission or addition of a word, or by a misarrangement of sentences, a different thought is expressed than was intended. The hearer, intent in following the argument, is seldom misled thereby. But whatever view be taken of the language used, no harm to the defendant can have resulted from it, as the jury were carefully cautioned by the court that in determining the question of the defendant's guilt they were to take the testimony as they had heard it from the witnesses, and the law from the court, and decide the case in accordance therewith. This exception, therefore, affords no ground for a new trial.

The remaining questions raised on the appeal relate to rulings upon questions of evidence. A question propounded to *Birdsey A. Farnham*, a witness for the state, calling for a fact tending to connect the defendant with the alleged crime, was objected to by the defendant upon the ground that the identity of the dead body as that of *Peter Lucaszewicz* had not been established beyond a reasonable doubt. The court overruled the objection and admitted the evidence. It is the defendant's claim that proof of the corpus delicti could not be complete without proof of the identity of the dead body, and that in trials for murder the body of the crime must be established before evidence to connect the accused with it can be permitted. But the body of the crime is established by proof of the two facts, that one person has been killed, and that another person killed him, although the identity of neither the perpetrator nor the victim of the crime has been shown. *People v. Palmer*, 109 N. Y. 110, 114, 16 N. E. 529, 4 Am. St. Rep. 423. These facts are to be proven by subsequent evidence to establish the guilt of the accused. The law fixes no rule as to the order of this proof. It is therefore within the discretion of the court. In the present case it is not questioned that before offering the evidence which was objected to, ample evidence had been introduced to prove that the person whose dead body had been discovered concealed in the sand was unlawfully killed by some one. The

state was therefore justified in proceeding to connect the defendant with the crime, and the court's ruling permitting it was right.

The state offered in evidence an identification card of an account in a savings bank under the name "John Wasieclewski," and its admission was objected to in behalf of the defendant until it should be connected with the accused. Upon the state's attorney's undertaking to so connect it, it was admitted against the defendant's objection. It was competent for the court in its discretion, upon the assurance of the state's attorney that it would be properly connected, to thus admit the testimony before the foundation for it had been laid. The finding of the court is that in its opinion sufficient evidence was in the case to warrant the jury, if they believed it, in finding that the account belonged to the defendant and that the name "John Wasieclewski" in the identification card referred to was intended to represent the defendant. As the sole foundation of the defendant's objection was thus removed he cannot complain of the court's exercise of its discretion as to the order of the proof.

Annie Walszic, the former wife of Lucaszewicz, but now the wife of another man and mother of a child by him, was called as a witness for the state and afterward for the defendant. Testimony tending to prove improper relations between her and the defendant during the life of her former husband had been introduced by the state, and upon her direct examination in behalf of the defendant she had given evidence tending to vindicate herself from such imputation. Upon cross-examination she was asked whether in giving her testimony in this case she did not deem it important to clear herself if she could of the imputation of any improper conduct with the defendant. The question was objected to, no reason being assigned therefor, and claimed as affecting her credibility. The objection was overruled, and the witness answered, "It is just the same to me. I am telling the truth."

The same witness testified for the defendant to troubles which occurred at and just outside her home on the night of the alleged crime, between Lucaszewicz and one Gronowski, after the defendant had left the house. She also testified that she knew of no trouble between Lucaszewicz and the defendant that night. The defendant claimed that this trouble about which the witness testified was the same which the state's witness had described, wherein the defendant was said to have assaulted Lucaszewicz. On cross-examination the state's attorney, against the objection of the defendant, was permitted to ask the witness whether she told one Martin Bartusewicz anything about the defendant soaking Lucaszewicz with a club. The witness answered that she did not tell him that. The evidence was admissible in view of the witness' direct testimony. But the answers to this and the preceding question rendered those

questions harmless to the defendant, and it is therefore unnecessary to inquire whether any objection could have been successfully interposed to either question, on the ground that the witness had originally been called by the state. It is claimed, however, in behalf of the defendant that it is apparent from the character of the questions that they were asked with no expectation of eliciting answers favorable to the state, but with the sole purpose of prejudicing the witness and the defendant's case before the jury. And it is claimed that he was prejudiced thereby and the trial rendered unfair. Such conduct on the part of the state's attorney as is claimed by the defendant would be most reprehensible. What its effect would be upon the trial we need not consider, because we do not agree with counsel that it is apparent from the questions themselves that the purpose in asking them was what is claimed. As regards the first question, it would be apparent to the jury that the witness might deem it important to free herself from the claimed imputation. They would naturally consider that fact in weighing her testimony, had the question not been asked. How the asking of it and receiving the answer given, and which it is claimed was of such a character as the attorney expected, could raise any prejudice against the witness or the defendant, not existing before, is not explained. The second question was clearly pertinent and admissible. The fact that the question was asked, therefore, suggests no improper purpose in asking it. To impute the purpose which is claimed, we must assume that the attorney knew or had good reason to believe that the witness had not used the expression attributed to her, and that he invented the expression and confronted her with a witness to whom he knew she had never uttered it. There is nothing in the question and nothing before us to in any way suggest such an assumption.

The defendant produced a witness by whom he proposed to prove that at about 10 o'clock on the night of his disappearance, Lucaszewicz came alone to her home and that at that time he had a weapon. The state objected to the evidence and it was excluded. The sole ground upon which it was claimed was that if armed he might later have met somebody and the result been his death. It is true that meetings resulting in the death of one of the parties more frequently occur when one or both of them carry weapons. In the absence of any evidence concerning the meeting the natural inference from the fact that Lucaszewicz was armed would be that the other party and not he would be the one to meet death in the encounter. Any inference from the fact that he was armed, either that some other person than the defendant killed him, or that if the defendant killed him it was under circumstances justifying, excusing, or mitigating the crime, would be so remote as to leave the admission

of the evidence within the sound discretion of the court. There was no error in excluding the evidence.

There are several remaining assignments of error upon rulings upon evidence, but they present no questions requiring discussion. The rulings are all sustainable upon familiar and well-settled rules of evidence. We pass them, therefore, with the remark that we find nothing erroneous in them.

There is no error. The other Judges concurred.

#### Order and Opinion on Motion of State's Attorney.

BALDWIN, C. J. The state's attorney has moved for the appointment of a time for the execution of the judgment by which sentence of death was pronounced against the defendant by the superior court for New Haven county. This motion rests upon the assumption that Gen. St. 1902, § 1522 (as amended by the Public Acts of 1905, p. 295, c. 70), applies to the present case. That provides that when, by reason of the pendency of an appeal to this court from a judgment of sentence to death, such judgment shall not be executed at the time assigned therefor, if no error be found, this court, after its decision on such appeal, shall appoint the time for the execution of said judgment, and its clerk shall issue a writ of execution accordingly. The judgment of the superior court against the defendant was that he should be hanged on the 1st day of April, 1908. On March 16, 1908, he was granted a reprieve by the Governor until the 1st day of July, 1908. That day is still in the future. The judgment of the superior court could not be executed at the time assigned therefor by that court, by reason of the reprieve. Our decision on the appeal was announced before the expiration of the time for which the reprieve was granted. The reprieve appointed a new time for the execution of the sentence. Thereupon that became the time legally assigned for its execution.

Under our decision on the appeal, the judgment of which the sentence of death formed a part stands good. The warrant of execution is therefore to be issued upon it by the clerk of the superior court.

The motion is denied. The other Judges concurred.

(75 N. J. L. 467)

#### BURNETT v. MAYOR, ETC., OF TOWN OF BOONTON.

(Supreme Court of New Jersey. Jan. 7, 1908.)

#### 1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS—MACADAMIZING STREETS—AUTHORIZATION BY ORDINANCE.

Where under a town charter a street improvement can only be made by ordinance, and the ordinance for that purpose provides merely that the street be graded, and the improvement made thereunder includes paving with macadam, the benefit of the macadam pavement cannot be assessed against the abutting property owner.

#### 2. SAME—ESTOPPEL—SILENCE BY OWNER.

Where the paving with macadam is unauthorized by the ordinance under which improvement is made, the inaction or silence of the landowner whose lands are supposed to be benefited thereby creates no estoppel against him to deny the liability of his lands for an assessment for such benefits, and he is not to be considered in laches by reason of such inaction or silence.

#### 3. SAME—ASSESSMENTS FOR BENEFITS—REVIEW—REASSESSMENT.

Where the landowner's property is not liable to assessment on account of macadamizing the street, because that work was not authorized by the ordinance under which the improvement was made, there can be no reassessment on account of the benefit of the macadam, under the act approved March 23, 1881 (P. L. p. 194). But where the property of the landowner is subject to assessment on account of work done in grading, curbing, and flagging the sidewalk, paving the gutters and grading the street, which was authorized by the ordinance, the board of assessors may be ordered to make a new assessment upon the property in proportion to the benefits received, and not in excess thereof.

(Syllabus by the Court.)

Certiorari by Smith W. Burnett against the mayor and common council of the town of Boonton, to review an assessment made against the property of prosecutor on account of a street improvement. Assessment set aside.

See 73 N. J. Law, 453, 63 Atl. 995.

Argued June term, 1907, before PITNEY, HENDRICKSON, and TRENCHARD, JJ.

Reed & Salmon, for prosecutor. S. Claude Garrison, for defendant.

TRENCHARD, J. This writ of certiorari brings before this court for review an assessment made against the property of the prosecutor by the board of assessors appointed by the common council of the town of Boonton, on account of the improvement of Main street in that town. The improvement in question was made under the authority conferred by an ordinance passed by the common council. The authority to pass the ordinance is found in sections 7 and 12 of the charter of the town of Boonton, approved March 26, 1872 (P. L. pp. 806, 810). The validity of the ordinance is not attacked.

The sections of the ordinance relating to the character and scope of the improvement are as follows:

"Sec. 2. Be it further ordained by the common council of the town of Boonton, that Main street, from the center of Liberty street to the corporate line, be graded the full width of the street, according to the grade lines as shown by the profile map made by Lewis Van Duyne, surveyor, bearing date August 25, 1898, and as laid down in an ordinance of the town of Boonton known as 'An ordinance to establish the grade of Main street west of Liberty street, passed October 5, 1898, approved October 5, 1898.'

"Sec. 3. Be it further ordained, that said street shall be so made as to form a regular arch from curb to curb; the crown of the



street to be 12 inches above the bottom of the gutters, and that the gutters be paved three feet wide, commencing at the curb stone and following the arch of the street.

"Sec. 4. Be it further ordained, that the sidewalks shall be eight feet wide, and be leveled and graded in a line with the street, and be curbed with stone not less than four inches in thickness and 16 inches wide, the curb to be eight inches high from the bottom of the gutter, and that said sidewalks shall be flagged or concreted for at least four feet in width, which shall be laid on a slope of four inches in eight feet from the top of the curbing to the side of the street, and equally distant from the curbing and the outside line of the street."

It appears from the state of the case, not only that the sidewalks were improved by grading, curbing, and flagging, the gutters by paving and the street by grading, as provided for in the ordinance, but that the street was also improved by macadamizing the same; and, from the report of the board of assessors, it appears that the cost and expense of the whole work was computed, and the assessment against the prosecutor included his pro rata share of the cost of the whole work. It is insisted that the assessment against the prosecutor should be set aside because the ordinance did not authorize an assessment for the benefit of macadam. We think the contention of the prosecutor must prevail. The ordinance authorizes merely that the sidewalks be graded, curbed, and flagged, that the street be graded the full width, and that the gutters be paved. No provision is made for paving the street with macadam. Under the charter of the town such work can only be done by ordinance. *State v. Bayonne*, 35 N. J. Law, 335.

In *App' v. Stockton*, 61 N. J. Law, 520, 39 Atl. 921, where the undertaking of the improvement was dependent on the presentation of a petition to the municipal body, and the petition presented asked for the grading of a street only, while the contract was let, not only for grading the street, but for metalling and placing of gutters along it, and the cost and expense of the whole work was assessed against the prosecutors and included their pro rata share of the cost of the whole work, it was held that, as the authority to do the work depended upon the petition, and the petition only provided for the grading of the street, the assessment for the portion covering the cost of paving, metalling, and curbing the street could not be sustained. The court said: "Without this petition the town council was vested with no legal power to thus improve the street, and then assess benefits against the landowners benefited, and the contract made by the town, so far as the imposition of any burden upon the prosecutors was concerned, was of no validity whatever. Such improvements can only be made by municipal authorities under the powers granted

them by legislative enactment, and in conformity therewith. \* \* \* The jurisdiction of council was to proceed to grade the street and not to metal, macadamize, and curb it."

The case last cited, and the reasoning by which it is supported, we regard as decisive of the present case. It is true that in that case the court held that the town council was without jurisdiction to order the macadamizing of the street because this improvement was not asked for by the petition to council. But we think the present case is no better for the validity of the assessment, for it appears that council did not, by ordinance, order the improvement for which the assessment is, in part, attempted to be laid. For the reasons stated we find that the prosecutor's property is not liable to assessment on account of the macadamizing of the street. As to the macadam, therefore, there can be no reassessment under the act approved March 23, 1881 (P. L. p. 194). That act applies only where the court determines that the property upon which the assessment is assessed is, in fact, liable to assessment in respect of the purposes for which the assessment in controversy is levied. Nor is the prosecutor estopped from denying the validity of the assessment so far as the benefit of the macadam is concerned. If the defect consisted of an irregularity only, this contention might prevail, since the prosecutor was inactive and silent in the face of the progress of the work. But this improvement, so far as paving with macadam is concerned, was unauthorized by the ordinance under which the work was instituted. The inaction and silence of the prosecutor, therefore, worked no estoppel or laches on his part. He had a right to rest upon the fact that he was not to be assessed for the benefit of this unauthorized work any more than he would have been if it had been done by some mere volunteer. *App v. Stockton*, 61 N. J. Law, 520, 39 Atl. 921. The assessment must therefore be set aside, with costs. Since the property of the prosecutor is subject to assessment on account of the work done in grading, curbing, and flagging the sidewalk, paving the gutters, and grading the street which was authorized by the ordinance, the board of assessors will be ordered to make a new assessment upon the property of the prosecutor in proportion to the benefits received from these improvements only, and not in excess thereof, according to the statute.

(75 N. J. L. 677)

RYER v. TURKEL et ux.

(Court of Errors and Appeals of New Jersey.  
March 2, 1908.)

1. CERTIORARI—REVIEW—QUESTIONS OF FACT.

When a cause is removed by certiorari from an inferior court to the Supreme Court, the function of the writ is that of a writ of error.

In such case the Supreme Court accepts the findings of the inferior court upon the facts, if

there be any legal evidence to warrant them; and, when the judgment of the Supreme Court is removed into the Court of Errors and Appeals, this court in turn accepts the findings, subject only to a like inquiry for some legal evidence.

## 2. SAME—QUESTIONS CONSIDERED.

Considering only those points of the plaintiff in error which were taken in the district court, and which were raised and determined in the Supreme Court, or were necessarily involved in the decision of that court, the Court of Errors and Appeals inquires whether there be ground for reversal:

(a) In that the plaintiff below had not, by himself alone, produced a purchaser ready and willing to enter into a contract of purchase on the terms authorized, in writing; or

(b) In that the plaintiff below had not brought his principal and the proposed purchaser to an agreement for sale on the terms mentioned in the authority to sell.

## 3. PRINCIPAL AND AGENT — DELEGATION OF AUTHORITY — MINISTERIAL ACT — CONTRACTS — EVIDENCE — PAROL EVIDENCE AFFECTING WRITINGS — CIRCUMSTANCES OF PARTIES AND CONDUCT AFTER EXECUTION.

(a) When an act to be done is ministerial or mechanical only, the agent may employ another to do it; and in such case the act is as well performed by the subagent as by the agent.

(b) The rule that, as between the parties themselves, oral evidence is not admissible to contradict a written agreement, does not, in a proper case, forbid the throwing of light upon the meaning of the agreement by evidence of the circumstances of the parties to it, or of their conduct after its execution, or of the condition of its subject-matter.

There was no legal error in the application of either principle in the court below.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 87–89.]

## 4. BROKERS—COMPENSATION—SUFFICIENCY OF SERVICES—DEFAULT OF PRINCIPAL.

The right of the agent or broker to his commissions is complete, when he has procured a purchaser able and willing to conclude a bargain on the terms on which he was authorized to sell. Such right is not to be defeated by any default of the principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 94–96.]

(Syllabus by the Court.)

### Error to Supreme Court.

Action by Thomas A. Ryer against Adolph M. Turkel and wife. From a judgment of the Supreme Court, affirming a judgment of the district court for plaintiff as against Adolph M. Turkel, he brings error. Affirmed.

This was an action in contract, brought in the Second district court of Jersey City by Thomas A. Ryer (the present defendant in error) against Adolph M. Turkel (the present plaintiff in error) and Annie Turkel, his wife. The state of demand alleged an indebtedness of the defendants to the plaintiff in the sum of \$237.50 for the price and value of work done and in a like sum for money found to be due and owing on an account stated, and to the state of demand was annexed a bill of particulars and a copy of the agreement upon which the demand was founded. (These will be found on a later page.) The defendants filed no written pleadings, but the nature of the defense will sufficiently appear. When the case came to trial, Thomas A. Ryer,

Charles L. Cast, Frank E. Older, and Harriet E. Phelps were sworn for the plaintiff, and three exhibits offered. For the defendants, Adolph M. Turkel was sworn. Whereupon the district court ordered a nonsuit as to the defendant Annie Turkel, and gave judgment against the defendant Adolph M. Turkel for \$237.50 damages and \$16.07, costs of suit. The judgment so recovered was removed into the Supreme Court by writ of certiorari.

Upon an allegation of diminution of the record, the judge of the Second district court was directed to certify as to certain facts, if found, and certain proceedings before him. Whereupon he certified as follows:

"(1) I found that there was an agreement in writing made by the defendant, Adolph M. Turkel with the plaintiff, Thomas A. Ryer, a copy of which is annexed [see post]. (2) I found that the negotiations for sale of said premises were had, and the proposed purchaser was produced by one Frank E. Older, an employé of the plaintiff, Thomas A. Ryer, and acting for him, and that the terms and conditions upon which the proposed purchaser, one Harriet E. Phelps, was willing to purchase said premises were in writing, a copy of which is annexed [see post]. (3) At the close of the plaintiff's case, a motion was made for a nonsuit in favor of the defendant Adolph M. Turkel on the following grounds: (a) Because the evidence did not show that said Thomas A. Ryer had produced a purchaser, ready, and willing to enter into a contract on the terms designated in the agreement in writing between the plaintiff and defendant. (b) Because, when the said Adolph M. Turkel gave the said Thomas A. Ryer authority in writing, to sell the premises, said Ryer had no right to delegate his authority to another; and, inasmuch as the testimony shows that the alleged sale was brought about through one Frank E. Older, the said Thomas A. Ryer had no right to the commissions designated in the authority given to him. (c) Because the said Thomas A. Ryer never brought the said Adolph M. Turkel and Harriet E. Phelps to an agreement on the terms mentioned in the authority to sell, and therefore he was not entitled to his commissions. The motion for a nonsuit was denied. (4) I found that the defendant Adolph M. Turkel, at the time of signing the exhibit firstly annexed, instructed the plaintiff, Ryer, to sell the premises at the price and on the terms named thereon. The defendant Turkel testified that he told Ryer, the plaintiff, that the property was to be sold for cash. (5) At the close of the whole case, a motion was made for judgment in favor of the defendant Adolph M. Turkel, upon the same grounds as those urged for a nonsuit. This motion was also denied, and judgment was given for the plaintiff."

The bill of particulars and copy of the agreement annexed to the state of demand appear to have been the same as the agree-

ment in writing firstly annexed to the certificate of the judge of the Second district court. They were upon the obverse and reverse of a card, and are as follows:

"Adolph M. Turkel and Annie Turkel to Thomas A. Ryer. Commissions, two and a half per cent. on ninety-five hundred dollars, \$237.50.

"Mr. A. M. Turkel Address, 305 Railroad Ave.

"I hereby authorize Thomas A. Ryer to sell or exchange the premises described on the other side of this card at the price and upon the terms hereon named, and hereby agree to pay him two and one-half per cent. of the gross amount of the sale, the amount in no case to be less than twenty-five dollars.

"A. M. Turkel, Owner.

"Witness: Charles L. Cast.

Premises,		Location,		Roof,
2 - 6 Family Flats.		131 Manning Ave., 575 Grand St.		tin.
Size, House, 25 x 100 Lot, 25 x 100	No. Rooms, 3 rooms to floor, 4	Stories, 4	Material, -Frame.	-Heat, Stove.
Sewer, Yes.	Stable, No.	Water, Tubs.	Light, Gas.	Rental, \$104 a month, \$1,248 a year.
Taxes; Water Rents.	Price \$9,500.00.	W. C. Yes.	Bath, No.	Incumbrances, \$6,000.00 5%
		Trade.		* Terms, etc.

"Date, August 23d."

The exhibit secondly annexed to the certificate of the judge was, so far as of value, as follows:

"Agreement made the eighteenth day of January, A. D. nineteen hundred and six, between Annie Turkel and A. M. Turkel, her husband, \* \* \* of the first part, and Harriet E. Phelps, \* \* \* of the second part. The said party of the first part, in consideration of the sum of ninety-five hundred dollars, to be fully paid as hereinafter mentioned, hereby agrees to sell unto the said party of the second part all that certain lot or parcel of land and premises situate in the city of Jersey City \* \* \* and known as 575 Grand street and 131 Manning avenue, these properties running through from street to street. The said party of the second part hereby agrees to purchase said premises at

the said consideration of ninety-five hundred dollars, and to pay the same as follows:

Jany. 18th, deposit, to be held by Thomas A. Ryer in trust, until passing of title	\$ 250 00
On or before March 1st, on delivery of deed, the party of the second part to assume a straight mortgage, now on the premises, bearing interest at 5 per cent. per annum, for three years	6,000 00
On or before March 1st, on delivery of deed, cash.	3,250 00
	<u>\$9,500 00</u>

"\* \* \* Thos. A. Ryer, having made this sale, is entitled to a commission of 2½ per cent. on the gross amount of sale, to be paid by the party of the first part."

The above agreement was signed by Harriet E. Phelps, in the presence of F. E. Older as witness.

The special reasons filed on the return of the writ of certiorari were, firstly, that when the plaintiff below rested his case the district court refused to consult the plaintiff for the reasons (supra) at that time urged by the defendant; and, secondly, that the said court refused to give judgment in favor of the defendant below when moved for on the grounds (supra) at that time given. The judgment of the Second district court was affirmed by the Supreme Court, and the judgment of the latter court has been removed into this court by writ of error.

Error was assigned here in three particulars: Firstly, that in affirming the judgment of the district court the Supreme Court in effect decided that the defendant in error had produced a purchaser ready and willing to enter into a contract of purchase on the terms designated in the agreement in writing between the plaintiff and defendant in error; secondly, that the Supreme Court in effect decided that the findings of the trial court were based upon the last-mentioned agreement and oral proof that would warrant the findings, although there was no evidence before the Supreme Court to show that oral proofs had been taken by the trial judge which would sustain his findings; and, thirdly, that the Supreme Court in effect decided that it appeared from the evidence that the defendant in error brought the plaintiff in error and the proposed purchaser, Harriet E. Phelps, to an agreement on the terms mentioned in the authority to sell given by the plaintiff in error, although there was no legal evidence thereof. (1) The only evidence of the terms on which the plaintiff in error (defendant in trial court) was willing to sell his house and land is found in the card of authorization. The interpretation thereof is one of law; and inasmuch as terms of sale are not given in any particular, the only legal conclusion is that the price was to be \$9,500 in cash. (2) There was no evidence that the defendant in error brought the alleged purchaser, Harriet E. Phelps, and

the plaintiff in error to an agreement on the terms mentioned in the authorization of sale. He is not entitled to commissions, if he modified the contract of authorization without the knowledge and consent of his principal. (3) There was no evidence before the Supreme Court to show that any oral proof had been taken before the district court respecting the terms of sale, except the testimony of the plaintiff in error that he told the defendant in error to sell for cash, and this was uncontradicted. Hence there was no evidence to support a finding by the district court that a sale for \$3,500 in cash and the assumption of a mortgage for \$6,000 was within the intent of the parties.

H. J. Melosh and L. G. Morten, for plaintiff in error. Augustus Zabriskie, for defendant in error.

GREEN, J. (after stating the facts as above). 1. There are some legal rules, not seriously denied in argument and not to be discussed at length, which may well be stated at the outset, as thereby our reasoning may be clarified, and the basis of it made sure. In a case like the present, the writ of certiorari is used, not simply to remove the cause from the inferior court, but to correct some error which has crept into the proceedings therein. *Ayres v. Bartlett* (1834) 14 N. J. Law, 330, 332. The function of the writ is that of a writ of error. *Coles & Sons' Co. v. Blythe* (1903) 69 N. J. Law, 666, 668, 55 Atl. 816. The Supreme Court in such a case does not settle disputed facts, or review the evidence, but accepts the findings of the inferior court upon the facts, if there be any legal evidence to warrant such findings. No intendment will be taken against the judgment below; rather, in favor of it. *Roehers v. Remhoff* (1893) 55 N. J. Law, 475, 478, 26 Atl. 860; *Somers v. Wescoat* (1901) 66 N. J. Law, 551, 552, 49 Atl. 462; *Britton v. McDonald* (1881) 43 N. J. Law, 591, 593; *Demster v. Frech* (1889) 51 N. J. Law, 501, 502, 18 Atl. 354. When, on error to the Supreme Court, the judgment is again removed into the Court of Errors and Appeals, this court in its turn accepts the findings, inquiring only whether there be any legal evidence to sustain them. *Coles & Sons' Co. v. Blythe* (1903) 69 N. J. Law, 666, 669, 55 Atl. 816. See, also, *Doolittle v. Willet* (1894) 57 N. J. Law, 398, 399, 31 Atl. 335. It being now established that, when the trial has been before the judge of the district court without a jury, the proper practice is to send up the facts found by him from the testimony, and not the testimony itself (*Van Vechten v. McGuire* [1904] 70 N. J. Law, 657, 659, 58 Atl. 331), we may not assume, when no attempt is made to perfect, or, in a proper case, to dispute, the findings, that the trial court either received evidence that was inadmissible or irrelevant (*Wallace v. Hendee* [1902] 68 N. J. Law, 574, 576, 53 Atl. 694), or, on the other hand, found as a fact that which

had no evidence to support it (*Barday v. Brabston* [1887] 49 N. J. Law, 629, 631, 9 Atl. 769). From every point of view, in cases like the one in hand, the findings of fact below should be accepted in the appellate court. *Gore v. Herring* (1905) 72 N. J. Law, 423, 60 Atl. 1110.

2. Under well-settled principles, we consider only those points of a plaintiff in error in this court which were taken in the district court, and which were raised and determined in error in the Supreme Court, or which, being involved in the case made in the Supreme Court, might or should have been there determined. *Oliver v. Phelps* (1843) 20 N. J. Law, 180, 181, 185, in error (1845) 21 N. J. Law, 597, 600; *Trent Tlle Co. v. Fort Dearborn Nat. Bank* (1891) 54 N. J. Law, 33, 23 Atl. 423, in error (1892) 54 N. J. Law, 599, 25 Atl. 411; *Van Alstyne v. Franklin Council* (1903) 69 N. J. Law, 15, 16, 54 Atl. 564, in error (1903) 69 N. J. Law, 672, 673, 58 Atl. 818; *Leaver v. Kilmer* (1904) 71 N. J. Law, 291, 292, 59 Atl. 643. Addressing ourselves to the legal merits of this case, we now inquire whether, in the district court, Ryer, the plaintiff, should have been consulted, or judgment final should have been given for Turkel, the defendant (a) because Ryer had not, by himself alone, produced a purchaser ready and willing to enter into a contract of purchase on the terms mentioned in the agreement in writing between Turkel and Ryer, and therefore was not entitled to commissions, or (b) because Ryer had not brought Turkel, his principal, and the proposed purchaser, Harriet E. Phelps, to an agreement for sale on the terms mentioned in the authority to sell so given by Turkel to Ryer, and on that ground was not entitled to his commissions. It will be observed that the first branch of the inquiry has to do with the presence or absence of personal service on the part of Ryer, and that the second branch has to do with the legal import of the power conferred by the card of authorization and of the contract to which Harriet E. Phelps had subscribed her name.

3. (a) It may, indeed, be true that under the maxim, "Delegata potestas non potest delegari," an agent or broker whose employment involves any exercise of judgment or discretion may not transfer to another the right and power to discharge his own duty. *Clark & Skyles on Agency*, § 342; *Dwelling House Ins. Co. v. Snyder* (1896) 59 N. J. Law, 18, 20, 34 Atl. 931. Nevertheless, when an act to be done is ministerial or mechanical only, the agent may employ another to do it; and in such case the act is as well performed by the subagent as by the agent. *Clark & Skyles, Agency*, § 345d; *Titus et al. v. Cairo & Fulton R. R. Co.* (1884) 46 N. J. Law, 393, 418. The finding of the trial court was that Older was an employé of Ryer and acting for him, and there was nothing whatever to show that Older's part in procuring a purchaser was other than ministerial, or that

Ryer had attempted to divest himself of his functions or of his responsibility to Turkel, his principal. No legal error is perceived in the case below, so far as this branch of the inquiry is concerned.

(b) It is to be accepted as settled law that, as between the parties themselves, oral evidence is not admissible to contradict a written agreement. *Leslie v. Leslie* (1892) 50 N. J. Eq. 155, 160, 161, 24 Atl. 1029, and *Bandholz v. Judge* (1898) 62 N. J. Law, 526, 529, 41 Atl. 723, and *Hanrahan v. Nat. Bldg., Loan & Prov. Ass'n* (1901) 66 N. J. Law, 80, 85, 48 Atl. 517, are recent illustrations of the rule in equity and at law. Nevertheless the rule does not, in a proper case, forbid the throwing of light upon the meaning of the written agreement by evidence of the circumstances of the parties to it, or of their conduct after its execution, or of the condition of its subject-matter. *Axford v. Meeks* (1896) 59 N. J. Law, 502, 503, 36 Atl. 1036; *Naughton v. Elliott* (1904) 68 N. J. Eq. 259, 267, 59 Atl. 869. The trial court found that there was an agreement in writing between the parties to this suit (vide the same), and that the terms and conditions upon which the proposed purchaser, Harriet E. Phelps, was willing to purchase were also in writing (vide the same), and, further, the trial judge received the testimony of Turkel that he had told Ryer that the property was to be sold for cash. From the findings of fact, three conclusions may have been possible: Firstly, that Turkel had authorized Ryer to sell the equity of redemption for \$9,500 in cash, thus making the total cost to the purchaser, \$15,500; secondly, that Turkel had given authority to sell for \$9,500, as the whole price, of which \$6,000 were to be used at once in paying off the mortgage incumbrance; and, thirdly, that Turkel had given authority to sell for \$9,500 as the whole price, of which \$3,500 were to be paid to him and \$6,000 were to be kept back by the purchaser, in order to the future discharge of the mortgage debt. The first of these conclusions seems to have been suggested by no one, either at the trial or on the argument upon the reasons in certiorari; and it should not now be adopted here. The second is that for which the counsel of the plaintiff in error contends in his present brief; but the obvious objection is that the executing of the authority in that form was impossible without the consent and co-operation of the mortgagee, inasmuch as, from the uncontradicted evidence, the mortgage debt would not be due and payable until three years should have elapsed. That an authorization in that form was the intent of the parties to the written agreement was and is not to be accepted. The third and last conclusion was undoubtedly that to which the trial court came in giving judgment for the plaintiff, inasmuch as, in order so to do, the judge must have found, further, that the terms and conditions upon which the purchaser produced by

Ryer was willing to buy were within the scope of the authority given by Turkel to him.

An authorization to sell at a price of which part is to be kept back by the purchaser for the discharge of a mortgage debt is not unusual or unlawful in this state. *Held v. Vreeland* (1879) 30 N. J. Eq. 591, 593. If the conclusion of the district court judge was one of fact simply, we do not review the finding on writ of error. *Brewster v. Banta* (1901) 66 N. J. Law, 867, 869, 49 Atl. 718; *Snyder v. Com. Union Assur. Co.* (1902) 67 N. J. Law, 626, 627, 52 Atl. 384; *Suburban Land Imp. Co. v. Vailsburgh* (1902) 68 N. J. Law, 311, 312, 53 Atl. 388. If the conclusion was on a mixed question of fact and of law, then it is not to be disturbed in error, if the conclusion was legally inferable from the facts proven. *Stout v. Leonard* (1874) 37 N. J. Law, 492, 493; *D., L. & W. R. Co. v. Newark* (1899) 63 N. J. Law, 310, 312, 43 Atl. 691; *Burr v. Adams Exp. Co.* (1904) 71 N. J. Law, 263, 270, 53 Atl. 609. We perceive no legal error, so far as the second branch of our inquiry is concerned. It may be worth while to remark that the oral testimony of Turkel, to the effect that the property was to be sold for cash, seems either to have supplied an obvious omission in the card of authorization (*Ackens v. Winston* [1871] 22 N. J. Eq. 444, 446), or, though perhaps not in strictness cumulative (*Van Riper v. Dundee Mfg. Co.* [1868] 33 N. J. Law, 152, 156), to have tended to support the same conclusion which the other evidence supported. In failing, therefore, to pass upon the strict propriety of Turkel's testimony, the present opinion cannot become a precedent for the admission of oral testimony in general, where there is a contract in writing.

4. The undisturbed findings of fact being that the plaintiff below, Ryer, had procured one Harriet E. Phelps to be an able and willing purchaser of the house and land upon the terms and conditions on which the defendant below, Turkel, had authorized a sale, the law applicable to the facts is not doubtful. The general rule is that the right of the agent or broker to his commissions is complete when he has procured a purchaser able and willing to conclude a bargain on the terms on which he was authorized to sell. *Hinds v. Henry* (1873) 36 N. J. Law, 328, 332; *Runyon v. Wilkinson, Gaddis & Co.* (1894) 57 N. J. Law, 420, 421, 31 Atl. 390; *Crowley Co. v. Meyers* (1903) 69 N. J. Law, 245, 248, 55 Atl. 305; *Courter v. Lydecker* (1904) 71 N. J. Law, 511, 512, 53 Atl. 1093. Such right is not to be defeated by any default of the principal. *Hinds v. Henry*, supra; *Somers v. Wescoat* (1901) 66 N. J. Law, 551, 552, 49 Atl. 462. The plaintiff below should not have been nonsuited; neither should judgment have passed for the defendant below on any ground by him alleged.

The right of recovery having been properly adjudged in the district court and confirmed

in the Supreme Court, the judgment will be affirmed here, with costs; and it is so ordered.

(75 N. J. L. 665)

### CHESS v. VOCKROTH.

(Court of Errors and Appeals of New Jersey.  
March 2, 1908.)

#### 1. APPEAL AND ERROR—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS—ADMISSION OF EVIDENCE.

There is a distinction between an action for the recovery of damages for the vendor's breach of an existing contract of sale, and an action for the recovery of a deposit paid upon a contract of sale, terminated by abandonment, repudiation, or rescission. Nevertheless, when evidence in support of a right to recover a deposit is offered, without a distinct and plain objection by the defendant, in an action which seeks damages for the breach of an existing contract, the objection will not avail, on error brought, that the evidence was outside of the issue made by the pleadings. In such case, the real question in dispute having been fairly tried, the declaration will be amended so as to support the judgment.

#### 2. SAME—PRESUMPTIONS—INSTRUCTIONS.

Though a perusal of the printed case should show, negatively, that there was a failure to submit a certain question to the jury, argument that, in such failure, there was error, will not be successful, inasmuch as, on error, it will be presumed, in the absence of instructions to the contrary, that the trial court submitted all disputed questions of fact to the determination of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3729-3731, 3749-3751.]

#### 3. TRIAL—INSTRUCTIONS—NECESSITY FOR REQUESTS.

A mere omission to give a pertinent charge, when not requested, or to state some legal principle applicable to the facts of the case, is no ground of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 627, 623.]

#### 4. SALES—REMEDIES OF BUYER—CONDITIONS PRECEDENT—EXCUSE FOR NONPERFORMANCE.

If a party to a contract of sale, without warrant either in common or statute law, insists upon the execution of a chattel mortgage by the wife of the other party, as a condition of his own performance, such insistence is evidential of a waiver of any actual tender of the chattel mortgage or of the money which together formed part of the consideration of the sale, and the other party is excused from such tender.

A motion for a nonsuit on the ground of no proper tender is therefore rightly refused, in an action to recover a deposit made on account of the purchase money.

(Syllabus by the Court.)

#### Error to Supreme Court.

Action by Samuel M. Chess, Jr., against Emil Vockroth. Judgment for plaintiff, and defendant brings error. Affirmed.

Samuel M. Chess, Jr., plaintiff below, brought in the Supreme Court an action upon contract, against Emil Vockroth, the defendant below. The plaintiff's declaration embraced both a special count and the common counts, and, in the former, he set up a written contract, dated January 18, 1905, whereby the defendant, in consideration of \$500 paid down, agreed to sell and assign to the plain-

tiff, on or before January 20, 1905, his five-year leasehold interest in the store No. 55 Newark avenue, Jersey City, N. J., with all the stock and fixtures therein, and a policy of insurance against fire, at the total price of \$7,760; his (plaintiff's) payment of the \$500 as a deposit on account of the purchase money; his readiness to pay the remainder of the purchase money, and to complete the purchase; his request to the defendant to make a good and sufficient assignment and transfer of the leasehold interest, stock, etc.; and the defendant's wrongful refusal so to do, to the loss and damage of the plaintiff. The defendant interposed a plea of the general issue. The issue joined between the parties was tried at the Hudson circuit before Mr. Justice Fort and a jury.

The proofs at the trial, so far as now pertinent, were as follows:

For the plaintiff: The execution of the contract was admitted, and it was offered as an exhibit. It was in these words: "Jersey City, January 18, 1905. In consideration of five hundred dollars (\$500), I hereby sell, transfer, and assign my drug store, No. 55 Newark avenue, Jersey City, to Mr. S. M. Chess, Jr., with all its contents, consisting of stock, fixtures, and insurance policy, with a five years' lease of store as it stands to-day, for the agreed price of seven thousand, seven hundred and sixty dollars (\$7,760). Final settlement to be made on or before January 20th, p. m. Emil Vockroth. Witness: Thomas Osterman." The oral evidence was to the effect that the contract was signed at the store, on the day of its written date; that there were present, that day, the two principals, Vockroth and Chess, S. Guterman, a New York lawyer, who was Chess' attorney, and Osterman, the broker who had brought the parties together; that the sum of \$500 was then paid in cash, as a deposit on account of the purchase money; that the sale was to be completed at the end of two days, but, in fact, discussions of detail in performance of the contract continued through four or five days; that, after the making of the contract, it was agreed that the purchase money, over and above the deposit, should be discharged to the extent of \$4,760, by promissory notes of \$100 each, to be payable one a month, with interest, and secured by a chattel mortgage of the stock and fixtures, sold and assigned, and the residue, \$2,500, should be paid, in cash, at the completion of the sale; that at the last meeting of the parties in Jersey City (Mrs. Vockroth and Mrs. Chess, J. A. Hamill, a New Jersey lawyer, who was Vockroth's attorney, and Reardon, a clerk, then also being present), Chess, by himself or his attorney, tendered the \$100 promissory notes, offered himself ready to sign, forthwith, the chattel mortgage, which, by arrangement, had been prepared by Vockroth's attorney, and also tendered the \$2,500, not in cash, but by and in a certified check; that the offer and tender aforesaid

were absolutely refused, and the giving of the bill of sale and the assignment of the leasehold were also refused, by Vockroth or his attorney, he standing by, unless Mrs. Chess, who was a stranger to the contract of sale, would sign the chattel mortgage, which she was unwilling to do, and did not do, although her husband's attorney asked her to do it; that no objection was made to the tender of the certified check, as being other than money or cash, till after the requirement and refusal of Mrs. Chess' signature to the chattel mortgage—indeed, no objection was ever made to the certified check by Vockroth, personally—that the contract of sale was never fulfilled on the part of Vockroth; and that the return of the \$500 deposit was demanded by Chess or his attorney, and was refused.

For the defendant: There were offered, as exhibits, an assignment of the leasehold interest, and unexecuted drafts of a bill of sale of the stock, fixtures, etc., and of a chattel mortgage of the same. The oral evidence was to the effect that the method of paying or discharging the purchase money, testified to on the part of the plaintiff, had been agreed upon after the execution of the contract of sale; that, by arrangement between the attorneys of the respective parties, the drafts of the bill of sale and chattel mortgage were to be prepared, and actually were prepared, by Vockroth's attorney; that they were in such form as to require the signatures of the wives of Vockroth and Chess, respectively; that Vockroth had never consented to receive a certified check instead of cash; that, when it was tendered, he had, by the advice of his attorney, rejected it, because it was not cash; that the promissory notes had not been tendered at all; that Mrs. Vockroth was ready and willing to sign the bill of sale, but Mrs. Chess refused to sign the chattel mortgage, although her husband's attorney tried to persuade her to do so, and Vockroth's attorney insisted that she should do so, saying that, unless she did, the transaction would not go through; that, at the close of the last interview, the return of the \$500 was demanded and refused; that, at the time of the trial, Vockroth was still in possession of the store, and carrying on business there; and that he still had the \$500 in his hands.

At the close of the plaintiff's case, the defendant's counsel moved for a nonsuit on the ground that no proper tender, either of the chattel mortgage, or of the cash, had been made by the plaintiff in accordance with the proved agreement. This motion was denied, and an exception was sealed on such denial. When both sides had rested, the defendant's counsel asked for the direction of a verdict in his favor, because the contract then before the court was not the contract sued upon, apparently meaning that it differed with respect to the consideration. At least, the meaning was so understood by the court. This motion was denied, but no exception was taken.

He then renewed his request for a nonsuit on the ground that a proper tender had not been made, evidently meaning a request for the direction of a verdict on the same ground as that on which he had founded his motion for nonsuit. This also was denied, and an exception was sealed. After the summing up, the court left the case to the jury, charging, in effect, that both parties agreed in saying that the manner of paying the purchase money had been modified, and that the important matters of fact were these: Was the chattel mortgage to be given by Mr. Chess, or by Mr. and Mrs. Chess, together? If by Chess alone, then did Mr. Vockroth, personally or through his attorney, refuse to carry out the contract of sale, unless the mortgage were signed by Mrs. Chess as well? If he did, then whether Chess tendered the \$2,500 in cash or in and by a certified check was of no consequence. No exception was taken to the charge. The verdict of the jury was for the plaintiff, for the amount of the deposit, and judgment thereon was entered in the Supreme Court. On error, it has been removed into this court.

Error is specially assigned in that the trial justice refused to grant a nonsuit at the close of the plaintiff's case, when the defendant below showed that no proper tender had been made to him; and, also, that the court did not rule that the certified check tendered by the plaintiff below was not a proper and legal tender. The court refused to grant a nonsuit to the defendant below, when it was clearly shown that no lawful tender was made. The court failed to submit to the jury whether a certified check was or was not agreed upon as the method of paying the \$2,500. The court did not charge the jury that the payment was to be made in cash, as testified to by the plaintiff below, but wholly neglected to touch on the question. The court did not err in refusing to nonsuit.

Eugene W. Leake, for plaintiff in error.  
Robert M. Hudspeth, for defendant in error.

GREEN, J. (after stating the facts as above). 1. The statement hereunto prefixed shows that the plaintiff in error objected, at the closing of the case, that the contract before the court was not the contract sued on in the declaration, and asked for the direction of a verdict in his favor on that ground, and that the court refused such direction, evidently understanding the precise point of the objection to be that the contract as proved differed from the contract sued upon with respect to the mode of paying the consideration. In this view of the matter, the ruling of the court was right, inasmuch as it can scarcely be doubted that proof of an agreement, entered into by the parties to a written contract, after the making of the contract and before the time for performance, whereby a new consideration or a new mode of paying the consideration is substituted for the first, is relevant and proper to go to the

jury; the modification being testified to by both parties and relied upon by both parties at the trial. The authorities certainly go as far as, if not further than, the circumstances of this case require. See 2 Parsons on Contracts (9th Ed.) bottom pp. 706, 708, and notes; 9 Cyc. of Law & Proc. pp. 593, 595-597, 756; McEowen v. Rose, 5 N. J. Law, \*582; Stryker v. Vanderbilt, 25 N. J. Law, 482, 496; Church v. Florence Iron Works, 45 N. J. Law, 129, 132.

In another aspect of the matter, the objection had an unobserved force, and it is alluded to, not because advantage may now be taken of it, but because the affirmation of the judgment should not carry with it a supposed judicial approval of the plaintiff's declaration. A reading of the declaration reveals that the redress sought was the recovery of damages for the vendor's breach of an existing contract of sale. A reading of the evidence sent up with the bills of exception shows that what was tried in fact was the right to recover a deposit paid upon a contract of sale which had been terminated by abandonment, repudiation, or rescission, wrought or acquiesced in by both parties. The distinction between such modes of redress clearly appears in the opinion of this court in *McTague v. Sea Isle City Bldg. Ass'n*, 57 N. J. Law, 427-429, 31 Atl. 727. Had the defendant below rested his objection upon the ground of variance, and argued that only questions within the issue are to be submitted to the jury (*Partridge v. Woodland Steamboat Co.*, 66 N. J. Law, 290, 294, 49 Atl. 726), doubtless the learned trial justice would have given due heed to the objection. At this time, however, the objection does not lie in the mouth of the plaintiff in error. If there were nothing else in the way, this would be the failure to make distinctly and plainly known to the court below any such ground of objection as we have now suggested. See *Bell v. Mecum* (N. J.) 68 Atl. 149, 150. Furthermore, the objection will not now be regarded *ex proprio motu*, by this court. It is well settled that, when the real question in dispute has been fairly tried, and the ends of justice will be promoted, the declaration will be amended here in order to support the judgment below. *American Life Ins. Co. v. Day*, 39 N. J. Law, 89, 91, 23 Am. Rep. 198; *Blackford v. Plainfield Gaslight Co.*, 43 N. J. Law, 438, 441, 442.

2. In argument, counsel for the plaintiff in error has contended that there was error in that the trial court failed to submit to the jury whether a certified check was or was not agreed upon as the method of paying \$2,500 of the purchase money. To this it seems sufficient to say that, if it be true that there was such failure, the point is not embraced in any exception taken in the court below, and therefore is not to be considered or decided. *Williams v. Sheppard*, 13 N. J. Law, 76, 78; *Penna. R. R. Co. v. Page*, 41 N. J. Law, 183, 184. In the absence of a bill of

exception, error cannot be assigned on the matter which such bill should contain. Neither can the judgment be reversed. *Wanamassa Park Ass'n v. Clark*, 61 N. J. Law, 611, 612, 41 Atl. 153; *Conrad v. Broucker*, 70 N. J. Law, 823, 58 Atl. 1019; *Crosby v. Wells*, 73 N. J. Law, 790, 803, 67 Atl. 295. Even though a perusal of the whole printed case should show negatively that there was such a failure, the argument here would not be successful, inasmuch as, on error, it will be presumed, in the absence of instructions to the contrary, that the trial court submitted all disputed questions of fact to the determination of the jury. *Marsh v. Newark, H. & V. Machine Co.*, 57 N. J. Law, 36, 39, 29 Atl. 481.

3. On the argument, it was also urged that there was error in that the trial court did not charge the jury that payment was to be made in cash, as testified to by the plaintiff below, but wholly neglected to touch on the question. Assuming (what may not be true) that the point has been raised upon a proper bill of exception and assignment of error, we find no weight in the argument. A mere omission to give a pertinent charge, when not requested (there was but one request to charge in the present case, and that was granted), or to state some legal principle applicable to the facts of the case, is no ground of error. *Folly v. Vantuyt*, 9 N. J. Law, \*153, \*156-158; *Hetfield v. Dow*, 27 N. J. Law, 440, 447, 448; *Conover v. Middletown*, 42 N. J. Law, 382, 384; *Mead v. State*, 53 N. J. Law, 601, 606, 23 Atl. 264. Modern English cases state the rule rather more tersely, to wit: It is misdirection, and not nondirection, that is the proper subject of a bill of exceptions. *McAlpine v. Maggnall*, 3 C. B., 496, 510, 517; *Greene et al. v. Bate-man*, L. R. 5 Eng. & Ir. App. 593, 602, 603, and note. At first sight, this seems incomplete, but a careful perusal of these cases and of the New Jersey cases last above cited, together with *State v. Petre*, 35 N. J. Law, 64, 68, and *Packard v. Bergen Neck Ry. Co.*, 54 N. J. Law, 553, 557, 25 Atl. 506, shows that there is no real conflict of judicial opinion. Further, such cases as *Den v. Sinnickson*, 9 N. J. Law, \*149, \*152, and *Marley v. State*, 58 N. J. Law, 207, 209, 33 Atl. 208, are not opposed to the rule in either form. The earlier case was on a rule to show cause why a new trial should not be granted. The later disapproved of an omission which made the charge partial and hurtful to the person convicted.

4. We are now to inquire whether the trial court should have allowed the motion for a nonsuit, on the ground that no proper tender of the chattel mortgage or of the \$2,500 in cash had been made by the plaintiff below. There was, indeed, a motion to direct a verdict for the defendant below, on the same ground, and an exception was sealed, on its denial. No assignment of error, however, embraces the point, and therefore the propri-



ety of the motion to nonsuit only will be considered.

As we look at the question, we perceive that there are several elements in it, to wit: Was the defendant, Vockroth, justified in refusing to carry out the contract of sale, unless Mrs. Chess would join with her husband in executing the chattel mortgage? If he unjustifiably refused, did he thereby waive any tender of the mortgage and of the cash? If he waived a tender, was he entitled, as the case stood, to a judgment of nonsuit?

(a) Unless a special agreement to that end was made by the parties or their authorized agents (and, evidently, the jury found no such agreement as a fact), Mrs. Chess' signature to the chattel mortgage was not necessary. By the common law, as we inherited it from the mother country, a feme covert acquired no right in the personalty of her husband, during his lifetime, the paraphernalia excepted. 2 Blackst. Comm. (Lewis' Ed.) star pp. 435, 436; Reeve on Dom. Relat. (1st Ed.) p. 37. All that she could acquire in the personalty was a right to one-third part or share at the husband's death, intestate, and this right he could defeat by a testamentary disposition. 2 Blackst. Comm. star pp. 492, 493. The underlying principles which required a wife to be a party to any form of assurance of land, or which led, with us, to any such enactment as may be found in 2 Gen. St. 1895, p. 1275, § 1, were and are wholly lacking, with respect to personalty. Mr. Jones, in writing the article "Chattel Mortgages," in 6 Cyc. of Law & Proc., says, at page 999: "Since, at common law, a valid mortgage could be created by parol, informalities in the signature of a mortgage will not invalidate it, unless certain requirements are made necessary by statute, such as that chattel mortgages shall be executed in like manner as mortgages of real estate, or that mortgages of household property shall be signed by both husband and wife. \* \* \*" At present we are interested in the correctness of this statement of the law only so far as it indicates that the signature of the wife to a chattel mortgage is not necessary unless required by a statute. In this state, there is a statute, first enacted in 1893 (2 Gen. St. 1895, p. 2111, § 41), and reproduced in "An act concerning mortgages on chattels (Revision of 1902, P. L. 1902, p. 489, § 10), which prescribed that "a chattel mortgage of household goods and furniture in the use and possession of any family \* \* \* shall be duly signed, sealed, executed, and acknowledged by the husband and wife." In the cases in which this statute has been set up against the validity of a chattel mortgage not signed by a wife, it has been construed strictly, perhaps as in derogation of the common law. Green v. McCrane, 55 N. J. Eq. 436, 439-441, 87 Atl. 318; Dunham v. Cramer, 63 N. J. Eq. 151, 155, 156, 51 Atl. 1011. Inferentially, these cases support the view that, outside of the scope of this statute, there is

no law that requires the wife's signature to a chattel mortgage. We think, then, that, in insisting upon the signature of Mrs. Chess as a condition of his own performance, the defendant Vockroth was not justified by the common or statute law.

(b) If there was evidence to sustain a conclusion that the defendant wrongfully refused to perform his undertaking unless Mrs. Chess would sign the chattel mortgage, the next question is: Did he thereby waive a tender of the mortgage and of the cash? Or, as some authorities put it, did the plaintiff, Chess, then stand excused from making any such tender? Undoubtedly, there may be cases in which a tender of one thing or another is necessary, before suit brought. A few illustrations occur to us: The tender of a note for \$58, for the final payment on a contract of sale of land, was held in this court (Ware v. Lippincott, 45 N. J. Eq. 220, 224, 16 Atl. 684) to be the act which entitled the vendee to a conveyance. The tender of \$295 was held (Harvey v. Trenchard, 6 N. J. Law, \*126, \*127) to be a prerequisite to the maintaining of an action at law for damages for not delivering a deed of land. It has been determined, also, that, in paying cash, a tender should be in lawful money, unless by special agreement between the parties. Coxe ads. State Bank at Trenton, 8 N. J. Law, \*172, \*174, 14 Am. Dec. 417; Hoagland v. Post, 1 N. J. Law, \*82. Such decisions are not, however, controlling of the case in hand. In Pittenger's Adm'r v. Pittenger, 3 N. J. Eq. 156, 165, it appeared that a purchaser took the deed of conveyance into his hands, and read it; that he then handed it back, and said he believed he would not take it. On these facts, it was held that "where a deed is to be given, and the party is present, prepared to give it, and the one who is to receive it positively declines, there is no need of a formal execution and tender." In Thorne v. Mosher, 20 N. J. Eq. 257, 258, 262, it was in evidence that the defendant went to the complainant's house to pay the interest upon a debt; that she had the amount in her purse in her hand, the purse but not the money being in the complainant's sight; and that she was in the act of taking the offered money out of her purse, but stopped because the complainant refused to receive the interest. On this evidence, the chancellor said that the offer was neither payment nor tender, but the refusal was a sufficient excuse for not making an actual tender. In the very late case of Crosby v. Wells, 73 N. J. Law, 790, 792, 802, 67 Atl. 295, it appeared that a certificate of stock, with an assignment thereof, was in the defendant's pocket, ready to be returned, but was not delivered, or perhaps even shown, because the plaintiff declared that he would not receive the papers at all. That the act of rescission thus fell short of a complete return of the thing sold did not, in the opinion of this court, destroy the effect of

the notice and offer to return; the defendant not being required to do more than, under the circumstances of the case, the plaintiff permitted him to do. We think that, under the principle of these cases, the wrongful insistence of the defendant below was evidential of a waiver on his part of an actual tender by the plaintiff below of that part of the purchase money which was to be paid in cash, or of the chattel mortgage which was to secure the residue of the purchase money, and thereby the plaintiff was excused from making such tender. A similar view was expressed by the Supreme Court of Pennsylvania in the late case of *Douglas v. Hustead*, 216 Pa. 292, 299, 300, 65 Atl. 670.

(c) We thus reach the last element of the inquiry: Whether the defendant was entitled to a judgment of nonsuit, when the plaintiff rested. In the consideration of this element, we should, of course, confine ourselves to the merits of the ground on which the motion was placed. *Selif v. North Jersey St. Ry. Co.*, 69 N. J. Law, 541, 542, 55 Atl. 96; *Maguth v. Freeholders of Passaic*, 72 N. J. Law, 226, 227, 62 Atl. 679. It being already determined that the plaintiff below was excused from making any actual tender, it would be a waste of time gravely to inquire whether he had made a proper tender. The motion on the ground alleged was rightly disallowed. Moreover, we think that, if the motion had been granted, this could have been done only in disregard of legitimate evidence offered by the plaintiff, and such a ruling would not be approved. *Metting v. North Jersey St. Ry. Co.*, 69 N. J. Law, 605, 55 Atl. 35. See *Cadwallader v. Hirschfeld*, 62 N. J. Law, 747, 751, 752, 42 Atl. 1075, 72 Am. St. Rep. 671.

The conclusion is that the judgment below should be affirmed. This conclusion, it may be remarked, puts the case in harmony with decisions of which *Zimmerman v. Branyan*, 62 N. J. Law, 478, 41 Atl. 689, and *Wolff v. Meyer* (N. J. Sup.) 66 Atl. 959, are types, although they be not controlling precedents.

Let an affirmance be entered, with costs.

(76 N. J. L. 271)

**FRELINGHUYSEN et al. v. TOWN OF MORRISTOWN et al.**

(Supreme Court of New Jersey. June 8, 1908.)

**1. STATUTES—SPECIAL LEGISLATION.**

The act of 1902 to authorize incorporated towns to construct, operate, and maintain a system of sewers (P. L. 1902, p. 371), applies to any town which may be incorporated at the time proceedings under the act are begun.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 108, 109.]

**2. SAME—EXPRESSION OF SUBJECT IN TITLE.**

The title of chapter 124 of the Laws of 1902 (P. L. 1902, p. 371), sufficiently expresses the object of the act, including the authority to construct sewage disposal works beyond the limits of the town.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 177.]

**3. MUNICIPAL CORPORATIONS—SEWAGE DISPOSAL WORKS—ERECTION IN ANOTHER MUNICIPALITY.**

Chapter 124 of the Laws of 1902 (P. L. 1902, p. 371) is not invalid because of the power given to erect sewage disposal works within the bounds of another municipality.

**4. SAME.**

It is not necessary for an incorporated town, which is acting under the sewer act of 1902 (P. L. 1902, p. 371), to secure the consent of another municipality to the erection of sewage disposal works within the territorial limits of the latter, nor is such consent made necessary by the act of 1907 (P. L. 1907, p. 707).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, § 732.]

**5. SAME—INTEREST OF MEMBER OF BOARD IN LAND SELECTED.**

The action of a sewerage board of an incorporated town, under chapter 124 of the act of 1902 (P. L. 1902, p. 371), is only a preliminary to legislative action by the governing body of the town and by the voters at a special election, and the determination of the sewerage board, fixing as a site for disposal works land in which a member of the board is interested, is not voidable, in the absence of actual fraud.

**6. SAME—CERTIORARI—LACHES.**

The prosecutors waited until after the plan of the sewerage board, including the location of a disposal plant, had been submitted to and approved by the voters at a special election. *Held*, that they cannot be permitted to question by certiorari a contract because it provides for the erection of a disposal plant at the place fixed, upon the ground that the town has not yet acquired title, when the law authorizes the acquisition of the title by condemnation.

(Syllabus by the Court.)

Certiorari by George G. Frelinghuysen and others against the town of Morristown and others to review the proceedings of the board of sewerage for the construction of a sewage disposal works. Proceedings affirmed.

Argued February term, 1908, before GARRISON, SWAYZE, and TRENCHARD, JJ.

Vreeland, King, Wilson & Lindabury and Pitney, Hardin & Skinner, for prosecutors. R. Wayne Parker, Cortlandt Parker, and Chauncey G. Parker, for township of Hanover. Edward K. Mills, for town of Morristown. Willard W. Cutler, for board of sewerage of Morristown.

SWAYZE, J. The writ in this case has brought here for review the proceedings of the board of sewerage of the town of Morristown for the construction of sewage disposal works for that municipality within the bounds of the township of Hanover. The proceedings were taken under the act of 1902 (P. L. 1902, p. 371).

The first objection to be considered is the constitutionality of the act. It is assailed, first, as a special act, because it is said to apply only to towns incorporated prior to its passage. This contention is based on the first sentence of the act, which makes it applicable to any town "which has been incorporated under any general or special law." We think the interpretation sought to be put on these words is too narrow. The language may naturally be construed as including any town which has been incorporated at

the time proceedings are begun. In *Butler v. Montclair*, 67 N. J. Law, 426, 51 Atl. 494, we sustained the constitutionality of an act which applied only to towns "whenever there has heretofore been constructed" an outlet or connecting sewer. It was held that the word "heretofore" related, not to the time of the passage of the act, but to the time of incorporation of the town, whether before or after that date, and earlier cases were relied on to justify that latitude of construction. The present case is well within that rule.

The act is assailed, also, because by its title it relates only to incorporated towns, and does not, therefore, point to an intention to legislate with reference to the construction of disposal works in townships. This contention is answered by our decision in *Newark v. Orange*, 55 N. J. Law, 514, 26 Atl. 799, where we held that an act entitled "An act to provide for drainage and sewerage in cities of this state" authorized cities to carry their sewers through adjacent townships to tide water. The court said: "It is a matter of common knowledge that there are cities in the state which have not within their limits an available outlet for sewage. For such cities an act would be futile which did not authorize the entrance upon adjacent territory. The title of this act, making provision for the relief of all cities, clearly suggests that it will be so framed as to furnish all the means and instrumentalities requisite to make it effective in the various localities and situations to which it extends. It must be presumed that the lawmaker will so mold the act as to give relief in every case and adapt it to the wants of every political district of the class, so that it will in fact and in effect be a general law." The same reasoning is applicable to incorporated towns. The well-known density of population in this state naturally suggests that an effective act for the sewerage of incorporated towns, of which all may avail themselves, would be so drawn as to authorize sewers or disposal works outside of the municipality. The case is not distinguished by the fact that it may be necessary that sewers have an outlet on tidewater, while there is no such necessity that sewage disposal works be erected outside the municipality. The necessity may be as great in one case as in the other. Even if there is not a strict necessity that disposal works should be located outside the municipality, it is so manifestly desirable that such works should be located away from the densely populated centers that the title of the act would naturally suggest the possibility.

The argument that the act attempts to vest in Morristown legislative or police powers to be exercised within the political limits of Hanover township ignores the fact that the police power is vested in the state, and not in the municipalities, which are but subordinate agents of the state and subject to

its control. In the exercise of the police power of the state the Legislature may authorize one municipality to invade the territory of another for the purpose of constructing sewers for sanitary purposes, and the state does not thereby surrender its right to protect the public health by subsequent enactment, regulating and controlling the mode of construction and manner of use. *Millburn v. South Orange*, 55 N. J. Law, 254, at page 262, 26 Atl. 75. In *Chicago Packing Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545, the court sustained the right of Chicago to exercise the police power to control works in the township of Lake which were injurious to residents of Chicago. The case of *Van Cleve v. Passaic Valley Sewerage Commissioners*, 71 N. J. Law, 574, 60 Atl. 214, 108 Am. St. Rep. 754, contains no intimation to the contrary. The Court of Errors and Appeals in that case expressly sustained the authority of the Legislature to create a sewerage district out of parts of several municipalities. When it added that a different question would be presented if the statute concerned itself with the internal sewerage of any of the municipalities, and substituted an alien commission to carry its requirements into effect, it did not mean that the territorial bounds of a municipality constituted a limit to its management and disposal of its own sewage. Such a construction would work havoc with some, and doubtless with many, of the municipal sewerage systems of the state. In *Bloomfield v. Glen Ridge*, 55 N. J. Eq. 505, 37 Atl. 63, the Court of Errors and Appeals held that the entire sewer system was the property of Bloomfield, although part of it was within the territory of Glen Ridge, and that the right to control, regulate, and maintain the sewers was vested exclusively in Bloomfield, and that an ordinance of Glen Ridge asserting a right to control and regulate the sewers within its territory, and permits by Glen Ridge to make connections were subject to be set aside on certiorari. One of the reasons which moved the court to that result was that the sewer system was an entirety, and could not be advantageously controlled and devoted to its intended use unless under one management. The same reason is applicable to a disposal works, which is necessary for the proper and efficient management of a system of sewerage. What governmental control the township of Hanover may still retain over the territory to be occupied by the disposal works is a question not now before us.

Passing from the question of the validity of the statute to its effect, the most serious objection urged against the present proceedings is that the consent of the township of Hanover to the erection of the disposal plant has never been obtained. That objection is open in the present case, as well as in the pending suit by the township of Hanover as prosecutor, since the present prosecutors are

taxpayers and entitled to challenge the expenditure of public money in building disposal works, if the works cannot legally avail the town of Morristown.

It is not suggested that the consent of Hanover is made necessary by the act of 1902. The argument is that it is required by prior or subsequent legislation, evincing a legislative policy. Four acts are relied upon: (1) An act of April 9, 1892 (P. L. 1892, p. 452); (2) an act of June 13, 1895 (P. L. 1895, p. 822); (3) section 63 of the general township act of 1899 (P. L. 1899, p. 397); (4) an act of October 29, 1907 (P. L. 1907, p. 707).

The act of 1892 is entitled "An act to allow towns, villages or other municipal corporations to acquire and use lands or real estate in an adjoining township or other municipal corporation for use for the construction of a sewage receptacle or sewage disposal works." An attempt was made to repeal this act by an act concerning townships (Revision of 1899; P. L. 1899, p. 372). It may be doubtful whether an act which both by its title and its provisions applies to towns, villages, and other municipal corporations can under the constitutional provisions be repealed by an act which by its title relates only to townships; but it is unnecessary to dwell upon this question for a reason presently stated.

The act of 1895 is entitled "An act to regulate the location of pesthouses, crematories, and other objectionable structures." Its scope is limited by this title. In one sense a sewage disposal works may be called a structure, although the use of the word to include a disposal plant seems a little strained; but another consideration leads us to think that a more restricted meaning must be attributed to it. Words, like men, are known by the company they keep; and the word "structures" is here found in company with "crematories" and "pesthouses." It must mean some structure of like character; that is, some sort of a building.

The section of the act of 1899 which is relied upon follows sections authorizing townships to construct sewers, and is placed under the heading of "Sewerage and Drainage." It is evidently meant to restrict the right of townships to locate disposal works within another municipality, and not to protect townships from the works of other municipalities. It is a part of the scheme for sewers to be built by the township. If this were not so, a different result would necessarily have been reached in *Philadelphia Trust, Safe Deposit & Insurance Co. v. Merchantville* (recently decided) 68 Atl. 170. The point was distinctly made in that case that the borough of Merchantville was not authorized by law to build a sewage disposal plant in the adjoining township of Pensauken. The court disposed of the case without referring to the township act of 1899, evidently because it was thought that the question was entirely governed by the borough act of 1897 (P. L. 1897, p. 285).

All of these acts were passed before the act of 1902, under which Morristown is proceeding. That act not only carefully omits any restriction as to the place where a disposal works may be built, but in express terms authorizes the construction of disposal works within or without the town (section 1). This power is repeated in section 11. In neither section is the consent of any other municipality required. This omission is most significant, in view of the other legislation requiring such consent, which we must presume was present to the mind of the Legislature. It is made more emphatic because in section 11, immediately following the authority to construct disposal works, provision is made for an agreement between the board of sewerage and the authorities of the other municipalities as to the terms upon which the sewers may be constructed through the streets and highways, with an appeal to the circuit court to appoint commissioners to determine the streets and fix the terms upon which they may be used and occupied, in case an agreement cannot be reached with the municipal authorities. If the Legislature had meant to require consent to the construction of disposal works, it would have inserted it at this point, where the mind is naturally directed to the question by the somewhat analogous question of the use of streets. It is quite evident, from the omission in the one case and the insertion of the requirement of an agreement in the other, that the Legislature drew a distinction between land the title to which might be acquired by the town, and streets or highways which could be used only subject to the public easement, and did not mean to require consent of the other municipality to the work of the town merely because it consisted of building a sewer system and might be more or less objectionable.

It is quite true that the act of 1902 contains no express repeal of the acts of 1892, 1895, or 1899, that implied repealers are not favored, and that there is no necessary repugnancy between an act authorizing a town to build sewage disposal works and an earlier act requiring the consent of a municipality before another can build such works within its bounds. But even when there is no express repeal, and no necessary repugnancy, if it is plain that it is the legislative intent to embrace the whole subject or to provide a scheme complete in itself, the later act supersedes the earlier. *Roche v. Jersey City*, 40 N. J. Law, 257; *De Glinther v. New Jersey Home*, 53 N. J. Law, 355, 33 Atl. 968; *Camden v. Varney*, 63 N. J. Law, 325, 43 Atl. 889. The rule does not rest strictly upon the ground of repeal by implication, but upon the principle that when the Legislature frames a new statute upon the subject-matter, and from the framework of the act it is apparent that the Legislature designed a complete scheme, it is a legislative declaration that whatever is embraced in the

new law shall prevail, and whatever is excluded is discarded. *Roche v. Jersey City*. The question is one of legislative intent, and the Court of Errors and Appeals has held, following the *Roche* Case, that when a later law deals generally with the subject-matter of earlier statutes, not simply as a revision, but as a new and independent enactment, that affords decisive evidence of an intent to abrogate and repeal the older legislation. *Haynes v. Cape May*, 52 N. J. Law, 180, 182, 19 Atl. 176. This is so, even though the scheme is not absolutely complete, but is complete only for municipalities of the class affected. *Wilson v. Trenton*, 56 N. J. Law, 489, 29 Atl. 183.

The act of 1902, both by its title and its provisions, assumes to provide a complete scheme by which incorporated towns may construct, operate, and maintain a system of sewers. Nothing necessary for that purpose is omitted, and we think the legislative intent is clear that in this respect incorporated towns should be governed by this act alone.

It seems to be thought by counsel for the prosecutor that the act of 1902 is modified by the act of 1907 (P. L. 1907, p. 707). This act was approved after these proceedings were begun; but, passing by all other questions that may be raised, we think it clear that the act does not apply to the case of incorporated towns proceeding under the act of 1902. It can by its terms apply only to municipalities where there is a municipal board having charge of the sewers therein. The board of sewerage under the act of 1902 does not have charge of the sewers, but only of their construction. Section 9 expressly limits the existence of the board to the time of the completion of the work. Again, the act of 1907 is applicable only to municipalities with a board or commission having charge of the finances of the municipality. Morristown does not seem to come within this requirement. And section 8 of the act of 1907 makes it quite clear that the act was meant only for cities.

The next contention of the prosecutors is that Morristown had not secured the consent of the state sewerage commission, as required by section 7 of the act of March 21, 1900 (P. L. 1900, p. 113). The act requires that plans shall be submitted to the state commission, and that it shall be unlawful without its approval to construct any plant from which the affluent is to flow into any of the waters of the state. The plans were submitted, and were approved "subject to such conditions of construction, operation, and purification as this commission may from time to time require." We think that this was not a conditional, but was an absolute, approval of the plans, and that all the words quoted mean is that the state commission reserves the right from time to time to require changes of construction as the need may arise. The conditions as to operation

and purification clearly relate to the future use of the plant, and can have no relation to present plans which alone are required to be submitted. The approval of the plans is not merely tentative, and was not so regarded by the prosecutors at the time, for they petitioned the state commission to rescind its approval of the plans. The state commission has never acted on that petition, and the approval remained unrescinded when the contract was awarded.

One of the sewerage commissioners of Morristown is Eugene S. Burke, who is a member of the firm of Pruden & Burke. Just prior to the determination of the sewerage commissioners as to the location of the disposal plant, and apparently in contemplation of that approval, Pruden & Burke bought the land in question; and it is said that Burke's personal interest in the land vitiates the official action of the board of which he was a member. His good faith is not impugned. In fact, he seems to have acted from public spirit in buying the land before it was known that it would be wanted by the municipality, and at a time when it could be bought more cheaply. After his purchase, he and his partner immediately offered to convey to the town such part of the land as it wanted without profit to themselves, and they subsequently made an offer in writing on terms which seem to have been advantageous to the town. It is possible that they may be held to have acquired the land in trust for the town; but it is unnecessary, as the case now stands, to consider the question of Mr. Burke's good faith. The rule which is appealed to by the prosecutors relates to proceedings of a judicial character, and rests upon the principle that no one should be a judge in his own cause. Whether the proceeding is of a judicial character or not is the question to be determined. *Moore v. Haddonfield*, 62 N. J. Law, 386, 41 Atl. 946; *Sears v. Atlantic City*, 73 N. J. Law, 710, 64 Atl. 1062, 118 Am. St. Rep. 724. We think the present proceeding was legislative, not judicial. The determination of the place of location of the disposal works was a part of the general plan or scheme which the act required the sewerage commission to adopt and submit to the governing body of the town. That body, in turn, after a public hearing, might accept, modify, or reject the plan. If they accepted, it must still be submitted to the voters at a special election, of which notice was required to be given. The action of the sewerage commissioners, therefore, was only a preliminary step to legislative action on the part of the voters themselves, and was not in itself final or binding. It is, perhaps, too much to call such a recommendation of the sewerage commissioners a legislative act. It certainly is not judicial. We think Mr. Burke's interest as an owner of the land did not vitiate the proceedings.

In proceedings of this character, where

the approval of the voters is required, a definite plan must be submitted. The criticism of the present proceedings is that no piece of ground in either Hanover township or Morris township was designated with precision. The report of the board of sewerage designated the location as "near the road dividing the township of Morris from the township of Hanover and near the old burnt mill, said disposal works to be constructed without the limits of the town of Morris-town and in either the township of Morris or in the township of Hanover, as shall be considered most desirable as the work progresses." The statute (P. L. 1902, p. 372, § 4) requires the board of sewerage commissioners to determine whether the system shall extend throughout the town, or, if in parts of the town only, in what parts, through what streets it shall be constructed, in what manner the sewage shall be disposed of, and, if by connecting with disposal works without the limits of the town, the general location of such connecting sewer or sewers. This language indicates that it was not the exact and precise, but only the general, location of the disposal works that was to be determined in advance. It is not questioned that the report sufficiently indicates this general location. In fact, it indicated it with sufficient precision to arouse opposition on the part of the present prosecutors. We think the report complied with the statute.

The last objection argued applies to the contract only. It is said to be unauthorized, because at the time it was made the town did not own the land on which the disposal works were to be built. We think it a sufficient answer that, some six months before the contract was signed, the commission received a written offer to convey the land from Pruden & Burke, which seems to be still open, acceptance having been delayed only because the present controversy arose, and that the commission was authorized to acquire the land by condemnation, and had passed a resolution authorizing their counsel to apply for a commission. The conclusive answer, so far as the present prosecutors are concerned, is that no other location would comply with the vote of the people adopting the plan of the board of sewerage. In this respect the prosecutors are in laches.

The proposed location of the disposal works was made public as early as February 26, 1907, when it was presented to the board of aldermen. Due notice was given of a hearing before that board. There was then an opportunity to secure a modification of the plan. None seems to have been suggested that affected the location of the disposal works. The plan was approved by the board of aldermen on March 22d. Notice was given of an election to be held April 30th. Although in form the question submitted to the people was the acceptance of the act of 1902, in substance it was the acceptance of the proposed plan for a sewer system. The

plan was accepted by a vote of 1,081 to 59. As far as the records show, the first objection came on May 8th. It is obvious that any change in the location of the disposal works would or might be a radical change in the plan, upon which the voters have not been, and cannot by virtue of any statutory provision be, consulted. In view of the substantial unanimity for the proposed plan, it is altogether probable that a majority of the voters would not approve of a change, especially as the only change proposed involves a large additional expenditure, which may amount to \$70,000. In view of the statutory provisions requiring an assent of the voters at a special election for the purpose, and the opportunities afforded for a hearing and for modification of the plans, we think the prosecutors waited too long when they waited until the election had been held. If, in fact, they protested before the election, although the record fails to show it, their position is worse, since their objections have been overruled by the tribunal to which the decision was committed by the statute.

The proceedings are affirmed, with costs.

#### LAKE et al. v. WEAVER et al.

(Court of Chancery of New Jersey. May 16, 1908.)

#### 1. GIFTS — UNEXECUTED INTENT — ENFORCEMENT.

Children who are mere volunteers cannot enforce an unexecuted intent on the part of their grandmother to make a gift to them of a sum of money owing to her from the father of the children.

#### 2. MORTGAGES—DEED AS MORTGAGE—BURDEN OF PROOF.

Where a deed absolute in form was executed by a debtor to his creditor the burden of showing that the grantee is not the absolute owner of the land conveyed rests on those who dispute the absolute character of the instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 95-96.]

#### 3. LIMITATION OF ACTIONS—ABSOLUTE DEED AS MORTGAGE—EQUITABLE RELIEF—RECOGNITION OF INDEBTEDNESS.

Where land has been conveyed absolutely as security for a loan the aid of equity cannot be invoked by the grantor or those claiming under him unless they recognize the indebtedness as an existing lien on the land, though the debt is barred by the statute of limitations.

#### 4. EXECUTORS AND ADMINISTRATORS—FAILURE TO ACCOUNT.

In an action by the distributees against the executrix of an estate to restrain the enforcement by the executrix of a deed executed by plaintiffs' father to the executrix to secure an overpayment of the father's distributive share an allegation in the bill that the executrix had properly expended the entire personal estate warranted the court in adopting defendant's statement of the account, though she had failed to present a complete account of her administration.

Suit by Frank Lake and others against Josephine T. Weaver and others. Decree for defendant Josephine T. Weaver.

The primary purpose of the bill was to obtain an injunction to prevent Josephine T. Weaver from establishing a deed at law which she was seeking to do by virtue of the statute. P. L. 1898, p. 694, § 60.

John J. Crandall, for complainants. Melosh & Morton and Gilbert Collins, for defendants.

GARRISON, V. C. Samuel W. Weaver died in 1872, testate, his widow, Josephine T. Weaver, being the executrix of his will. There were three children, Theodore S., born in 1855, Alphonso, born in 1857, and Ella Etta born in 1859. Alphonso died in 1888. Theodore died in 1892. Ella Etta intermarried with Rufus Smith, and is still living, as is also Josephine T. Weaver, the widow of Samuel W. The complainants herein, Josephine Maude Weaver Lake and George H. Weaver, are the children of Theodore S. The will of Samuel W. Weaver gave one-third of his property to his wife, and the remaining two-thirds to his three children, to be equally divided among them "together with all the profits and income thereof, after the expenses of their education, clothing and board have been defrayed, to be conveyed to them by my executrix when the said Ella Etta Weaver shall have arrived at the age of twenty-one, to have and to hold the same."

By an account filed in the orphans' court of Atlantic county by Josephine T. Weaver, the executrix, on the 12th day of September, 1872, it appears that the balance of the personal estate of the testator in her hands amounted to \$7,245.63. Samuel W. Weaver died seised of certain real estate in Atlantic county. The bill charges that in the eight years elapsing between the date of the death of Samuel W. Weaver and Ella Etta's attaining her majority the executrix "had used and consumed the whole of the residuum of testator's estate in her hands" for the education, clothing, and board of the children. On the 28th day of February, 1889, Theodore S. Weaver gave a quitclaim deed to Josephine T. Weaver, his mother, the executrix of his father's will, for all of his right, title, and interest in the real estate of which his father died seised. As Alphonso was then dead without widow or children, this real estate belonged one-third each to the widow, to Theodore, and to Ella Etta. The existence of this deed is proven beyond all question, and is admitted by the complainants. It was lost in 1893. It is proven that before the delivery of this deed Theodore and his mother, the executrix, had gone over their accounts and reached the conclusion that Theodore had drawn more money from the mother than he would be entitled to receive out of the personal estate of the deceased father.

The contention of the complainants was that this deed was without consideration, and was a scheme to deprive the second wife of Theodore of any interest in this real estate; that Theodore conveyed the land to his mother to be held by her in trust for Theodore's

children for the purpose of depriving his then wife (who was not the mother of the children) of any interest therein. Apart from the fact that the second wife herself signed and acknowledged this deed—which she would scarcely be thought to have done if the purpose was to deprive her of what otherwise would be her right—there was no proof of any such trust, and the charges of the bill in this respect must fail for lack of any evidence whatever to support them. The contention of the defendants was that this deed was in payment of what Theodore owed his mother. As will be seen when the facts are further developed, I do not find this to be so.

Other contentions of the complainants were based upon events which must be briefly recited in order to make the decision clear. Mrs. Weaver made a contract with people named White to convey this real estate to them. When she failed to convey they brought an action for specific performance against her, and in that suit she pleaded in her answer that she only had title to one-third, another third being in Ella Etta, and another third in the children of Theodore S., namely, Josephine M. W. Lake and George H. Weaver, the complainants in this suit. The last named were of course not parties in the specific performance case. The complainants here contend that Mrs. Weaver is bound by the statements in that answer. Leaving aside the question as to whether her answer in a suit to which they were not parties could bind her to them, I do not think that, in view of my finding herein that this deed is a mortgage, there is anything inconsistent in her statement that the title was in them at that time. If it be a fact that she held this deed merely as security (and that is what I find to be the fact) then all that she really had was a lien for what was due her, and the equitable title was in the children of Theodore, the complainants in this suit. After the Whites had obtained title to Mrs. Weaver's third they brought a suit for partition against Ella Etta and the children of Theodore, but as Mrs. Weaver was not a party to that suit nothing therein binds her. In an application to open that decree I had occasion to deal with many of the aspects of this transaction, and my opinion therein will throw some light upon my view of the circumstances. It will be found recorded in *White v. Smith* (N. J. Ch.) 65 Atl. 1017. From all the proofs I find that Theodore S. Weaver did obtain from his mother, who was the executrix of his father's will, sums of money. That in 1889 they had an accounting by which they reached the conclusion that he had drawn more money than would be coming to him from the personal estate of his father; that to protect his mother he conveyed to her, by the deed of the 28th of February, 1889, his interest in the real estate; and that the purpose of each of the parties to that transaction was to secure the mother with respect to what they deemed was an overpay-

ment. I therefore find that this deed should be treated as a mortgage.

It is curious that Mrs. Weaver never attempted to have the deed recorded until she began the proceedings sought to be enjoined by the bill in this suit, although it was in existence for many years after its execution. There is much in the case which leads me to believe that for a long time Mrs. Weaver's state of mind was to refrain from asserting or exercising her rights under the conveyance, and thus practically to make a gift to Theodore's children. But she never effectuated this intention—she never made an executed gift. Her attitude was passive, not active, and she afterwards changed her mind and determined to assert her claim. I know of no legal reason why she may not do so. The children of Theodore are volunteers, and unless it be found that she made a gift to them they have no standing to compel her to forego her rights with respect to this conveyance.

Undoubtedly the deed when executed vested title in her, as a mortgagee. On its face it vested absolute title in her. The burden of showing that she is not the absolute owner rests upon those who dispute it. *Winters v. Earl*, 52 N. J. Eq. 52, 28 Atl. 15 (Van Fleet, V. C., 1893), affirmed on opinion below, 52 N. J. Eq. 588, 33 Atl. 50. Since the date of the deed in February, 1889, less than 20 years have elapsed, and it cannot be held that the statute of limitations barred the right of the mortgagee, even if the deed be treated as if in fact a mortgage. *Colton v. Depew*, 60 N. J. Eq. 454, 46 Atl. 728, 83 Am. St. Rep. 650 (Ct. of Errors, 1900). And in addition to this, it has been held that where land has been conveyed absolutely, as security for a loan, the aid of equity can only be invoked by the grantor, or those claiming in his right, by recognizing the debt as an existing lien upon the land, even if the debt has been barred by the statute of limitations. *Sturdivant v. McCordley*, 83 Ark. 278, 103 S. W. 732, 11 L. R. A. (N. S.) 825, in which latter report will be found a note with many other cases.

If the charge of the bill binds the complainants, then Mrs. Weaver would be permitted to hold this deed as a mortgage for all the moneys which she proved that she advanced to Theodore, because that charge is that she expended all of the personal property in the education, clothing, and board of the children prior to the date of distribution named in the will, namely, the attainment by Ella Etta of her majority. But the defendant Mrs. Weaver has not insisted upon any such claim in her favor. She has not presented a complete account as executrix. If her failure to do this could work any injustice to the complainants, then she should suffer for such failure. But, as just shown, it cannot, because they allege what is much more unfavorable to them, namely, that she had properly expended all of this personal property under the terms of the will before she was required by

the terms of the will to distribute the residuum. Therefore, no injustice is done to the complainants, the children of Theodore, by adopting the accounting of the defendant Mrs. Weaver. She set aside, as if belonging to Theodore his proportion of the total personal property found by the orphans' court to be in her hands as executrix in 1872 at the time of the accounting in that court. This amount of money is \$1,628. Theodore, in his own handwriting, sometime after the year 1878, made a memorandum showing that he had received from his mother \$2,568.42. This included what he charged himself with up to that time. Since the exhibit contains the items, I see no occasion to lengthen this opinion by restating them.

The items, in addition to those just referred to, which I find were advanced by Mrs. Weaver to Theodore, and for which she has a right to hold the deed as a mortgage are as follows:

Board bill paid by her for him while he was in Chicago.....	\$ 50 00
Two chattel mortgages upon his furniture paid off by her at his request, one of \$72.00 and one of \$62.00....	134 00
Amount advanced by her to him in connection with the Iron Steamboat Company .....	600 00
Amount advanced to enable him to go into the oil business, or in connection with the oil business.....	130 00

These items, aggregating \$914 together with the sum admitted by Theodore as above, make \$3,482.42. Leaving out the matter of interest, the computation would then be as follows:

Total amount advanced by Mrs. Weaver to Theodore .....	\$3,482 42
Amount of Theodore's share of personal property.....	1,628 00
Balance .....	\$1,854 42

Of course these figures will be changed by the calculations of interest; but the principle upon which the amount will be settled is as just indicated, and Mrs. Weaver will therefore be decreed to hold this deed as a mortgage for the amount which that computation shows to be due.

Since the land has been sold in the partition suit and the interests of the respective parties transferred to the purchase money paid into court, in that suit, the decree in this suit must be drawn in view thereof.

The form of the decree will be settled upon notice.

(76 N. J. L. 464)

#### STATE v. SKILLMAN.

(Supreme Court of New Jersey. June 12, 1908.)

#### 1. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY.

In a trial for forging a will, the genuine will was admissible to show that testator had executed and preserved a prior will radically inconsistent with the provisions of the disputed will and as a standard for comparison by the jury of accused's handwriting.



## 2. SAME — COMPARISON OF HANDWRITING — PHOTOGRAPHIC REPRODUCTIONS.

In a trial for forging a will, photographic reproductions of the forged will and signatures and other signatures of the size of the originals, and photographs of letters containing the signature enlarged 24 times without a like enlargement of the standard signature, were admissible, though the originals had been admitted, the evidence not being received as substantive proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 893.]

## 3. WITNESSES—CROSS-EXAMINATION—SCOPE.

A witness for the state in a trial for forging a will having testified as to admissions made by accused in a contest over the will, cross-examination referring to a period other than that involved in the direct examination was properly excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 949-954.]

## 4. CRIMINAL LAW — APPEAL — INSUFFICIENT EXCEPTIONS.

An exception to the exclusion of evidence cannot be reviewed, where the record indicates that no reason was given at the trial for the exception taken.

## 5. SAME — EVIDENCE — EXPERT OPINIONS — HANDWRITING.

A handwriting expert having testified that he had had no experience with signatures first written in pencil and then traced over with ink, it was proper to exclude a question asked him as to whether he was competent to pass upon that kind of a signature.

## 6. SAME.

In a trial for forging a will, a handwriting expert testified that the signatures of the alleged will and a genuine signature were not written by the same person, but admitted that he had had no experience with signatures first written in pencil and then traced over with ink. *Held*, that it was not error to refuse to strike out his testimony, since he was qualified to express an opinion eliminating the tracing, and the state could not foresee that the pencil marking was not to be disputed.

## 7. WITNESSES — CONTRADICTION—EVIDENCE—ADMISSIBILITY.

In a trial for forging a will, the state could show that testator told witness that accused undoubtedly burned his own barns for the insurance money, where accused had shown on witness' cross-examination that the relations between testator and accused were friendly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1276, 1277.]

## 8. FORGERY—EVIDENCE—ADMISSIBILITY.

One accused of forging a will having shown on cross-examination that the relations between testator and accused were friendly, and the alleged will having recited the friendly relations between them, the state could show that the relations were not friendly.

## 9. CRIMINAL LAW—TRIAL—ORDER OF PROOF.

What evidence may be admitted on rebuttal is a matter of discretion with a trial court, not reviewable in the absence of gross abuse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1615-1618.]

## 10. WITNESSES — EXAMINATION—NONRESPONSIVE ANSWERS.

Nonresponsive answers of witnesses are properly stricken.

## 11. CRIMINAL LAW — APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

It was not harmful to one accused of forging a will to exclude evidence tending to show the condition of his health when the will was

alleged to have been executed, where it was admitted that he was then able to prepare it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3145-3153.]

## 12. SAME—ACCUSED'S FAILURE TO TESTIFY—PROPERTY OF COURT'S COMMENTS.

In a trial for forging a will, the court properly commented on accused's failure to testify, where testimony as to material admissions made by him bearing on the genuineness of the will was received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1902-1903.]

## 13. SAME.

In a criminal trial, the jury was not bound to find beyond reasonable doubt that accused's witnesses did not tell the truth, it being sufficient that the jury be satisfied of accused's guilt beyond reasonable doubt on a view of the whole case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1267-1268.]

## 14. SAME—INSTRUCTIONS—ABSTRACT PROPOSITIONS.

A request to instruct must be based upon some facts which the evidence tends to prove, and the court should not give instructions not relevant to the proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980-1981.]

## 15. SAME—HARMLESS ERROR.

It was not prejudicial error to refuse to instruct that the jury must reconcile conflicting testimony without imputing perjury, unless it should be unavoidable, since the instruction stated an abstract proposition.

## 16. SAME—INSTRUCTIONS—PROVINCE OF JURY.

In a forgery trial, it was proper to refuse to instruct that testimony of one who speaks from personal knowledge is more satisfactory than that of one expressing an opinion, since whether the testimony of one witness is more satisfactory than that of another is to be determined by the jury upon the facts and circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1732-1748.]

## 17. SAME—INSTRUCTIONS NOT WITHIN ISSUES.

An instruction not within the issues is properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980-1981.]

## 18. SAME.

It was not error to refuse to instruct that accused's failure to testify could not be considered as evidence against him, where the court instructed that he was not bound to testify, and that in not doing so he exercised his right as a citizen.

## 19. SAME.

Accused having relied on his alleged unsound condition of health, and not his constitutional rights in failing to testify in his own behalf, if the jury found that his condition did not prevent him from testifying, they could infer that he could not truthfully deny the important facts bearing upon the question of his guilt.

## 20. SAME.

Comments of the trial court upon the testimony made to explain, apply, and elucidate it for the convenience and assistance of the jury are not improper.

Error to Court of Quarter sessions, Somerset County.

William H. Skillman was convicted of uttering a forgery, and he brings error. Affirmed.

Argued February term, 1908, before GUMMERE, C. J., and BERGEN and MINTURN, JJ.

Clark & Case, for plaintiff in error. John F. Reeger, for the State.

MINTURN, J. The defendant was indicted upon the charge of forging and uttering a paper writing purporting to be the last will and testament of William Lanehart, deceased, and was found guilty by the jury of the uttering. The writ of error presents certain exceptions taken at the trial by defendant, relating almost entirely to the admissibility of testimony. The first and second of these exceptions relate to the admission of the testimony regarding the execution of what was called in the case the "Race Will," a document proved to have been executed by deceased in the city of New York, in and by which, after making certain specific bequests to friends and relatives, and \$3,000 to his sister Mary J. Lanehart, he directed that the residue of his estate be divided equally among his brothers and sisters, and appointed John N. Race and Laura Kellogg, his executor and executrix, respectively.

The admission of this will was competent. It was within the line of proof for the state to introduce the will for the purpose of establishing the fact that the testator had executed and preserved a prior will, radically inconsistent with the provisions of the document drawn by the defendant; and the Race will being in evidence for that purpose could be used by the state as a standard for comparison by the jury of the defendant's handwriting. In England this rule is established and liberalized by an act of Parliament (28 Vict. c. 18). But whatever diversity of judicial opinion may exist in this country upon the admissibility of writings otherwise irrelevant to the issue solely for the purpose of comparison, there is quite a uniformity of opinion that a genuine writing in evidence for one purpose may be properly used as a standard of comparison by the jury to determine the genuineness of the handwriting of another document in issue. *Yoemans v. Petty*, 40 N. J. Eq. 495, 4 Atl. 631; *Shaw v. Bryant*, 157 N. Y. 715, 53 N. E. 1132; *Himrod v. Gilman*, 147 Ill. 293, 35 N. E. 373; *Stephens' Dig.* § 289; 17 Cyc. 163, and cases.

The court admitted against objection photographic reproductions of the disputed will and signatures, and other signatures of the size of the originals, which were in evidence, and also photographs of letters, containing the signature enlarged 24 times without a like enlargement of a standard signature, and this admission forms the basis of an assignment of error, upon which defendant cites the case of *Howard v. Ill. Trust Co.*, 186 Ill. 568, 59 N. E. 1108. That authority approves the admission of enlarged photographs as evidence, upon the ground that they make the proportions plainer, and to that extent it is consistent with the weight of authority.

*Marcy v. Barnes*, 16 Gray (Mass.) 161, 77 Am. Dec. 405; 17 Cyc. 414, and cases cited; *Rowell v. Fuller's Est.*, 59 Vt. 688, 10 Atl. 853. But we cannot give adherence to the view that photographic copies of a disputed document are inadmissible, because the original has been admitted. If such copies were offered as substantive proof of the original document they would be clearly inadmissible. But where the sole purpose is to use the photographs to illustrate and elucidate a contention which forms the gravamen of the case, such procedure seems to be as reasonable as the use of a magnifying glass would be for the same purpose.

We find no ground for complaint in the third assignment of error which is based upon the exclusion by the court of certain testimony which the defendant attempted to elicit from cross-examination of the witness Mary M. Steels, who was called by the state to prove certain admissions and statements made by the defendant in a contest over the will in question in the orphans' court of Somerset county. It is manifest that the questions upon cross-examination refer to another period than that involved in the examination in chief, and were therefore properly excluded. It may be further said that the court's action in this particular, as in other instances throughout the trial of the case, is not properly before this court for review, as the record indicates that no reason was given at the trial for the exception taken. *Columbia Delaware Bridge Co. v. Glesse*, 38 N. J. Law, 39; *State v. Hendricks*, 70 N. J. Law, 41, 56 Atl. 247.

A witness, *McMurty*, who qualified as an expert, testified that the signatures of the alleged will and a genuine signature were not written by the same person. When asked whether he had had any experience with signatures first written in pencil and then traced over with ink, he replied in the negative. He was then asked whether he was competent to pass upon that kind of a signature. The question was objected to and properly overruled, because, by his own admission, he was not qualified. Defendant then moved to strike out the testimony, which motion was refused. We perceive no error here, for the witness was qualified to express an opinion eliminating the tracing, and the state could not at that time foresee that the pencil marking was not to be disputed.

Miss Kellogg was allowed, against objection, to testify to a conversation had with the testator regarding the defendant, during the year 1905. The question called for a conversation regarding Mr. Skillman, the defendant, but was objected to and allowed; and the witness said that the testator told her that the defendant undoubtedly burned his barns in order to get the insurance money. This evidence was admitted after the defendant had cross-examined the witness regarding the social relations of testator and

defendant, and had her testify over objection that they were friendly. In view of this circumstance, and of the fact that the record shows that the object of the question was to contradict the fact that the relations were intimate between defendant and testator as brought out by the cross-examination, the defendant should have given the court the reason for his objection. Still, if this had been done, the evidence was competent in denial of a fact introduced by the defendant.

Objection was also made to the testimony of Hagaman regarding the relations between the testator and defendant. This subject was opened by the defendant on cross-examination of Miss Kellogg. We think it was competent to show that the parties were not friendly as stated in the disputed will, the inference being that the testator would hardly refer to defendant as his friend, if his state of mind was such as his declarations indicate. The objection stated was that the question was immaterial and not in rebuttal. If it was immaterial no injury was done, and what evidence may be admitted on rebuttal is a matter of discretion, not reviewable except in case of gross abuse, but in this case the defendant offered evidence of the friendly relations between defendant and testator, which it was competent for the state to rebut.

No reason was given for the exception taken by defendant on the motion to strike out the testimony of the witness Ely. It was clearly not responsive, and the striking out was no injury to the defendant.

The question as to the condition of defendant's health in the winter of 1905 was overruled. This was not important, and in nowise harmful to defendant, for, if the defendant's witnesses tell the truth, the testator went to defendant's house and executed the will, and it is admitted that defendant was able to prepare the will.

Exception was taken to the charge of the court upon the fact that defendant did not offer himself as a witness. Miss Kellogg and Mr. Stryker both testified to admissions made by defendant. Miss Kellogg testified that defendant told her that his daughter (who was a witness) was conscientious, and counsel had difficulty in making her say she saw testator use the lead pencil on the day the will was executed. This was an important fact, because, if the testator had not traced the signature over one made with a pencil, it tended to support the theory that the disputed signature had been copied in pencil, and then traced with ink. Mr. Stryker testified that the defendant had shown him the will, and said, "I have used all precautions in writing this will, and I don't intend for all hell to change it." This testimony, if true, had a direct bearing on the genuineness of the paper. Defendant, in the face of this testimony, failed to offer himself as a witness to disprove these facts—facts which he could meet and deny, and the

explanation of which would reach beyond a mere denial of guilt. We think the situation thus presented falls within the rule laid down in *Parker v. State*, 61 N. J. Law, 308, 39 Atl. 651, and *State v. Wines*, 65 N. J. Law, 31, 46 Atl. 702; permitting the court to comment on defendant's silence.

It is also urged as error that the court refused to charge when requested as follows: "That the evidence that William Lanehart did not write the disputed signature is largely, if not wholly, circumstantial, while some of the evidence given at the trial is direct and positive, and in order to reach a verdict of guilty the jury must be satisfied, beyond a reasonable doubt, from the evidence produced before them at this trial that the witnesses who have testified that they saw William Lanehart write the disputed signature did not tell the truth." All that this request embodies is that the jury must be satisfied, beyond a reasonable doubt, that the witnesses who testified that they saw the disputed signature written did not tell the truth. The court was not bound to charge in the words stated in the request, for the jury was not bound to be satisfied beyond a reasonable doubt that the witnesses for the defendant did not tell the truth. All that is required is that the jury be satisfied of the defendant's guilt beyond a reasonable doubt, and that depends upon the view they take of the whole case.

It is also urged as error that the court refused to charge as follows: "In weighing evidence the rule is elementary that conflicting testimony must be reconciled without imputing willful perjury to any witness unless the conclusion is unavoidable." It was held in 1887 in *Rickerson v. State*, 78 Ga. 15, 1 S. E. 178, that, in a criminal case, "It is error to refuse to charge that, if there was apparent conflict in the evidence, it was the duty of the jury to reconcile it, if they could, and not impute perjury to any witness." While we doubt the propriety of this conclusion, because it seems to us an invasion of the province of the jury, the present request to charge does not fall within the case referred to, for here the court was not asked to charge "that if there was any conflicting evidence it was the duty of the jury," etc., but, rather, to charge an abstract proposition. A request to charge must be based upon some facts which the evidence tends to prove, and the court should not give instructions which are not relevant to the proofs. The request embodies nothing of advantage to the defendant. An instruction which would limit the jury in dealing with the credibility of witnesses, it seems to us, would invade the right of the jury to deal with the only question submitted to them, and an instruction that they must reconcile the testimony without imputing perjury unless it is unavoidable states an abstract proposition which the evidence does not warrant,

and the refusal of the court to so charge therefore did not prejudice the defendant.

The court refused to charge that the testimony of a witness who speaks from his personal knowledge "is more satisfactory than the testimony of another who speaks of matters which lie in opinion only," and that the testimony of a witness who was present, and who saw the testator sign the disputed document, should outweigh the statement of another witness who testifies that he is acquainted with the signature, and does not believe it to be genuine. This request was properly refused. Whether the testimony of one witness is more "satisfactory" than that of another, is to be determined by the jury upon the facts and circumstances; because the word "satisfactory," as there used, means manifestly truthful, and whether both witnesses are equally credible can only be determined by the jury under all the circumstances of the case.

The court refused to charge that the verdict would not establish or set aside the will, and that no legacies mentioned in the will would be paid upon a verdict of not guilty, nor would payment thereof be refused if the verdict were guilty. This request was properly refused. There was no evidence in the case which required any such instruction, and the matters set forth were not within the issue tried.

It is also assigned as error that the court refused to charge "the fact that the defendant did not testify cannot be considered as evidence against him." This, we think, was substantially charged. The court instructed the jury that the defendant was not bound to offer himself as a witness, and that in not testifying he was exercising his right as a citizen. Besides this, the defendant, although present in the courtroom, produced a physician, who testified that the defendant could not safely offer himself as a witness, because of his condition of health, and it was thus made to appear that the defendant was not relying upon any constitutional right he possessed, but on the evidence which was presented to the jury, viz., whether his condition of health was a sufficient explanation for his refusal to testify. He had a right to rely upon his legal right, and he did not choose to do so, but excused himself by raising a question of fact, and if the jury found that fact against him, we think they were justified in drawing the inference that he refused to offer himself, because he could not truthfully deny the important facts bearing upon the question of his guilt or innocence.

The comments of the court upon the testimony during the charge were made for the purpose of explaining, applying, and elucidating the testimony for the convenience and assistance of the jury, and, under the well-established rule, present no ground for exception. *Donnelly v. State*, 28 N. J. Law, 463; *State v. Valentina*, 71 N. J. Law, 553, 60 Atl. 177.

An examination of the remaining exceptions taken, where reasons were assigned for them at the trial, convinces us that they are without legal substance, and we therefore conclude that the judgment of conviction should be sustained.

(108 Md. 353)

# MUTUAL LIFE INS. CO. OF BALTIMORE v. RAIN.

(Court of Appeals of Maryland. June 24, 1908.)

## 1. INSURANCE—APPLICATION—FALSE STATEMENT—QUESTION FOR JURY.

Whenever statements and answers in an application for life insurance are shown to be false by clear, convincing, and uncontradicted evidence, the court may so rule as a matter of law; otherwise the question is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1735, 1738.]

## 2. TRIAL—INSTRUCTIONS—FORM.

It is better practice to reduce all instructions to writing and so submit them than to refuse all the prayers of both parties, and give oral instructions.

## 3. SAME—EFFECT OF ADMISSION OF EVIDENCE.

Where, in an action on a life insurance policy, the proofs of loss are put in evidence by the plaintiff, they are admissible only to show that the requirements of the policy have been complied with, and not to establish declarations or admissions against plaintiff for which purpose the proofs must be offered on defendant's behalf.

Appeal from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by Marie Rain against the Mutual Life Insurance Company of Baltimore. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

Paul M. Burnett, for appellant. Thomas R. Clendinen, for appellee.

WORTHINGTON, J. This is a suit upon a policy of life insurance issued by the appellant to the appellee upon the life of appellee's daughter, Rose Rain. The policy is dated June 24, 1905, and the death of the insured occurred on December 13, 1906. The amount of the insurance was \$180, and the weekly premium of 10 cents was paid regularly, for about 75 weeks, until the insured's death.

The "substantial defense" to the claim of the beneficiary for the amount of the insurance is that at the time of the issuance of the policy the insured had consumption of the lungs, of which it is contended she subsequently died. In support of this defense, the appellant refers to the following provision contained in the policy of insurance: "Provided, however, that no obligation is assumed by this company, unless at the date of the actual delivery of this policy the insured is in sound health"—and also to the evidence of Dr. Lilly, a witness for appellant, who testified that in April, 1905, he made an examina-

tion of the insured's sputum, and found therein the germs of tuberculosis. It appears from the evidence in the case that Dr. Lilly first attended the insured on February 15, 1905, at the Northeastern Dispensary in Baltimore; that subsequently, in April of the same year, he examined her sputum; and that he attended her but two or three times thereafter until her death in December, 1906. The manner in which the examination of the sputa was made does not appear, and the only evidence in the case to prove that the doctor was possessed of the requisite knowledge and skill to make a scientific and accurate examination was that he had graduated from the Maryland University some six years before, and had been practicing medicine for that length of time. He admitted on cross-examination that in his profession a good many mistakes were made, and, though he denied that he had told the mother of the insured that the young woman had died of inflammation of the stomach, the mother swore most positively that he did so inform her, and that he never mentioned anything about her daughter having consumption. The mother also testified that the doctor told her that, if he had known her daughter's life was insured, he would not have certified that she died of tuberculosis pulmonalis, but "would have made it something different." The doctor was present in the courtroom at the time it would seem, and yet did not go upon the stand and deny this statement. We think that the statements and answers of the beneficiary in her application for the insurance on the life of her daughter were made warrantably by the terms of the policy as well as by the application. *Mutual Life v. Thomas*, 101 Md. 501, 61 Atl. 293, subject to the provisions of Code 1906, art. 23, § 196. We also affirm what was said by this court in the case of *Mutual Life v. Mullen*, 107 Md. —, 69 Atl. 385, to the effect that, whenever the statements and answers in the application are shown to be false by clear, convincing, and uncontradicted evidence, the court may so rule as a matter of law. But in this case we do not think their falsity has been established by such testimony, and therefore this question of fact was properly submitted to the jury.

The court refused all the prayers of the respective parties, and gave oral instructions to the jury, which are set out in the record. While we do not commend the giving of verbal instructions, deeming it much better practice to carefully reduce all instructions to writing, and in this form to submit them to the jury, yet in this case we can find no substantial error in the instructions actually given by the trial court.

It was suggested in the brief of counsel for the appellant, though not urged upon the court, that the appellee stated in her application for the policy of insurance that no parent, brother, or sister of the insured had died of consumption, and yet in the proof of death submitted by appellee it appeared that a

sister of the insured had died of that disease prior to the date of the application. If properly established, such a fact would have been a very important one to be considered, but as the proofs of loss, when put in evidence by the plaintiff, are only admissible for the purpose of showing that the requirements of the policy have been complied with, and as they are not admissible for any other purpose (*Travelers' Ins. Co. v. Nicklas*, 88 Md. 474, 41 Atl. 906), there is no legal proof in this case that a sister of the insured at any time died of consumption, and for this reason no doubt this phase of the case was not urged upon the court either in the brief of appellant or at the argument of the case in this court. In order to make declarations of the plaintiff contained in the proofs of death evidence for the defendant company, it is necessary that such declarations be offered by the company, just as any other admissions of a party to the record are offered in evidence against him. When so offered, it is for the court to decide whether such declarations are admissible as evidence for the defendant or not.

In *Stibbe's Case*, 46 Md. 312, the court allowed the declarations of the plaintiff to go to the jury, not as conclusive evidence against her, but as evidence to be considered by the jury in connection with all the other evidence in the case. Very frequently the form for making out the plaintiff's proof of death is filled up by a physician or some other third person, and merely signed by the plaintiff as such proof of death, without the plaintiff examining or thereby intending to subscribe to all the incidental statements therein contained; and for this reason there is danger that such statements would be given undue weight by the jury, unless they were specially offered in evidence by the defendant, and opportunity given the plaintiff to explain the circumstances under which such statements were made. As we have said, the "substantial defense" is that the insured was not in sound health at the date of the delivery of the policy of insurance, and, as the question of fact involved in such defense was properly submitted to the jury, we find no reversible error in the ruling of the trial court, and its judgment will therefore be affirmed.

Judgment affirmed, with costs to the appellee.

(108 Md. 439)

#### JONES COLD STORE DOOR CO. OF WASHINGTON COUNTY v. JONES.

(Court of Appeals of Maryland. June 25,  
1908.)

#### 1. COURTS—EXCLUSIVE JURISDICTION OF FEDERAL COURTS — ACTIONS UNDER PATENT LAWS.

While the state courts may construe a contract by which a patentee assigns a patent right to another, they have no jurisdiction of an action by the assignee to restrain a breach by the assignor of stipulations in the contract by using the devices covered by the patents, since such breach involves an infringement of the

patent, and the action is not one in which the question of patent rights is only collaterally involved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 1327, 1328.]

**2. CONTRACTS—LEGALITY OF OBJECT—STIPULATIONS IN CONTRACT FOR SALE OF PATENT RIGHT—RESTRAINT OF TRADE.**

A stipulation in a contract for the assignment of certain patents that the assignor will not, for a period of five years, patent and dispose of any devices or part thereof in the line of the business to be conducted with the patents assigned, and that in the event of a change of any of the patents or devices in use, conceived of or invented by the assignor, he will submit the same to such assignee for his acceptance, and, if the same be not accepted, and a price therefor agreed on, the same shall be withdrawn by the assignor, is void as in restraint of trade.

Appeal from Circuit Court, Washington County, in Equity; M. L. Keedy, Judge.

Suit by the Jones Cold Store Door Company of Washington County against Richard Jones. From a decree dissolving a preliminary injunction and dismissing the bill, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

Lewis D. Syester, for appellant. Palmer Tenant and C. A. Little, for appellee.

BRISCOE, J. This appeal is from a decree of the circuit court for Washington county dissolving a preliminary injunction and dismissing the bill of complaint. The object of the proceeding was to restrain the appellee from patenting and disposing of certain devices and articles in the line of the cold store business, and from manufacturing, selling, or disposing of any cold store doors, or any of the appurtenances or other equipments in connection with the cold store door business, contrary to and in alleged violation of the terms of an agreement set out in the bill of complaint, dated the 27th day of February, 1906. The facts of the case appear from the record to be that the appellee and one W. F. Elgin were partners in the manufacture of cold store doors and appurtenances, and other equipments in connection with the cold store business. This partnership continued until the 27th of February, 1906, when it was dissolved, and a corporation, under the name of the Jones Cold Store Door Company of Washington County, was formed by Jones, Elgin, and other persons, and, in consideration of \$2,500 of the capital stock of the corporation paid to each, Jones and Elgin conveyed, transferred, and assigned to the corporation all of the property, business, effects, rights, and things belonging to the partnership.

This controversy arises, and the questions involved are based, upon the following provisions of the contract dated the 27th of February, 1906, between the appellee Jones and W. F. Elgin, one of the directors of the appellant company: "I, the said R. E. Jones, in consideration of the sum of twenty-five

hundred dollars in stock of the new corporation aforesaid, do hereby agree and consent to set apart, turn over, surrender, and give unto the said new corporation, 'the Jones Cold Store Door Company,' all my right, title, interest, and every claim I have for services and in any and every manner, to the stock, good will, equipment, fixtures, bills receivable, and money on hand belonging to the former partnership; and, further, I do assign and turn over to the said corporation all my patents granted, applied for or pending, relating to the purposes aforesaid. And I do hereby authorize and direct the Commissioner of Patents of the United States to enter upon the books thereof the assignment of all my rights, title, and interest in and to all patents granted and applied for by me to the Jones Cold Store Door Company of Washington County. And I do expressly agree that I will not patent and dispose of to any other corporation, concern, or company any device, thing, article, or part thereof in the line of the business hereinbefore referred to for a period of five years from the date hereof, but, in the event of such a change conceived of or invented by the said Jones of any of the patents or devices in use, then the said Jones agrees to submit the same to the said company or corporation for their adoption, approval, or acceptance, and if the same shall not be accepted, and a price therefor shall not be agreed upon, the same shall be withdrawn by the said Jones, who hereby expressly agrees that he will not dispose of, transfer or assign to any other person, corporation, or company any such patent, device, or thing for the period above set forth, to wit, five years." The record shows that, in accordance with the terms of the agreement, the appellee, Jones, on or about the 2d day of March, 1906, assigned and transferred in writing to the appellant corporation his right, title, and interest to a patent, and patent right, for "refrigerator door fasteners," and also his right to a certain invention known as a "refrigerator door hinge," for which letters patent had been applied for. These two assignments and transfers were duly entered for record in the Patent Office of the United States and recorded among the "Transfers of Patents." The appellee thus agreed that he would not patent and dispose of any device, thing, article, or part thereof in the line of business to be carried on with the patents assigned for the period of five years; and, further, he agreed, in the event of such a change conceived of or invented of any of the patents or devices in use, to submit the same to the corporation for their adoption, approval, or acceptance, and, if the same should not be accepted upon a price to be agreed upon, the same should be withdrawn by him. And he further expressly agreed that he would not dispose of, transfer, or assign any such patent, device, or thing so withdrawn for the space of five years from

the date of the contract. The appellee remained a member of the corporation, as one of its principal officers, until the 17th of April, 1907, when he sold and transferred all of his stock, and severed his connection with the business.

By the seventh paragraph of the bill it is averred that, notwithstanding the sale, assignment of the letters patent, and of the application for letters patent and in violation of the written agreement, the defendant is now engaged in the manufacture and sale of cold store doors with their appurtenances and equipment, and that he was using in the construction and manufacture of these doors the very device and plans which he had sold, assigned, and transferred to the corporation, and which the plaintiff corporation is now using in their business. By the eighth paragraph of the bill it is alleged that the said defendant on or about the 15th day of October, 1907, in pursuance of the terms of the said agreement, notified the plaintiff by letter that he would have for their inspection a "self-tightening fastener and self-adjusting hinge," and calling upon the plaintiff to purchase the right to manufacture and sell said devices, but the said plaintiff did not desire, and does not now desire, to acquire the said devices as offered, but the defendant, in violation of the terms of the said agreement, did not withdraw the said devices, but is engaged in the manufacture and sale of the same. By the tenth paragraph it is further averred that it is the manifest intention and purpose of the defendant, in violation of the terms and spirit of the said agreement, to engage in the manufacture and sale of cold store doors and appurtenances and of other equipment in connection therewith, similar in kind and character with that sold, transferred, and assigned to the plaintiff. The defendant in his answer to the seventh paragraph denies that he has used any of the patents or patent rights assigned and transferred to the plaintiff, as set forth in the article of agreement. And in his answer to the eighth paragraph he avers that the self-tightening fastener and self-adjusting hinge as now manufactured and sold by him, which was submitted to the plaintiff, is an entirely different fastener and hinge from that patented, sold, and transferred by the defendant to the plaintiff. The fundamental question, then, raised by the pleadings, and one of the grounds upon which the intervention of the court is sought by injunction, is the infringement upon the rights of the plaintiff as the assignee and owner of the patent rights assigned by the defendant. The case, therefore, being one directly involving the infringement of patent rights under the patent laws, the federal, and not the state, courts, would have jurisdiction to grant the relief under the prayer of the bill. The rule is well settled that the state courts may determine what the contract is and in whom

the patent is vested, but it has no right to say that a party shall be enjoined from using the patent in dispute or in any way pass upon any question arising as to its infringement. *Continental Store Service Co. v. Clark*, 100 N. Y. 365, 3 N. E. 335; *Pratt v. Paris Gas-light Co.*, 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458. In this case one of the allegations of the bill is that the defendant is using the devices covered by the patents, and the defendant is infringing upon its rights secured by the patents. It is not then a case where the question of patent rights are only collaterally involved, but where the question is directly presented, as to the infringement of the patents held by the plaintiff. This question is manifestly beyond the jurisdiction of this court, and can be determined in a federal court. Having reached the conclusion that this court has no jurisdiction to determine the issue raised under the sixth, seventh, eighth, and tenth paragraphs of the bill, we come to the second question in the case, as raised by the fourth and fifth paragraphs of the bill, involving the true construction of the agreement, and what the contract is.

By the first clause of the contract in dispute the defendant assigned and transferred to the corporation all his patents granted, applied for or pending, relating to the purposes of the business, and the assignments were duly made to the company. Manifestly, then, he could not afterwards use the patents or manufacture articles under them, because such use would be an infringement on the original patents, and in direct violation of the patent laws of the United States, which provide that every patent shall grant to the patentee, his heirs or assigns, the exclusive right to make, use, and vend the invention and discovery. But, even if the allegations of the bill were sustained in this respect, it would be a case arising under the patent laws, and, as we have seen, the state courts would have no jurisdiction to grant relief. The second clause of the agreement we think refers to not patenting and disposing of some new or changed articles. The language of the clause is "that I do expressly agree I will not patent and dispose of any device, etc., or part thereof in the line of the business, to be conducted with the patents assigned." It does not refer to articles made under the original patents, but those made under some new patents, because it further provides that, in the event of such a change of any patents or devices in use (meaning a change conceived of or invented by a new patent), then he agrees to submit the same (that is, the changed patent, or device), and, if the same (meaning the new patents and articles under them) is not accepted and a price not agreed on, the same shall be withdrawn, and that he will not dispose of, transfer, or assign to any other person any such patent, device, or thing (meaning a new patent or article under it). Now, there is no

avermment in the bill or proof in the record that the defendant is attempting to patent or dispose of some new or changed article in violation of this clause of the agreement. On the contrary, the defendant avers in his answer that he has not patented and disposed of any device, thing, article, or part thereof in the line of the business referred to, and this averment appears to be supported by the testimony. But, assuming the construction of the contract urged by the appellants is correct, we are of opinion that the contract is void and invalid, and cannot be enforced, because it is in general restraint of trade, unreasonable, and against public policy. *Guerand v. Dandeleit*, 32 Md. 561, 3 Am. Rep. 164; *Warfield v. Booth*, 33 Md. 63; *Lufkin Rule Company v. Fringell*, 57 Ohio, 598, 49 N. E. 1030, 41 L. R. A. 185, 68 Am. St. Rep. 736; 24 A. & E. Enc. of Law (2d Ed.) p. 849. There was no ground whatever in the allegations of the bill or on the record to warrant the relief sought in this case by way of injunction, so without prolonging this opinion, by discussing the other questions raised in the briefs, we shall affirm the decree appealed from dissolving the preliminary injunction and dismissing the bill.

Decree affirmed and bill dismissed, with costs to the appellee.

(108 Md. 551)

# BERNHEIMER BROS. v. BAGER.

(Court of Appeals of Maryland. June 25, 1908.)

## 1. APPEAL AND ERROR — HARMLESS ERROR — ADMISSION OF EVIDENCE.

The admission of evidence which could not injure the party appealing is, at most, harmless error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

## 2. MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURIES—ACTIONS—QUESTIONS FOR JURY—NEGLIGENCE.

In an action for injuries to a servant from the falling of a brace placed against a wall where plaintiff was at work, evidence as to the unsafe manner of erecting the brace and the liability of excavation about the supporting bank held sufficient to go to the jury on the question of defendant's negligence in failing to provide a safe place to work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010-1031.]

## 3. SAME—DUTY OF MASTER—SAFE PLACE TO WORK—UNUSUAL CONDITIONS—EFFECT.

Where extraordinary conditions arise increasing the danger in excavating for a foundation, and the lives of those who are to work in the place are at stake, the owners and those representing them should not be satisfied with the ordinary measures of securing a prop to an adjacent building, notwithstanding there would ordinarily be but little or no danger therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 267.]

## 4. SAME—CARE REQUIRED OF MASTER.

The master must exercise ordinary and reasonable care to avoid unnecessary injuries to his servant in the course of his employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 267.]

## 5. SAME—DELEGATION OF DUTY—SAFE PLACE TO WORK.

While a master may delegate to others certain duties, he cannot delegate the duty of providing a safe place for employes to work, and negligence of alleged fellow servants who erected a prop, the falling of which injured plaintiff, is no defense to an action against the master for damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 392-399.]

## 6. SAME — EXCEPTIONS TO RULE REQUIRING SAFE PLACE—RISK.

Where a place is out of repair and dangerous, and the employé undertakes to make it safe, he assumes the additional risk arising from the work, or place, or if he accepts an employment or continues in it with knowledge of the danger, he cannot ordinarily hold his employer liable, for otherwise repairs in dangerous places could not be made without such employer becoming in effect an insurer of the employes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 551-558.]

## 7. SAME—ASSUMPTION OF RISK.

A master employing a servant impliedly agrees that there is no danger in the place, tools, and machinery other than is obvious and necessary, and where a prop against a building, near where the excavation at which plaintiff was working, had been braced against a timber, the top of which was against an adjoining building and the lower end beneath the surface of the ground, so that plaintiff could not tell how deep it extended, and he had nothing to do with the prop or its erection, he had a right to assume that it was properly placed, and did not assume the risk from improper placing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 551-558.]

## 8. SAME—NEGLIGENCE OF INDEPENDENT CONTRACTOR—EFFECT.

On account of excavations for the foundation of a building which would go beneath that of an adjacent building, a brace was placed by defendant, the builder, against the adjacent building. The brace rested against a timber placed against a building on the lot to be excavated, and its bottom rested on brick beneath the surface of a bank at the base of that building; the job of removing the buildings on the lot and excavating was let to another contractor; a servant of the contractor dug at the bank where the foot of the brace was placed, and the brace was loosened and fell, injuring defendant's servant. The most that had been done to insure the safety of the prop after it was placed, was to tell one of the excavation contracting firm not to disturb the bank in question. Held, that defendant was not released from liability by the doctrine of independent contractor, for one on whom positive duties are imposed by law cannot avoid liability for injuries resulting from failure to perform them by employing a contractor for the purpose, and the fact that the injuries resulted from the negligence of the contractors or their servants would be no defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 175.]

## 9. SAME — BURDEN OF PROOF — AFFIRMATIVE DEFENSE.

While a plaintiff in an action for personal injuries must not, in presenting his testimony, show that he failed to use due care, yet if contributory negligence or any distinct affirmative matter of defense is relied on by the master, the burden is on him to prove it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 908.]

Appeal from Court of Common Pleas of Baltimore City; Henry D. Harlan, Judge.

Action by George Bager against Bernheim-



er Bros. for personal injuries. From a judgment for plaintiff, defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and HENRY, JJ.

Albert E. Donaldson, for appellants. S. S. Field, for appellee.

BOYD, C. J. This is an appeal from a judgment obtained by the appellee against the appellants for injuries sustained by the former by reason of the alleged negligence of the latter. The defendants were engaged in the construction of a building in the city of Baltimore, and the plaintiff was employed by them, as a laborer. At the time of the injury he was at work in the cellar on the excavation for the foundation. The lot of the appellants fronts on the north side of Fayette street and runs back to Marion street—adjoining on the west side a building known as "Nixon's Hotel." In making a foundation of sufficient depth, it became necessary to underpin a part of the Nixon wall, as the foundations of the Bernheimer building went below the level of those of the Nixon property. A prop was put against the Nixon wall, at a point about 25 feet above the ground, and the other end rested on a piece of joist placed against the rear end of a wall of the kitchen of one of the buildings on the appellants' property, which was being torn down. The witnesses differed as to the length of the prop, but it was apparently 42 feet long. The joist which was 2 inches thick and 12 inches wide rested, at the bottom, upon some bricks which were in a bank of sand and clay, and described as the footing of the wall. A few feet above the bank a cleat was nailed to the joist, and the lower end of the prop rested on it. The prop was constructed of two timbers about 6 by 6 inches, spliced together by boards 6 inches wide and 2 inches thick nailed on the four sides, and there was a brace under it made by what is called a "king piece" which was at right angles to it, and, from the end of that, boards were run up obliquely to the prop for the purpose of making it more rigid. Boards were also run from the prop to the wall of a house on Fayette street, which was parallel with the prop, and were fastened to the window frames of that house. There were also some props against the house on Fayette street which extended under the large one spoken of, although not placed there to support the latter. The appellee was working under the main prop when it fell, and one of the boards which was broken off struck him, causing the injuries complained of.

Two exceptions were taken to the admissibility of evidence, but as the first question objected to was answered in such way as could not possibly do the appellants any injury, it will be unnecessary to further refer to it. The plaintiff first offered evidence to show that the witness was competent as an

expert, and then asked him a hypothetical question as to whether it was safe to construct a prop as therein stated. He replied that it was a hard question to answer, and did not express an opinion. Another was then asked him, and the witness replied: "If, as you say, the board was supported on sand, and didn't have a wide base to support it, it naturally wasn't safe; sand makes a good foundation when confined and well surrounded." It is difficult to see how that answer could injure the defendants, especially when taken in connection with his cross-examination. What he said could scarcely be disputed. It is therefore useless to discuss those exceptions, for if there was any error in permitting the questions to be asked the answers were harmless.

The remaining bill of exceptions presents the rulings on the prayers. The court granted the first, second, fourth, and fifth offered by the plaintiff, and rejected all (11) offered by the defendants. It also overruled special exceptions to the second and third of the plaintiff, but as it rejected the third the special exception to it need not be considered.

We will first consider those of the defendants. The first, second, and third sought to take the case from the jury on the ground that there was no legally sufficient evidence to entitle the plaintiff to recover. As the first and third referred to the pleadings, we will examine the declaration. It alleges that the defendants "negligently and insecurely constructed" the prop, or beam, as it is therein called; "that because of the negligence and carelessness of the defendants in erecting and constructing said beam insecurely and unsafely said beam fell down, striking the plaintiff while he was attending to his work, and without notice or warning"; and that "although it was the duty of said defendants to furnish said plaintiff a safe place to do his work and safe surroundings yet they neglected to do so, and because of the negligent way in which the defendants erected and put in position, extending from one side of the building on which they employed the plaintiff to the other side thereof, a long heavy beam which fell by reason of said defendants' negligence, and which the defendants knew said beam was dangerously constructed, but the plaintiff did not know it," etc. It will be observed that while the negligence relied on refers, for the most part at least, to the insecure and unsafe erection and construction of the beam, the narr. also alleges that the beam "fell by reason of said defendants' negligence"; not by reason of defendants' said negligence. Just what was intended by that expression is not altogether clear, but it apparently did not mean to confine the negligence to the erection of the prop, although it does not seem to us to be very material in considering these prayers. Mr. Preston, the building inspector of the city, and others said that the prop was safe in the way in which it was erected. Mr. Preston not only occupies

that official position, but he was also in the employ of the appellants, and was one of the defendants in this case, although it was subsequently non pros'd as to him.

But notwithstanding the evidence of Mr. Preston and others, there were facts before the jury from which they were authorized to conclude that the prop was not securely and safely erected. It could not be expected that those that had been connected with its erection would testify to anything other than what they did—indeed, it would be doing them an injustice to say that they did not believe that it was properly erected, as it would have been gross, if not criminal, negligence on their part to place it in such a position, unless they did so believe. But the plaintiff and the jury were not concluded by their opinions. It was admitted that when the prop was erected a contract had been let to George W. Howser & Co. to tear down all the old buildings on the lot and excavate the cellar, which included the ultimate removal of the bank upon which the prop rested. Of course, we do not mean that it was intended by the appellants, or those acting for them, that the bank should be removed while the prop was still on it, but it must have been understood that they would excavate near the bank, and they knew they would eventually remove it. Mr. Townsend, the foreman of the appellants, testified that the bank was 4 or 5 feet wide on the top, sloped down on a grade of about 45 degrees, and was about 6 feet high. He also said that the joist, against which the lower end of the prop rested, was at or about the end of the wall of an old kitchen, in the rear of the lot. At the time of the accident the kitchen wall had been taken down to the first floor, and the joists and floor had been taken out. The wall was still about 7 or 8 feet above the bank, and there was a cross-wall at the corner, which Mr. Townsend said strengthened it. The joist, set up against the wall, was not nailed or fastened to it, and, in the language of the plaintiff, "it led down into the ground a little, only for a short ways," "there were only two courses of brick there, and they were loosened, and there was no strength at all to carry the prop, except just the footing where it was on." It was shown that before the accident he did not know how the prop was fastened or how deep the joist was in the bank, and that no warning had been given to him about it. Mr. Townsend, Mr. Preston, and other witnesses said that it was not necessary to fasten the joist to the wall, or put the end of it in the ground, as the weight and pressure of the prop would keep it in position. But the fact is that something caused the prop to slide off the joist, and the east end of it fell clear (north) of the corner of the wall, and the joist also fell down after the prop fell. The west end of the prop, after it fell, rested on the three props which had been placed against the north wall of the building on Fayette street;

they having undoubtedly been the means of saving from injury—possibly death—other men working under the large prop.

There was therefore some evidence before the jury from which they could properly draw the inference that the prop had not originally been safely erected—especially in view of the fact that the ground was intended to be excavated at and about the bank, and that the bank itself would eventually be removed. If the appellants' theory be correct—that the accident was occasioned by a colored man named Mosby digging on the bank—then there did occur just what might reasonably have been anticipated. Mosby testified that on the morning the prop fell he was told by his employer, Mr. Shott, of the firm of Howser & Co., to dig on the bank, and that he was digging about two feet from the foot of the prop when it fell; that he did not strike it, and no one had warned him not to dig. Mr. Townsend testified that he had notified either Mr. Shott or Mr. Radecke, the foreman of Howser & Co., not to allow the bank of earth to be disturbed, but he was not certain which of them he so notified, and thought it was Mr. Radecke. At any rate Mosby said Mr. Shott told him to do the digging, and even if Mr. Townsend notified both of them, it only shows the necessity of not taking chances, and merely relying on such instructions, instead of fixing the prop in the beginning in a way that it would not be liable to be thrown down by the carelessness or ignorance of others. There was not even a notice placed on the bank, warning the workmen not to dig or otherwise disturb it. There is certainly nothing in the evidence that would necessarily convince a jury that the joist, or some kind of timber, could not have been placed deep enough and be fastened to the wall, so as to make it safer than it was, and when it was known that a contract had been let to make the excavations, including that very bank, it was not an unreasonable precaution to require to be taken. When the lives and limbs of those who were to work in that place were at stake, the appellants, and those representing them, ought not to have been satisfied with the ordinary means of securing a prop from which there would be little or no danger, when somewhat extraordinary conditions existed—owing in part to their undertaking to place the control of the excavation in the hands of others.

The master's liability for personal injuries to his servant is one of the most familiar subjects in courts of law, by reason of the great multitude of people occupying that relation, but the liability varies very much, according to the circumstances of each particular case. Certain general principles are, however, well established, and it only remains to apply some of them to the facts in this case. It is a fundamental rule that the master must exercise ordinary and rea-

sonable care to avoid unnecessary injuries to his servant, in the course of his employment. While he is permitted to delegate to others certain duties there are some which he cannot relieve himself of, or avoid the responsibility for, if there be a failure to discharge them to the injury of the servant. One that is required of him, in this as well as in other jurisdictions is providing and maintaining safe machinery and appliances and a reasonably safe place for the work undertaken by the servant. Necessarily there are some exceptions to these as well as to most general rules. For example, where a place is out of repair and dangerous, and the employé undertakes to make it safe, he assumes the additional risk arising from the existing condition of the work or the place. *Eckhardt v. Lazaretto Co.*, 90 Md. 192, 44 Atl. 1017. So if he accepts an employment, or continues in it, with knowledge of the danger, he cannot ordinarily hold his employer liable, and other like illustrations might be given. If such were not the law, an employer could not have repairs made in dangerous places, without in effect becoming an insurer of his employé.

But are such exceptions applicable to this case? There were, of course, certain risks which the appellee assumed, injuries from which his employers would not be liable for, but when he went into the place where he was engaged to work he had a right to assume that his employers had exercised reasonable care in securing this prop, which had been erected before he went there, and that the place at which he had been put to work was reasonably safe. He was not engaged in making it safe, but was working in a place which presumably had been made safe, excepting in so far as the work he was doing was likely to make it unsafe. As was said in *B. & O. R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, quoted with approval in *Am. Tobacco Co. v. Strickling*, 88 Md. 504, 41 Atl. 1084, 69 L. R. A. 909: "A master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and machinery, and when he employs one to enter his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary." It was not suggested in the evidence that the appellee had any cause to suspect that there was any danger of this prop falling, and it cannot be denied that it was, as located, dangerous, unless it was properly secured. The bottom of the joist was far enough in the sand to be hidden, and the appellee had the right to assume that the prop was safely erected. We are of the opinion, as we have already intimated, that there was sufficient

evidence of the want of such reasonable care as was required in placing the eastern end of the prop to go to the jury, and the first, second, and third prayers of the defendants were therefore properly rejected.

The defendants' fourth and seventh prayers were offered on the theory that as Mosby was in the employ of George W. Howser & Co., and they were independent contractors, there could be no recovery. It may be that the prop would not have fallen if Mosby had not dug away part of the bank, but inasmuch as there was some evidence that it was not originally placed as it should have been, that cannot relieve the appellants. We have already seen that they employed Howser & Co. to make the excavations, and that included in their contract was the removal of the bank on which the prop rested. There is not even any satisfactory evidence that the appellants, or their representatives, ever cautioned Mr. Shott, or any one except Mr. Radecke, not to disturb the bank, and the uncontradicted testimony of Mosby was that he was instructed by Mr. Shott to dig there. Mr. Shott doubtless believed that the appellants had properly secured the prop, and if it had been secured by putting the joist lower into the earth, or by fastening it to the wall, or both, the digging might, and in all probability would, not have disturbed it at all. It would be carrying the doctrine of independent contractor beyond what the law authorizes to permit an owner of property to thus insecurely erect a dangerous instrument over where his employés were to work, and then escape the result of his negligence by letting the work to be done to a contractor. The appellants were under obligation to use reasonable care in protecting their servants while they were engaged in the work, and could not thus shift the responsibility.

The general rule as to independent contractors is thus qualified by the authorities: "A person or corporation on whom positive duties are imposed by law cannot avoid liability for injuries resulting from failure to perform such duties, by employing a contractor for the purpose; nor, in such a case, is the fact that the injuries resulted from the contractor's negligence a defense." 16 Am. & Eng. Ency. of Law, 197. Illustrations of that rule are given, and on page 199 of that volume it is said: "A master's duty to furnish to his employés a safe place to work cannot be delegated to an independent contractor." This court has announced similar views in several cases. In *City & S. Ry. Co. v. Moores*, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345, after citing *De Ford's Case*, 30 Md. 179, and *O'Donnell's Case*, 53 Md. 110, 36 Am. Rep. 395, we referred to *Water Co. v. Ware*, 16 Wall. (U. S.) 566, 21 L. Ed. 485, where the question is fully discussed, and added that there were many cases in this country and England to the effect that "when the employer owes certain duties to

third persons or to the public in the execution of a work, he cannot relieve himself from liability to the extent of that duty, by committing the work to a contractor." In *Bonaparte v. Wiseman*, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482, Judge Schmucker, in considering the question, referred to *De Ford's Case*, as holding that "the distinction is well established between the cases in which, when work is being done under a contract, an injury is caused by negligence in a matter collateral to the contract and those in which the thing contracted to be done causes the mischief. In the former class of cases the employer is not liable for the injury but in the latter he is." After quoting from *Ohio South. R. R. Co. v. Morey*, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701, the general rule as to independent contractors, he further quoted from that case: "But this principle has no application where the resulting injury, instead of being collateral and following from the negligent act of the employe alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case the person causing the work to be done will be liable, though the negligence is that of any employe of an independent contractor." That doctrine was thus announced in *Moore's Case*, supra: "Even if the relation of principal and agent, or master and servant, does not, strictly speaking, exist, yet the person for whom the work is done may still be liable if the injury is such as might have been anticipated by him, as a probable consequence of the work let out to the contractor, or if it be of such character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work." So without referring to other questions, such as the statement in the prayers that the undisputed evidence shows that *Howser & Co.* were notified and warned by the appellants not to dig away or disturb the support, we think the fourth and seventh prayers were properly rejected.

The fifth, sixth, ninth, and eleventh prayers relied on the defense of negligence by fellow servants—either in erecting the prop or digging away the bank. Without discussing the different phases of that question, presented by the prayers, a sufficient answer to them is that the master cannot delegate his duty to provide a reasonably safe place for his servants to work in. *P. B. & W. R. Co. v. Devers*, 101 Md. 341, 61 Atl. 418; *Russell's Case*, 88 Md. 210, 44 Atl. 219; *Baker v. Md. Coal Co.*, 84 Md. 19, 35 Atl. 10, and other authorities that might be cited. There was no evidence to support the eighth prayer, in reference to the danger being obvious to the plaintiff or his seeing *Mosby* removing the bank. It is not only contrary to the uncontradicted testimony of the appellee,

but is utterly so to the whole theory of the appellants, that they did not know that *Mosby* was digging at the bank. What was said in the recent case of *United Ry. & Elec. Co. v. Cloman* (Md.) to be found in 69 Atl. 379, is sufficient to show that we do not approve of such prayers as the tenth. It was perhaps not as objectionable as it was in that case, but it was liable to mislead the jury. One illustration, in addition to what was said in *Cloman's Case* as to the extent of injuries alleged in the declaration, will suffice to show how the jury might be misled. While it is true that a plaintiff in cases of this character must not in presenting his testimony show that he failed to use due care, yet if contributory negligence, or any distinct, affirmative matter of defense, be relied on by the defendant, the burden is on him to prove it. *Tucker v. State*, to *Use of Johnson*, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004, 46 L. R. A. 181, and yet the jury might not understand the distinction, if a prayer like the tenth is granted.

From what we have already said, it is apparent that, in our opinion, there was no error in granting the first, second, and fifth prayers of the plaintiff, or in overruling the special exception to the second. His third was rejected, and we do not understand the exception to the fourth to be urged. It is the ordinary prayer in reference to the measure of damages, and we see no ground for complaining of it.

It may in some respects be a hardship on the appellants to be held responsible for the injuries sustained by the appellee, but as we find no reversible error in any of the rulings of the lower court, and the case was properly submitted to the jury, the judgment must be affirmed.

Judgment affirmed, the appellants to pay the costs above and below.

(108 Md. 233)

FRANCIS v. BRIGHAM-HOPKINS CO.  
et al.

(Court of Appeals of Maryland. June 24, 1908.)

1. CORPORATIONS—OFFICERS—SALARIES—EXCESSIVE SALARIES.

A corporation with a capital of 3,000 shares of the par value of \$100 each was engaged in manufacturing hats. The president of the corporation bought all the goods for it, amounting to over \$500,000 per year, and he had also sole charge of the financial business of the concern, borrowing large sums of money, and individually indorsing paper to large amounts. The treasurer attended personally to the selling of the goods, and had supervision over subordinate salesmen. He sold from \$175,000 to \$250,000 annually, and he also designed all the styles. The net profits for a year amounted to over \$89,000. A member of a clothing manufacturing firm and a straw hat manufacturer testified that a salary of \$16,000 per annum for the president and \$11,000 for the treasurer was not excessive. Held to authorize a finding that the salaries were not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1341, 1342.]

## 2. SAME—AUTHORITY TO FIX SALARIES.

Where one votes for his own salary in a board of directors of a corporation, pursuant to the authority to act conferred by the by-laws adopted by the stockholders, and his vote is essential, the burden of proof is on him to show that the salary is just, and that no advantage has been taken of the stockholders, but his act is not absolutely void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1338-1340.]

## 3. SAME.

A by-law of a corporation providing that the compensation of the president, vice president, and secretary and treasurer "shall be designated by the board previous to their election" is not mandatory, but directory merely, and the act of the board of directors in fixing the salaries subsequent to the election of the officers is valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1338-1340.]

Appeal from Circuit Court No. 2 of Baltimore City; James P. Gorter, Judge.

Two suits by Isaac H. Francis, Jr., against the Brigham-Hopkins Company and others. The causes were consolidated, and heard and determined together. From a decree dismissing the bills, complainant appeals. Affirmed.

The following is the opinion of the trial court:

"The Brigham-Hopkins Company of Baltimore City at the time of the occurrence of the acts in this suit complained of, viz., in the years 1905 and 1906, was a corporation duly incorporated under the general laws of Maryland, having become so in the year 1890, when its certificate of incorporation was filed in the clerk's office of the superior court of Baltimore City. Its business was that of manufacturing hats; its capital stock at the time in question was \$300,000, divided into 3,000 shares at the par value of \$100 each, and were held as follows:

Robert D. Hopkins.....	Shares	1,327
Walter Hopkins.....	"	158
Isabel L. Hopkins.....	"	175
Robert D. Hopkins, Jr.....	"	30
William M. Hopkins.....	"	8
R. D. Hopkins, Guardian.....	"	80
Mrs. P. M. Brock.....	"	16
Mrs. Mary J. Platner.....	"	37
Walter C. Brigham.....	"	58
William T. Brigham.....	"	11
Estate of I. H. Francis.....	"	1,000
W. Harry Francis.....	"	50
I. H. Francis, Jr.....	"	50

"Under the charter of this company its affairs were to be managed by four directors, and under its by-laws these were to be elected for one year at the general stockholders' meeting held on August 1st of each year. The directors for the year 1903 were: Robert D. Hopkins, Isaac H. Francis, William H. Francis, and Walter Hopkins. At the meeting of the directors on August 5, 1903, all the directors being present, Robert D. Hopkins was elected president and treasurer, Isaac H. Francis was elected vice president, Walter Hopkins was elected secretary; and the salaries of each were fixed at \$7,000 per annum. The same directors were elected on August

1, 1904, for the years 1904 and 1905. On the 2d of August, at the directors' meeting held next day—the testimony does not show who were present—the same officers were elected, and the same salaries fixed.

"We now come to the proceedings held in 1905, the validity of which is called into question by the bill of complaint in this case. The stockholders' meeting was duly held, and the same directors were re-elected. On August 3, 1905, the directors' meeting was held. Those present were Robert H. Hopkins, Walter Hopkins, and William H. Francis. Isaac H. Francis, who was ill at the time, was not present. The board elected Robert D. Hopkins, president and treasurer; Isaac H. Francis, vice president; Walter Hopkins, secretary—and fixed the salary for the president and treasurer, Robert D. Hopkins, at \$10,000, and the salary of the secretary, Walter Hopkins, at \$8,000, thus increasing the former \$3,000 more than the previous year and the latter \$1,000 more than he had received the previous year.

"The following motion or resolution was adopted: 'Owing to the present condition of the vice president, his inability of rendering any assistance to the business for a period of two or more years, making it necessary for his son to take his place, so far as the management of the male help is concerned and the general overlooking of that part of the business, we deem it just to both our vice president and his son that the question of salary of each be left unsettled for future determination.'

"On September 25, 1905, Isaac H. Francis died. On October 21, 1905, a special meeting of the board was held to take action on Mr. Francis' death. Fitting resolutions were passed by the board. Robert H. Hopkins, Jr., was elected a director to fill the vacancy caused by the death of Isaac H. Francis. Robert D. Hopkins resigned his position as treasurer, and Walter Hopkins resigned his position as secretary. W. Harry Francis was elected vice president, the position formerly held by his father. Walter Hopkins was elected treasurer, and Robert D. Hopkins, Jr., was elected secretary.

"The salaries were fixed as follows: President, \$10,000; vice president, \$3,000; treasurer, \$8,000; secretary, \$2,600—from July 1, 1905, to June 30, 1906. The salaries had always in the past been from July 1st to June 30th in each year. The bill filed on May 20, 1907, by Isaac H. Francis, Jr., a stockholder of the company, owning 50 shares of stock, attacks the increase of salary of \$3,000 allowed to Robert D. Hopkins, and the increase of salary of \$1,000 allowed to Walter Hopkins upon the following grounds: First, because the same is excessive and unreasonable. Second, because each of the Hopkins was essential to the quorum, only three being present. Third, because contrary to the by-laws of the company which says: 'That each shall receive for their sal-

aries such compensation as shall be designated by the board previous to their election.'

"On August 7, 1906, the general meeting of the stockholders took place at the corner of German and Paca streets, resulting in the election of the following directors:

"Robert D. Hopkins, William H. Francis, Robert D. Hopkins, Jr., Walter Hopkins; notice being given each and acceptance of each received.

By vote .....1,399

By proxy .....1,427

2,826

"[Signed] Robert D. Hopkins,  
"Acting Secretary.

"The directors' meeting was held on August 14, 1906, and the minutes thereof are as follows: 'Baltimore, Md., August 14, 1906. A meeting of the directors of the Brigham-Hopkins Company took place this day at their office. Owing to the absence of two directors it could not have been held before. Present: Robert D. Hopkins, William H. Francis, and Walter Hopkins. Mr. William H. Francis was called to the chair, and Walter Hopkins made secretary. Minutes of the last meeting read and approved, as well as annual meeting. An election of officers to serve for one year took place, resulting in the following: Robert D. Hopkins, president; William H. Francis, vice president; Walter Hopkins, treasurer; Robert D. Hopkins, Jr., secretary. Salaries were fixed for president, at \$16,000; vice president, \$7,000; treasurer, \$11,000; secretary, \$3,600 a year.'

"The plaintiff, Isaac H. Francis, Jr., in his bill of complaint, objects to the increase of salaries of the president and the treasurer over \$7,000 a year. First, because they are excessive and unreasonable. Second, because, as only three of the board were present, the presence of the president was essential to a quorum when a salary was voted, and the presence of the treasurer was essential to the existence of a quorum when his was voted. Third, because they were passed in disregard of the by-laws.

"(1) Was the increase of salaries of R. D. Hopkins and Walter Hopkins for the years 1905-6 and 1906-7 reasonable? It seems to me that the first question that should be considered is the unreasonableness vel non of the increase of salaries of the president and treasurer for the years 1905-6 and 1906-7. Because, if such salaries are unreasonable and excessive, and the directors have abused their trust by voting to themselves or in any way assisting in getting the funds of the corporation for themselves, they would be held to account by a court of equity. If, on the other hand, the increase was just and proper, and only a fair compensation for the work done, the plaintiff must rely on some irregularity or invalidity in the proceedings to sustain his position, based upon some general principle of law, that the courts would

feel bound to enforce, regardless of the merits or justice of the particular case. This company was born out of the partnership of Brigham-Hopkins & Co. Mr. Brigham, Mr. Hopkins, and Mr. Francis were, prior to 1890, equal partners. They incorporated, and each took a salary of \$100 per week, or \$5,200 a year. The directors' minutes for 1891, show that Mr. Brigham was the president; Mr. Francis, the vice president; Mr. Hopkins, the treasurer; Mr. W. I. Hopkins, brother of Robert D. Hopkins, was the secretary. They composed the board. The salary of the first three was fixed at \$5,200 per year, and of the last at \$2,340. The directors' meeting for the year 1892 shows the same officers and the same salaries. The directors' meeting for the year 1893 shows the same officers, and the same salaries, except that the secretary's salary was increased from \$2,340 to \$2,600. The directors' meeting for the year 1904 shows the same officers and the same salaries. The directors' meeting of August 5, 1895, shows those present—Messrs. Brigham, Francis, and R. D. Hopkins, Mr. W. I. Hopkins having died. The same officers were elected, except that Mr. Hopkins assumed the office of secretary in addition to that of treasurer, and salaries of \$7,000 each were voted. The directors' meeting of August 7, 1896, shows the same three present, the election of the same officers, and the same salaries. The directors' meeting of August 3, 1897, shows the same officers, except that Walter Hopkins is made secretary. The salaries of the vice president and treasurer are increased to \$7,000 a year, and that Mr. Brigham's salary as president is reduced to \$2,600. The reason was that Mr. Brigham had ceased to take an active interest in the business, having previously thereto moved to New York, and, as the other two assumed the labor and responsibility of his duties, their salaries are increased. The directors' meeting of August 5, 1898, shows the same salaries were fixed: Brigham, president, \$2,600; Francis, vice president, \$7,000; R. D. Hopkins, treasurer, \$7,000; Walter Hopkins, secretary, \$2,600. At the directors' meeting August 8, 1899, same officers were elected. The president's salary is reduced to \$1,200 a year, and the amount taken off is added to the salary of the secretary, making the salaries as follows: President, \$1,200; vice president, \$7,000; treasurer, \$7,000; secretary, \$4,000.

"At the directors' meeting August 8, 1900, R. D. Hopkins was unanimously chosen president and treasurer; Isaac H. Francis was chosen vice president, and Walter Hopkins was chosen treasurer. The salaries of R. D. Hopkins and Francis remain the same. The \$1,200 from the salary of Mr. Brigham seems added to the secretary who gets \$5,200. The directors' meeting for August 6, 1901, shows the same officers elected and the same salaries. The directors' meeting for August 16, 1902, shows the same officers, and each

a salary of \$7,000. The directors' meeting for August 5, 1903, shows same officers were elected and same salaries fixed as previous year. The directors' meeting for August 2, 1904, shows same officers and same salaries as preceding year. We thus see the changes in salaries from the year 1890 to 1905. We see that, as Mr. Brigham first began to take a less active part in the business, his salary lessened, going to the others who assumed the work, and duties that he had ceased to perform. When Mr. Brigham's salary first drops from \$5,200 to \$2,600, we see the other two officers' salary increased from \$5,200 to \$7,000—half the amount taken off the president's salary plus \$500 added to the salary of each of the other original members of the firm who remained active. In 1899, when the salary of the president, Mr. Brigham, is again reduced to \$1,200, we see the \$1,400 added to the salary of the secretary, whose activity in the business no doubt then began to be shown. In 1900 when Mr. Brigham drops out entirely, we see his salary added to the secretary's bringing it up to \$5,200. In the following year, we see Mr. Walter Hopkins' salary increased to equal that of Mr. Francis' and his father's. The testimony shows the value of his services to the company at the time, as well as the fact that the Hopkins family had purchased the great majority of the Brigham stock. So the salaries remained for the next three years.

"When we come to the year 1905, the testimony shows that by reason of sickness—certainly for one year, but I find for the period of two years—Mr. Francis had ceased to take an active part in the business, and the work and responsibility of Mr. R. D. Hopkins and Mr. Walter Hopkins had been thereby increased. No steps were taken during these two years to lessen the salary of Mr. Francis, although his services to the company had practically stopped. The resolution of the board of directors at their meeting of August 3, 1905, states that he had been sick for two years, and that it was fair between him and his son, who was to some extent taking his father's place in the factory, to defer action. If the company had continued to make the same profits after the sickness of Mr. Francis that it did before, I think that he being totally disabled from attending to business, and his work and the responsibility of the business falling thereby more on Mr. R. D. Hopkins and Mr. Walter Hopkins, they in justice would have been entitled to greater compensation; and this, as I have shown in regard to Mr. Brigham, had been the policy of the company, in which Mr. I. H. Francis had taken part and by which he had properly benefited. But if I am right, the profits for the year 1904-5 had increased from \$35,000 in 1903-4 to \$60,000. To have given Mr. R. D. Hopkins an increase of salary of \$3,000, and Mr. Walter Hopkins an increase of salary

of \$1,000 with such increase as the other two officers received—that is, W. H. Francis and R. D. Hopkins, Jr.—probably not altogether amounting to the \$7,000 given to Mr. Francis before his death, was not only not unreasonable and excessive, but, under the circumstances of the case, most reasonable. When we come to the directors' meeting of August 14, 1906, we find that the profits of the company for the previous year have again greatly increased, amounting to \$90,000. The controlling spirit in the management of the company for that year was certainly Mr. R. D. Hopkins, and next to him his son, Walter Hopkins. Therefore, it strikes me, that the increase of the salary of one, \$6,000, and of the other, \$3,000, over the previous years was not unreasonable or excessive. This was a corporation that depended for its success upon its management, just as much as the firm of Brigham-Hopkins & Co. had done prior to 1890. Mr. Brigham had passed away, Mr. Francis had died, and Mr. R. D. Hopkins, assisted by his son, Walter, had produced the splendid results just spoken of. After the death of Mr. Francis, Mr. Hopkins alone indorsed the paper for the company and controlled its policy. Walter Hopkins, on the other hand, had done so well in his department, that had he for these and the previous years taken the usual commissions on his sales instead of the salary allowed him, would have received a sum of \$14,000 in excess of what he did receive. The facts as disclosed by the evidence and which are not contradicted, without regard to the expert testimony, which was, however, clear and convincing, have brought me to the conclusion that the increases of the salaries of R. D. Hopkins and Walter Hopkins for the years 1905-6 and 1906-7 were not excessive and unreasonable, but just and proper. Were the acts of the board of directors on August 3, 1905, and August 14, 1906, increasing the salaries of R. D. Hopkins and Walter Hopkins, invalid, because the presence of each was necessary to make the quorum?

"(2) The next question to be considered is the question as to the validity of the acts of the directors at their meetings on August 3, 1905, and August 14, 1906, in increasing the salaries of R. D. Hopkins and that of Walter Hopkins. In addition to the objection that the salaries were not fixed until after the officers were elected, an objection that I will consider hereafter, it is strongly urged upon me that the fixing the salaries of R. D. Hopkins and Walter Hopkins was invalid, as the salary of each was voted at a meeting of the board of directors when the presence of each was necessary to make a quorum. The testimony in the case shows that R. D. Hopkins did not vote on the question of his salary, but the other two did. It seems to me that it would make no difference had R. D. Hopkins voted with the

other two for his salary, and it would have made no difference had Walter Hopkins voted for his salary. It might not have strengthened the positions, but it certainly would not have weakened them. So that, after all, the question which must be decided is, under the circumstances of this case, were the salaries of R. D. Hopkins and Walter Hopkins legally increased at the directors' meetings of 1905 and 1906, disregarding for the present the operation or effect of the by-law, as to the time of fixing same?

"In the first case that I am referred to by the plaintiffs' counsel—that of Santa Clara Mining Company v. Meredith, 49 Md. 400, 33 Am. Rep. 264—I find the law laid down as follows: To entitle a president or director of a corporation to recover for services rendered his corporation, he must prove an express contract of employment, if the services for which he claims compensation are within the line and scope of his duties as president or director. But if the president or director of a corporation renders services to his corporation which are not within the scope of and are not required of him in his duties as president, or director, but are such as are properly to be performed by an agent, broker, or attorney, he may recover compensation for such services upon an implied promise. Under which class of cases does this case actually fall?

"In 1890, when the partnership was turned into a corporation, each partner became the holder of practically one-third of the stock. As between themselves it made at that time no difference whether they received their profits in the form of salary or of dividends. They continued to devote their full energies to the management of the business. Mr. Brigham did the buying and financing, Mr. Hopkins did the selling, and Mr. Francis did the manufacturing. They were not only directors, supervising the running of the business, but personally engaged, by their unremitting toil in the actual creation and prosecution of the business. To it they gave their whole time and undivided attention. In the late 90's Mr. Brigham sold out most of his stock, and most of it passed to Mr. Hopkins' family, some to Mr. Francis' family. Fifty shares has passed into the hands of the plaintiff. As such shareholder the plaintiff has his rights. But the question we are now considering is, is the relationship of Mr. R. D. Hopkins and Mr. Walter Hopkins to the plaintiff and the other stockholders of the company solely that of president and directors, or are they something more? Do the services they have been rendering to the company only give them rights to compensation as president and director under the first class of cases in the report first quoted? Or have they rights in addition thereto by reason of their relationship to the company, and the services they have rendered thereto,

bringing them within the principle of the second. Is it the duty of the president of a company to buy all its goods; attend to all its finances; indorse its paper to the extent of over \$200,000; and to spend every minute of his business life in its service? Or is it the duty of a director to take the active management of its great volume of sales, amounting to thousands of dollars? In other words, no matter how much money these gentlemen may have made for the company by their ability, industry, and energy, if it turned out that when their salaries were fixed there was an irregularity or illegality in the manner of fixing them, they would be forever precluded from receiving a just or, indeed, any compensation for their work, but the fruits thereof would pass unjustly into the pockets of others. The officers of this company were never really paid salaries as directors or as officers. Mr. Brigham was paid for the work he did in buying goods, Mr. Francis for his work in manufacturing goods, and Mr. Hopkins for his work in selling goods. So long as these gentlemen had the same interest in the business, and their labor and responsibilities were the same, no question could arise; but as soon as Mr. Brigham ceased to take an active part, we see his salary lessen, although he still remained president. As his salary was reduced, the salaries of the others were correspondingly increased, not because their obligations or duties as directors were changed, but because the work they did in the running of the business was increased. When Mr. Brigham dropped out altogether, and Mr. Hopkins took both the office of president and that of treasurer, his salary was not increased. It remained the same as Mr. Francis, who continued to hold the one office, although Mr. Hopkins and his family owned considerable more of the stock than Mr. Francis and his family. In other words looking squarely at the matter, those who are paid salaries in this company are not paid because they are the president and directors of the company, because of their labors; but because of the exercise of business sagacity; because of their industry and ability in the actual work of conducting the business of the company.

"It therefore seems to me that, if no salaries had been fixed for these two gentlemen, Mr. Walter Hopkins ought to have been entitled to commissions on the goods he has sold, or a reasonable compensation, and Mr. R. D. Hopkins for work he has done distinct from and outside of the duties of a president or director. Walter Hopkins sold for the year 1905-6 goods amounting to \$183,129.50, the usual commissions on which would have been at 6 per cent. \$10,987.77, and he sold for the year 1906-7 goods amounting to \$241,878.06, the usual commissions on which would have been \$13,512.68, and Mr. R. D. Hopkins, by his efforts, his experience



and ability, produced for the stockholders \$90,000 in net profits, after paying all salaries. Surely they should be entitled to compensation for this work without conflicting with the principle that "the president or director must prove an express contract of employment, if the services for which he claims compensation are within the line and scope of his duties as president or director. Did Mr. Francis get \$7,000 a year for his duties as vice president or director, or did he get it for his services in the factory? Were not the duties of Mr. Walter Hopkins the same as director and secretary, when he got \$2,600, as when he got \$5,200 or \$7,000? Identically the same, but his value as a salesman had increased. *Waters v. Am. Finance Co.*, 102 Md. 212, 62 Atl. 357.

"It is said in *Morawetz on Corporations*, vol. 1, § 508: 'Directors are not entitled to any compensation for their official services as directors unless compensation is provided by the charter or by-laws adopted by the majority. But if a director is properly employed to perform services which do not pertain to his office as director he is entitled to such compensation as is agreed upon or as the services are reasonably worth.' Is this not all that the Hopkins are asking? Are not really the services for which they claim compensation of the character that do not pertain to the office of directors? I think if fixed at all, under the circumstances of this case, Mr. R. D. Hopkins and Mr. Walter Hopkins would have been entitled to reasonable compensation for their services to the company. Again, were the acts of the board of directors in August 1905 and 1906, in voting R. D. Hopkins an increase of salary and Walter Hopkins an increase of salary, illegal upon the grounds that the presence of each was essential to a quorum?

"Article 2, entitled 'Board of Directors and Their Powers,' in section 1 provides: 'There shall be elected from the stockholders at each general meeting a board of four directors, who shall have charge and management of the property and business of the company for one year, and until their successors shall have been elected and accepted office, each of whom shall be subject to removal by a majority of the board; they shall have power to fill all vacancies from death or otherwise; elect from their members a president, vice president, secretary and treasurer, who shall each serve for one year and until their successor shall be elected and shall have accepted office, or until their said offices shall be declared vacant by the board of directors, and shall each receive for their services such compensation as shall be designated by the board previous to their election, and shall incur such expenses as in their judgment will best promote the business of the company. They may make such rules and regulations for the government and conduct of the clerks and other employés of the com-

pany and the transaction and conduct of its business as they shall deem proper. At their regular yearly meetings in August of each year they may declare such dividends to the stockholders from the net profits of the business as in their judgment is proper. At all meetings of the board of directors, three members thereof shall constitute a quorum.'

"Here we have a by-law, making the board of directors to consist of four members; with power to select a president, vice president, treasurer, and secretary; with power to declare any one of these offices vacant; with power to fix their compensation; and concluding with the express provision, 'at all meetings of the board of directors, three thereof shall constitute a quorum.' Is this last clause not equivalent to saying that, at the general meeting of the directors when they select officers and fix salaries, three shall constitute a quorum? Is not this meeting at which not only the officers are selected and the salaries fixed but the dividend to the stockholders, declared the most important meeting of the board? And must this not have been fully in the minds of the stockholders when they adopted this by-law? What escape is there from the conclusion that when in the same by-law these powers are given to the directors, and the number constituting the quorum is fixed, that the stockholders meant to say that three of the board if present can do all the things authorized by the board to be done in this by-law? The plaintiff invokes the equitable principle that a man cannot occupy two inconsistent positions; he cannot act in a representative capacity in a matter where his personal interest is involved. The whole object and purpose of this principle is to safeguard those represented. But if they authorize one to act for them or after the act is performed ratify it, what becomes of the principal? Now, of course, the power conferred by this by-law for three to act is only to act within the bounds of honesty and fair dealing; but when they have so acted, can it be said that their act is illegal, simply because they have done that which those they represented expressly authorized and directed them to do? I do not understand it that way. It seems to me that this by-law expressly authorized three of the board to constitute a quorum of the board, at a meeting when the board elects officers and fixes salaries.

"It is said in volume 12 *Cent. Digest*, § 1340, quoting from *McNab v. McNab*, 62 Hun, 25, 16 N. Y. Supp. 448: 'Where the directors of a manufacturing corporation, being also its officers, have by their management raised the company from insolvency to a high degree of prosperity, so as to pay large dividends and accumulate a handsome surplus, their action in voting themselves an increase of salary as officers of the corporation, each one voting for the increase of all the others, but not voting for his own, is valid, in the absence of any evidence of combination or pre-

sious agreement or that the increases were unreasonable, though the increases were all voted at one meeting of the board.' This case in its facts bears a strong analogy to the case under consideration. But there were five directors present out of a board of six. So that the man not voting was not necessary to the quorum.

"In the case of *Bassett v. Fairchild* (Cal.) 61 Pac. 794, it is said on page 795: 'The contention of the respondent that the act of the board on November 9th was invalid because the presence of Fairchild was necessary to make a quorum is not maintainable. There is a broad statement of this proposition of respondents in *Thompson on Corporations*, § 3929, but the authorities do not sustain the text. *Miner v. Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412. It is decided that the majority of the quorum of the board must be disinterested in respect to the matter voted on. The Code (California) provides a majority is sufficient to form a board for transaction of business, and every decision of a majority of the directors forming such board made when duly assembled is valid as a corporate act.' The by-law of the *Brigham-Hopkins Company* just quoted declares the same thing.

"There are but two cases to which I have been referred that hold, or rather state, that an act of a board of directors is invalid when the presence of a member, who is personally interested in the act, is necessary to make a quorum. The first is the case of *Butts v. Wood*, 87 N. Y. 318. In this case the effect was to allow an invalid claim, at a meeting of a board of directors consisting of five, at which only three were present—D. W., the party to whom the claim was allowed, his father, and a relative. In the opinion of the court it is said: 'A careful examination of the testimony in this case shows that D. W. could not have enforced his claim against the company, and the circumstances upon which it was allowed and paid were a fraud upon the stockholders.' The second case that states this doctrine is the case of *Martin v. Santa Cruz*, 4 Ariz. 171, 38 Pac. 36. In that case three directors of a board of five on February 3, 1891, elected one of their number secretary, at the same time passing a by-law creating the office, but fixing no salary. The same three directors met again June 20th, and fixed the salary at \$1,800 a year to begin in February, 1891, five months prior thereto. The appellant cast his vote for this resolution, otherwise it was never passed at all, for his vote was essential to its adoption. This sufficiently appears from the record.' Then, further on in the opinion, we find the dictum, for it was not necessarily involved in the decision of the case the following: 'They cannot properly act on nor form part of a quorum to act on, a proposition to increase their compensation.' *Bank v. Collins*, 7 Ala. 75. An examination of the case of

*Bank v. Collins* shows no expression of opinion upon the point now being considered.

"The plaintiff's counsel contends that the act of the board in August, 1906, in regard to the salary of R. D. Hopkins was invalid, indeed void, because Mr. R. D. Hopkins' presence was essential to a quorum, and the act of the board in regard to the salary of Walter Hopkins was void because his presence was necessary to a quorum. And this notwithstanding the fact that the action of the board in voting such salaries was proper and just; that the compensation was only such as should be reasonably allowed for the services; that the by-laws had directed the board to fix the salaries, and declared three to be a quorum; and that in all probability if the other director had been present the result would have been exactly the same, and the salaries were practically fixed in advance, so that any stockholder would be at liberty to inquire into the reasonableness of the amounts. I do not think that public policy requires a doctrine so inflexible to safeguard the rights of stockholders. I think there is a wide distinction between a person voting for something that is to his personal advantage, when that vote is essential to his getting such benefit, and his constituting a quorum, a bare majority of a board, when it is considering a subject in which he is interested. In the one case he takes part in a matter in which his duty and his interest may conflict; in the other, he only makes possible a body that is able to pass upon the question in a disinterested and impartial manner. Suppose there were a board of 21 directors, and 11 were present at a meeting, 11 being necessary to a quorum, and the salary of one is fixed by a vote of the other 10, is there any reason why such an act should be void when there would have been the same result had 19 been present and 9 including the person interested voted against the salary? It seems to me that even where one votes for his salary in a board where he is given the authority to act by the by-laws adopted by the stockholders, and his vote is essential, the act so done should not be absolutely void, but should be subject to close scrutiny by the courts, with the burden of proof upon the person benefited by the act to show that it was just and proper, and that no advantage was taken of the stockholders. But I do not have to go so far to decide the question we are now considering. I am of the opinion, bearing in mind the nature of the services and the by-law of the company, that salaries voted to R. D. Hopkins and Walter Hopkins in August, 1905, and August, 1906, were not rendered invalid because only three members of the board of directors were present at such meetings. It might be added that the minutes of the meetings of the board of directors at which salaries were fixed were composed in a number of instances of only three members.

"(3) Should the offices be filled before salaries fixed? It is also contended, as the election of the officers took place before the fixing of the salaries, the proceedings are illegal, as being in conflict with the by-laws already quoted. The by-law after providing for the election of the president, vice president, treasurer, and secretary, and for the term of their office, adds, 'and shall each receive for their services such compensation as shall be designated by the board previous to their election.' A great deal that I have already said bears upon this question. I do not think that this provision of the by-laws as applicable to this company is mandatory. Certainly those in charge of its affairs, who at one time were the holders of all the stock, have never so considered it. For from the beginning the minutes of all the meetings disclose that the officers were elected before the salaries were fixed. Indeed, as I have endeavored to show the salaries were not adjusted according to the duties of the offices, but according to the usefulness and work of the person who happened to hold the office. Mr. Walter Hopkins would have sold just as many goods had he been secretary instead of treasurer or held no office at all. Mr. R. D. Hopkins would have rendered practically the same services had he been vice president instead of president, and Mr. Francis would have had control of the factory during his life, no matter which of the offices he might have filled. I can see no purpose that, under the circumstances of this case, would be subserved in compelling the directors to fix salaries before officers were elected. Indeed, in a company like this, what possible difference can it make, whether the salaries are fixed immediately before, immediately after, or simultaneously with the election of the several officers. In other words, it is not the place, under the facts as they have existed since the incorporation of this company, that controls, or should control the salary, but the man that fills the place. The duties of the office of president were the same, whether occupied by Mr. Brigham when he bought all the goods for the company, as when he took no active part in its affairs. But in the first instance he was entitled to \$7,000 a year, and only \$1,200 in the last.

"(4) If I understood the plaintiff's attorney, he contended that as the salaries were fixed in August to relate back to July 1st, this could not be done. If such were his contention, I think it is answered by an examination of the by-laws.

"Article 1, § 1, requires the stockholders' meeting to be held on the first Monday in August.

"Art. 3, § 3, requires the treasurer to furnish at said meeting a full statement of the business of the company of the preceding year.

"Art. 4, § 2, provided that at the meeting of the stockholders the directors shall be re-elected.

"It therefore seems clear that the by-laws contemplated the fiscal year to have closed prior to the first Monday in August, a sufficient time intervening to have made up the statement of the business of the company. The directors could of course only assemble after they had been elected, and fix salaries, which would have to relate back to the beginning of the fiscal year, which then must have been under way.

"In conclusion, I think that while the action of a board of directors, constituted as this was, in fixing their salaries, should be subjected to careful scrutiny by the courts, yet, if the court should reach the conclusion as I have in this case, that the salaries were reasonable and just, and only a fair compensation of the work done, they should not be interfered with.

"It follows from the conclusions reached upon the several points so ably presented by the counsel in the case that the bills should be dismissed. I will sign a decree so ordering."

Argued before **BOYD, C. J.**, and **BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.**

**William S. Bryan, Jr.**, for appellant.  
**Vernon Cook and Edgar H. Gans**, for appellees.

**PEARCE, J.** This is an appeal from a decree of the circuit court No. 2 of Baltimore City dismissing the plaintiff's two bills of complaint in certain consolidated cases which will be now explained.

The first bill was filed by **Isaac H. Francis, Jr.**, as stockholder, against the **Brigham-Hopkins Company**, a corporation under the laws of the state of Maryland, and **Robert D. Hopkins**. The plaintiff sued, not only in his own behalf, but also on behalf of all other stockholders of the said Brigham-Hopkins Company, who should come in and contribute to the expenses of the suit. The bill alleged that during the years ending July 1, 1903, 1904, and 1905, respectively, **Robert D. Hopkins** was president and treasurer of said corporation, with a salary of \$7,000 per annum; that **Isaac H. Francis** since deceased, the father of the plaintiff, was vice president and manager, with the same annual salary; that **Walter Hopkins** was secretary, with the same salary; and **William Harry Francis**, another son of **Isaac H. Francis**, was a director and foreman, and received a salary of \$1,500; that the stock of said corporation was divided into 3,000 shares of the par value of \$100 each, of which at the time the bill was filed 1,327 shares were held by **Robert D. Hopkins**, 1,000 shares by the estate of **Isaac H. Francis**, deceased, 153 shares by **Walter Hopkins**, 50 shares by **William Harry Francis**, and 50 shares by the plaintiff **Isaac H. Francis, Jr.**, and the remaining 415 shares were held among other members of the Hopkins and Brigham families. The bill further alleged

that before the end of the fiscal year ending June 30, 1905, Isaac H. Francis became ill, and was unable to attend the regular stockholders' meeting on August 1, 1905, and died September 25, 1905; that at the meeting of August 1, 1905, Robert D. Hopkins, Isaac H. Francis, Walter Hopkins, and William Harry Francis were elected directors of said company, and that on August 30, 1905, a meeting of said directors was held, at which all were present except Isaac H. Francis, who was still ill, but who, it is charged, received no notice of said meeting. At that meeting the officers above named were re-elected to their respective offices. The bill further charges that at said meeting "the directors went through the form of fixing the salary of Robert D. Hopkins at \$10,000 a year and that of Walter Hopkins at \$8,000, and also "went through the form of passing a resolution" that the inability of the vice president to render any assistance for the past two years to the business made it necessary for his son William Harry Francis, to take his place, so far as the management of the male help was concerned and the supervision of that part of the business, and that it was deemed proper to leave the question of the salaries of Isaac H. and William Harry Francis to be settled thereafter; that at a meeting October 21, 1905, Robert D. Hopkins, Jr., was elected a director in place of said Isaac H. Francis, then deceased; that Robert D. Hopkins resigned as treasurer, retaining the position of president, and Walter Hopkins resigned as secretary. William Harry Francis was elected vice president for the unexpired term of his father. Walter Hopkins was elected treasurer, and Robert D. Hopkins secretary. Salaries were then fixed as follows: President, \$10,000; vice president, \$3,000; treasurer, \$8,000; secretary, \$2,600. On August 7, 1906, the same officers were elected, and the same form was gone through for a further increase of salaries, as follows: President, \$16,000; vice president, \$7,000; treasurer, \$11,000; secretary, \$3,600.

The bill then charges "that the above-cited increases in the personal salaries of the Messrs. Hopkins were illegal and void (1) as in violation of section 1 of article 2 of the by-laws of said company, which provides that the compensation to be paid the president, vice president, treasurer and secretary 'shall be designated by the board previous to their election.' (2) Because it was not competent for Robert D. Hopkins and Walter Hopkins after they had been elected and had assumed the fiduciary position of directors to vote to themselves an increase of salary, and that it was not within their power to represent and act for that corporation in a matter in which they have a personal interest in conflict with the interest of the corporation. (3) And because \$7,000 a year is a reasonable and adequate salary to compensate either Robert D. Hopkins or Walter Hopkins for any services which they have rendered, or are

capable of rendering to the corporation; and that the salaries so voted are excessive and unreasonable, and that the voting of them is an unlawful and covert method on the part of the Hopkinses, as the owners and controllers of a majority of the stock, to divert into their own pockets money which should rightfully go as dividends to all the stockholders pro rata."

The bill further charges that the two Hopkins above named who control said company have been unwilling to allow the estate of said Isaac H. Francis the salary due him at the rate of \$7,000 per annum from July 1, 1905, to the date of his death, September 25, 1905. Also that the plaintiff had before filing his bill made written demand on said company to compel Robert D. Hopkins and Walter Hopkins to make restitution to said company of the excess of salaries over \$7,000 per annum received by each of them, with which demand said company refused to comply. The prayer of the bill is that the Brigham-Hopkins Company be enjoined from paying any further salary to Robert D. Hopkins until after such time as the salary theretofore received by him, will, if calculated at \$7,000 a year, pay him for the services which he shall then have rendered said company; and that he be required to account with said company, and repay it, with interest at 6 per cent. per annum from the date of their wrongful receipt by him all sums in excess of \$7,000 a year; and for such other and further relief, etc. A similar bill was filed by the plaintiff on the same day against Walter Hopkins—making the same allegations and praying the same relief; and the two cases, by agreement, were consolidated, and heard and determined together.

The defendant corporation answered, admitting the allegations as to its incorporation, the amount of its capital stock, and the holding of the shares among its stockholders; also, that the salaries voted the various officers are correctly stated in the bills; but alleges that Isaac H. Francis had been ill for four years prior to June 30, 1905, and that for two years before his death he had been able to render very little assistance to the business, and was very little at the factory, though he was allowed for the full four years to draw his salary of \$7,000. It alleges that the meeting charged in the bill to have been held August 30th was in fact held on August 3d, and that due notice thereof was given to said Isaac H. Francis, and that the plaintiff also received prompt notice of all said increases of salary, and is guilty of laches in objecting thereto. It alleges that the provision of the by-law mentioned in the bills is directory merely, and not mandatory, and that the spirit of the same has been in no way violated by any act of any of the defendants. It alleges that all the salaries voted are fair and reasonable, and that the increases from time to time therein have not been proportionately more than the increase in the volume of busi-

ness and the net profits of the company; and that the officers devote their whole time to the management and extension of the business, and that it will appear by reference to the said increases of salary that the salary which has increased in the largest proportion of all is that of William Harry Francis, a brother of the plaintiff, and a son of Isaac H. Francis, deceased. Robert D. Hopkins and Walter Hopkins adopted the answer of the defendant corporation.

The only testimony offered by the plaintiff was that of Dr. Arthur Williams with reference to the illness of Isaac H. Francis, who said Mr. Francis was totally disabled physically a year before his death, and that for one year previous to September, 1904, he was so far physically disabled as to give only about two-thirds of his time to the business, going to it about 10 a. m. and leaving about 4 p. m. The plaintiff also put in evidence the minutes of various meetings of the directors, showing who was present, and what was done at those meetings.

Robert D. Hopkins and Walter Hopkins testified for the defendants, explaining the services rendered by themselves and by Isaac H. Francis from time to time to the company, and the character and extent of the business, and of its increase, as well as the increase in profits. Each of them said that he did not vote at any time upon the increase of his own salary.

It was shown that ever since 1900 Robert D. Hopkins bought all the goods for the company, involving the exercise of wide knowledge and sound judgment; and that these purchases amounted to over \$500,000 a year; that he had sole charge of the financial end of the concern, borrowing large sums of money for the business of the firm, and individually indorsing the firm paper to the extent of \$200,000 at one season. It was shown that Walter Hopkins attended personally to the selling of the goods and the supervision of subordinate salesmen; that he sold from \$175,000 to \$250,000 of goods annually, and also designed all the styles. It was shown from the books of the company that the net sales for the year ending June 30, 1907, were \$907,000 and the net profits on sales \$89,214.19. Mr. Samuel Rosenthal of Strauss Bros., the second largest clothing manufacturing firm in Baltimore, testified in view of the capital, net sales, and profits of the Brigham-Hopkins Company as proved in the case that the salaries of Robert D. and Walter Hopkins objected to were reasonable and fair; indeed "extremely moderate," and that they were underpaid instead of overpaid. Wm. P. Montague, a straw hat manufacturer of New York City, and also president of the Montague & Gillet Company—a New Jersey corporation doing business in Baltimore City, and formerly connected with the Brigham-Hopkins Company, testified that he knew Robert D. Hopkins, and regarded him as about the most able man in his line of business; that he was

the backbone of that concern; and that assuming the capital, net sales and profits to be as stated, he considered a salary of \$16,000 for him and \$11,000 for Walter Hopkins to be very moderate.

The foregoing statement of the pleadings and of the testimony fairly presents the case as presented to the court below. The learned judge filed a very careful and elaborate opinion in which he reviewed all the evidence, and carefully considered the law applicable thereto, and held (1) that the salaries objected to were not excessive and unreasonable, but were just and proper; (2) that they were not invalid because only three members of the board were present when they were voted. This conclusion upon this point was expressed in these words, having special reference to all the facts in this case: "It seems to me that even where one votes for his own salary in a board where he is given the authority to act by the by-laws adopted by the stockholders, and his vote is essential, the act so done should not be absolutely void, but should be subject to close scrutiny by the courts, with the burden of proof upon the person benefited by the act, to show that it was just and proper, and that no advantage was taken of the stockholders"—and we concur in this view of the law. (3) He held that the provision of the by-law that the offices should be filled before the salaries were fixed was not mandatory, but directory merely.

The reasons for these conclusions are stated with such clearness, and so well supported by authority, that we are satisfied no additional force could be added to them by any opinion we might file in the case. We will therefore affirm the decree of the court below for the reasons set out in the opinion of that court, which we will adopt, and request the reporter to include in the report of this case.

Decree affirmed, with costs above and below.

(108 Md. 456)

## BOOTH v. McLEAN CONTRACTING CO.

(Court of Appeals of Maryland. June 24, 1908.)

### 1. NEGLIGENCE—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

The question of contributory negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion therefrom, and, where a doubt exists as to whether plaintiff's conduct under all the facts and circumstances constitutes such contributory negligence as to prevent him from recovering, the question is one of fact for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 286, 296, 299, 333-346.]

### 2. APPEAL AND ERROR—REVIEW—SCOPE.

A prayer directing a verdict for defendant because of plaintiff's contributory negligence necessarily presupposes primary negligence, which would sustain an action but for the concurrence of the contributory negligence, and the special matter for consideration on appeal is whether on the evidence the case should have been submitted to the jury for its determina-

tion of the question of contributory negligence, and the question of defendant's negligence is not an issue.

**8. MASTER AND SERVANT—ACTIONS FOR INJURIES—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.**

Whether a laborer who caught and injured his hand between the joist under a hopper, from which cars were filled with dirt, and the top of the car while attempting to put an empty car on the track and push it through the tunnel under the hopper, was guilty of contributory negligence, *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

Appeal from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by William T. Booth against the McLean Contracting Company. Judgment for defendant, and plaintiff appeals. Reversed, and new trial ordered.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

Lee S. Myer and David Ash, for appellant, John E. Semmes, for appellee.

BRISCOE, J. This action was brought by the appellant to recover damages of the appellee, the McLean Contracting Company, a body corporate, engaged in the construction business, for personal injuries sustained by him while in the employment of the appellee company as a laborer. The declaration contains three counts. The first charges negligence in the construction and maintenance of certain cars operated by the company. The second charges negligence in failing to furnish proper machinery, and a properly constructed structure or trestle upon which to operate its cars. The third charges negligence in failing to furnish the appellant with a safe, suitable, and properly lighted place in which to perform his work. The questions and those brought to this court for review relate to the rulings of the court in the rejection of the plaintiff's prayers and in the granting of the defendant's prayer, which instructed the jury that the plaintiff was guilty of contributory negligence, and by such negligence directly contributed to the accident in question, and that their verdict must be for the defendant.

Assuming, then, the negligence of the defendant, the question is: Were the facts and circumstances of the case so patent and plain as to have justified the court in pronouncing them contributory negligence in law, and in withdrawing the case from the consideration of the jury? The law is well settled in this state bearing upon this class of cases, and it is this: Where the facts of a case are undisputed, or where but one reasonable inference can be drawn from them, the question is one of law for the court, but, where the facts are left by the evidence in dispute or where fair minds might draw different conclusions, the case should go to the jury. In other words, all the cases hold that, unless there is some prominent and decisive

act in regard to the effect and character of which no room is left for ordinary minds to differ, courts will not withdraw the case from the consideration of the jury. In the case of *Gardner v. Michigan Central R. R. Co.*, 150 U. S. 359, 14 Sup. Ct. 140, 37 L. Ed. 1107, the Supreme Court thus lays down the rule: "The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them. A case should not be withdrawn from the jury, unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish." All of the cases in this state hold that courts should never assume the responsibility of withdrawing a case from the jury, unless the case is a very clear one and presents some prominent and decisive act in regard to the effect and character of which no room is left for ordinary minds to differ. Where a doubt exists as to whether the conduct of the plaintiff under all the facts and circumstances constitutes such contributory negligence as should prevent him from recovering, the question is one of fact, to be determined by the jury.

In the case at bar the sole question for our consideration is whether or not the court committed an error in granting the defendant's prayer, which withdrew the case from the jury because of the alleged contributory negligence on the part of the plaintiff. In this case the question of negligence *vel non* of the defendant is not an issue, because the prayer granted at the instance of the defendant assumes the negligence of the appellee as one of the contributory causes of the accident. In *Strauss v. United Rys. Co.*, 101 Md. 498, 61 Atl. 137, it is said: "The prayer assumes the negligence of the appellee as one of the contributory causes of the accident, and therefore the special matter for us to consider is whether upon the evidence contained in the record and substantially restated here the case should have been submitted to the jury for its determination as to the alleged contributory negligence of the appellant." The law applicable to this character of case is clear and well settled. In *Vonderhorst Brewing Company v. Amrhine*, 98 Md. 414, 56 Atl. 833, 836, this court said: "If there was no primary negligence on the part of the defendants, there could be no contributory negligence on the part of the plaintiff. Contributory negligence necessarily presupposes primary negligence, which would of itself sustain an action but for the concurrence of the contributory negligence." In the case of *Cooke v. Street Railway Company*, 80 Md. 558, 31 Atl. 327, 329, it is said: "Where the nature and attributes of the act relied on to show negligence contributing to the injury can only be correctly determined by considering all the attending circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not

for the court to determine its quality as matter of law." *Strauss v. United Rys. Co.*, 101 Md. 499, 61 Atl. 137. The question of contributory negligence in the case now before us is not free from difficulty and doubt, and, such being the case, it was a question of fact, to be determined by the jury, and not by the court.

Unless the conduct of the plaintiff relied upon as amounting in law to contributory negligence is established by clear and uncontradicted evidence, the case will not be withdrawn from the jury. At the time of the accident the plaintiff was employed by the defendant company as a laborer at River-side, Baltimore county. There was a direct conflict between the evidence on the part of the plaintiff and that on behalf of the defendant as to the plaintiff's duties in respect to the work he was employed to do. The appellee company was engaged in the construction business, and was at the time of the accident unloading dirt from scows in the river, by means of cars loaded from and through a hopper. The dirt was raised from the scows by a derrick, and dropped in a hopper supported by a trestle. The empty cars were placed under the hopper, loaded, and carried away. The cars were then pushed by men to the dump and emptied. They would then be sent back or returned to be reloaded under the hopper. The plaintiff was at work on a trestle or structure on which the cars were operated, and, while attempting to put one of the empty cars on the track and push it through the tunnel under the hopper, had his hand caught between the joist under the hopper and the top of the car, and was severely injured. The plaintiff testified upon this subject as follows: "Q. When in this position, what did your duties require you to do? A. I was supposed to receive these cars and take them back, and I received one car as they filled them and leave one car up as they filled them. I leave them down to the hopper, and the man at the other end receives them and leaves them out. Q. Explain how you would do this work? A. I would have to go underneath there and go across and pull them through. Q. How did you pull them through? A. Just catch hold of the car at the top, and pull them through, and check them until the five came through." He further testified that while it was his duty to receive the cars, and take one car and push it back for loading, it was also his duty to go under the hopper to receive the cars and bring them out and keep the track clear. And in answer to the question "You don't know then what put it off the track?" answered: "I don't know what put it off, I found it off, and it was my place to put it on." He also testified that he was not warned by the superintendent from going under the hopper because "that was where I was bound to go in there, that was my place"; that, when the

cars did not go through, it was his duty to go and bring them through. The testimony on the part of the appellee company was to the effect that the plaintiff was employed "to attend to the cars," and his duty was to receive the cars after they came through the tunnel and have them loaded, and he was warned not to touch them until they were clear of the hopper. There was other evidence on the part of the plaintiff and defendant at the trial in the court below, but from an examination of the record it clearly appears that there is a direct conflict in the testimony as to the main facts of the case, and, this being so, the question of contributory negligence on the part of the plaintiff was one of fact, to be determined by a jury. The danger to which the accident is attributed was not one which the plaintiff should have been required to look out for and avoid, but one that he had every right to expect that proper precaution on the part of the appellee had been adopted to avoid. Assuming the theory of the plaintiff's case to be supported by the evidence if the car causing the injury had been in a good condition, or the roof between the car, and the first joist had been higher, the accident would not have occurred. We fail to find in the evidence any prominent and decisive act on the part of the plaintiff which authorized the court in withdrawing the case from the jury. The testimony of the plaintiff and his witnesses was more or less contradicted by the evidence submitted on the part of the appellee, but this contradiction did not justify the court in declaring the conduct of the plaintiff contributory negligence per se. On the contrary, all the cases hold that the court should in no case take the question of negligence from the jury, unless the conduct of the plaintiff relied on as amounting in law to contributory negligence is established by clear and uncontradicted evidence.

We are therefore of the opinion that this case should have been submitted to the jury, and, for the error in granting the defendant's prayer which instructed the jury that the plaintiff was guilty of contributory negligence and their verdict must be for the defendant, the judgment will be reversed and a new trial awarded. The plaintiff's prayers appear to be free from objection and properly presented the law, as applicable to the plaintiff's theory of the case.

Judgment reversed and new trial awarded, with costs.

(108 Md. 278)

SEFF et al. v. BROTMAN et al.

(Court of Appeals of Maryland. June 24, 1908.)

1. BROKERS — ACTIONS FOR COMPENSATION — PLEAS — SUFFICIENCY.

Non assumpsit filed to a declaration by real estate brokers for commissions is a good plea,

so as to render erroneous the entry of a judgment by default for want of a sufficient plea.

2. SAME—PLEA AMOUNTING TO GENERAL ISSUE.

A plea to a declaration by real estate brokers for commissions, averring that the brokers did not sell the property to the purchaser named for the owners for the amount named, and that the purchaser did not pay the owners such amount for the property, and that the owners never were indebted as averred, was not bad as amounting only to the general issue, as a plea is not objectionable on that ground, unless it sets up matters of fact merely amounting to a denial of such allegations in the declaration as on general issue would have to be proved to support the case.

Appeal from Baltimore City Court; Henry Stockbridge, Judge.

Action by Benjamin Brotmán and another, copartners, for the use of Nathan Kasan against Robert Seff and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

Israel S. Gomborov and Thomas C. Weeks, for appellants. Myer Rosenbush, for appellees.

BURKE, J. This is the defendants' appeal from a judgment in favor of the plaintiffs entered in the Baltimore city court. The suit was an action of assumpsit, and was brought under the practice act. The declaration contains the six common counts and one special count. The special count alleged that the plaintiffs were licensed real estate brokers in the city of Baltimore, and that on or about the 17th day of July, 1907, the defendants employed them to sell certain property, which is particularly mentioned in the count, and that they promised and agreed to pay to the plaintiffs a commission of 2½ per cent. as compensation for their services, and that, in pursuance of said employment, the plaintiffs sold the property for \$7,000 to Isaac Kader, and that the purchaser entered into a contract with the defendants to purchase the same, and did purchase the same by the payment of the balance of the purchase price in accordance with the terms of the contract; that, by reason thereof, the plaintiffs were entitled to receive from the defendants the sum of \$175; that the plaintiffs have demanded of the defendants the payment of said sum, but that the defendants have failed and refused to pay the same, and continued so to do. A proper account was attached to and filed with the declaration, and an affidavit as required by the act was annexed to the narr. The defendants were summoned to the October rule day, and within 15 days thereafter filed pleas to the action. To the first six counts of the narr. they pleaded that they never were indebted as alleged; and for a second plea they averred that they never promised as alleged, and for a third

plea they said that the plaintiffs did not as real estate brokers sell the property in said count mentioned to the said Isaac Kader for these defendants at and for the sum of \$7,000, and that the said Isaac Kader did not pay these defendants \$7,000 for said property, and that the defendants never were indebted as alleged in said count. On October 30, 1907, the plaintiffs filed a motion for a judgment by default against the defendants for want of sufficient pleas and affidavit of defense. On January 24, 1908, this motion was heard by the court, and on that day judgment by default was entered, and on the same day the judgment was extended for \$178.73, damages assessed by the court and costs of suit. The affidavit attached to the pleas is in proper form, and it is not claimed that it is in any manner defective or insufficient, and to it is appended a certificate of the defendants' counsel stating that he had advised the party making the affidavit to the pleas to do so.

Upon this state of facts, the single question for our decision is: Did the defendants plead a good plea to the declaration? If they did, the court had no right to enter a judgment as by default against them, because under the statute no such judgment can be entered where there is a plea, properly verified, showing a good defense to the action. In *Gemmell v. Davis*, 71 Md. 458, 18 Atl. 955, in which case the construction of this act was under consideration, the court, speaking through Chief Justice Alvey, said: "The obvious purpose of the act is not only to furnish a short and expeditious method of recovery in the class of actions mentioned, but by requiring disclosure under oath as to the real amount or matter in dispute or actual contest between the parties to avoid unnecessary trouble and expense in the trial. And while the construction of the statute should be such as to afford to every defendant a full and fair opportunity to make all defenses to the action against him, no such restrictive construction as against the rights of the plaintiff should be adopted as would, in any event, defeat or frustrate the beneficial objects contemplated by the Legislature. By the terms of the section quoted the plaintiff has a right, at any time after the expiration of the 15 days from the return day to apply for and obtain judgment, as by default, unless there be a plea by the defendant showing a good defense, and verified in the manner described by the statute." In 2 Greenleaf on Evidence it is said that: "Almost all the defenses to the action of assumpsit in the United States, and, until a late period in England, have been made under the general issue. This plea on strict principle operates only as a denial in fact of the express promise or contract where one is alleged, or of the matters of fact from which the contract or promise alleged may be im-



plied by law. But by an early relaxation of the principle the defendant, in actions on express contracts, was admitted, under the general issue, to the same latitude of defense which was open to him in actions upon the common count, and was permitted to adduce evidence, showing that on any ground common to both kinds of assumpsit he was under no legal liability to the plaintiff for that cause at the time of pleading. The practice in the English courts by recent rules has been brought back to its original strictness and consistency with principle. In the United States it remains, for the most part, in its former relaxed state; and accordingly, where it had not been otherwise regulated by statute, the defendant, under this issue, may give in evidence any matters, showing that the plaintiff never had any cause of action—such as the non-joinder of another promisor; the defendant's infancy; lunacy; drunkenness, or other mental incapacity; coverture at the time of contracting; duress; want of consideration; illegality; release or parol discharge or payment before breach; material alteration of the contract; that the plaintiff was an alien enemy at the time of contracting; or that the contract was void by statute, or by the policy of the law; nonperformance of condition precedent by the plaintiff; or that performance on his own part was prevented by the plaintiff, or by law, or, in certain cases, by the act of God; or any like manner of defense." The defenses allowable under the general issue plea at common law, in the absence of statutory changes, are still open to the defendant, except the defense of arbitrament and award, and possibly the defense of alien enemy. 1 *Poe on Pleading*, §§ 607-609; *Yingling v. Kohlhaas*, 18 Md. 148; *Herrick et al. v. Swomley*, 56 Md. 439. The general issue plea of non assumpsit filed by the defendants constituted a good plea to the action, and the court was therefore without power to enter the judgment appealed from. That judgment, as well as the judgment by default, must be stricken out, and the case remanded for a trial upon the merits. It was contended at the hearing that the defendants' third plea, which was in express terms limited to the special count of the declaration, is bad, because it is a plea which amounts to the general issue. If this were true, it ought to have been demurred to; but we do not think it is such a plea. A plea is never objectionable on this ground, unless it sets up matters of fact merely amounting to a denial of such allegations in the declaration as the plaintiff would on the general issue be bound to prove in support of his case, and the reasons why such a plea is held bad are, "first, because such special plea, if considered as a traverse, tends to needless prolixity and expense, and is an argumentative denial, and a departure from the prescribed forms of

pleading the general issue; and, secondly, if viewed as a plea in confession and avoidance, it does not give color or plausible ground of action to the plaintiff." 1 *Chitty on Pleading*, 527. The plea is a specific traverse of material averments of the special count, and, upon failure of the plaintiffs to prove any one of such material allegations upon the trial, the verdict would be for the defendants under this count of the narr. *Boullen & Leak Precedents of Pleading*, 435; 16 *Ency. Pl. & Prac.* 542; *Baltimore & Ohio R. R. Co. v. Ritchie*, 81 Md. 190.

Judgment reversed, with costs, and case remanded.

(108 Md. 306)

# ROSENKOVITZ v. UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE CITY.

(Court of Appeals of Maryland. June 24, 1908.)

## 1. APPEAL AND ERROR—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence, rendered on proper instructions, is conclusive on appeal. [Ed. Note.—For cases in point, see *Cent. Dig.* vol. 3, *Appeal and Error*, §§ 3935-3937.]

## 2. WITNESSES—EXAMINATION OF WITNESSES—"LEADING QUESTIONS."

"Leading questions" are those which ordinarily suggest to the witness the answer desired, or which, embodying a material fact, admit of a direct answer by a simple "Yes" or "No," or which instruct a witness how to answer on material points.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 50, *Witnesses*, §§ 837-851.

For other definitions, see *Words and Phrases*, vol. 5, pp. 4040-4041.]

## 3. SAME—DISCRETION OF COURT.

Under what circumstances leading questions may be asked a witness is very much under the control of the court, in the exercise of a sound discretion.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 50, *Witnesses*, §§ 837-851.]

## 4. APPEAL AND ERROR—OBJECTION BELOW—TIME—OBJECTIONS TO EVIDENCE—TIME TO MAKE.

An objection to a question as leading, not made when it was propounded, and before it was answered, comes too late; so that the allowance of the question is not reversible error on the ground.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 2, *Appeal and Error*, § 1141; vol. 48, *Trial*, §§ 183-190.]

## 5. SAME—PLEADINGS—REVIEW.

Where neither the granted, rejected, or modified prayers, nor the written or oral instructions given by the court, referred to the pleadings, no question on the pleadings could arise on appeal, but the question presented was whether the evidence established a case entitling a recovery in any form of action.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 2, *Appeal and Error*, §§ 1221-1225.]

## 6. TRIAL—INSTRUCTIONS—REQUESTS—RIGHT TO REFUSE.

The trial court may reject all the prayers offered, and grant instructions in its own language; and, where the instructions given are correct and cover the ground, the judgment will not be reversed, though some of the prayers might have been granted, but the law in the in-

structions given must be declared fully, and in terms intelligible to the jury, on the point raised by counsel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 668-675.]

#### 7. CARRIERS—INJURIES TO PASSENGERS—ACTIONS—EVIDENCE—INSTRUCTIONS.

Where, in an action against a carrier, the gist of the action was that plaintiff, while a passenger on a street car, had been assaulted by the conductor and ejected therefrom, and that if not a passenger he was entitled to protection from the violence of the employes of the company, and the theory of the company was that plaintiff boarded the car to sell newspapers, and that the conductor did not assault him, but that plaintiff contributed to his own injury by jumping from the car while in motion, an instruction that if the jury believed that plaintiff boarded the car for the purpose of riding as a passenger, and tendered his fare which the conductor without reason refused to receive, and forcibly and wantonly ejected him from the car, the verdict should be for plaintiff, while if he boarded the car to sell papers, the verdict should be for defendant, unless the injury was caused by the conductor wantonly ejecting him from the car, properly submitted the issue.

#### 8. SAME.

A street railway company is liable for an assault on a passenger committed by its conductor while executing the contract of transportation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1121-1124.]

#### 9. SAME — "PASSENGERS"—LICENSEES—TRESPASSERS.

A newsboy, entering a street car for the purpose of selling papers, and without paying fare, is not a "passenger" but a mere licensee or trespasser, and the company owes him no duty, except to use ordinary care for his preservation after discovering his peril, and to refrain from inflicting willful, reckless, and wanton injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 973-985.]

For other definitions, see Words and Phrases, vol. 6, pp. 5218-5227; vol. 8, p. 7748.]

#### 10. SAME—ACTIONS FOR INJURIES TO PASSENGERS—BURDEN OF PROOF.

One suing a street railway company for injuries received while a passenger, in consequence of being assaulted by the conductor, has the burden of showing, by the weight of the evidence, that the injury was caused by the wrongful act of the conductor, or the verdict must be for the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1283-1294.]

#### 11. TRIAL—INSTRUCTIONS—OBLIGATION OF COURT TO GIVE INSTRUCTIONS.

While the trial court is not bound to give either written or oral instructions, it is competent for it to give instructions of its own, either written or oral, provided they are not inconsistent, and the power of submitting an oral instruction should be cautiously exercised.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 514-523.]

#### 12. SAME—DUPLICATION OF INSTRUCTIONS—EFFECT.

The duplication of instructions has a tendency to mislead rather than to guide the jury, and should not be given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 513.]

#### 13. SAME—CORRECT AND INCORRECT INSTRUCTIONS.

Where correct and incorrect instructions have been given on the same subject, it cannot be shown that no injury resulted, because it

cannot be ascertained by which instruction the jury were governed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

#### 14. CARRIERS—ACTION FOR INJURY TO PASSENGER—INSTRUCTIONS.

Where, in an action for injuries to a passenger ejected from a street car, the court charged that if plaintiff boarded the car for the purpose of riding as a passenger, and tendered his fare, which the conductor, without excuse, refused to receive, and wantonly ejected plaintiff from the car, the verdict should be for him, and that if he was on the car for the purpose of selling newspapers, the verdict should be for defendant, unless the injury was caused wantonly, etc., an oral instruction that the court had refused instructions prepared by plaintiff, and had given, in lieu of them, its own instructions, which were read, and stating that at the instance of the parties it had granted prayers, which were read; that the object of the instructions was to present the theories of the case; that if the story told by plaintiff was believed, a verdict was authorized in his favor, while if defendant's story was believed, the verdict should be for it, was erroneous as misleading the jury to the prejudice of plaintiff.

Appeal from Superior Court of Baltimore City; Alfred S. Niles, Judge.

Action by Abraham Morris Rosenkovitz, an infant, by Louis Rosenkovitz, his father, against the United Railways & Electric Company of Baltimore city. From a judgment for defendant, plaintiff appeals. Reversed and new trial ordered.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

David Ash, for appellant. R. Lee Slingluff and J. Pembroke Thom, for appellee.

BRISCOE, J. The record in this case contains four bills of exception. Three relate to the rulings of the court upon the admissibility of testimony, and the fourth presents the action of the court, in refusing the plaintiff's prayers, in granting the defendant's third, fourth, and sixth prayers, and further in granting a written instruction, designated as "court's instruction No. 1," in lieu of the plaintiff's rejected prayers, and also to the action of the court, at its own instance, in granting a verbal instruction, which will be quoted in full, in a subsequent part of this opinion. The suit was brought by the plaintiff, an infant, by his father and next friend, in the superior court of Baltimore city, against the defendant corporation, to recover damages for personal injuries sustained while upon one of the defendant's cars, as particularly detailed in the several counts of the declaration. The narr. contains three counts. The first alleges that whilst the infant was a passenger and was conducting himself in an orderly and proper manner, the defendant corporation, by its servants and agents, wrongfully and unlawfully assaulted and beat him, and forcibly and unlawfully ejected him from the car, whereby he was seriously and permanently injured, and suffered mental and physical pain and anguish. The second avers

that the plaintiff, an infant of about nine years of age, was, with the leave and license of the defendant company, upon one of its cars, and while so rightfully upon the car was assaulted, beaten, and permanently injured, in the manner stated and set out in the first count. And the third count charges, in substance, that the plaintiff boarded the defendant's car on or about the 3d of July, 1905, intending to become a passenger, and offered to pay his fare, but that he was wrongfully assaulted and ejected from the car, while it was moving rapidly, by the conductor thereof, in the manner described in the previous two counts. The case was tried before a jury, and, the judgment being for the defendant, the plaintiff has appealed.

The substantial issue in the case is presented by the rulings of the court, as set out in the bills of exception, and the conclusion reached by the jury on the facts renders it unnecessary for us to do more than to examine the questions raised by the action of the court on its rulings. The plaintiff was a newsboy, about nine years of age, selling papers upon the streets, in the city of Baltimore, and on the 3d of July, 1905, boarded one of the appellee's cars near Exeter and Lombard streets, for the purpose of selling papers, and for the purpose of proceeding further in the city, to serve his customers. The theory of the infant plaintiff's case is that he was upon the defendant's car as a passenger, or that he intended to become such, and offered to pay his fare, but when he was handing the conductor the fare, the latter grabbed him, and said, "Get off, you damned Jew," and kicked him off the platform of the car while it was in motion. The boy's testimony was corroborated by the witnesses Salerno and Hartman, who testified on behalf of the plaintiff. They were on the street near the car, and stated they saw the conductor grab the boy and kick him off the car. The evidence on the part of the defendant company was in direct conflict with that offered on the part of the plaintiff. The conductor testified that he never assaulted the boy, did not grab or kick him, or say to him, "Get off, you damned Jew," and the boy did not offer to pay his fare. He further testified: "On July 3, 1905, a newsboy boarded the car at Pratt and Exeter streets. The car stopped at Granby and Exeter streets to let a lady on, and I told him to get off, and he had plenty of time to get off, when the lady got on, and I went in to collect the lady's fare, and when I came out, the boy was still on the rear platform, and he saw me coming out, and got scared and jumped off and fell over some watermelons. I didn't touch him, never had my hands on him. He got on at Pratt and Exeter streets, and I stopped at Granby street to let a lady on, and I told him to get off. The boy was then standing on the sidewalk on the street; when I told him to get off he was on the rear platform, standing beside the rail on the right-hand side."

The conductor's testimony was supported by that of two passengers, who were on the platform of the car at the time of the occurrence, and who testified on the part of the defendant company.

In this state of the proof, and there being a manifest conflict in the evidence, it is clear, upon all the authority, that the questions of fact were for the jury to determine, upon proper instructions from the court, and the verdict of the jury is conclusive on the facts. The questions, then, upon this branch of the case are exceedingly narrow, because, unless the court committed some error, whereby the plaintiff was injured, in its rulings on the evidence and the prayers, or in its action in submitting its own written and verbal instructions, the judgment of the court must stand, and cannot be disturbed. The record does not disclose any reversible error, in the rulings of the court, in permitting the questions to be asked the witness set out in the first, second, and third bills of exception. The questions may be regarded as somewhat leading, and for this reason, bad in form for examination in chief, but it is difficult to perceive in what way either the questions propounded, or the answers given, could have injured the plaintiff's case. Leading questions are defined to be those which ordinarily suggest to the witness the answer desired, or which, embodying a material fact, admit of a direct answer by a simple "Yes" or "No," or which instruct a witness how to answer on material points. In *Buschman v. Morling*, 30 Md. 388, it is said: "Under what circumstances such questions may be asked is a matter very much under the control of the court, in the exercise of a sound discretion." There was no objection offered to the questions as leading at the time they were propounded, and before they were answered. There was no reversible error in the rulings under these exceptions. *Frownfelter v. State*, 66 Md. 80, 5 Atl. 410; *Jones v. Jones*, 36 Md. 447, 11 Am. Rep. 505; *Black v. B. & O. R. R. Co.*, 107 Md. —, 69 Atl. 439.

We come now to the rulings of the Court upon the prayers, as presented by the fourth exception, and here it will be observed that neither the granted, rejected, nor modified prayers make any reference to the pleadings, nor are they referred to in either the written or oral instructions given by the court. In such case no question upon the pleadings can arise in this court, but the broad proposition is presented whether the evidence establishes a case entitling the plaintiff to recover, in any form of action. *Fletcher v. Dixon*, 106 Md. —, 68 Atl. 875; *Bldg. Ass'n v. Grant*, 41 Md. 569; *Leopard v. Canal Co.*, 1 Gill, 222; *Giles v. Fauntleroy*, 13 Md. 126. At the trial of the case the court rejected all of the instructions submitted by the plaintiff, and stated to the jury that he gave, in lieu of them, "court's instruction No. 1," covering the general grounds sought to be presented by the instructions asked by the plaintiff.

The court's instruction No. 1 was as follows: "If the jury believe that the plaintiff got upon the defendant's car for the purpose of riding as a passenger, and duly tendered, or was about to tender, his fare to the conductor, but that the conductor, without reason or excuse, refused to receive said fare, called him a 'damned Jew,' and forcibly and wantonly ejected him from said car, giving said plaintiff a kick as he ejected him, then the verdict should be for the plaintiff." The defendant's third prayer, it appears from the record, was granted in connection with the court's written instruction, and is to this effect: If the jury believe that at the time he received the injuries he was upon the car of the defendant for the purpose of selling newspapers to the passengers, then the verdict must be for the defendant, unless the jury further find that the injury to the plaintiff was caused by the conductor of the car, either wantonly or with reckless carelessness, pushing and kicking the plaintiff off the car while it was in motion. It is the settled law of this court, says Bartol, C. J., in *P. W. & B. R. Co. v. Harper*, 29 Md. 330, that "It is competent for the court below to reject all the prayers offered, and grant instructions to the jury in its own language, and where these are correct and cover the whole ground, the judgment will not be reversed, though some of the prayers might have been granted." But when this is done, all the cases hold "the law ought to be declared fully and accurately, and in terms certain, explicit, and intelligible to the jury, upon the points raised by counsel." There was no error in the court's instruction No. 1, in lieu of the plaintiff's prayers under the evidence in the case, nor to the defendant's third prayer, granted in connection with it.

The defendant's sixth prayer as to compensatory damages, and the court's verbal instruction as to punitive damages, in connection with the court's instruction No. 1, are also free from objection. It will not then be necessary, in deciding the law applicable to this branch of the case, to refer to the plaintiff's prayers, because they were all rejected by the court, and court's instruction No. 1 was given in lieu thereof. If that instruction covered the law of the case, as we have held in connection with the other granted prayers, the appellant would have no cause of complaint in this respect.

The gravamen of the plaintiff's complaint against the defendant, as offered by the plaintiff's evidence, was that, as a passenger upon the car, he had been wrongfully assaulted and ejected therefrom, and, even if not a passenger, he was entitled to protection from the violence of its employees. The defendant's theory, as presented by the testimony, was that the plaintiff was a newsboy, that the conductor did not assault him, but that he contributed to his own injury by jumping from the car while in motion. There can be no reasonable dispute as to the law, applicable to a case of this character, upon either

theory as herein stated. If the assault was made, and the plaintiff was ejected, whilst a passenger, and whilst the conductor was in its employ, executing "the contract of transportation" (provided the jury found these facts), the company would clearly be responsible. *B. & O. R. R. Co. v. Barger*, 80 Md. 23, 30 Atl. 560, 26 L. R. A. 220, 45 Am. St. Rep. 319; *C. Ry. Co. v. Peacock*, 69 Md. 259, 14 Atl. 709, 9 Am. St. Rep. 425; *Cate v. Schaum*, 51 Md. 309; *Consol. Ry. Co. v. Pierce*, 89 Md. 504, 43 Atl. 940. In *Steamboat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049, the court holds that a common carrier of passengers undertakes absolutely to protect them against the misconduct and illegal acts of its own servants engaged in executing the contract. The duty and obligation of a street railway company to a newsboy who enters upon its cars for the purpose of selling papers, and who pays no fare, has been clearly defined by the courts of this country. He is not a passenger, but a mere licensee or trespasser, and the company owes him no duty, except to use ordinary care for his preservation after discovering his peril, and to refrain from inflicting willful, reckless, and wanton injury. The recognized law upon this subject is well stated in case note, titled "Duty of Carrier to One Whom It Permits to Enter Its Cars upon His Own Business and Not as a Passenger," in the report of the case of *Peterson v. South & Western Railroad*, 143 N. C. 260, 55 S. E. 618, 8 L. R. A. (N. S.) 1240, 118 Am. St. Rep. 799, where the leading cases are cited and collected. In this state the rule of law applicable to cases where injuries result to persons bearing the relation of mere licensees has been established by a long line of decisions. *B. & O. R. R. Co. v. State*, 79 Md. 335, 29 Atl. 518, 47 Am. St. Rep. 415; *Benson v. Traction Co.*, 77 Md. 535, 26 Atl. 973, 20 L. R. A. 714, 39 Am. St. Rep. 436; *Maenner v. Carroll*, 46 Md. 193. The defendant's third prayer substantially presented these propositions of law as herein stated, and the court committed no error in granting it.

The fourth prayer, as modified, submitted, in substance, the proposition that the burden of proof was upon the plaintiff to show by the weight of the evidence that the injury was caused by the violent and wrongful act of the conductor, and unless the jury so found, their verdict must be for the defendant. The prayer was properly granted.

This brings us to a consideration of the remaining question in the case, and this arises on the fourth exception, in the action of the court, at its own instance, in submitting the following verbal instruction to the jury: "Gentlemen of the jury, the instructions under which the case now comes to you are these: I have refused all the instructions that the plaintiff prepared, and in place of those give this instruction, as covering the general grounds sought to be covered

by the instructions asked by the plaintiff [aforesaid court's instruction No. 1 was here read], in connection with that I grant the prayer as to damages as follows: The court instructs the jury that if the jury find for the plaintiff under the court's instruction, then in estimating the damages, they are to consider the health and condition of the plaintiff before the injuries complained of, as compared with his present condition in consequence of said injuries, and whether said injuries are, in their nature, permanent, and how far they are calculated to disable the plaintiff from engaging in those business pursuits for which, in the absence of said injuries, he would have been qualified, and also the physical and mental suffering to which he has been subject by reason of the injuries, and to allow such damages as in the opinion of the jury will be fair and just compensation for the injuries which the plaintiff has suffered, and the jury may also in their discretion allow punitive or exemplary damages. At the instance of the defendant I have granted this prayer [defendant's third prayer read]; at the instance of the defendant, I have granted his fourth prayer as follows: [defendant's fourth prayer, as modified, read]. The defendant's sixth prayer I grant as follows: [defendant's sixth prayer read]. The object of these instructions, taken as a whole, is to present to you the two theories of this case held by the plaintiff and the defendant. The court instructs you practically that, if you believe the story which the plaintiff told here that the conductor refused to accept his fare, put him off the car, and kicked him off in the process of his ejection, then you are to find for the plaintiff, and being a wanton, willful, and inexcusable act, you are at liberty, first, to allow compensatory damages, and, in addition to that, punitive damages. But if, on the other hand, you believe the defendant's story that the newsboy got upon the car, went in the car, and sold such papers as he could, got off in pursuance of the conductor's order at Granby street, then got on the step after that, and then seeing the conductor approach, or as the conductor was approaching, got off the car himself while the car was in motion, and the conductor never laid his hands upon him, then your verdict must be for the defendant. The object of these prayers is to eliminate such matters as were not contained either in the defendant's case or plaintiff's case, and submit the stories of each side; and it is in your province to determine what you believe in regard to this matter."

The plaintiff insists that there was error in granting this instruction, as it tended to mislead and confuse the jury, to his manifest prejudice and injury, and in this objection we all concur. Whatever may be the rule and practice in other jurisdictions, under the settled practice in this state, the

courts are not bound to give either written or oral instructions. While it is competent for the court to give instructions of its own, either written or oral, or explain the effect of those granted, provided they are not inconsistent, we have found no case in this state, and none has been cited, where the court has gone to the extent in an oral instruction as it did in this case. In *Smith v. Crichton*, 33 Md. 103, it is said: "The law may be sufficiently expounded to the jury through oral instructions." In *Downey v. Forrester*, 35 Md. 117, it was held to be competent for the court, by an oral instruction, to make an explanation, *ex mero motu*, of written instructions previously granted by the court. And in *Hussey v. Ryan*, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772, it is said, so far as defendant's exception to this last instruction rests upon its being voluntary or an explanation of the prayer to which it relates: "It is well settled that the court may give instructions of its own, or explain the effect of those granted at the instance of the parties, provided they are not inconsistent therewith. Such an interposition is often salutary and promotive of a clear understanding of the law, especially if its rulings are not understood, or, as sometimes occurs, are contravened or misconstrued in the argument to the jury." While it is clear that the power exists in the courts of submitting an oral instruction in cases where it applies, or may be considered necessary, yet it is a power that should be cautiously exercised, and will be found in practice a dangerous one, and open to abuse. Under our practice it is not to be approved or commended, except to promote the ends of justice as indicated by the cases cited. In the case at bar it is difficult to reconcile parts of the oral instruction with those previously given. It is somewhat inconsistent with the written instructions, and may have misled the jury to the prejudice of the plaintiff. In part it was practically a "duplication of instructions." In *Storr v. James*, 84 Md. 290, 35 Atl. 965, the duplication of instructions was condemned by this court. It is there said: "Instructions are intended to give to the jury a clear and concise statement of the law governing the case. The duplication of instructions has a tendency to mislead or confuse rather than to guide the jury, and thus to frustrate the very object intended to be accomplished by their being given at all."

It is also well settled, where a correct and an incorrect instruction have been given on the same subject, it cannot be shown that no injury resulted, because it cannot be ascertained by which the jury were governed. *Adams v. Capron*, 21 Md. 186, 83 Am. Dec. 566. In *Coffin v. Brown*, 94 Md. 203, 50 Atl. 567, 55 L. R. A. 732, 89 Am. St. Rep. 422, this court, in passing upon the effect of an oral statement, made by the court in the presence of the jury, said: "If a written instruction

had been granted, to the effect of what we have quoted, there could be no doubt that it would have been error, and such oral statements, in the presence of the jury, were calculated to greatly injure the defendant, and perhaps made it useless for his counsel to argue that question before the jury." 11 Ency. of Pl. & Pr. 114. We are, therefore, of opinion, that the oral instruction, submitted by the court in this case, was calculated to confuse and mislead the minds of the jury, to the injury of the plaintiff's case, and should not have been given them. For this error the judgment will be reversed, and a new trial awarded.

Reversed and new trial awarded, with costs.

(108 Md. 229)

COCHRAN v. PRESTON et al.

(Court of Appeals of Maryland. June 24, 1908.)

1. WORDS AND PHRASES—"POLICE POWER."

The power to prescribe regulations demanded by the general welfare for the common protection of all is known as the "police power," and is inherent in every sovereignty.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5424-5438; vol. 8, p. 7756.]

2. STATUTES—CONSTRUCTION—PURPOSE.

The purpose of a statute, whose validity is under consideration, not appearing on its face, is open to inquiry.

3. MUNICIPAL CORPORATIONS—POLICE POWER—REGULATION OF HEIGHT OF BUILDINGS.

Acts 1904, p. 63, c. 42, providing that no building, except a church, shall be erected or altered, in a designated locality of the city of Baltimore, to exceed in height 70 feet above the surface of the street at a certain point, the primary object thereof being protection from fire, is a valid exercise of the police power.

4. CONSTITUTIONAL LAW — STATUTES—CONSTRUCTION—INTENDMENT IN FAVOR OF VALIDITY.

Where the object of a statute is to promote the public welfare, and there is a substantial relation between the object aimed at and the means devised for attaining that object, every intendment is in favor of the entire validity of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 46.]

5. SAME—PRESUMPTION OF CONSTITUTIONALITY.

The presumption in favor of the validity of a statute should prevail, unless the lack of constitutional authority is clearly demonstrated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 46.]

6. SAME—EQUAL PROTECTION OF THE LAWS—REGULATION OF HEIGHT OF BUILDINGS.

Acts 1904, p. 63, c. 42, providing that no building, except a church, shall be erected or altered in a designated locality of the city of Baltimore, to exceed in height 70 feet above the surface of the street at a certain point, is not a denial of the equal protection of the laws, contrary to Const. U. S. Amend. 14, on the ground that, as the prescribed locality is hilly, and the point designated practically the highest point within its limits, persons owning property on the lower ground have an advantage over those owning property on the higher ground, because the former may build to a greater height than the latter.

7. SAME.

The act is not a denial of the equal protection of the laws contrary to Const. U. S. Amend. 14, because exempting churches from its operation.

Appeal from Court of Common Pleas of Baltimore City; Henry Stockbridge, Judge.

Application for mandamus by William F. Cochran, Jr., against Edward D. Preston, inspector of buildings of Baltimore City, and others, to compel the issuance of a permit to make an alteration in a building. From an order dismissing the application, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

W. Stuart Symington, Jr., for appellant. Sylvan Hayes Lauchheimer, for appellees.

WORTHINGTON, J. The only question involved in this appeal is whether or not Acts 1904, p. 63, c. 42, is a valid exercise of legislative power. By this act it is provided: "That from and after the date of the passage of this act, no building, except churches, shall be erected or altered in the city of Baltimore on the territory bounded by the south side of Madison street, the west side of St. Paul street, the north side of Centre street and the east side of Cathedral street, to exceed in height a point seventy feet above the surface of the street at the base line of Washington Monument." The act was approved March 15, 1904. The ordinances of Baltimore require all persons who desire to build, alter, or repair any structure within the limits of the city, or who desire to put an additional story upon any building therein, to obtain a permit from the inspector of buildings, and also from the appeal tax court of that city. The appellant is the owner of a large apartment house, located on the northwest corner of Mt. Vernon Place and Washington Place, within the territory to which the prohibition of the statute applies; and, desiring to put an additional story thereon to be used as quarters for employes, he applied to the appellees for a permit to make the desired alteration. In his application for such a permit the applicant stated that the house is, at present, 70 feet high, and that the proposed addition would be but 8 feet in height, and set back on the roof at a uniform distance of 20 feet from Mt. Vernon Place, and a like uniform distance from Washington Place, and that it would not be possible to see any part of the addition from either of these places. That the total cost of the building and ground, in the first place, was about \$450,000, and that, as the building now stands, it is impossible to derive from the same a sufficient revenue to yield a fair profit on the investment therein, but that the proposed addition would enable the owner to derive a fair return for the whole outlay. The appellees refused the permit, on the ground that the additional story

proposed would raise the building to a height greater than 70 feet above the base line of Washington Monument, contrary to the provisions of the act of Assembly above mentioned. A mandamus was then applied for, and denied by the court for the same reason assigned by the appellees in the first instance.

It is elementary that the word "land," in its legal signification, has an indefinite extent upwards as well as downwards, and, therefore, if it were possible for man to live in a state of nature, unconnected with other individuals, the proprietor of land would own, not only the face of the earth within the boundaries of his proprietorship, but also everything under it and over it. An imaginary person, living in such a state of nature, would be at liberty to use his land as he pleased, to build on it to any height, and to dig into it to any depth, without restraint. But as man was formed for society, and is incapable of living alone, organized society is essential to his well-being and happiness, and every person who enters society must give up a part of his so-called natural rights and liberties for the benefit of the community. 1 Black. Comm. p. 125. "The very existence of government presupposes the right of the sovereign power to prescribe regulations, demanded by the general welfare, for the common protection of all. The principle inheres in the very nature of the social compact. The protection of private property is one of the chief purposes of government, but no one holds his property by such an absolute tenure as to be freed from the power of the Legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all." Parker and Worthington Public Health and Safety, § 14. The power to prescribe regulations, demanded by the general welfare, for the common protection of all, is known as the police power of the state, and is inherent in every sovereignty. Prentice on Police Power, p. 6; Comm. v. Alger, 7 Cush. 53; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. Among the police powers of the state the right to regulate the height of buildings in a city is one that cannot be questioned. Lewis on Eminent Domain, § 156; Tiedeman on State and Federal Control of Persons and Property, p. 754; Welsh v. Swasey, 193 Mass. 384, 79 N. E. 745. Yet such regulations must be reasonable in their character, and adapted to accomplish the purpose for which they are designed. People v. D'Oench, 111 N. Y. 359, 18 N. E. 862; Watertown v. Mayo, 109 Mass. 319, 12 Am. Rep. 694; Atty. Gen. v. Williams, 174 Mass. 477, 55 N. E. 77.

As the purpose of the statute under consideration does not appear on its face, such purpose is open to inquiry, and the appellant contends that its purpose was and is to preserve the beauty and architectural symmetry of the environment of Washington Monument, and that in the exercise of the police power

property rights cannot be impaired for purely æsthetical purposes. To sustain the legal proposition, he quotes from Freund, Constitutional Rights and Public Policy (1904) § 181, as follows: "If the purposes were purely æsthetic, the impairment of property rights, even upon the payment of compensation, would not pass unchallenged"—and also from 2 Tiedeman, State and Federal Control of Persons and Property, p. 755, as follows: "Regulations, which are designed only to enforce upon the people the legislative conception of artistic beauty and symmetry, will not be sustained, however much such regulations may be needed for the artistic education of the people." Such is undoubtedly the weight of authority, though it may be that, in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the fine arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power, even for such purposes. In Welsh v. Swasey, supra, it is said that, "If the primary and substantial purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in as auxiliary." And our predecessors have said, in speaking of an ordinance of Baltimore City, passed in pursuance of the act of 1833, c. 180, and regulating the distance that any portico, steps, or other ornamental structure on Mt. Vernon Place might extend from the building line into the street, that the object was, "in furtherance of the purpose to render these places or squares attractive, to give more freedom to the exercise of private taste for adornment in their vicinity. In a city noted for its monuments, municipal legislation peculiar to their neighborhood would seem indispensable." Garrett v. Jones, 65 Md. 280, 3 Atl. 597. We do not assent, however, to the proposition that the statute under consideration was passed for purely ornamental purposes.

We find a more substantial reason for its enactment in the suggestion of the counsel for the appellees that its purpose was to protect the handsome buildings and their contents, located in that vicinity, and also the works of art clustered there, from the ravages of fire. It must be remembered that in the center of the prescribed territory to which the statute applies stands the lofty and beautiful monument to the illustrious Washington; on one corner of Mt. Vernon Place and Washington Place is the handsome Mt. Vernon Methodist Episcopal Church, on another is the Peabody Institute, a stately marble building, in which are kept for public use many rare and valuable books and works of art, to replace which would be well-nigh impossible; in the same neighborhood are numerous handsome residences of private citizens, containing valuable works of art and of literature. In Mt. Vernon and Washing-

tion Places are found statues to several eminent Marylanders: Severn Teackle Wallis, Roger B. Taney, and General John Eager Howard, and also a number of beautiful figures, known as the "Barye bronzes," so that the environment of the locality in question is, in several respects, unique, and well worthy of preservation in its entirety. During the session of the Legislature at which the statute under consideration was passed, a great fire visited Baltimore, and destroyed a large part of the business section of the city. Extracts from an account of the fire will demonstrate some of the dangers to be apprehended from this devouring element. The account says: "The fire spread to the north and east, rapidly devouring block after block of buildings. Landmark after landmark went down. Nothing but burnt clay—bricks and cement—could stand against a conflagration which developed 2,500 degrees of heat, and was carrying itself along by its own volume, against which no water supply, no human effort could be effective. The lofty skyscrapers on Charles, St. Paul, Calvert, and Baltimore streets burned like great torches up to the sky. Granite and marble cracked and spalled off. The marble work of the new custom house, then in course of construction, was badly damaged wherever exposed to the heat, as was also the St. Paul street front of the new courthouse. Shortly after midnight the American newspaper office was enveloped in flames, which quickly spread across to the Sun Iron Building involving all in common ruin. Devastation was carried down Calvert street, down South street, and Holliday street and Gay street, wiping out hotels, newspaper offices, bank buildings, warehouses, and nearly everything in the way, clear to the water front of the inner harbor. Among the buildings destroyed were many so-called fireproof structures. After the fire these lofty buildings stood amidst the ruins of lesser buildings, like gaunt skeletons, burned out interiorly but still 'structurally fireproof,' with from 40 to 60 per cent. salvage credited to their construction." Great impetus is given to such a fire by very tall buildings. They serve as so many large funnels furnishing draft for the flames, thereby intensifying the heat, and outreaching the efforts of the firemen. Already some very tall buildings have been erected in this locality; the "Hotel Stafford" being 132 feet high, and the apartment house known as "The Severn" being 115 feet above the pavement at the base line of Washington Monument. It was to prevent the multiplication of such buildings in this neighborhood, and the increased danger from fire attendant thereon, that this statute was no doubt passed. We consider such an object entirely legitimate, and the statute valid as far as its purpose is concerned.

The appellant contends, however, that as the prescribed territory is hilly, and the base line of Washington Monument practically the

highest point within its limits, persons owning property on lower ground have an advantage over those whose property is located on the higher ground, because the former may build houses to a greater height than the latter and that therefore the statute denies the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States. While we recognize the force of this contention, we think, when it is remembered that the primary object of the law is protection from fire, it is met by the consideration that very tall buildings on the highest part of the ground would be more difficult to deal with in case of fire than such buildings lower down. By operating from the higher portions of ground, water might be thrown on tall buildings further down the hill, and reach the top, while the tops of buildings of the same height on the higher ground would be wholly out of the reach of the fire apparatus. "In virtue of its right and duty to provide for the public welfare the legislative branch of government possesses a large discretion as to the manner in which it shall be exercised." Parker and Worthington, Public Health and Safety, § 4. If the object of the statute is to promote the public welfare, and there is a substantial relation between the object aimed at and the means devised for attaining that object, every intendment will be in favor of the entire validity of such statute. Parker and Worthington, Public Health and Safety, § 4; *Adler v. Whitbeck*, 44 Ohio St. 539, 562, 9 N. E. 672; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455. The presumption in favor of the validity of the statute should prevail, unless the lack of constitutional authority is clearly demonstrated. *U. S. v. Harris*, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290.

It was for the Legislature to determine the manner in which the purpose aimed at was to be accomplished, and we are not prepared to say that the method adopted does not bear a substantial relation to the object aimed at, or that it denies the equal protection of the laws, as that term is understood and construed. *Easton v. Covey*, 74 Md. 262, 22 Atl. 266; *Ex parte Fisk*, 72 Cal. 125, 13 Pac. 310; *Hine v. New Haven*, 40 Conn. 478; *People v. D'Oench*, 111 N. Y. 361, 18 N. E. 862. In the last-mentioned case the court held that a statute, regulating the height of all houses used as dwellings, did not include stores, factories, warehouses, buildings used for offices, or hotels, and that it was a valid exercise of the police powers, although because private residences were seldom above the prescribed height, it, in effect, applied only to tenement and apartment houses. The last-mentioned case is also authority for upholding the present statute, although churches are, in terms, exempted from its operation. There is not the same reason for regulating the height of churches as of some other buildings. The former frequently have spires for



ornamental purposes, reaching a much greater height than 70 feet, but they do not present the same danger from fire to the surrounding buildings as many other structures do, chiefly because they are not likely to become very numerous in any one locality.

After a careful consideration of the case in all its different aspects, we think the order of the lower court dismissing the application for a writ of mandamus was right, and the same will therefore be affirmed. Order affirmed, with costs.

(108 Md. 367)

**NEWMAN et al. v. JOHNSON.**

(Court of Appeals of Maryland. June 25, 1908.)

**1. SPECIFIC PERFORMANCE—GROUND FOR RELIEF—DISCRETION OF COURT.**

The specific performance of a contract is not a matter of right, but is within the sound discretion of the court, to be granted or refused according to the circumstances of the case, and the court may not arbitrarily or capriciously perform one contract and refuse to perform another, but must regard the conduct of the plaintiff and the circumstances extrinsic to the contract itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 17, 18.]

**2. SAME—PLEADING—DETERMINATION.**

Where the allegations in a bill for the specific performance of a contract appear to be meager when contrasted with the facts as disclosed by the evidence, and presents a case where plaintiff has failed to make a full and candid disclosure in his bill, the court may refuse to grant the relief sought.

**3. SAME—GOOD FAITH AND DILIGENCE.**

Plaintiff, a vendee of land, delayed the completion of the contract of sale, assigning various reasons, among others that there was a defect in the title. The vendor asserted that the claimed defect was merely technical, and refused to take any steps to cure the same, on the ground that to do so would be a recognition of a supposed outstanding title having no validity. After several months of delay, the vendor notified the plaintiff that, unless he fulfilled the contract by a certain day, he would consider the contract at an end. The plaintiff paid no heed to the notice, and, after the date mentioned therein, the vendor sold the property to a third person, who had notice of the previous contract. *Held* that, whatever cause of action plaintiff might have at law, he was not entitled to waive the defect in the title theretofore asserted by him, and demand specific performance of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 227.]

Appeal from Circuit Court No. 2 of Baltimore City; James P. Gorten, Judge.

Action by Clinton M. Johnson against Isaac L. Newman and others. From a decree for plaintiff, defendants appeal. Reversed, and bill dismissed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

Vernon Cook and Wm. P. Lyons, for appellants. William G. Towers and Richard Bernard, for appellee.

PEARCE, J. The bill in this case was filed by the appellee against the appellant

to enforce the specific performance of a written contract between them for the purchase by the appellee of a parcel of land in Baltimore city belonging to the appellant. This contract was executed March 13, 1907, the appellant being named and described therein as vendor, and the appellee as vendee, and the property being accurately described. The material recitals are these: "That the said vendor has this day sold to the said vendee, and that the said vendee has this day bought of the said vendor, at and for the sum of ten thousand dollars (\$10,000) in fee simple, all that lot of ground and improvements situate in Baltimore City and described as follows: [Description omitted here.] The title to all of the above described property to be good and marketable, and the said property is to be free of all liens and claims, otherwise this agreement is to be null and void, and the money paid hereunder is to be returned to the said vendee. Taxes to be adjusted and allowed to the date of transfer of title. The two hundred and fifty dollars (\$250) of said purchase price of ten thousand dollars has been paid before the signing hereof, the receipt whereof is hereby acknowledged, and the balance of said purchase is to be paid as soon as the examination of title is completed, for which a period of thirty days is allowed." The contract further provided that, upon full payment of the purchase money, the property should be conveyed to the vendee by the vendor, at the cost of the vendee, by a deed giving a good and merchantable title, subject to certain restrictions as to the buildings to be erected thereon, and the use to be made thereof, which are not material to the case. The property extends from the center of Kate avenue to the center of Grace avenue, and binds upon the east line of the right of way of the Western Maryland Railroad. The vendee opened negotiations for the purchase through W. L. Russell, as agent for the vendor, in the spring of 1906, but it does not appear that the vendee's name was disclosed to the vendor until some time in January, 1907. In the meantime, the negotiations producing no result, the vendor wrote Mr. Russell on January 11, 1907, that he had other inquiries about a part of the tract, which he could not answer without interfering with Russell's clients, and he would, therefore, withdraw his offer of sale after January 31, 1907, unless before that date they said positively they wanted the property and put up a forfeit. As a result of this the vendee on January 31, 1907, signed an agreement prepared by him, and which Russell signed as agent for Newman, and the vendee gave his check for \$250 in part payment. This agreement was not satisfactory to the vendor, who before signing a contract, thought it necessary to get in what he thought might be outstanding interests, and, after this was accomplished, the agreement of March 13th was prepared

and executed by the parties; the vendee's check in the meantime being retained by Russell, and being delivered to the vendor on March 13th. This check was not honored when presented that day, and was not made good, according to the vendor's testimony, for several days, but it was then paid, and appears to have been overlooked by the vendee through inadvertence merely. That incident will therefore be dismissed. The vendee then employed Mr. Towers as his attorney to examine the title, and he deemed it necessary or proper to have certain relatives of the vendor make conveyances to him to cover some possible interest they might be supposed to have. One of these conveyances was recorded April 8, 1907, but the other was not recorded until May 31st. Mr. Towers also, before the 30 days for examination of title expired, says that he informed the vendor he had discovered a deed upon record creating an easement in a strip of said land in favor of the Western Maryland Railroad for the maintenance of a station thereon; but the vendor testifies that this was not made known to him until April 13th when he called for a settlement, and that he was not convinced until he saw the deed that there was such a paper. By the terms of that deed it appears that, whenever the railroad company should cease to maintain a station upon said strip of ground, it should revert to the estate of L. P. D. Newman, to whose title the vendor had succeeded. It appears from the record that the station and platform erected on said strip under the said deed had been abandoned and removed about 1896, when the Park Heights Electric railroad was built, and since then there has never been a station there—nothing but the single track of rails, until 1906, when a switch was put in at that point on a fill made for that purpose, but, as the record shows, wholly upon the right of way of the railroad. The vendor's land and the surrounding lands were all uninclosed, and, after the construction of this switch, persons drove across the vendor's land in going to this switch as they had before done in going to the station and platform. In reference to this matter there is a conflict of testimony, the vendee claiming, as alleged in his bill of complaint, and in his testimony, that the vendor agreed to get a release from the railroad, and from that time down to the filing of his bill the delay was due to the vendor's failure to procure the release, and that he had always been, and still was, ready to pay the purchase money upon receipt of a clear merchantable title. The vendor, on the other hand, denied in his answer and also in his testimony that any such promise was ever made by or for him. He denied that the railroad had any existing easement or right, alleging it had long since been abandoned, and that the use and title had reverted to him as the successor in title of the said L. P. D. Newman and his trustees, and that, as soon as he was informed

of the claim made by Mr. Towers that a release was deemed necessary to perfect the title, he had replied he would not ask a release from unfounded or imaginary claims, and that the vendee subsequently said he would procure it himself, and that the vendor need give it no further thought. The vendor further answered, and testified that from that date, April 13th, to September 27th, he was constantly urging the vendee to close the transaction, and that the delay was wholly due to the financial inability of the vendee to carry out the contract. The evidence very strongly sustains the vendor's assertion that he denied the existence of any easement or right of the railroad, and that he positively refused to put himself in the position of recognizing any foundation for such claim of the railroad by asking a release. Under these circumstances, if the vendee deemed such release necessary for his protection, his alternative was either to procure it himself from the railroad, and complete his contract with the vendor, or treat it as broken by the refusal of the vendor to procure it and his failure to convey a title free from all liens or claims, and as entitling him to a return of the money paid, and to such damages for the breach of the contract as he should be able to show.

The vendee testified that he was from May until the last of September constantly expecting the vendor to procure a release from the railroad, and that, though he was not personally prepared with the money, he had the promise of a responsible man, Mr. Kelly, to furnish it whenever required, and that the only delay was due to his waiting on the vendor to procure the release from the railroad. This contention, however, is not consistent with important and uncontradicted evidence in the record. On June 19, 1907, the vendor's attorneys, Messrs. Gans & Haman, wrote the vendee that they were instructed to say that, unless the contract was performed by him not later than June 30th, a bill would be filed against him for specific performance. The receipt of that letter was admitted by the vendee, and that no reply was made thereto by or for him. He contented himself with referring it to his attorney. The vendor testified that this bill was not actually filed, because he was satisfied that the vendee was not financially responsible, and a decree would be unavailing if obtained. Mr. Kelly did testify that he would have financed the purchase for the vendee if required, though under no legal obligation to do so, and that he would in that event have secured himself on the property, but that, under the proposed arrangement, much assistance would not have been required of him. It is quite clear that Mr. Kelly was abundantly able to finance this purchase, and it is true that he furnished the \$10,286.25 paid into court after this suit was brought. But it is reasonably clear from all the evidence taken together that the ven-

dee's original reliance for the money was in selling a part of the tract to Mr. Kelly, and that, after Mr. Kelly bought another place suited to his purpose, he then relied upon selling a part to some other person, and that no positive arrangement was ever made with Mr. Kelly until about the time the money was paid into court. Mr. Pentz testified that during May and June Mr. Johnson several times endeavored to sell him the larger part of the property at least six or eight times; and on July 19th he did enter into an agreement with a Mr. Hoffman to sell him about one-fourth of the property for \$7,500, and actually received from him \$500 on account of the contract. On August 12th Hoffman applied to the Title Guarantee & Trust Company to examine the title, and Mr. Towers also applied for the same purpose on August 31st, and on October 1st the title company reported to Mr. Towers by letter the result of a partial examination in which several objections were made, including the matter of the easement of the railroad. Mr. Newman testified that from April to September he was urging Mr. Towers every two or three days, and that the reply always was it would have to go over a day or two, and that the last excuse for the delay was that Hoffman had been disappointed in getting the money on mortgage, and that Johnson told him on August 21st that he had made satisfactory arrangements with the railroad, but that his plans to finance the matter had all failed, so far, but that on September 1st Hoffman would be in position to settle with him, and he could then settle with Newman, and that Newman consented to wait till that time. Mr. Towers was not called in rebuttal of Mr. Newman's testimony on this point. Mr. Johnson was called, but was not interrogated on that point, and made no denial. The 1st of September arrived and nothing was done. On September 24th or 25th Mr. Newman was on Kate avenue, adjoining this property, when he met a Mr. Flanigan, who had a contract to grade Kate avenue, and asked him what he would take for it as he wanted to dump his waste earth upon it. Newman told him he had an agreement to sell it to Johnson for \$10,000, who had been fooling over it a long while, and that he would like to sell it to Flanigan, but must first ascertain whether he was relieved from Johnson's contract. Flanigan said he would take it at that price, but must have an answer by the next Monday. Newman consulted his counsel, Mr. Cook, who advised him he could proceed with Flanigan, and he then wrote Johnson a letter, September 27th, stating that the performance of the contract had been delayed over five months, and that, unless the purchase money was paid by noon on September 30th, he should treat the contract as canceled and at an end, and this letter was sent by registered mail, and Mr. Towers was acquainted by Newman with its contents. No answer appears to have been made to

this letter by any one, but after its receipt Mr. Towers met Mr. Horsey, of Gans & Haman, and asked him what Newman was going to do, and he replied, "Stand by the letter," to which Mr. Towers answered, "All right." On October 1st Newman entered into a written contract with Flanigan to sell him this property for \$10,250, and \$500 was paid on account, the balance to be paid on execution of a conveyance. The bill in this case was filed on October 15th. With this statement of the principal facts we are prepared to consider the law governing them.

It has been many times said, as in *Bamberger v. Johnson*, 86 Md. 41, 37 Atl. 901, that the application for this relief "is addressed to the sound discretion of the court, to be granted or refused according to its circumstances. It does not flow as matter of right." In *North Avenue Land Co. v. Balt. City*, 102 Md. 480, 63 Atl. 177, the court, quoting and approving section 44 of *Fry on Specific Performance*, said: "The meaning of this proposition is not that the court may arbitrarily or capriciously perform one contract and refuse to perform another; but that the court has regard to the conduct of the plaintiff and to circumstances outside the contract itself, and that the mere fact of the existence of a valid contract is not conclusive in the plaintiff's favor." This principle was applied and emphasized in the recent case of *Gunther Brewing Co. v. Brywczyński* (reported in the *Daily Record* of June 3, 1908) 69 Atl. 514. In *Canton Co. v. Northern Central Railway Co.*, 21 Md. 383, it was held that there must be a full and candid disclosure of all the facts in the bill, and that, if this is not done, the court may refuse to grant the relief sought. The allegations of the bill in this case are very meager, and, when contrasted with the facts as disclosed by the evidence, we do not think they measure up to the standard of a full and candid disclosure. In *Penn v. McCullough*, 76 Md. 231, 24 Atl. 425, the court approves the language of Lord Alvanley in *Milward v. Thanet*, 5 Vesey, 720, note "b": "A party cannot call upon a court of equity for a specific performance unless he has shown himself ready, desirous, prompt, and eager." In the case of *Penn v. McCullough*, supra, as in the present case, the defendant wrote the plaintiff a letter charging him with repeated failure to keep his promises and perform his contract, to which he made no reply. Commenting upon this, the court said: "Now, if he was ready and anxious as he now says to perform his part of the contract, it is strange, to say the least, why he did not at once upon the receipt of this letter tender to the defendant the purchase money and demand a conveyance of the property. So, if the case rested here, we should have no hesitation in saying that the plaintiff had failed to perform his part of the contract." In the present case the second letter of September 27th, written after Johnson

admits he was willing to waive the release he had previously insisted that he required, still more imperatively called upon him to tender the purchase money and demand a conveyance. Yet he still remained silent. Moreover, "the circumstances outside of the contract itself" to which the court in *Bamberger v. Johnson*, supra, has said "regard will always be had," cannot be overlooked in this case. Newman had been making every effort to sell this property for some time, and for nearly six months had been vainly urging Johnson to perform the contract and was being put off with one excuse or another. When Flanigan appeared and proposed to purchase, prompt action was required of Newman, or he would have lost that opportunity to sell, and he could not be expected to wait indefinitely for the performance of promises repeatedly made and broken. He did, however, give Johnson reasonable notice that, unless the purchase money was paid, he would consider the contract canceled. Flanigan assented to this, and neither took nor sought to take any advantage of Johnson in the matter. Both he and Newman are shown to have acted throughout in good faith towards Johnson, who has only his inability or tardiness to blame for his situation. Even if it were conceded that Johnson was in perfect good faith insisting upon his right to demand a release from the railroad, he should have elected either to accept the title without a release, or cancel the contract upon Newman's refusal to procure a release and enforce whatever rights, if any, he had under those conditions. He could not play fast and loose with the contract, speculating upon the contingency of a resale, instead of complying with his own absolute obligation as to payment. Flanigan proposed to consummate his purchase without a release from the railroad, and testified that on October 9th Kelly told him he would not put up a dollar for Johnson until he would get a guaranteed title, and explained that he meant a title guaranteed by the title company to Hoffman under his application to them, and Kelly admitted this was true. Flanigan thus acquired in good faith valuable contract rights in this property after repeated defaults by Johnson, rights much more strongly invoking the favor of a court of equity than any acquired by Johnson in view of all his conduct in the matter. In such cases the court will consider the claims of third parties who have dealt as to the property in good faith, and will not decree specific performance if injustice will thereby be done to them, or injury be inflicted upon the defendant. For five months Johnson, according to his contention, was declining to take such title as Newman had, and then, when he finds Newman has a purchaser willing to take that title, asks the court to award it to him. In *Farber v. B. Coal Co.*, 216 Pa. 209, 65 Atl. 551, where the contract was for a fee-simple estate, the vendor found he did

not have the whole estate. He offered to convey the title he had, but the vendee refused to accept it, and afterwards asked for specific performance, which was refused; the court saying: "It would not permit such inconsistent and unconscionable conduct on the part of a litigant, but, on the contrary, will compel him to act with due regard to the rights of other interested parties." And in *Halsell v. Renfrow*, 202 U. S. 294, 26 Sup. Ct. 612, 50 L. Ed. 1032, the vendor offered to convey such title as he had, and, the vendee refusing this, the vendor sold to another. The vendee afterwards asked specific performance, which was refused; the court saying: "As the plaintiffs were unwilling to accept the deed unless a fuller and more undisputed possession were given than could be given at the time, Renfrow was justified in selling to another who would take the risk or rely upon his covenants." Upon both the grounds above considered and the authorities referred to, we think the law is settled adversely to the plaintiff; so, without discussing any of the other matters argued in the briefs or at the hearing, we are of opinion under all the circumstances that there was error in granting the relief sought, and that the plaintiff should be left to his remedy at law, if any there be.

The decree of the circuit court No. 2 will therefore be reversed, and the bill of complaint dismissed, with costs to the appellant.

Decree reversed, with costs, and bill dismissed.

(76 N. H. 1)

### SWOROSKI v. SWOROSKI.

(Supreme Court of New Hampshire. Belknap. June 2, 1908.)

#### 1. DOMICILE—OPERATION OF LAW—DOMICILE OF WIFE.

A married woman residing in a sister state may, for cause, acquire a domicile apart from her husband by removing to this state with the intention of permanently making this her home, and actually residing here.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Domicile, § 25.]

#### 2. DIVORCE—JURISDICTION—DOMICILE OF PARTIES.

A divorce may be granted to a wife by the courts of this state for causes recognized by our laws accruing since the wife has separated from her husband in a foreign state and taken up her permanent residence in this state.

#### 3. SAME—ANOTHER ACTION PENDING—ACTION IN FOREIGN STATE.

The pendency of a proceeding for divorce brought by the husband in another state is not a bar to an action for divorce brought by the wife in this state after she has separated from her husband and acquired a residence in this state; and it is immaterial whether the grounds alleged by her for the divorce are the same as those alleged by her husband in the foreign suit.

Exceptions from Superior Court, Belknap County.

Libel for divorce by Antonina A. Sworoski against Joseph Sworoski. From an order denying defendant's motion to dismiss the

libel, defendant takes exception. Exception overruled.

Libel for divorce filed September 18, 1907, alleging extreme cruelty and treatment seriously injuring health. The defendant appeared specially, filed a plea to the jurisdiction of the court, and entered a motion to dismiss the libel for want of jurisdiction. At the November term, 1907, of the superior court, Stone, J., took jurisdiction of the cause and denied the motion, subject to the defendant's exception. The grounds relied on in support of the plea were that the domicile of the defendant at the time the action was begun was and now is in Massachusetts; that the plaintiff's domicile then was and now is in Massachusetts; that prior to the filing of this libel the defendant in this action brought a libel for divorce in Massachusetts against the present plaintiff, charging her with adultery; and that she appeared by counsel in that proceeding and filed an answer, denying the allegations of the libel. The position taken in the motion to dismiss was that the alleged cruelty and treatment endangering health, of which the plaintiff complained, occurred before she took up her alleged domicile in New Hampshire. The plaintiff introduced evidence in support of the allegations of her libel. It was found that she was married to the defendant in Massachusetts February 1, 1896, and that they were both domiciled in that state until about January 1, 1906, when the plaintiff, for justifiable cause, left the defendant and came to this state with the intention of permanently residing at Center Harbor, where she has since lived and made her home. After the plaintiff came to New Hampshire to permanently reside, the defendant visited her home in Center Harbor, and persisted in treating her in such a manner as to seriously injure her health. Upon these facts a decree was entered in her favor.

Shannon & Tilton, for plaintiff. Stephen S. Jewett and Jeremiah J. McCarthy, for defendant.

**BINGHAM, J.** A married woman residing in a sister state may for cause acquire a domicile apart from her husband by removing to this state with the intention of permanently making this her home and actually residing here (*Frery v. Frery*, 10 N. H. 61, 32 Am. Dec. 395; *Payson v. Payson*, 34 N. H. 518; *James v. James*, 58 N. H. 206; *Foss v. Foss*, 58 N. H. 283; *Shute v. Sargent*, 67 N. H. 305, 36 Atl. 282); and a divorce may be granted to her by the courts of this state for causes which have accrued since taking up her permanent residence here and which are recognized by our laws as grounds of divorce (*Hopkins v. Hopkins*, 35 N. H. 474; *Leith v. Leith*, 39 N. H. 20, 40; *Foss v. Foss*, supra). Inasmuch, therefore, as it is found that the plaintiff left her husband in Massachusetts for cause, that she was domiciled in this state when this proceeding was commenced, that

she had actually resided here for a year next preceding the beginning of the action, and that since making her permanent residence here had been so treated by the defendant as to seriously endanger her health, it is clear that the court had jurisdiction of the cause and could grant a valid decree of divorce.

The fact that the defendant had previously brought a proceeding for divorce against the plaintiff in Massachusetts, which was pending in the courts of that state at the time this proceeding was commenced, furnishes no ground for depriving this court of jurisdiction, or for abating this proceeding. The cause alleged in that proceeding is not the same as in this; and, if it were, its pendency in Massachusetts would not be a ground pleadable in abatement of the present action. *Weeks v. Pearson*, 5 N. H. 324; *Goodall v. Marshall*, 11 N. H. 88, 35 Am. Dec. 472; *Yelverton v. Conant*, 18 N. H. 123; *Smith v. Insurance Co.*, 22 N. H. 21; *Rogers v. Odell*, 39 N. H. 452; *Moore v. Casualty Co.*, 74 N. H. 47, 64 Atl. 1099; *Stevens v. Stevens*, 1 Metc. (Mass.) 279; *Cordier v. Cordier*, 26 How. Prac. (N. Y.) 187; *Simpson v. Simpson* (Cal.) 41 Pac. 804; 1 Cyc. 34, 35, 36.

Exception overruled. All concurred.

(75 N. H. 7)

Ex parte SNOW.

GLIBSON et al. v. SNOW et al.

(Supreme Court of New Hampshire. Carroll. June 2, 1908.)

**1. DEPOSITIONS—PRODUCTION OF DOCUMENT IN ATTORNEY'S CUSTODY—RIGHT OF ADVERSE PARTY TO DISCLOSURE.**

Under Pub. St. 1901, c. 224, § 14, providing that no party shall be compelled in testifying to produce any writing material to his case, etc., contestants of a will could not be compelled to produce a copy of the testimony of witnesses to the will taken down by contestants' attorney's stenographer when the will was proved in solemn form, and, the attorney's possession being contestants', he could not be compelled to produce it on the taking of his deposition by the other parties.

**2. SAME—REFUSAL TO PRODUCE IMMATERIAL WRITING—PUNISHMENT IMPROPER.**

On the taking of a witness' deposition, he cannot be punished for refusing to produce a writing not material to any issue in the case.

**3. DISCOVERY—RIGHT TO.**

If a court can compel one party to permit his adversary to inspect memoranda made in preparing the case, it should not exercise the power unless satisfied that it should or that such course tends to promote discovery of the truth, and contestants of a will should not be compelled to disclose a copy of the testimony of witnesses to the will taken down by contestants' attorney's stenographer when the will was proved in solemn form, where their adversaries and counsel attended the hearing in probate court, the adversaries live near such witnesses, the witnesses do not appear to be hostile, and it does not appear that the adversaries are not informed of every fact testified to by the witnesses.

Exceptions from Superior Court, Carroll County; Chamberlin, Judge.

Petition for habeas corpus by one Snow

and bill for discovery by one Gibson and another, executors, against Snow and another. Petitioner being discharged and the bill being dismissed, defendants excepted. Exceptions overruled.

Snow, the petitioner in the habeas corpus proceeding and one of the defendants in the second action, was employed by the other defendants to contest the will of William Randall. When the will was proved in solemn form, Snow had his stenographer take the testimony of the witnesses to the will. The plaintiffs' counsel took no minutes of the testimony, thinking they could procure a copy from Snow, if one was needed. Some time after the hearing, they tried to procure a copy, but Snow refused to furnish it. They then took his deposition. The summons required him to produce a copy of the testimony of the witnesses to the will, but he refused to comply, and was committed for contempt. The plaintiffs then brought the proceeding for discovery, making Snow and his clients defendants, and alleging that the plaintiffs' case could not be prepared for trial without the copy of the testimony in question. The only evidence to sustain that allegation was the testimony of one of the plaintiffs' attorneys. The court discharged Snow on habeas corpus and dismissed the bill in equity, and the plaintiffs excepted.

Sargent & Niles and John B. Nash, for plaintiffs. Leslie P. Snow and John C. L. Wood, for defendants.

YOUNG, J. 1. The plaintiffs undertook to compel Snow to produce the copy as a part of his deposition, and he refused on the ground that his possession was the possession of his clients, and that they could not be compelled to produce it because of section 14, c. 224, Pub. St. 1901. It is clear that they could not be compelled to produce the copy in that way, for it is a writing within the meaning of that section. If it either is or may be admissible on any issue in the case, it would come within the provision of that section; and, if it is inadmissible as to every issue, it is elementary that they could not be punished for refusing to produce it. The copy of the evidence was their property, and was in Snow's possession because he was their attorney. Since this is so, the plaintiffs' exception to Snow's discharge on habeas corpus must be overruled if his possession of the copy was the possession of his clients.

It is usually held that, if an attorney has a paper belonging to his clients, his possession is their possession (Anonymous, 8 Mass. 370), and that the test to determine whether he can be compelled to produce it is to inquire whether his clients might be required to do so. 4 Wig. Ev. § 2307. The plaintiffs say, however, that this rule does not obtain in this jurisdiction, and rely on Bradley's Petition, 71 N. H. 54, 51 Atl. 264, to sustain

their contention. The only point that case decides is that section 14, c. 224, Pub. St. 1901, will not protect an employé of a corporation, if, when giving a deposition in an action against the corporation by one who was injured in an accident, he refuses to disclose the names of those he knows were present. The case does not sustain the plaintiffs' contention, and there is nothing to show that the section above cited was intended to modify the general rule that an attorney's possession of a writing belonging to his clients is their possession. Nor is that case in point on any question now before the court. Snow was not committed for refusing to state what the witnesses to Randall's will testified to in the probate court, but for refusing to produce a copy of his stenographer's minutes of their testimony; that is, he was not adjudged to be in contempt because he refused to testify as to what the witnesses said on the ground that it was a privileged communication, but because he refused to produce a writing which belonged to his clients. The plaintiffs' argument, founded on the proposition that the copy is not a privileged communication, is therefore wide of the mark; for the reason Snow cannot be compelled to produce the copy is not because it is a privileged communication, but because his clients could not be compelled to produce it.

2. It will not be necessary to consider whether a bill of this nature can be maintained against one who is not a party to the proceeding in aid of which it is brought (Adams, Eq. 314), nor whether the court can compel one of the parties to an action to permit the other to inspect memoranda made by his adversary in preparing the case for trial; for if it is conceded that the court has that power, and that the bill can be maintained against Snow, it does not follow that the court must order the defendants to furnish the plaintiffs with the copy. If the court has the power, it should not exercise it unless it is satisfied that that is what should be done, or that such a course would tend to promote the discovery of the truth. Eaton v. Eaton, 64 N. H. 493, 496, 14 Atl. 867; Reynolds v. Fibre Co., 71 N. H. 332, 336, 51 Atl. 1075, 57 L. R. A. 949, 98 Am. St. Rep. 535; Jaques v. Chandler, 73 N. H. 376, 382, 62 Atl. 713; Fenner v. Railway, L. R. 7 Q. B. 767. Since this is so, the question of law raised by the plaintiffs' exception to the dismissal of the bill in equity is not whether there is any evidence tending to prove that it would be equitable to compel the defendants to furnish the plaintiffs with the writing in question, but whether that is the only inference which can be drawn from the evidence relevant to that issue. One of the plaintiffs' counsel testified that he attended the hearing before the probate court, and that one of the subscribing witnesses to the will (he did not remember which) testified to

something (he did remember what) in respect to Randall's mental condition. It also appeared that the plaintiffs attended the hearing, and that they live near all the witnesses to the will. It did not appear that the witnesses were hostile to the plaintiffs or unwilling to give them all the information they possessed regarding the matter in dispute, or that the plaintiffs were not informed of every fact testified to by the witnesses. It is clear it cannot be said that it conclusively appears from this evidence either that the bill was brought to enable the plaintiffs to discover the truth about Randall's mental condition or that it was inequitable for the court to refuse to compel the defendants to furnish the plaintiffs with a copy of the evidence. In view of this result, it would serve no useful purpose to consider the plaintiff's exception to the ruling that the copy could only be used as impeaching testimony.

Exceptions overruled. All concurred.

(221 Pa. 31)

### COMMONWEALTH v. LOMBARDI.

(Supreme Court of Pennsylvania. April 20, 1908.)

#### 1. CRIMINAL LAW—APPEAL—REVIEW—REFUSAL OF NEW TRIAL.

Refusal of court to grant a new trial on conviction of crime is not assignable for error.

#### 2. SAME—MISCONDUCT OF JURY.

Where a jury, on a trial for murder, were permitted to take their meals in the common dining room of a hotel, and sit on the veranda and to talk with outsiders at the windows of the jury room, it is not ground for reversal of a conviction, where it appears that the jury were always accompanied by two tipstaves, and had a separate table for their meals, and did not converse with any one as to the case during the trial.

#### 3. SAME—THIRD PARTY IN JURY ROOM.

Where a barber entered the jury room after it had been sworn, and separately shaved the members of the jury, with the consent of the counsel on both sides, and the barber had been instructed not to talk to the jury, and the only word he spoke was to say "next" when he had shaved one man and was ready for another, there was no ground for reversal.

#### 4. SAME—INSTRUCTIONS.

It is good practice for the judge to instruct the jury about communications with outside parties.

Appeal from Court of Oyer and Terminer, Mercer County.

Amebalo Lombardi was convicted of murder in the first degree, and appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. G. White, W. R. Stewart, Fred A. Service, and J. M. Campbell, for appellant. T. C. Cochran, J. A. McLaughry, and S. H. Miller, for the Commonwealth.

MITCHELL, C. J. The killing and the circumstances of it were not materially disputed. The only issue, therefore, practically, was the degree of the crime. The case

was submitted to the jury in a long and careful charge, to which no exception was taken, and the jury found a verdict of murder of the first degree. Under such circumstances serious error should be shown to justify the delay of justice by an appeal. The defendant went on the premises of the deceased, and there fired three, or perhaps four, shots from a revolver, one or more of which killed the deceased. In view of these facts the claim that the jury were not warranted in finding murder of the first degree is frivolous. The elements of first degree were undisputed, and that is all this court is required to inquire into. If the elements are there, the conclusion is for the jury. None of the assignments of error is in proper form, all of them being to the refusal of the court to grant a new trial, which is not assignable for error. Apart from this defect of form, none of them involves reversible error. Some of them, however, call attention to irregularities that are always to be avoided if possible, and which, therefore, require some notice.

Among the reasons for new trial were: "(5) That during the progress of the trial, the jury were allowed to take their meals in the common dining room of the Hotel Humes, with the other guests, and that conversation occurred between the jury and others, and that the jury and others conversed while the former sat on the south veranda of said hotel, and that jurors conversed with outsiders from the third story windows of the jury room, during the progress of the trial. (6) That a barber was permitted to enter the jury room, where the jury was assembled, after they had been sworn in this case, and did then and there separately and severally shave the members of the jury." The learned judge investigated these complaints carefully, and his conclusions are best stated in his own words: "It is true that the jury took their meals in the regular dining room of the hotel, but they were accompanied by two tipstaves, and were assigned to a table by themselves, in the extreme northwest corner of the dining room. It is also true that one evening, or perhaps more than one, the jury sat on the balcony of the south side of the hotel, where they were also accompanied by two tipstaves. This balcony is about three feet above the level of the sidewalk, and is inclosed on all sides by an iron railing about three feet in height, and no person other than the jury and the tipstaves were at that time on the balcony. It may be that some members of the jury spoke to persons passing along the sidewalk, by bidding them the time of day or something of that kind. One of the defendant's counsel also informed the court since the verdict that two members of the jury called to him from a window of the jury room on the third floor, and tried to enter into conversation with him. Aside from this statement of counsel, no evidence was offered to show that any member of the

jury spoke to any person whatever. But even conceding that some members of the jury did speak to or talk with outsiders, the admission of the learned counsel in the written brief that in none of the instances referred to was a single word said concerning the case in which they had been sworn takes all of the vitality out of the exceptions now being considered. \* \* \* In the same connection the counsel for the defendant allege and discuss the error of the court in permitting a barber to enter the jury room and shave some or all of the members of the jury. The jury made a request for a barber, counsel on both sides consented, and the court granted the request, with strict instructions to the barber that he was not to talk to any member of the jury. Our information is that the only word spoken by the barber while in the jury room was to say 'next' when he had shaved one man and was ready for another." Such occurrences are always subjects of suspicion and complaint, as well as gross exaggeration, as they seem to have been in the present case. But for these very reasons they should be guarded against with unremitting care by the tipstaves and the supervision of the court itself. On the part of jurors they are nearly always due to ignorance, and it is good practice for the judge, even in cases of less grade than murder, to instruct and caution the jury about communications with outside parties. But it is not always possible, particularly in the limited accommodations of smaller towns during court sessions, to keep the jurors segregated as completely as might be desirable. The day has gone by when jurors were kept without food or fire to coerce an unwilling agreement, and jurors are no longer regarded as wrongdoers, who want only a chance to violate their duty. Such situations are to be treated with common sense, and while the investigation should be full and searching, yet a trial really fair and proper should not be set aside for the mere suspicion or appearance of irregularity shown to have done no actual injury. This is the uniform ruling of the Pennsylvania cases: *Alexander v. Commonwealth*, 105 Pa. 1; *Goersen v. Commonwealth*, 106 Pa. 477, 51 Am. Rep. 534 (see specially the remarks of Ludlow, J., on pages 492, 493); *Commonwealth v. Eisenhower*, 181 Pa. 470, 37 Atl. 521, 59 Am. St. Rep. 670; *Commonwealth v. Cressinger*, 193 Pa. 326 (338), 44 Atl. 433; *Commonwealth v. Williams*, 209 Pa. 529, 58 Atl. 922.

Judgment affirmed, and record remitted for purpose of execution.

(220 Pa. 542)

**BILOTTA v. MEDIA, MIDDLETON, ASTON & C. E. RY. CO.**

(Supreme Court of Pennsylvania. April 20, 1908.)

**1. CARRIERS—INJURY TO PASSENGER—PROXIMATE CAUSE OF INJURY.**

Where some peculiarity of an injured party, unknown to defendant carrier, whereby he could

not understand what would be a sufficient warning to an ordinary person, is the proximate cause of his injury, the accident is to be referred to such party's misfortune, and not to the negligence of the defendant because of failure to give an effectual warning.

**2. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

Plaintiff sued a street railway company to recover for personal injuries by coming in contact with a live wire, which had been dragged down by the fall of a tree. Plaintiff, an Italian, was warned by the motorman to remain seated in the car; that it was dangerous to cross over to another car to which he was to be transferred. Not understanding the motorman, he started to leave the car, when he was warned back by defendant's superintendent by motions, but, disregarding the warning, came in contact with the wire, and was injured. *Held*, that it was error to refuse a point presented by defendant that there was no obligation on its part to warn plaintiff in Italian, and if the warning indicated danger ahead to any man of ordinary intelligence, it was sufficient, the court modifying the instructions to charge that, if from any motion or act of defendant, plaintiff understood the warning, he could not recover, but that if he was warned in a language that he did not understand and he did not heed it, it was not contributory negligence for him to pay no attention, but if he understood the motions and directions not to go on and he did, it constituted contributory negligence.

Appeal from Court of Common Pleas, Delaware County.

Action by Guiseppe Bilotta against the Media, Middleton, Aston & Chester Electric Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

David Wallerstein and E. A. Howell, for appellant. Jos. H. Hinkson, for appellee.

STEWART, J. The plaintiff boarded a car of the defendant company at Chester to go to a point on its Media line beyond the intersection at Folsom. It so happened that about an hour before, a large tree, uprooted by a storm, had fallen across the track and the public road alongside, at a point between Chester and Folsom, temporarily preventing through travel in the same car. To meet conditions existing while the work of removal was going on, the company ran its cars from Chester to the place of obstruction, then back again to Chester; and in the same way ran the cars from Folsom to the place of obstruction, and then back; permitting an exchange and transfer of passengers at the place of interruption. The fallen tree had stood north of the track, and beyond two telephone lines, one of which belonged to the defendant company and the other to an independent company. In its fall the tree carried the wires of these lines down with it and across the trolley wire. Some of the wires thus thrown down were broken, some were tangled in the branches of the trees, and all to greater or less extent were carried over the whole space covered by the débris. When the car in which the



plaintiff was traveling had reached the point of obstruction, plaintiff alighted, and while attempting to cross over to where the other car was, or where it was expected, a distance of about 75 feet, he encountered a broken wire, which he says was concealed from his view, and received the shock which occasioned his injury. On the trial of the case the effort was to show negligence on the part of the defendant, in failing to adopt proper measures to secure the safety of its passengers, in connection with their transfer from one car to the other beyond the obstruction upon the track and road. True, this is not the negligence charged in the statement of the cause of action, but it is what was set up on the trial, what was defended against there, and what is insisted upon here. The situation occasioned by the falling of the tree was unusual and unexpected, but with electric wires scattered in such confusion, in the branches of the trees, upon the ground, and in some places imbedded in the ground, it was a situation that manifestly exposed to danger any one attempting to cross over debris, and it became the plain duty of the company not only to see that there was a safe way of transfer from one car to the other, since it had invited such transfer, but it was clearly its duty to warn passengers of the danger of attempting to pass over or through the obstruction before the wires had been disconnected or removed. Conceding that a safe way did exist by avoiding entirely the obstruction and passing around it—a condition which must have been obvious—the question remained, did the company do what it should have done by way of warning the passengers of the danger of attempting to cross over through the brush? The brush itself, on that part of the public road where plaintiff met his injury, offered no serious impediment to travel, and the only source of danger there was from the scattered wires. Of this danger it was the duty of defendant to give warning; its employés there engaged were fully informed as to the situation, for several of them testified that they had seen sparks of fire shooting from the debris, smoke and flame. It is not a question of what the defendant did, or what it failed to do, in giving warning to other passengers; in this matter the plaintiff stands in a class by himself, since it is in evidence that special effort was made to caution and warn him, even to the extent of directing him to desist from his efforts to cross over when he attempted so to do. If the warning was given him in such a way that he must have understood it, and he gave it no heed, he alone would be responsible for the consequences of his daring. The motorman testified that when he (the plaintiff) was about to leave the car, then about 12 feet from the fallen tree, to cross over, he told him to remain seated, that the car he intended to take on the other side

had not yet arrived, and that it was dangerous to cross over there. Defendant's superintendent was the first to alight from the car, and the plaintiff followed next. The former proceeded to where the workmen were employed in cutting the tree, and upon looking around saw the plaintiff approaching directly at a distance of about 5 yards. He testified that he called to the plaintiff to stay back, and indicated like direction by movements. Had these warnings been heeded, the accident most likely would have been avoided. To escape the effect of this testimony it was argued that plaintiff, being an Italian, unfamiliar with our language, did not understand the warning given. The purpose of defendant's tenth point was to meet his aspect of the case. It was as follows: "There was no obligation on the part of defendant company to warn the plaintiff in Italian, and if the jury find that the warning was such as to indicate danger ahead to any man of ordinary intelligence, the plaintiff cannot recover." This point called for an unqualified affirmance with respect to both questions raised, the negligence of the defendant and the contributory negligence of the plaintiff. If the warning was such as would indicate danger ahead to any one of ordinary intelligence, a disregard of it would unquestionably convict the party disregarding it of contributory negligence. If the defendant's servants knew, or had reason to believe, that the person they were attempting to warn in English was ignorant of that language, they would have come short of their duty had they done nothing more; but without anything to indicate peculiarity in the plaintiff, distinguishing him from the ordinary traveler, defendant's servants had a right to presume that what would be notice to the ordinary traveler would be notice to him. His inability to understand English required greater caution on his part in advancing, but added nothing to the duty of the defendant, except as such fact was brought to its notice. Had the plaintiff been deaf, it would hardly be contended that failure to spell out "danger" to him according to the manual of mutes would have been negligence. With no greater reason can the failure to address the plaintiff in his own language be accounted negligence. While the learned trial judge in terms affirmed the point presented, he so qualified it that his answer was in effect a rejection of the point. His language was: "We will say that if from any motion or act of the defendant he (the plaintiff) understood the warning, then he cannot recover. But we cannot say that if they warned him in a language that he did not understand, and that he did not heed it, that it would be contributory negligence for him to pay no attention to it; but we do say to you that the point is affirmed if he understood it, though he might not have understood the language, if he understood the motions and

directions not to go on, understood that they were dangerous." The point was directed to both questions in the case—the negligence of the defendant and the contributory negligence of the plaintiff. We have considered it mainly in connection with the first, upon which it had immediate and direct bearing. Where the inability of the party injured, owing to some individual peculiarity of his, unknown to the defendant, to understand what to the ordinary person would be a sufficient warning, is the immediate and approximate cause of his injury, the accident is to be referred to the party's misfortune, and not to the negligence of the defendant, simply because of failure to give effectual warning. How far the jury was influenced by the court's ruling in this peculiar manner of course we cannot say. It is enough to know that the point had a direct bearing upon a material question in the case, and should have received an unqualified affirmation. Apart from this the record shows no error. The case was one for the jury on both questions raised, because of conflicting evidence. The tenth assignment of error is sustained; the other assignments are overruled.

The judgment is reversed, and a venire facias de novo awarded.

(221 Pa. 51)

REYNOLDS et al. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. April 27, 1908.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—ACTION FOR INJURIES.

In an action against a city to recover for injuries received because of an alleged defect in a sidewalk, the questions of plaintiff's contributory negligence and defendant's negligence held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, §§ 1745-1757.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by David R. Reynolds and Blanche S. Reynolds against the city of Philadelphia. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Frederick Beyer, Robert Brannan, Asst. City Sol., and J. Howard Gendell, City Sol., for appellant. Henry J. Scott, for appellees.

PER CURIAM. The plaintiff, walking at night along Diamond street, stepped into a hole or depression, apparently the cover of a water box, which had sunk several inches and was an obstruction in the line of travel. The plaintiff herself was not very clear as to the cause of her fall; but she said, "My foot went in and I fell." But her companions examined the spot immediately and were more explicit. On the question of her own

negligence she was also far from clear; but, among other answers, she said she was just looking the way she walked. On both points it was a case for the jury.

Judgment affirmed.

(220 Pa. 646)

CHESTER CITY et al. v. WHITE et al.  
(Supreme Court of Pennsylvania. April 20, 1908.)

JUDGMENT—CONSENT—VACATING.

A city filed a bill to prevent the removal, through the public streets, of a building used by a smallpox hospital. The parties agreed on a decree directing the destruction of the building and the compensation to the owners. After the entry of the decree and the destruction of the building, intervening taxpayers moved to set aside the decree, on the ground that the city authorities had not expressed their assent to its entry by a municipal ordinance. Held, that the vacation of the decree would be an unjust exercise of judicial authority, which the city could not demand, and the interveners, having no higher rights than the city, were subject to the same restrictions.

Appeal from Court of Common Pleas, Delaware County.

Bill by the city of Chester and the board of health against Eugene F. White and Robert S. Maison. From decree dismissing petition to set aside the decree rendered, Harry S. Riley and others, taxpayers, appeal. Affirmed.

The following are the facts as found by Johnson, P. J., and Broomall, J., in the court below:

"On March 27, 1905, the plaintiffs filed their bill in this court, setting forth that on July 11, 1902, Eugene F. White and Robert S. Maison, M. D., had entered into a contract with the city of Chester. This contract stipulated for the construction of a smallpox hospital within the city, or within three miles therefrom, for the reception and treatment of persons afflicted with smallpox in said city, under the rules and regulations of the board of health, and upon certain compensation therein prescribed. This agreement provided for a term of two years. The hospital was erected by White and Maison, and the term of the contract had expired, and the necessity for its continuance had ceased. The hospital buildings were about to be removed by White and Maison from their present location to some other locality in the city of Chester, and that the effect thereof would be to endanger public health. The prayer in this bill was for an injunction to prevent the removal of the said buildings and their contents along any of the public highways of the city. The locality where the buildings were erected is within the corporate limits of the city of Chester. After this bill was filed, to wit, on March 31, 1905, an injunction preventing the removal of the said buildings along said public highways was issued. On May 18, 1905, the defendants filed an answer, substantially setting forth that the buildings had been erected upon ground which they had leased for the

purpose. The lease had expired. The buildings and contents had cost them about \$12,000. They could not be removed from the demised property except over a public highway or highways of the city. They could be removed without endangering public health, and that, if they were enjoined from removing them, such prohibition would amount to a confiscation of their property. A replication joining issue upon all of the averments of the answer having been filed, the case was proceeded with until September 12, 1906, when a decree nisi was entered, adjudging the injunction to be permanent. Exceptions were filed by the defendants to this decree, which were dismissed on March 26, 1907, and at the same time a decree was entered, under an agreement of the attorneys for the plaintiffs and defendants. This decree is the subject of the present contention and is here given in *ipsisssimis verbis*:

"And now, March 26, 1907, it is ordered and decreed that the city of Chester, plaintiff above named, pay to the defendants the sum of \$5,000, the same to be accepted by a stipulation, to be filed by them as a full settlement of all claims and demands between the parties for or by reason of the agreement entered into between the parties for the conduct of the hospital for contagious diseases, for or by reason of the issuance and continuance of the injunction issued herein, for or by reason of the entry of this decree, or for or by reason of the destruction by fire of all buildings, beds, bedding, furniture, dishes, and all other property of every kind and description on the premises, the destruction of which is hereby ordered to be done within 30 days hereafter. It is further ordered and decreed that the injunction issued shall be and remain perpetual, and that the payment of \$5,000 by the plaintiff city, and acceptance of it by the defendants, relieves the parties, respectively, of the payment of costs one to the other. The payment of said sum of \$5,000 is not to be due and payable until the buildings and property have been destroyed by fire as aforesaid. It is further ordered and decreed that if the said sum of \$5,000 should not be paid by the said city of Chester within three months after demand made, and after the buildings and other property have been destroyed, it is stipulated that upon motion a decree shall be entered dismissing said bill, with costs to the defendants."

"On May 18, 1907, the petition of taxpayers was presented, praying for permission to intervene in this suit, for the purpose of inquiring into the validity of this decree. On this petition a rule to show cause was granted. An answer was filed by White and Malson, denying the right of the taxpayers to intervene, and further denying the right to inquire into the validity of the decree, for the reason that on the 29th day after the date of the decree they had burned the buildings in

pursuance of the direction of the decree. On May 29, 1907, the taxpayers presented their further petition to have the said decree revoked and set aside."

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

A. B. Geary, for appellants. O. B. Dickinson and J. E. McDonough, for appellees.

STEWART, J. However much the decree in this case may have been open to attack on appeal for irregularity, or for reasons still more serious, it may not now be assailed in the way here attempted. This is not an appeal for the decree itself—if it were, it comes too late to avail—but an appeal from the order of the court below refusing to vacate and strike off the decree. Admitting the right of the appellants to be heard as interveners, since it was allowed by the court below, such right allows them to do only that which the original party, in whose shoes they stand, might do. They are subject to the same limitations and restrictions. Can it be pretended that the city of Chester, having received the benefit of so much of the decree as required the destruction of the defendant's property, could now come in and attack the validity of the decree, in order to escape the liability, imposed on it by the decree, to make compensation for the property destroyed at its instance? If it would be inequitable to allow such demand on the part of the city, it would be none the less so to allow it at the instance of these intervening taxpayers. The decree was moulded to express what at the time was supposed to be the agreement of the parties. The effort in the court below, on part of the appellants, was to show that the city authorities had not expressed their assent to the entering of the decree by municipal ordinance, and that therefore the decree, in so far as it charged liability upon the city, and embraced other things than the relief prayed for in the original bill, was invalid, and should be vacated. The time to set up such defense was before anything was done under the decree to the advantage of one side or the prejudice of the other. The decree directed defendant's property to be destroyed, for sanitary considerations, within 30 days. On the last day of this period the property was destroyed in obedience to the decree. The appellants did not seek to intervene until afterwards. In refusing to vacate the decree the learned judge said: "It would be manifestly an illegal, unjust, and inequitable exercise of judicial authority to decide that the decree of March 26, 1907, should be revoked after the defendants have incurred the loss of their property, and thus deprive them of the advantage of the other parts of the decree." In this expression of view we fully concur.

The decree is affirmed, and the appeal is dismissed at the costs of the appellants.

(220 Pa. 522)

## STEPHENS v. DAYTON et al.

(Supreme Court of Pennsylvania. March 30, 1908.)

## PERPETUITIES—CONSTRUCTION OF WILL.

Testator gave all his property to his executor in trust, and directed that the net profits should be divided semiannually between his son and daughter, or, should either die, between the survivor and heirs of the deceased, or, if the trust should continue after the death of both his son and daughter, the income to be divided between the heirs and next of kin of the same. It further provided that the trust should cease on the sale by the trustees of his shares of capital stock in a certain corporation, or on the trustees dividing the stock between his two children, or on the death of the survivor of such children should he or she die before the other, and that on the termination of the trust the trustee should convey all the estate in his hands to his son and daughter, or, if both were dead, to such persons as under the intestate laws would be thereto entitled had the son or daughter died owner of the same, and also that, if it should be unwise in the opinion of the trustees to divide his estate, the trust should continue during the life of the survivor of his grandchildren who might be living at the time of testator's death, or until such time as the trustees should agree that it was safe to terminate said trust. Held not to offend against perpetuities or the statutes preventing accumulations beyond the life or lives in being and 21 years thereafter, as in no event could it extend beyond the life of a grandchild living at testator's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, §§ 4-44.]

Appeal from Court of Common Pleas, Lycoming County.

Bill by Susan M. Stephens against George A. Dayton and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The bill averred that John E. Dayton died July 3, 1905, leaving a last will and testament, in which he named his son, Ira A. Dayton, and his brother, George A. Dayton, and William J. Dale as executors and trustees, with full power and authority to carry on the business theretofore carried on by the testator during his lifetime, and in case of a vacancy, from any cause, at any time, in the board of trustees, said trustees are authorized to fill such vacancy; that testator left to survive him two children, both of full age, viz., Ira A. Dayton and Susan M. Stephens (plaintiff and appellant in this case) and five grandchildren, viz., John D. Stephens, aged 13, William H. Stephens, aged 11, and Mary A. Stephens, aged 4, children of said Susan M. Stephens, and Louise Dayton, aged 9, and Robert Dayton, aged 7, children of said Ira A. Dayton, and that said Ira A. Dayton, one of said executors and trustees, is dead, and C. W. Scott has been appointed executor and trustee in his stead; that the trust which testator undertook to create in his executors and trustees and in their successors violates the rule of law against perpetuity, and is in unlawful restraint of alienation and therefore void; that said testator, at and before the time of his death, was engaged in the manufacturing business, and possessed of property of the value of \$103,000; that the executors

and trustees had neglected and refused to account to plaintiff, though often requested so to do. The bill prayed for a decree making null and void the trust created under the will of the testator.

Argued before MITCHELL, O. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

John J. Reardon and Wm. M. Stephens, for appellant. Seth T. McCormick and A. M. Hoagland, for appellees.

MESTREZAT, J. The testator devised and bequeathed all his property to his executors in trust for the purposes named in his will, and then over.

By clause (h) of paragraph 2, it is provided: "The residue of the rents, issues and profits of my said estate, after paying all charges thereon, shall be equally divided, semi-annually, between my son Ira A., and daughter, Susan, or should either die, between the survivor and the heirs and the next of kin of the deceased, said heirs and kin taking what the deceased, if living, would have taken; or, if this trust should continue after the death of both my said son and daughter, the said residue of the rents, issues and profits of my estate shall be divided, one-half to the heirs and next of kin of said deceased son, and one-half to the heirs and next of kin of said deceased daughter."

Clauses (k) and (l) of the said paragraph provide for the termination of the trust. Clause (k): "The trust hereby created shall cease immediately upon the sale by the trustees of my shares of the capital stock of the J. E. Dayton Company, Williamsport, Pa., or upon the said trustees dividing the said capital stock between my said two children or upon the death of the survivor of my son or daughter, should he or she die before the other, and the said trustees shall immediately, upon this its termination in any one of the ways aforesaid, convey all the estate then in their hands to my son and daughter in equal shares; or, if my son or daughter or both be then dead, the half which otherwise would be conveyed to him or her, shall be conveyed to the heirs of said son or daughter, or, if the property be the personalty, to such persons as, under the intestate laws, would be thereto entitled had such son or daughter died owner of it." Clause (l): "Notwithstanding the provisions in the preceding paragraph as to the termination of the trust hereby created, if in the unanimous judgment of my said trustees, it would be unwise for any reason at the time and under the conditions mentioned therein to so divide my estate, this trust shall continue during the life of the survivor of my grandchildren, who may be living at the time of my death, or until such time, although one or more of said grandchildren be living, as the said trustees shall unanimously agree that it will be wise and safe to terminate said trust."

It will be observed that under clause (k) there are three ways in which the trust may be terminated. But each of those ways contemplates its termination not later than the death of the survivor of the testator's two children, and hence earlier than the date fixed in the succeeding clause. Whether it should be terminated in the manner provided in clause (k) was, by clause (l) left to the unanimous judgment of the trustees. If in their judgment it was unwise for any reason to terminate the trust and divide the estate as provided in clause (k), they were authorized to continue the trust as provided in clause (l). It is, therefore, apparent that, under neither clause, could the limitation upon the life of the trust be extended beyond the restriction provided in clause (l).

There is no difficulty in interpreting clause (l) and in reaching the conclusion that it does not violate the rule against perpetuities. The controlling language is: "This trust shall continue during the life of the survivor of my grandchildren, who may be living at the time of my death, or until such time, although one or more of said grandchildren be living, as the said trustees shall unanimously agree that it will be wise and safe to terminate said trust." As contended in appellant's brief, this enlarges the duration of the trust declared in clause (k). If, therefore, in the judgment of the trustees it is unwise to divide the estate at the death of the testator's surviving child as provided in clause (k), the trust shall continue during the life of the survivor of his grandchildren who may be living at the testator's death. The death of the surviving grandchild who was living at his grandfather's death fixes the utmost limit of the trust, and under this clause of the will it must terminate upon the happening of the event. But the trust may be sooner terminated under the alternative provision of the clause. It is to continue during the life of a surviving grandchild, "or until such time, although one or more of said grandchildren be

living," as the trustees may unanimously determine it is wise and safe to terminate it. The trustees, therefore, are not obliged to await the death of the surviving grandchild to terminate the trust and vest the estate. They may end it while any or all of the grandchildren who were living at the testator's death are still living. The "said grandchildren" named in the alternative provision of this clause of the will refer to the grandchildren mentioned in the previous clause who are those living at the death of the testator. In no contingency, therefore, can the trust be extended beyond the life of a surviving grandchild who was living at his grandfather's death. Hence it must be terminated within a life in being at the death of the creator of the trust. At that time, the remainder of the estate will vest in those entitled to it under the will. This trust, therefore, does not offend the rule against perpetuities or the statute that prevents accumulations beyond the life or lives in being and 21 years thereafter.

The third paragraph of the will does not postpone the termination of the trust under the limitation fixed in clause (l) of the preceding paragraph. It is simply a declaration by the testator of his purpose in making the "previous dispositions" of his property. His principal object was, as he states, to preserve his interest in the Dayton Company for his children and descendants. It is true, he says, that his object is to continue the trust "as long as possible," but that does not avoid or change the prior clauses of the will wherein he creates and limits the trust, but is merely an expression of his desire that the property be continued in his descendants as long as it can legally be done.

After a very careful examination and consideration of the will we are of opinion that the learned court below was right in holding that it does not transgress the law against perpetuities.

The decree is affirmed.

(82 N. J. L. 390)

**NEGLEY v. NEW YORK LIFE INS. CO.**  
(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

**APPEAL AND ERROR—DEFECTIVE RECORD—ASSIGNMENTS OF ERROR.**

This court will not consider assignments of error based upon alleged exceptions, if the printed book furnished to the court shows no such exceptions signed by the judge in the court below.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 2300-2305.]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Albert G. Negley, Jr., against the New York Life Insurance Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Francis C. Lowthorp and John Kirkland Clark, for plaintiff in error. Raymond, Van Blarcom & Anthony, for defendant in error.

**PITNEY, C.** This writ of error brings under review a judgment of the Supreme Court based upon the verdict of a jury. The assignments of error, so far as relied upon in argument, are all directed at supposed trial errors. So far, however, as the printed state of the case furnished to the court shows, only one exception was sealed by the trial justice, and this referred to that portion of the charge to the jury relating to the measure of damages. No assignment of error challenges this instruction, and it is admitted in the brief of the plaintiff in error that there is no doubt of its legal correctness. This court will not consider assignments of error based upon alleged exceptions, if the printed book shows no bill of exceptions signed by the trial judge. *McLaughlin v. Davis*, 64 N. J. Law, 360, 45 Atl. 967; *Davis v. Littell*, 64 N. J. Law, 595, 46 Atl. 631; *Conrad v. Brockner*, 70 N. J. Law, 823, 58 Atl. 1019.

No error being shown, the judgment must be affirmed.

(73 N. J. E. 678)

**CLAMPITT et al. v. DOYLE.**

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

**SALES—RIGHT TO RESCIND—LACHES.**

A purchaser who has been led into a contract of sale by false representations that entitle him to rescind the contract has but one election to rescind, which he must exercise with reasonable promptitude after his discovery of the falsity of the representations that induced his purchase. Beyond this mere delay in the rescission of the contract may amount to satisfactory evidence of an election to abide by the contract notwithstanding the fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 313-317.]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by James A. Clampitt and others against John Doyle. Decree for complainants, and defendant appeals. Reversed.

Thomas B. Harned, for appellant. Lewis Starr and Harrison H. Voorhees, for respondents.

**GARRISON, J.** The complainants' bill was filed to set aside an executed contract of sale by which John Doyle, the defendant, had turned over to the complainants the steamboat Major Reybold and certain wharf properties in Salem county for the consideration of \$31,500. The details of the sale involved the transfer of Doyle's stock in a corporation that owned the Reybold, but in its equitable aspect the transaction may be treated as a sale by Doyle to the individual complainants, who constituted a purchasing syndicate.

The equitable ground of the bill is that the sale in question was brought about by the false representation of Doyle that the yearly gross receipts of the Major Reybold were \$35,000 and that her net annual income was \$10,000. The learned Vice Chancellor who heard the cause, upon reaching the conclusion that such representations had been made on behalf of Doyle, and that they were false and had induced the purchase, advised a decree setting aside the sale and relegating the parties to their original status by the reconveyance of the property to Doyle and the repayment of the purchase price by Doyle to the complainants. From this decree Doyle has appealed.

In the view that we take of the case it is unnecessary for us to determine whether the conclusions of fact reached by the learned Vice Chancellor are justified by the proofs; for if it be assumed that the representations of Doyle as to the receipts and profits of the boat were proven, so that the purchasers upon the discovery of their falsity were entitled to elect to rescind the contract of sale on that account, still such election, to have weight in equity, must have been made promptly and unequivocally upon the discovery of the fraud—i. e., it must have been an unqualified election to repudiate the entire bargain, made with reasonable promptness after its fraudulent nature became apparent. Assuming fraud in a vendor and its discovery by the vendee, an election by the latter to rescind the contract of sale cannot follow an election not to rescind; and mere delay—i. e., lack of reasonable promptness—in rescission after the discovery of the fraud is evidence from which an election not to rescind may be inferred. There is, in fine, in equitable contemplation, but one juncture at which a purchaser who has been induced by fraud to enter into a contract of sale may elect on that account to rescind the contract, and that is upon his discovery of the fraud or within a reasonable time thereafter. Beyond this period mere delay in rescission may be satisfactory evidence of a waiver of the right to rescind. That such election, if made, or when made, is final, is also established law. *Dennis v. Jones*, 44

N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899.

The application of these general rules to the case in hand will be apparent upon a brief résumé of the facts and dates established by the testimony. In the summer of 1905 John Doyle, as owner of the boat Reybold, is said to have made the representations as to the earnings of the boat to a broker, who was not at that time negotiating with the complainants. Nearly a year later these representations were communicated by the broker to the complainants and induced their purchase of the boat. On March 1, 1906, the sale was executed and the property turned over by Doyle to one Sproule, the representative of the purchasers. On March 5th, two weeks before the complainants began running the boat, Doyle, according to the complainants, informed Sproule, then their trustee, that the boat was worn out, that no one would ride in her, and that the complainants would be unable to make both ends meet. At this same time Doyle exhibited his check for \$1,500, stating that it was the amount of the commission he was to pay to two members of the purchasing syndicate, whose personal interest in effecting the sale was a surprise to the other purchasers and threw light upon an advance of \$1,500 on the purchase price made pending negotiations. On March 19th the complainants began operating the Reybold between Philadelphia and Salem, N. J., and early in April, according to the complainants, Doyle told the president of the company that the boat would not make the amount that he had said she would—a fact that was, indeed, otherwise self-evident. Notwithstanding these circumstances and disclosures, which constitute the proof of the falsity of Doyle's representations, the complainants continued to operate the boat during the spring, summer, and fall of that year, and not until December 16, 1906, was the election to rescind the contract communicated to Doyle by a written tender to him of the property after he had refused to entertain an offer to repurchase it, made to him a short time previously. That this delay of several months was with the purchasers' knowledge of the fraud that had been practiced upon them is frankly admitted on the witness stand by Mr. Sproule, who throughout the transaction had been the representative and trustee of the purchasers. In response to the question of his counsel, "After you had conversed with Capt. Doyle subsequent to the time the transfer was made, when did you consult counsel relative to the matter?" The answer was, "We went along for some time after discovering the representations that had been made, and we consulted counsel the 1st of September of last year." Inasmuch as the conversation with Doyle referred to in this question was that of March 5th already cited, a delay of six months is admitted to have occurred before even consulting counsel, and after that

no election to rescind was made until nearly four months later, viz., on December 16, 1906. That so long a period was reasonably necessary in order to ascertain whether the receipts would in fact amount of \$35,000 and the net profits to \$10,000 is totally inconsistent both with the proofs and with the whole framework of the complainants' case, which was that the disparity between the receipts of the boat and the representations of Doyle was so great as to shock the conscience. The more likely explanation of the delay is that the margin of profit to the purchasers on their investment of \$31,500 was so great that business prudence suggested that the bargain might be a good one, notwithstanding the annual profit was less than \$10,000. At that rate of profit the sum invested would have yielded an annual dividend of over 31 per cent. It may well be, therefore, that if the boat showed earnings of one-half, or even of one-third, of the sum represented by Doyle, the purchasers would still prefer to hold on to so profitable a bargain. This, however, while sound as a business proposition, would be fatal as a basis for equitable relief. It would be, in fine, one of those elections not to rescind that are inferable from mere delay in rescission.

The facts that were before this court in the case of *Dennis v. Jones*, already cited, are in their essential features so nearly identical with the facts now before us that the equitable rule then applied is obviously applicable to the present case.

In *Dennis v. Jones* the essential facts were that on February 14, 1885, Jones agreed to sell his skating rink to Dennis and Woglom for \$10,000, of which sum the purchasers paid \$5,000 upon entering into possession and secured the remaining \$5,000 by a mortgage on the rink. On the foreclosure of this mortgage in September of the same year the purchasers set up the defense that Jones had represented to them that his net profit in operating the rink had been \$1,000 per month and that the rink was patronized by numbers of the most respectable people in the town. Assuming these representations to have been proven, it was further established by proof that within a week from the time the purchasers took possession of the rink they discovered that the conduct of some of the former employés with disreputable characters who had been allowed to frequent the place had driven away many of the better class of patrons, and they also speedily found out, from the receipts of the rink, that the net profits to be derived from its operation were inconsiderable in comparison with a net profit of \$1,000 per month. "So great, indeed," to quote from the opinion, "was the disparity between the appellant's receipts and the profits which they allege the respondent claimed to have received that it was plainly impossible for his representations to have been true." Notwithstanding that this discovery was made early in April, the purchasers did not

make their election to rescind the sale until some time in September following, when, according to the opinion, "it became plainly apparent that the popular furor for roller skating was waning and that the business they had entered upon must soon collapse. Under this condition of affairs," the opinion continues, "they now seek to rescind their contract because of the fraud they allege to have been practiced upon them. It is unnecessary for us to determine whether the proofs establish the fraud, for it is apparent that, if there was in fact the fraud complained of, it in substance became manifest to the appellants months before the foreclosure suit was commenced. When it was discovered, it was the appellants' duty, with all reasonable diligence, to disaffirm the contract. They could not derive all possible benefit from the transaction, and then be relieved from their obligation by a rescission or refusal to perform, on their part. It would be most inequitable to permit them to hold the rink and its business, in apparent acquiescence in the fraud, until the collapse of the business was assured, and then rescind their contract.

"It is the rule that the defrauded party to a contract has but one election to rescind, that he must exercise that election with reasonable promptitude after discovery of the fraud, and that when he once elects he must abide by his decision. Bigelow on Law of Fraud, 436. Delay in the rescission of the contract is evidence of a waiver of the fraud, and an election to treat the contract as valid. *Williamson v. N. J. Southern R. R. Co.*, 29 N. J. Eq. 311, 319; *Brown v. Mutual Benefit Life Ins. Co.*, 32 N. J. Eq. 809; *Oakey v. Cook*, 41 N. J. Eq. 350, 7 Atl. 495; *Bigelow on Law of Fraud*, 438; 2 *Pomeroy's Eq. Jur.* p. 817; *Baird v. New York*, 96 N. Y. 567; *Farlow v. Ellis*, 15 Gray (Mass.) 229.

"I think," the opinion concludes, "that in the case now considered it is plain that after the appellants had knowledge of all the substantial features of the alleged fraud, and were fully aware of the deceit which had been practiced upon them, they so acted as to afford plenary evidence of an election to abide by their contract. Their election thus made was irrevocable."

The case now before us is even stronger upon its facts than that just cited, for the reason that the nature of the enterprise and the relative situation of the parties more imperatively called for promptness in the restoration of the original status. Doyle was a South Jerseyman, a resident of Salem county, with a lifelong acquaintance among the shippers of that farming community. He had worked on the Major Reynold first as a deckhand, afterward as fireman, then as second engineer, and finally as chief engineer, and in 1893 purchased the boat and became her captain. It is fair, therefore, to assume that Doyle was a well-known character in Salem county, and that the local business he controlled was largely due to his personality

and wide acquaintance. The complainants, on the other hand, were strangers to Salem county and were not steamboatmen at all. During the period, therefore, that the boat was being operated by these novices in the business, it was naturally to be anticipated that the trade previously held together by Doyle would slip away or be diverted into other channels, and also that active and permanent opposition would be invited and developed. Such was actually the case. When, therefore, in December, 1900, the purchasers made their belated election to return the boat to Doyle and to demand back the purchase price, the status of the parties had widely altered from what it had been at the time of the purchase of the boat, or from what it would have been had the purchasers elected to rescind their contract with reasonable promptness upon their discovery of the falsity of Doyle's representations. In fine, as was said by this court in *Dennis v. Jones*: "They so acted as to afford plenary evidence of an election to abide by their contract and their election thus made was irrevocable."

Other cases illustrative of this rule are *Arnold v. Hagerman*, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712; *Norfolk, etc., Hosiery Co. v. Arnold*, 49 N. J. Eq. 390, 23 Atl. 514; *Conlan v. Roemer*, 52 N. J. Law, 53, 18 Atl. 858.

The decree of the Court of Chancery is reversed, and the record remitted, that the complainants' bill may be dismissed.

(76 N. J. L. 582)

#### JAMES v. AMERICAN EXPRESS CO.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

#### CARRIERS—EXPRESS COMPANY—DELAY IN DELIVERY—EVIDENCE.

In an action against an express company for delay in the delivery of plaintiff's trunk, containing articles which he intended to use at a summer resort, evidence that the hotel to which the trunk was to be delivered and where plaintiff was to stop was a high-priced hotel, patronized by people of wealth and prominence in the business and social world, that many social functions and entertainments were conducted there for the benefit of the guests, and that there were tennis courts and golf links for the use of guests, which plaintiff desired to use, had used on former occasions, and which he did use after receiving the apparel contained in the trunk, was admissible, as bearing on plaintiff's damage.

Error to Supreme Court.

Action by Peter H. James against the American Express Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Riker & Riker, for plaintiff in error. F. W. Hastings, for defendant in error.

PER CURIAM. This case came before the Supreme Court upon an appeal from a judgment of the Second district court of Jersey City. The Supreme Court affirmed the judgment upon the grounds stated in the following memorandum:



"Per Curiam. The only legal question presented by the state of the case is whether it was error in the trial court to permit the plaintiff to testify that the hotel at Fabian was a high-priced hotel, patronized by people of wealth and prominence in the business and social world, and that many social functions and entertainments were conducted at the hotel for the benefit of the guests, and that there were also tennis courts and golf links for the use of the guests, which he had desired to use and had used on former occasions, and which he did use after he received the two suits from Jersey City. We think that there was no error in permitting this testimony. The judgment rests upon the negligence of the defendant in failing to deliver to the plaintiff at the hotel in question a trunk containing the articles which he had intended to use at that place of resort. The testimony in question tended to throw light upon the nature and to some extent the degree of deprivation suffered by the plaintiff, owing to the defendant's negligence. It was relevant to the issue, and hence its admission not illegal. The judgment of the Second district court of Jersey City is affirmed."

We concur in these views, and the judgment under review should therefore be affirmed, with costs.

(75 N. J. L. 763)

**BATHGATE v. NORTH JERSEY ST. RY. CO.**

(Court of Errors and Appeals of New Jersey. June 15, 1908.)

**1. TRESPASS—ACTIONS—INSTRUCTIONS.**

In an action of tort, in which the declaration counted upon a trespass by the defendant upon plaintiff's land in entering thereon and putting electric wires through the plaintiff's trees, through which wires defendant sent electric current, whereby the trees were injured, where no justification was pleaded, and where the undisputed evidence showed the fact of trespass and the damage resulting therefrom, and there was nothing to show leave or license from the plaintiff, nor any evidence of other right on the part of the defendant, *held* proper to charge the jury that the defendant had no right to run the wires through the trees, and that, in any event, the verdict of the jury must be in favor of the plaintiff for at least nominal damages.

**2. STREET RAILROADS—INJURIES TO PROPERTY—ACTIONS—EVIDENCE.**

Where a street railway company ran its feed wires through the trees of an abutting land owner without leave or license of the owner, *held* that, if this act was to be justified on the ground that the company was acting in the exercise of rights granted to it by the public, such a grant ought to have been adduced by the defendant.

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by Charlotte B. Bathgate against the North Jersey Street Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

John A. Bernhard and Chauncey H. Beasley, for plaintiff in error. Louis Hood, for defendant in error.

**PITNEY, Ch.** The judgment here under review is based upon the verdict of a jury awarding damages to the plaintiff below for injuries to certain trees standing upon lands owned by her in the city of Newark; the injuries having been caused by electric current communicated to the trees through certain wires maintained by the defendant company in the street. Plaintiff's declaration contains three counts. The first is in trespass for entering upon her land and putting electric wires through the trees, through which wires defendant from April 1, 1901, to August 1, 1903, did send electric current, whereby the trees were injured and killed. The second and third counts are in trespass upon the case, and rely upon the negligence of the defendant company in carelessly putting up, stretching, and maintaining wires through the trees, and in negligently maintaining the wires with bad insulation. Defendant did not plead a justification of the alleged torts; its only plea being the general issue.

The evidence at the trial showed that the plaintiff was the owner of a tract of land situate on the northerly side of Orange street, in the city of Newark, her title extending, presumably, to the middle of the street (*Friedman v. Snare & Trieste Co.*, 71 N. J. Law, 605, 609, 61 Atl. 401, 70 L. R. A. 147, 108 Am. St. Rep. 764, and cases cited); that the tract had a frontage of something over 200 feet on the street, with appropriate depth, and upon it was a single dwelling house; that there was a row of shade trees standing upon plaintiff's sidewalk near the curb line; that defendant was operating an electric railway in and along the street; that in the fall of the year 1901 it placed upon poles along the plaintiff's side of the street a cable, made up of numerous electric wires known as feed wires; that the cable was so placed as to come in contact with the trunks of one or more of plaintiff's trees and near to many of the branches, and there was evidence tending to show that the shade trees were injured and eventually killed by the electric current escaping from the feed wires. The undisputed evidence showed that in the year 1893 the street railway was operated with horses; that in 1894 or 1895 electricity was introduced as the motive power, the overhead trolley system being adopted. Iron poles were erected on both sides of the street at or near the curb line, with cross-wires extending across the street from pole to pole supporting the trolley wires over the tracks, and feed wires were suspended upon the poles on one side of the street, and were connected with the trolley wires at intervals. It appeared without dispute that, when it was proposed to equip defendant's car line upon Orange street with electricity, John

Bathgate, who was at that time in charge of plaintiff's property, was opposed to the installation of the electrical equipment, and refused to give consent to the operation of an electrical street railway in front of the plaintiff's land, and that consent was finally given upon the agreement of the company, made by its general manager, that the company would place its feed wires on the south side of Orange street opposite to plaintiff's property, so as to avoid injury to her trees. This agreement was observed in the original installation; the feed wires being placed on the poles on the south side of the street, and none upon plaintiff's land. This was done in the year 1894 or 1895. So the situation remained until the month of November, 1901. At this time the company placed a feed wire cable upon the poles on plaintiff's side of the street and through her trees, as already mentioned. This cable was not for the purpose of supplying the current to the trolley wires in Orange street, or elsewhere in Newark, but for conveying current to defendant's railway system in the city of Orange. In June, 1903, complaint was made by plaintiff to the proper officers of defendant company that this had been done, contrary to the agreement made when the electrical equipment was established, and that her trees had been damaged thereby. She insisted that the obnoxious feed wire should be removed, and, after some correspondence between her counsel and the company, the wire was removed from her land in or about the month of August, 1903.

The first assignments of error to be considered are based upon two exceptions taken to the charge of the trial judge to the jury. One of these challenges the instruction that "this defendant had no right whatever to run that wire through those trees." The other challenges the instruction that, in any event, the verdict of the jury must be in favor of the plaintiff for at least nominal damages. The learned trial judge seems to have based these instructions upon the ground that the company had agreed to put its feed wires upon the opposite side of the street. It is suggested here that this agreement was unenforceable because contrary to public policy. If, however, this were made to appear, so that the judge was wrong in the reason he entertained for the instructions given to the jury, yet there should be no reversal if the instructions were proper for other reasons. From the record before us we are unable to determine whether the agreement referred to was or was not contrary to public policy. If the consent of the property owner that furnished the consideration for the agreement was such a consent as is mentioned in the act of May 16, 1894 (P. L. 1894, p. 374; Gen. St. 1895, p. 3247, § 659), which requires the consent in writing of at least one-half in amount in lineal feet of property fronting upon the street in which a street railway is to be constructed, it

would follow upon the principle enunciated by this court in *Montclair Military Academy v. North Jersey Street Railway Company*, 70 N. J. Law, 229, 57 Atl. 1050, that the agreement would be contrary to public policy, and therefore unenforceable. That decision was based upon a later act, passed after the making of the agreement referred to in the evidence herein (P. L. 1896, p. 329), but the policy of the act of 1894 respecting the giving of consents was manifestly the same. But it does not at all appear that defendant's street railway was constructed in Orange street under the act of May 16, 1894, and, by inference, the contrary appears; for it was already established as a horse railroad prior to the passage of that act, and at least as early as the year 1893. Under what legislative authority it was thus established does not appear. Nor does it appear by what authority electricity was introduced as the motive power. By "An act concerning street railroads," approved March 6, 1886, and a supplement of March 11, 1893 (P. L. 1886, p. 69; P. L. 1893, p. 241; Gen. St. 1895, p. 3210, § 10), horse railway companies were authorized to use electric motors as the propelling power, instead of horses, upon first obtaining the consent of the municipal authorities; and those authorities were empowered to authorize the use of poles located in the public streets, with wires strung thereon, for the purpose of supplying the motors with electricity, and to prescribe the manner in which and the places where the poles should be located and the wires strung. This act did not require the consent of abutting property owners. But there is nothing in the evidence to show that the defendant obtained the consent or authorization of the municipal authorities under this act. The evidence at the trial, and the arguments of counsel here, leave us in the dark upon the status of the parties at the time the agreement referred to was made; and from this it is sufficiently plain that the exceptions to the judge's charge that are now under consideration were not designed or understood to raise the question of the legal invalidity of the agreement.

However, since its validity is at least doubtful, we prefer to rest our affirmance of the judgment upon the ground that, irrespective of any such agreement, the undisputed evidence at the trial displayed the company in the light of a trespasser upon plaintiff's land when it placed the feed wire upon her side of the street, so that the judge was entirely correct in instructing the jury that the defendant had no right to run the wire through her trees; that it was guilty of a trespass in so doing, and was, in any event, liable for at least nominal damages. Plaintiff's declaration founded her action upon a trespass to her realty, and not upon the breach of any agreement. The evidence showed that the property was hers, and that the company had placed the feed wire

through her trees without her leave or license. If this was to be justified on the ground that the company was acting in the exercise of rights granted to it by the public, such a grant ought to have been adduced by it. But no license from the municipal authorities was either averred or proved, and certainly one could not be inferred in the face of the undisputed facts that, when the poles and wires were first established in the street, the feed wires were located upon the side opposite to the plaintiff's property; that it was not until at least six years later that a feed wire was placed upon her property, and this was done not for the purpose of supplying current to trolley wires in the same street, or even in the same municipality, but for conveying current to the city of Orange, and that, when plaintiff protested and demanded the removal of this feed wire as having been placed upon her land without right, the company removed it. We find no error in the instructions above referred to.

For like reasons, we think the trial judge did not err in declining to charge that the defendant had a statutory right to string the feed wire upon defendant's land for the operation of its road if it became necessary to furnish power for the same.

The only remaining questions discussed on the argument relate to certain rulings upon evidence. We have examined these without finding error, and they require no particular discussion.

The judgment under review should be affirmed.

(76 N. J. L. 573)

**MORRIS & CUMMINGS DREDGING CO. v. MAYOR, ETC., OF CITY OF BAYONNE**  
et al.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

**MANDAMUS—WHEN ERROR LIES.**

Error will not lie to an order of the Supreme Court directing a mandamus to issue, unless the constitutionality of a statute is involved in the decision by the court.

(Syllabus by the Court.)

Error to Supreme Court.

Action by the Morris & Cummings Dredging Company against the mayor and council of the city of Bayonne and others. Judgment (87 Atl. 20) for defendants, and plaintiff brings error. Dismissed.

Elmer W. Demarest, for plaintiff in error.  
McDermitt & Enright, for defendants in error.

**PER CURIAM.** The record returned with the writ of error in this case shows that the proceedings below consisted of a rule to show cause why a writ of mandamus should not issue requiring the city of Bayonne and the members of its common council, defendants in error, to apportion certain arrears of taxes on lands of the prosecutors, a stipulation of

facts in lieu of depositions pursuant to such rule, a further rule of the Supreme Court making the rule to show cause absolute and directing that a peremptory writ of mandamus issue, and the writ itself.

It was decided by this court as long ago as 1860 that error would not lie in such a case. This rule was reaffirmed in *American Trans. Co. v. N. Y. Susq. & W. R. R. Co.*, 59 N. J. Law, 156, 35 Atl. 1118, and in *Paterson, City of, v. Shields*, 59 N. J. Law, 426, 36 Atl. 891. The proceedings are reviewable in error if on an issue of fact or law final judgment is given. P. L. 1903, p. 381, § 4. The practice in such case is indicated and its history given in the opinion of the late Mr. Justice Dixon in *Kenney v. Hudspeth*, 59 N. J. Law, at page 527 et seq., 37 Atl., at page 67. And by the mandamus act, where the constitutionality of a statute is the main issue involved, error will lie even if there is no judgment. P. L. 1903, p. 381, § 6; *Neptune Township v. Mannion*, 73 N. J. Law, 816, 65 Atl. 440. In the present case, however, as in the case of *Paterson v. Shields*, supra, no such constitutional question is raised, nor is there any issue framed upon pleadings.

The writ of error will therefore be dismissed.

(76 N. J. L. 801)

**PENNSYLVANIA, N. J. & N. Y. R. CO. v. SCHWARZ et al.**

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

**1. EVIDENCE—COMPETENCY OF EXPERTS.**

In condemnation proceedings, where the prospective depreciation of a tract of land arises entirely from the construction and operation of a railroad tunnel 200 feet below the surface of the soil, a real estate agent familiar with the prices of property in the neighborhood, and who in another locality became acquainted with the effects upon property values of a railroad tunnel 80 or 90 feet below the surface, with shafts through which the smoke and gas escaped, is not an expert with respect to the question: What will be the value of the given tract after the construction of the tunnel, as compared with its present value?

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2357.]

**2. SAME.**

The experience of such witness that purchasers of real estate have a prejudice against deeds that except easements does not qualify him to give an expert opinion upon the foregoing question of land values.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2357.]

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Condemnation proceedings by the Pennsylvania, New Jersey & New York Railroad Company against Marie Schwarz and others. From the judgment, plaintiff brings error. Reversed.

James B. Verdenburgh, for plaintiff in error. John J. Fallon, for defendants in error.

GARRISON, J. This writ of error brings up a judgment rendered upon the verdict of the jury on an appeal to the circuit court in a proceeding to condemn an easement for a tunnel for railroad purposes. P. L. 1903, p. 657, § 23.

The defendant in error is the owner of a tract of land through which the tunnel in question passes at an average depth of 200 feet below the surface of the soil. The tract is occupied by three frame dwellings and a stable. At the trial a witness called by the landowner testified over objection that he considered that the effect of the tunnel would be to depreciate the value of the tract "anywhere from 30 to 50 per cent." When asked by counsel who had called him to the stand, "What actuates you in placing that percentage upon the depreciation?" the witness answered: "Because Mrs. Schwarz or any other individual who will own property affected as this property will be, to sell that property, cannot give a full-covenant warranty deed without placing that exception and saying that the exception is that there is a railroad that has a right under this property, practically its entire length." When asked, "If some 42 feet were taken from underneath the Schwarz property, at a point 182 feet or thereabouts below the surface of the street, what, in your opinion, would be the amount of the depreciation in value of that property caused by that taking away?" the answer was: "Anywhere from 30 to 45 or 50 per cent.; I couldn't say. I never had a similar case, but I say that the prejudice— I claim that the damage done is the prejudice a man would have against purchasing a piece of property that would have some covenant, or would convey an easement into it, giving a certain right of way." To the question, "Have you, in the course of your real estate business, ascertained that tenants have a prejudice against living in properties over tunnels?" the answer of the witness was, "I never had any experience of that kind." To the following questions then put by the court the following answers were given: "Q. Your idea as to depreciation in value is due to what you consider to be a fact that if a deed is offered to a purchaser, and it has an easement, the purchaser would not be as willing to buy it, and that depreciation is from 30 to 50 per cent. in the case of a tunnel? A. I think that would certainly be the damage. Q. And that is irrespective of any question whether there is any shaft or not? A. Yes, sir. Q. It is the mere existence of the easement? A. I claim that is my argument."

There can be no doubt, therefore, either as to the basis upon which the witness testified or that his testimony was prejudicial to the plaintiff in error.

Assignments based upon exceptions allowed at the trial challenge the ruling of the trial court that accorded to this witness the status of an expert with respect to the special

question of value upon which the jury was to pass, viz.: What will be the value of the tract after the construction of the tunnel, as compared with its present value? The legal question upon error is whether there was any testimony before the trial court that the witness possessed such special knowledge touching the particular matter of inquiry that entitled him to express an expert opinion upon the subject.

The witness was a real estate agent; but that did not qualify him as an expert with respect to the peculiar question of value that arose upon the facts of the present case. *Pennsylvania Railroad v. Root*, 53 N. J. Law, 253, 21 Atl. 285.

Indeed, neither the court below nor counsel for the landowner rested the qualification of the witness upon the nature of his vocation; on the contrary, the effort was to show his possession of a special knowledge of the subject that entitled him to give an expert opinion upon the matter the jury was to pass upon. The proofs upon this preliminary question brought out by the counsel who called the witness were that witness had been for six years clerk of the town of Union, through which the West Shore tunnel was constructed, and that for a part of that time he was engaged in the real estate business, in the course of which he became acquainted with certain facts touching the development of real estate along the line of that tunnel and with property values thereby affected. Upon cross-examination it was brought out that the West Shore tunnel was only 80 or 90 feet below the surface, that it carried two tracks, on which a steam railroad operated both freight and passenger trains, and that the tunnel was constructed with open shafts, through which the smoke and gas escaped. This latter circumstance, as well as the great disparity in depth between the two tunnels, were claimed by counsel for the condemning party to so differentiate the West Shore tunnel from the one under consideration in substantial respects as to afford no basis for the expert qualification of the witness touching the pending inquiry. Beyond this single instance the witness admitted that he had neither knowledge nor basis of knowledge. Upon the conclusion of the preliminary examination the witness was told by the court that he might answer the following question:

"By Mr. Fallon: Q. From your knowledge of what happened in the town of Union, as regards the effect on realty values after the building of the West Shore tunnel, what, in your opinion, would be the effect as against the values of the Schwarz property by reason of the construction of that tunnel?"

Instead, however, of answering this question, the witness addressed the following questions to the court and received the following answers:

"The Witness: There is one question that I am not positive on that I would like to ask the court, if he would enlighten me: If an award is made, such as in a railroad of this kind, the owner, of course, can only sell it subject to this award, or whatever is given?"

"The Court: Subject to the tunnel right.

"The Witness: That easement?"

"The Court: That is right.

"The Witness: You could not give a full covenant warranty, free and clear of all incumbrance, without making an exception, could you?"

"The Court: The right of the railroad to build a tunnel would have to be excepted."

Thereupon the witness gave as his answer to the question that had been propounded to him the estimate that the depreciation in value would be "anywhere from 30 to 50 per cent.," adding the explanations as to the basis of this estimate that are quoted in the earlier part of this opinion, viz., the prejudice against such conveyances.

From this rehearsal of the examination of the witness that preceded his answer to the question calling for his expert opinion, it is clear, not only that he gave no testimony that showed the possession by him of any special knowledge that qualified him to speak as an expert upon the particular subject of inquiry, but, also that by his questions to the court he made it evident that he was about to base his answer, in part, at least, upon an irresponsible, if not an improper, consideration, viz., a popular prejudice that he believed existed against conveyances of a certain character.

Inasmuch as the witness exhibited no right to the status of an expert, other than his single observation with respect to a substantially different tunnel and his belief as to the existence of a prejudice against conveyances that excepted easements, there was no testimony before the trial court that qualified the witness as an expert upon the special question at issue. The discussion of Chief Justice Beasley in *P. R. R. v. Root*, already cited, and that of Mr. Justice Dixon in *Laing v. U. N. J. R. & C. Co.*, 54 N. J. Law, 576, 25 Atl. 409, 33 Am. St. Rep. 682, make it clear that the witness under these circumstances was not entitled to speak with expert authority. In view of the preliminary examination of the witness, we think that the trial court erred in its refusal to sustain the objections that were persistently and pertinently presented by the plaintiff in error, and that the testimony that came in by reason of such refusal was of so prejudicial and injurious a character as to require the reversal of the judgment rendered upon the resulting verdict.

The judgment of the Hudson circuit is reversed, in order that there may be a venire de novo.

(74 N. J. E. 435)

### SMITH v. WIGLER.

(Court of Errors and Appeals of New Jersey.  
June 15, 1903.)

#### INDEMNITY—CONSTRUCTION OF CONTRACT.

Smith was defendant in a criminal cause. His brother, the complainant, to procure his release, induced Wigler to become surety on the recognizance, and, as part indemnity for this suretyship, assigned a bond and mortgage to Wigler. The recognizance was subsequently forfeited for the nonappearance of Smith before the federal court. The complainant then demanded an assignment of the bond and mortgage, claiming that the indemnity was limited to the appearance of Smith before the committing magistrate. *Held*, that the testimony in the case and the circumstances attending the transaction satisfactorily indicate that the undertaking of indemnity was not limited to the preliminary hearing, but extended to the appearance of Smith before the federal court, and that the relief sought should therefore be denied. (Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Charles H. Smith against Jacob Wigler. Decree for complainant (65 Atl. 900), and defendant appeals. Reversed.

Hood & Hood, for appellant. Frank H. Bradner, for respondent.

MINTURN, J. On August 17, 1903, Edmund J. Smith was in the custody of the United States marshal upon a criminal complaint, and was seeking bail. He was taken by the marshal to the office of one Simon, who sent for the defendant Wigler, a stranger to Smith, and an arrangement was there entered into by which Wigler was to become one of two sureties upon Smith's bail bond of \$2,500, upon condition that Wigler would be indemnified. This indemnity was given by Albridge C. Smith and Charles H. Smith, brothers of Edmund J. Smith, in the form of a bond and mortgage for \$800, held by Charles H. Smith as mortgagee and the promissory note of Albridge C. Smith for \$450. Wigler became bail with one Hargraves, in accordance with this agreement, and Smith was released upon the recognizance, to appear before the United States commissioner on August 27th. The promissory note to Wigler reads as follows: "Newark, N. J. Aug. 18th, 1903. In consideration of Jacob Wigler becoming surety for the appearance of Edmund J. Smith to answer a charge made against him on behalf of the Merchants' National Bank of Newark, N. J., before S. Howell Jones, U. S. commissioner, I hereby agree to pay to him any loss he may suffer or incur by reason of being such surety, to the amount of \$450, if the said Edmund J. Smith shall neglect or refuse to appear in compliance with his recognizance. [Signed] Albridge C. Smith." Edmund J. Smith appeared before the commissioner on August 27th. An examination took place, as a result of which Smith was held to appear before the federal court, and Wigler and Hargrave renewed their recognizance for his appearance. Smith failed

to appear. The recognizance was forfeited, and judgment therein entered against Wigler and Hargrave. A bill was thereafter filed in the Court of Chancery by Charles H. Smith to compel a reassignment of the bond and mortgage by Wigler to him, upon the ground that the condition of the indemnity had been satisfied by the appearance of his brother Edmund before the commissioner, which, as he alleges, was the only condition incident to the indemnity. Wigler, however, refuses to surrender the security upon the ground that the agreement of indemnity required him to continue his bail to answer for the appearance of Smith before the federal court, and that his action in the matter corresponded with that understanding. The learned Vice Chancellor found in favor of the complainant's view, and, from the decree entered upon that decision, this appeal was taken.

Our view of the case differs from that of the learned Vice Chancellor, for the reason, among others, that we cannot give to the promissory note of the brother, Albridge Smith, the weight and importance that the learned Vice Chancellor attaches to it. It is open to the construction attempted to be put upon it by either party to the cause, and in either view it is decidedly ambiguous, and of no great evidential value in the determination of this controversy. Albridge Smith's testimony is contradicted by Wigler, and Wigler is supported by the testimony of the marshal and by that of Simon. Mr. Trimble's testimony, also, although based only upon the best of his recollection, is not without weight in support of Wigler's contention. The circumstances that both the complainant and his brother Albridge were present at the commissioner's office when the original bail was given for the subsequent hearing before the commissioner and their absence from that hearing are indicative of a quiescent state of mind upon their part relative to the extent of this indemnity and the safety of complainant from apprehension, which lends color and strength in our judgment to the defendant's contention.

For these reasons, we conclude that the decree advised by the learned Vice Chancellor should be reversed, with costs.

(74 N. J. E. 616)

#### SMITH v. HOTEL RITZ CO.

(Court of Chancery of New Jersey. May 12, 1908.)

#### SALES—CONDITIONAL SALES—UNRECORDED SALES—"JUDGMENT CREDITORS."

The receiver or general creditors of an insolvent corporation are not "judgment creditors," within P. L. 1898, pp. 699, 700, §§ 71, 72, relating to conditional sales of chattels, and protecting only judgment creditors, subsequent purchasers, and mortgagees, without notice.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3844.]

Suit by Elizabeth Smith against the Hotel Ritz Company to determine whether an unre-

corded conditional sale agreement is valid as against a receiver and general creditors of defendant insolvent corporation. Judgment for complainant.

U. G. Styron, for complainant. Eli H. Chandler, for petitioners. Oliver Y. Rogers, for receiver.

LEAMING, V. C. I am unable to determine that the unrecorded agreement of conditional sale now in question is void as against the receiver or general creditors of defendant corporation. The chattel mortgage act under consideration in *Graham Button Company v. Spielmann*, 50 N. J. Eq. 120, 24 Atl. 571, and in *Currie v. Knight*, 34 N. J. Eq. 485, provided that mortgages not executed and recorded in accordance with the act should be void as against creditors of the mortgagor. While in *Currie v. Knight*, supra, it was held that creditors could not, without a judgment or other lien on the chattels, assert their claims against the validity of such a mortgage, it was also held that, when a lien should have been procured by a creditor and the invalidity of the mortgage asserted by virtue of the lien, the infirmity of the mortgage would be ascertained by reference to conditions obtaining at the time the creditor became a creditor, and not at the time the lien of the creditor was procured. The provisions of the act that the mortgage should be void as to creditors (general creditors) was thus observed and enforced. In *Graham Button Company v. Spielmann*, supra, it is held that insolvency of a debtor corporation operates, under our statute, to fasten the debts of such corporation on its property in such manner as to enable the receiver of the corporation, in behalf of its creditors, to assert the invalidity of a chattel mortgage which has not been executed and recorded in accordance with the provisions of the chattel mortgage act. It is manifest that the principles controlling these decisions do not extend to the present case; for the provisions of our statute touching conditional sales of chattels (P. L. 1898, pp. 699, 700, §§ 71, 72) protect only judgment creditors, subsequent purchasers, and mortgagees without notice. While the claims of general creditors of an insolvent corporation are fastened upon its property by force of the provisions of our corporation act touching insolvency and the appointment of receivers and distribution of assets, in such manner as to enable either a receiver or general creditor to assert in this court the invalidity of a chattel mortgage which the statute declares void as to creditors, yet it is apparent that such receiver or general creditors cannot in any sense be regarded as judgment creditors within the meaning of the conditional sales statute referred to.

I will advise an order directing the receiver to deliver the chattels in question to petitioner.

(74 N. J. E. 298)

**AMERICAN ICE CO. v. LYNCH.**

(Court of Chancery of New Jersey. May 12, 1908.)

**1. INJUNCTION — CONTRACTS — RESTRAINING BREACH.**

An agreement, by one entering into the employ of another as ice wagon driver and canvasser for customers, not to engage in the ice business within the territory covered by his route or within five squares therefrom for one year after his employment should cease, and, should he do so, to pay \$200 as liquidated damages, was not an alternative contract, extending an option to either refrain from engaging in an opposition business or to engage therein by paying \$200 for the privilege, so as to preclude an injunction restraining the employé from engaging in such opposition business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 121.]

**2. CONTRACTS — LEGALITY OF OBJECT — RESTRAINT OF TRADE — REASONABLENESS OF RESTRAINT.**

An agreement, by one entering into the employ of another as ice wagon driver and canvasser for customers, not to engage in the ice business within the territory covered by his route or within five squares therefrom for one year after his employment should for any cause cease, was reasonable as to the territory and period of restraint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 555.]

Bill for injunction by the American Ice Company against James Lynch. Order advised directing a preliminary injunction.

The bill seeks to enforce against defendant a certain contract wherein defendant agreed not to engage in the ice business within a specified territory for a period of one year. Defendant was employed by complainant as a driver of an ice wagon and canvasser for customers. The agreement of employment was embodied in a bond, which defendant and a surety gave to complainant, for \$200 in amount, conditioned that defendant would faithfully perform the duties and engagements specified in the several recitals contained in the bond. Among these recited agreements on the part of defendant was one to the effect that defendant would not engage in the ice business within the territory covered by his route or within five squares therefrom for one year after his employment should for any cause cease. Another part of the agreement, as recited in the bond, provided:

"And, further, if the said James Lynch shall leave the service or cease to serve the company without their consent during said term for which he has been employed, or shall, after leaving of his own accord or being discharged by the company, engage in the ice business as aforesaid within the time and territory above described, then he shall pay to said company the sum of two hundred dollars, not as a penalty, but as liquidated damages."

Defendant does not deny that he is engaged in the ice business contrary to the terms of his agreement, but insists that the stipulation touching liquidated damages operates to deny

to this court the right to enforce the covenant.

Heard on return of an order to show cause for a preliminary injunction.

Grey & Archer, for complainant. William C. French, for defendant.

LEAMING, V. C. (after stating the facts as above). The contention of defendant finds support in a considerable number of adjudicated cases; but this court is now firmly committed to the opposite view. *Crane v. Peer*, 43 N. J. Eq. 553, 4 Atl. 72; *Brown v. Norcross*, 59 N. J. Eq. 427, 45 Atl. 605; *Avon Land Company v. Thompson*, 60 N. J. Eq. 207, 46 Atl. 946. A consideration of the terms of the present contract and the conditions necessarily surrounding its execution clearly discloses that it was in no sense intended by the parties as an alternative contract, designed to extend to defendant an option to either refrain from engaging in an opposition business or to engage in that business among complainant's customers by paying \$200 for the privilege, after having acquired a knowledge of complainant's business and an acquaintance with its customers. The specific agreement of defendant is not to engage in the business. The purpose and force of that language cannot be mistaken. Had it been the intention of the parties to also provide that defendant should be privileged to purchase his liberty to perform the act which he specifically agreed not to perform, that intention should have been expressed in language equally clear. The territory of restraint and the period of restraint are reasonable, and complainant is clearly entitled to the aid of this court in the enforcement of the agreement.

The stipulations in the contract touching arbitration have no reference to the present conditions, and such stipulations do not operate to defeat the relief now sought.

I will advise an order directing a preliminary injunction to issue to restrain defendant from engaging in the business named within the territory and period specified in the contract.

(76 N. J. L. 553)

**CHAMPLIN v. CHURCH.**

(Court of Errors and Appeals of New Jersey. June 15, 1908.)

**SALES—ACTION FOR PRICE—DEFENSES.**

Where a merchant directed another to have shipped to him corn of a certain kind and grade at a certain price over a certain railroad, the weight and grade of the corn to be evidenced by a certain official certificate, the fact that the corn while in transit became heated will not excuse the vendee from payment of the purchase price.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Frank A. Champlin against Andrew S. Church. Judgment for plaintiff. Defendant brings error. Affirmed.

Adrian, Silzer & Pearse, for plaintiff in error. Brown & Beecher, for defendant in error.

**MINTURN, J.** The defendant delivered to the plaintiff, a grain merchant in the city of Newark, the following order: "Please have shipped to me at South River, via N. J. Central Railroad, one car, three mixed corn, price 57. Shipment: Hurry. Terms: Arrival draft. Remarks: Western Official Certificate of weight and grade final." The plaintiff ordered the required corn from a concern at Toledo, Ohio, and it was delivered at South River, where the defendant refused to accept it upon the ground that it was damaged by heating. The plaintiff having waited a reasonable time for the defendant to accept the corn, finally sold it, after notice to defendant, and brought this action to recover the difference between the price realized upon the sale and the agreed price of the corn. The judgment of the Essex circuit court, where the case was tried without a jury was for the plaintiff, and from that judgment this writ of error is taken.

The conspicuous feature of this case, which differentiates it from the ordinary case in the category of vendor and vendee, consists in the fact that the vendor in the case at bar was so limited and circumscribed in the exercise of judgment by the language of the written order, from which he derived his authority to purchase, that he was in essence a mere conduit or special agency, through which the goods were to be delivered. Upon the execution of the order, and substantial compliance with its requirements his duty was performed, and his right to the agreed compensation was complete. *Butler v. Maples*, 9 Wall. (U. S.) 766, 19 L. Ed. 822; *Story on Agency*, 128. It will be observed that he was not to ship, but to "have shipped," to the defendant at a fixed price corn of a certain quality over a certain railroad; the grade or condition of the corn to be evidenced, not by his judgment, but by a certain form of certificate which as between him and the defendant was to be final. "Both in morals and in law," remarks a recent writer of distinction, "one is responsible for the thing which he brings to pass, whether he employs an inanimate object to effectuate his purpose, or sets in operation the infinitely more complicated chain of causation which results from the employment of another moral agent." "Legal Liability" by Street, c. 41.

The trial court found as a fact that the corn when shipped was in good condition, and therefore the delivery to the carrier in accordance with the specific instructions contained in this order relieved the shipper of liability for damage in transitu, and imposed the burden and risk of damage upon the consignee. *Dawes v. Peck*, 8 T. R. 330; *Conn v. Reed Dawson Co.*, 73 N. J. Law, 112, 62 Atl. 271; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Silvestri v. Missocchi*,

165 Mass. 337, 43 N. E. 114; *Benjamin on Sales*, § 693; *Tiffany on Sales*, 196. In the light of this status it became a matter of slight, if any, importance whether the testimony of a conceded dealer in grain, not for the purpose of contradicting the terms of the order, but for the purpose of eliciting the meaning of a trade expression employed therein was relevant, although under the undeviating rule and policy of the courts in such matters it was properly admitted. *Steward v. Scudder*, 24 N. J. Law, 96; *N. J. Zinc Co. v. Boston Trunk Line, etc., Co.*, 15 N. J. Eq. 418, 17 Cyc. 685.

No error appearing in the record, the judgment is affirmed.

(76 N. J. L. 317)

#### BUTTERWORTH v. TODD et al.

(Supreme Court of New Jersey. June 30, 1908.)

#### 1. LIBEL AND SLANDER — COMPLAINT BY CHURCH MEMBERS—PRIVILEGED COMMUNICATIONS.

A complaint made by church members against another church member in accordance with the discipline of their church, if made believing the matters charged to be true, is qualifiedly privileged; and on a trial of the complainants for libeling the member so charged the burden is upon the latter to prove that the complaint was induced by express malice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 278.]

#### 2. SAME—EVIDENCE.

The proof of express malice in this case was insufficient to support the verdict against the defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 329.]

#### 3. SAME—DAMAGES.

A verdict of \$8,000, if otherwise supportable, was excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 353, 354.]

(Syllabus by the Court.)

Action by Caleb H. Butterworth against D. Everett Todd and others. Verdict for plaintiff. Rule to show cause why new trial should not be granted. Rule made absolute.

Argued June term, 1907, before the CHIEF JUSTICE and REED, J.

George Bacon, Ralph W. E. Donges, Mathew Jefferson, and John W. Wescott, for plaintiff. Thompson & Cole, for defendant Wesley A. Hunsberger. Carrow & Kraft, for other defendants.

**REED, J.** This action was brought against five persons for publishing a libel concerning the plaintiff. The five persons were D. Everett Todd, Harry H. Duncan, Sheriden Pressey, Rev. George L. Dobbins, and Rev. Wesley A. Hunsberger.

The following are the facts which led up to the publishing of the article alleged to be a libel upon Mr. Butterworth, the plaintiff: All the parties are members of the Methodist Episcopal Church. Mr. Butterworth was a dealer in drugs and painters' supplies in Philadelphia, and Mr. Todd was a painter in the



city of Camden. Prior to the year 1900 Mr. Butterworth had sold to Mr. Todd a quantity of white lead, to be used by Mr. Todd in his business of house painting. Mr. Todd found that the work upon which this paint had been used was unsatisfactory; that the paint peeled, and he charged Mr. Butterworth with having sold him impure lead. This Mr. Butterworth denied. The difficulty thus engendered led to a series of actions and counter-actions between Messrs. Butterworth and Todd. There seems to have been an action by Butterworth against Todd, and then a submission to arbitration of the differences between them, the award in which arbitration Mr. Butterworth, for reasons stated on the trial, disregarded. A church trial for alleged perjury by Mr. Butterworth in the trial of one of the causes resulted in Mr. Butterworth's acquittal. This was followed by other actions—one by Butterworth against Todd for the amount of the bill for the lead sold to Todd, and a counter action by Todd for selling impure lead, and finally an action for slander against Todd for stating that Butterworth had sold him impure lead, in which action a verdict was obtained against Todd for \$2,500. Then followed, at the intervention of certain members of the church, a settlement between Butterworth and Todd of their differences. On July 24, 1902, a paper was signed by Todd and Butterworth in which Todd agreed to pay Butterworth \$600 and Butterworth agreed to release Todd, and by the instrument did release him, from all further claims touching the question of impure lead. Todd agreed to drop the question as one forever settled. Two years later Butterworth and Todd were candidates for election to municipal offices in the city of Camden; Todd being a candidate on the Democratic and Prohibition ticket for councilman of the Twelfth Ward, Camden, and Butterworth being the regular Prohibition candidate for mayor of the city of Camden.

On October 27, 1904, the following article was published in a newspaper called "The East Side Press" of Camden, headed: "A Remarkable Confession."

"To whom it may concern:

"I, the undersigned, D. Everett Todd, of the city and county of Camden, state of New Jersey, personally appeared before Caleb H. Butterworth, Rev. George L. Dobbins, and Rev. Wesley A. Hunsberger, all of the city and county of Camden, and state of New Jersey, depose and saith that I have made certain charges and complaint against C. H. Butterworth, for which I was adjudged guilty in the civil court of Camden county, Camden, New Jersey, before a jury of twelve competent men, of slander, and called upon to pay C. H. Butterworth the sum of twenty-five hundred dollars (\$2,500.00).

"Now therefore, be it known to all men that I, D. Everett Todd, confess that I was in error in making my complaint against C.

H. Butterworth, and do verily believe that my trouble was due to the use of lucol oil which contained 40 per cent. mineral oil (better known as coal oil), which was the cause of the houses peeling, and that Mr. Butterworth's lead to the best of my knowledge was not the cause. I deplore and regret this my error in making this complaint against said C. H. Butterworth, and do now publicly and privately and over my signature apologize to said C. H. Butterworth and desire to take back any and all statements thus made against said Butterworth. I also wish to thank Mr. Butterworth for his kindness toward me in the settlement of the amount allowed him by the court, his generous offer to accept one-half (the words one-half were crossed out in ink and the figures \$600.00 written above) of the full amount allowed to cover his expenses in prosecuting his case against me in self defense and thus presenting me with twelve hundred and fifty dollars (the word twelve had been crossed off in ink and the figures 1900 written above). I pledge him my friendship and will do all I can to correct the error thus made by me.

"D. Everett Todd."

"Witness: Rev. G. L. D.

"Rev. W. A. H."

Mr. Todd, knowing he had not signed a paper such as the published confession purported to reproduce, ascertained on inquiry from Mr. Connors, editor of the East Side Press, respecting its authorship, that the original came from Mr. Butterworth. On November 14th a charge in writing was made against Mr. Butterworth signed by Messrs. Pressey and Duncan, two members of the Methodist Episcopal Church. The complaint was that Mr. Butterworth had been guilty of immoral conduct, and specified, first, that he did knowingly utter and publish a false letter or article headed "A Remarkable Confession"; second, that, he appended the name of D. Everett Todd to the paper; third, that he did forge, sign, and cause to be signed to the manuscript of the aforesaid letter the names of Messrs. Dobbins and Hunsberger as witnesses, directing the newspaper to partly obscure or wholly withhold them at discretion; fourth, that the whole document was an absolute forgery, uttered, published, and caused to be published in the said newspaper by Caleb H. Butterworth. This complaint was, in accordance with the rules of the church, presented to the Rev. Wesley A. Hunsberger, the pastor of the First Methodist Episcopal Church of Camden, of which church the plaintiff was a member. Dr. Hunsberger, under the rules of the discipline of his church, called in a committee of five to hear the complaint. This committee called upon Dr. Hunsberger to preside at an investigation, the result of which was a finding that Mr. Butterworth was guilty of the charges preferred. Thereafter Dr. Hunsberger, according to the requirements of the discipline of the church,

sent the proceedings to the Quarterly Conference of the church. The matter was heard before that body; Dr. Dobbins, by virtue of his position as presiding elder, presiding. The result of that hearing was that Mr. Butterworth was suspended from the membership of the church for six months, with certain conditions for his restoration after that period. Mr. Butterworth then appealed to the Annual Conference, and the committee whose functions were to hear the appeal affirmed the action of the Quarterly Conference. All these proceedings seem to have been in conformity with the general rules embodied in the discipline of the Methodist Episcopal Church.

The complaint imputed immoral conduct to the plaintiff, and the acts set out as constituting such conduct were none the less immoral if they happened to be criminal. The jurisdiction of the church tribunal to hear the matters charged in the complaint is clear. It appears, therefore, that the complaint which constituted the alleged libel was presented by the church members to the pastor of the plaintiff's church, was regularly heard, and the proceedings forwarded to the Quarterly Conference, and an appeal taken to it, and decided by the Annual Conference, in accordance with the law of the religious body with which all the parties were affiliated. The complaint, and all the acts, words, and votes of those who heard and decided upon the matters charged in the complaint originally, or upon appeal, were qualifiedly privileged, if they who complained and acted thereon believed the matters charged to be true. This doctrine was well stated by Chief Justice Shaw in *Farnsworth v. Storrs*, 5 Cush. (Mass.) 412-415, as follows: "Among those powers and privileges established by long and immemorial usage, churches have power to deal with their members for immoral and scandalous conduct, and for that purpose to hear complaints, to take evidence and decide; and, upon conviction, to administer proper punishment by way of rebuke, censure, suspension, and excommunication. To this jurisdiction every member by entering into the church covenant submits and is bound by his consent. The proceedings are quasi judicial, and therefore those who complain or give testimony, or act or vote or pronounce the result orally or in writing, acting in good faith and within the scope of the authority conferred by these limited jurisdictions, and not falsely or colorably make such proceedings a pretense for covering an intended scandal, are protected by law. If the charges are true, or if the defendants honestly believe them to be true, though they are in fact untrue, and believing them to be incompatible with the church principles and derogatory to the welfare of the church and the community where the church is established, the communication is privileged." This doctrine is undisputed. 25 Cyc. 390, and

cases cited. That those who made the complaint had reason to believe it to be true appears beyond question.

The following are the facts appearing in the plaintiff's case respecting the way in which the publication of the alleged confession came about: As already observed, there were papers signed by Butterworth and Todd on July 24, 1902, finally settling all differences between them. Mr. Butterworth says that previous to the conference at which these papers were signed he had prepared a paper which he intended to, and did, present to Mr. Todd for his signature at that meeting. Mr. Todd refused to sign this paper, but, instead, signed the paper already mentioned. The paper which Mr. Butterworth had prepared was the original of the published document headed "A Remarkable Confession," with the exception of the caption "A Remarkable Confession," and with the exception that in place of the name in full D. Everett Todd signed to the paper the original had the initials D. E. T. attached, and in place of the words, "Witness: Rev. Geo. and Rev. W. H." there were in the original words, "Witness: G. L. and W. A.," all the initials being written with a lead pencil. This paper, so prepared by Butterworth, after Todd had refused to sign it, Butterworth says he tore into two pieces, with the intention of destroying it, but he subsequently retained it and placed it in an envelope which contained some newspaper clippings relating to his former differences with Todd. The envelope containing these clippings and this document was placed in his desk. Two years later, when, as already mentioned, Todd was a candidate for a municipal office, Mr. Butterworth says he met one Connors while crossing the river between Camden and Philadelphia. Connors was conducting the newspaper in Camden already mentioned, the East Side Press, and was using the paper in opposition to the election of Mr. Todd. Evidently knowing of the former trouble between Todd and Butterworth, he asked the latter if he had any material he could use against Todd in the then present political campaign. Butterworth replied, "Yes," he believed he had some clippings over in his office, and, if Connors would step in some day, he would give them to him. Before Connors came after them, however, Butterworth wrote to him reminding him that the stuff was in his office. Connors thereafter called and got the envelope containing the clippings, among which was the original of the alleged confession. Connors when a witness for the plaintiff in this trial says that this paper was torn in two, and that he mounted it and headed it "A Remarkable Confession" when setting up the article, filling out the name of Todd in full at the bottom of the paper. It appears that before the publication of this paper Butterworth knew it was among the clippings he had giv-

en Connors, for he admits that he wrote to Connors a few days after delivering the papers stating that in the body of this article were the names of Dr. Dobbins and Dr. Hunsberger, and he feared that Connors might use their names. After this alleged confession by Todd appeared in the newspaper on October 27, 1904, Todd, knowing that he had never signed such a document, visited Connors, the editor of the East Side Press, and inquired of him from whom he had obtained the document, and Connors admitted that it came from Butterworth; but no information was given by Connors respecting the addition he had made in writing the caption and filling in the full signature of D. Everett Todd. Mr. Butterworth was also interviewed, and from him came no intelligence respecting the alteration in the document he had given to Mr. Connors. On November 14, 1904, the complaint which is charged as a libel, signed by Messrs. Duncan and Pressey, was lodged with Dr. Hunsberger, the pastor of the church of which the plaintiff was a member.

From these facts, it is apparent that, when the complaint was prepared and delivered to Dr. Hunsberger, all concerned in it could believe no otherwise than that Butterworth had put in the hands of Connors for publication a paper which purported to be signed by Todd, which paper Todd had never signed, and which contained a confession which Todd had never made. If such an apparent act perpetrated by one church member at the expense of another did not call for the exertion of the discipline of the church, it is hardly possible to conceive of a situation which ever would. The complaint being made under the belief that it was true, the burden rested upon the plaintiff to prove the existence of express malice in making it. *King v. Patterson*, 49 N. J. Law, 447, 9 Atl. 705, 60 Am. Rep. 622; *Fahr v. Hayes*, 50 N. J. Law, 275, 13 Atl. 261; *Rotholz v. Dunkle*, 53 N. J. Law, 438-441, 22 Atl. 193, 13 L. R. A. 655, 26 Am. St. Rep. 432. It should have been so charged as requested in defendant's first six requests. If it had been so left to the jury, the question would confront us what evidence of malice on the part of the defendant appears in the case to destroy the qualified privilege which attended the lodging of the complaint. So far as concerns Messrs. Duncan and Pressey, there is no evidence, of any substance whatever, of malicious motives inducing their acts. From all the information obtainable by them and their friends it was a clear case for a complaint; and there is nothing shown in their previous relations to Butterworth which exhibits any malicious purpose at the time the complaint was signed, and, after the complaint was delivered, it took its usual course.

Respecting the defendant Todd, he had no differences with Butterworth from the time the agreement of amity was entered into between them, at the solicitation of the officers of the Methodist Episcopal Church of

which they were both members. No act of his during the intervening two years is proved to show that he held any malicious feeling toward Butterworth. With the information he had when the charge was made, the imputation of malice in drawing the charge and inducing its presentation is unjustified by the circumstances surrounding the transaction.

As to Dr. Hunsberger, the pastor, and Dr. Dobbins, the presiding elder, it is manifest that their endeavors had been to placate the dispute between these men and save the church the scandal of two brothers contending in the civil courts in deplorable litigation. When the complaint was lodged with Dr. Hunsberger, he acted with the most scrupulous fairness by selecting a committee of five members of the Methodist Episcopal Church residing in Philadelphia; because they were outside the range of local feeling; and the names of those selected were exhibited by Dr. Hunsberger to Mr. Butterworth, and he expressed his satisfaction with the selection. Respecting Dr. Hunsberger, as well as Dr. Dobbins, after the reading of the letters written, and the communication to the press in the light of the circumstances which induced them, they seem utterly inadequate to support a verdict based upon the notion that, assuming that these gentlemen counseled the framing of the complaint, their motives were not the interests of the church, but that it was a malicious purpose to gratify their own dislike for Mr. Butterworth. It is, indeed, said that the use of the word "forged" in the charge is evidence of a malicious purpose. It seems to be quite true that the word "forged" was used in its general popular sense, meaning the fabrication of a false charge. The charge set out in full the document which Mr. Butterworth was alleged to have falsely made, and so it appeared upon the face of the charge just what the written accusation was intended to charge. The word "forge" as applied to the making of a false paper whether such paper is capable of being a subject for a criminal falsification, or, otherwise, is a word of common as well as of correct etymological use. Our conclusion is that, if the verdict is permitted to stand upon the testimony produced in this case, then no member of any church will hereafter dare to make a complaint to, or hear any complaint in a church tribunal; for, although it may be found to be true by every appellate tribunal, and although it indubitably appears that the charge was made by those who had every reason to believe it to be true, yet the complainant will be put to the hazard of a ruinous verdict against him in a civil action. The intemperate character of the verdict appears in the amount awarded, namely, \$8,000. This verdict, by reason of the joint action, stands against each and all of the defendants; against Messrs. Duncan and Pressey, as well as against Todd and the other defendants.

The testimony as to the plaintiff's loss of business resulting from the charge made against him is of the most general character. It was impossible for the jury to gain any information aside from the mere declaration of the plaintiff and his witnesses, unsupported by any specific facts. In awarding this large verdict, little consideration seems to have been given to the plaintiff's own attitude in bringing about the publication in the *East Side Press*. *Odgers on Libel & Slander*, marg. pp. 306-307. It is true that *Butterworth* says he did not intend *Connors* should publish the document put into his hands by the plaintiff; but that he only intended to have it used by *Connors* for the purpose of writing political squibs against *Todd*. He does not pretend that he imposed any restrictions on *Connors*, however, as to the use he should make of it, save that he did not wish him to use the names of *Dr. Hunsberger* or *Dr. Dobbins*. He knew the name of *D. Everett Todd* was in the body of the document as the one who had made the confession, and that his initials were at the bottom of the document. It is difficult to conceive what significance he thought *Mr. Connors* would give to a paper thus put into his hands to use against *Todd* other than to regard it, at least, as a memorandum of a confession made by *Todd*. But if *Mr. Butterworth's* purpose was merely to furnish *Connors* with material for political squibs, it is not perceived how the quality of his act is improved. The whole sting of the document is that *Todd* made a confession of certain things, and any political squibs which stated or hinted that *Todd* had done this would have been as false as the publication of the document itself. The position of the plaintiff was then that after two years of amity with *Todd* he voluntarily put into the hands of an editor such a document to be used for the purpose of affording materials for injuring the reputation of a fellow member of the Methodist Episcopal Church, which material was untrue in fact, and which acted to the making of the complaint, which through lack of information of the complainants technically charged too much, but was substantially true.

We think for these reasons the rule should be made absolute.

(74 N. J. E. 343)

VAN WAGENEN v. BONNOT et al.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

**WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEDENT.**

The proviso in the evidence act (P. L. 1900, p. 363, § 4) that the section permitting parties in civil actions to be sworn as witnesses, etc., "shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator or intestate represented in said action," renders the surviving party to a transaction consisting of a *donatio causa mortis* incompetent

to testify that a closed parcel then delivered remained in statu quo until after donor's death, and as to its contents when opened, because such testimony would establish by necessary inference its contents at the time of delivery, and on that point the deceased, if living, could contradict the survivor.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 50, *Witnesses*, §§ 664-669.]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by *Henry W. Van Wagenen* against *Rose M. L. Bonnot* and *Frederick F. Guild*, substituted administrator. Decree for complainant (85 Atl. 239), and the administrator appeals. Reversed and remanded.

*Woodruff & Stevens*, for appellant. *Hood & Hood*, for respondent.

**PARKER, J.** The decree appealed from is based on a bill of interpleader by one *Van Wagenen*, as administrator of *John Whitehead*, deceased, who was in his lifetime the administrator of *Minerva A. Harrison*, deceased, and had possession of savings bank books showing deposits in her name in three banks and amounting without interest credited during this litigation to over \$9,000. These books were claimed in *Mr. Whitehead's* lifetime by *Rose M. L. Bonnot*, the present respondent, as having been the subject of a gift causa mortis from *Miss Harrison* to herself; and at the time of *Mr. Whitehead's* death in February, 1905, an action of replevin had been brought against him as administrator by *Mrs. Bonnot* and was then pending. *Van Wagenen*, the complainant below, having been appointed administrator of *Whitehead* and discovering this situation, filed a bill of interpleader against *Mrs. Bonnot* and *Mr. Guild*, as substituted administrator of *Miss Harrison*; and, having deposited the bank books in court, was eliminated from the controversy, which thereupon proceeded as between the parties to this appeal.

The facts and circumstances surrounding and bearing on the last illness and death of *Miss Harrison*, her relations with *Mr. Bonnot* and the latter's daughter *Ernestine*, and the transaction relied on as constituting the *donatio causa mortis* now in question, are so fully and accurately stated in the opinion of the learned and experienced Vice Chancellor who heard the cause that any extended recital of them here except incidentally would be needless repetition. We concur with the Vice Chancellor in the opinion that savings bank books are proper subjects of gifts causa mortis. We also concur in his conclusion that the testimony of *Ernestine*, the daughter of *Mrs. Bonnot*, while unsupported by that of any other witness, was of sufficient weight to satisfy a court of the facts as to the delivery by the deceased of the package referred to in her testimony, and as to what was said and done at the time of such delivery in the presence of the deceased. But, as will be seen from an examination of the Vice Chancellor's opinion, which fully states

the evidence in this particular, assuming the delivery of a package or parcel as satisfactorily proved, the burden still remained on Mrs. Bonnot to show by clear and satisfactory evidence that this package then contained the bank books in question. The package was described as a "long parcel." It was wrapped up, when delivered, in a filthy rag, soiled with sputum, and smelling so foul that it had to be hung outside the window in the open air. It was handed by Miss Harrison to Mrs. Bonnot with the words: "Take them. Put them in your satchel. They are yours." The contents of the package were not stated by Miss Harrison or by any one in her presence. It was not unwrapped at the time of delivery, and, as claimed by respondent, not until four days thereafter at her daughter's house. A memorandum for a will had been written, which will be found in full in the Vice Chancellor's opinion, and, as will be seen, makes no mention of bank books. In short, at the time there was nothing to indicate its contents except that it was a "long" package; that Mrs. Harrison at a prior delivery which was properly held by the Vice Chancellor to be ineffective said to Ernestine, "I want your mother's house [on which there was a mortgage of some \$1,500] to be free. I want her to rest," and to Mrs. Bonnot, "Take this. They are yours. You will find they will be valuable to you"—that at the second and effective delivery she used the words first above quoted; and that she afterwards said that Mrs. Bonnot "could rest now." All this is fully as consistent with the hypothesis that the package contained bonds and mortgages or paper money, or certificates of stock, or railroad or other bonds, as with the bank book hypothesis; in fact, rather more so, as any of the suggested securities when wrapped up would seem more likely to lead a witness to describe the package as "long" than the savings bank books, which would measure about four by six and a half inches. The testimony of Ernestine about the subsequent opening of the package has no weight in fixing the contents of the package at the time of delivery, if, indeed, at the time of which she testifies, which was the Thursday following the tradition of the package. She was at her sister's in Newark; heard her mother exclaim in another room; went in there and found the dirty rag on her mother's knees; and the latter showed her the bank books. That the bank books had been taken out of the rag is, of course, either hearsay or assumption based on the proximity of the respective articles at the time. The court below naturally realized the impossibility of sustaining a finding on such evidence that the bank books had been in the package at the time it was delivered, and properly remarked in disposing of the case that the direct proof of that claim rested entirely on the evidence of Mrs. Bonnot herself.

She was the first witness called, and ob-

jection was almost immediately made to her competency to testify as to statements made by or transactions with the deceased, and the court said to her counsel in part: "The right of this witness to this money will have to be established by evidence other than her own, and it will not be on technical or sharp points. Her own evidence cannot give her the right to this money, and I do not take it you mean to establish your case in that way. You are entitled to have in all evidence that she may properly give, and also all evidence that may be fairly construed not to come within the prohibition of the statute, and I do not mean to close you out from putting in anything which you have got a fair right to argue is proper." This was equivalent, as we read it, to saying that her testimony, if not clearly incompetent, would be received and final ruling on it reserved until the decision of the case. Accordingly Mrs. Bonnot went on to testify that from the time she received the package from the hands of Miss Harrison, or, at all events, from the time she left the sick room with it, the package had remained in her satchel undisturbed in any way until she opened it, and finding the bank books in it gave vent to the exclamation which attracted Ernestine to her side. If the learned Vice Chancellor was right in receiving and weighing this as competent testimony, his decision awarding the bank books to Mrs. Bonnot was probably warranted by the evidence; but our careful and somewhat extended consideration of the case had led us to the conclusion that he erred in so doing.

As we have already seen, there was nothing definitely disclosing the contents of the package at the time of delivery. From that time until the time when Ernestine saw the bank books in her mother's hands there is a hiatus. Manifestly, to show a gift of the bank books, it must appear that they were contained in the package at the time of delivery; but, there being no direct evidence of this, resort must be had to inference, and from competent proof that there had been no change of any kind in the package during the time in question, and that at the time of opening it the books were found, the inference would necessarily follow that they were in it at the time of delivery. Testimony to prove these facts coming from the mouth of any one but an interested party like Mrs. Bonnot would have been competent and probably sufficient. But her testimony, as the court below fully recognized, was incompetent as to any transaction with or statement by Miss Harrison under the proviso of our statute (P. L. 1900, p. 363, § 4), which is all that remains of the old common-law rule disqualifying parties generally as witnesses. The tradition or delivery of the package (claimed to contain the books) was such a transaction, and an essential feature was the presence of the books. The test laid down in our decisions in ascertaining what is a "trans-

action with" the deceased about which the other party to it cannot testify is to inquire whether, in case the witness testify falsely, the deceased, if living, could contradict it of his own knowledge. *Smith v. Burnet*, 35 N. J. Eq. 314, 322; *Woolverton v. Van Scykel*, 57 N. J. Law, 393, 31 Atl. 603; *Provost v. Robinson*, 58 N. J. Law, 222, 33 Atl. 204; *Dickerson v. Payne*, 66 N. J. Law, 35, 48 Atl. 528. Manifestly, if the package had been opened at the time of delivery and again wrapped up, Mrs. Bonnot would be incompetent to testify to its contents at that time, because deceased, if living, could contradict her. Under the circumstances of this case, however, all the direct knowledge was presumably on Miss Harrison's side. She must have wrapped up the package herself, and, if living, could contradict any testimony tending to show its contents. And whether such testimony be direct or inferential is of no moment, so long as its logical result is, if admitted and believed, to establish as a fact anything forming part of a transaction with the deceased which said deceased might directly contradict. And as Miss Harrison could, if living, be heard to contradict any statement that the package contained the bank books, Mrs. Bonnot was as incompetent to connect by her testimony the books displayed to her daughter with the closed package delivered in the sick room as she would have been to say that it had then been opened and the books themselves given to her.

Concluding, therefore, that the Court of Chancery should not have received or considered the testimony of Mrs. Bonnot on the point in question, and the finding of that court not being sustainable without such testimony, it follows that the decree below will be reversed, and the cause remitted, with directions that a decree be entered that Frederick F. Guild, as substituted administrator of Miss Harrison, is entitled to the bank books in dispute.

(73 N. J. E. 744)

**ENGELHARDT v. ENGELHARDT.**(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)**DIVORCE—DESERTION—GROUNDS.**

A wife, not justified in leaving the home of her husband on the ground of his cruelty, cannot obtain a divorce on the ground of desertion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 130, 132.]

**Appeal from Court of Chancery.**

Suit by Julia C. Engelhardt against Rudolph Engelhardt. From a decree of the Court of Chancery, denying relief, advised by Vice Chancellor Leaming, complainant appeals. Affirmed.

George M. Bacon and G. Dore Cogswell, for appellant.

**PER CURIAM.** Appellant filed a bill for divorce on the ground of desertion. Re-

spondent answered, denying that he had deserted his wife, and by way of cross-bill charged her with deserting him, and prayed for a decree of divorce against her. Upon the hearing the case of the complainant was that she had left her husband, being driven to do so by his cruelty, as she claimed. The learned Vice Chancellor held that the evidence on the part of the complainant, considered in connection with the denials of defendant, was not sufficient to form the basis of an affirmative decree that defendant was guilty of cruelty such as to justify her in leaving his home. We agree with this conclusion.

The decree under review, so far as appealed from by her, is affirmed.

(74 N. J. E. 430)

**JEFFRIES et al. v. CHARLTON et al.**(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)**SPECIFIC PERFORMANCE—LACHES.**

An agreement, called an option, whereby C., the owner of certain lands which were under foreclosure, agreed with J., a fourth mortgagee of said lands, to convey her equity to J., J. to purchase the lands at foreclosure sale and to reconvey them to C. within two years at an advance of \$2,000, J. to rent the lands within said period and apply the rents to the fixed charges, interest on the cost to him of the premises, and also to the interest on the \$2,000 agreed to be paid, held to be an agreement to reconvey, of which time was not of the essence, and C.'s failure to comply within two years not to bar her from relief by the way of specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 245-248.]

(Syllabus by the Court.)

**Appeal from Court of Chancery.**

Bill by Charles H. Jeffries and others against Selina A. Charlton and others. Decree for defendants, and complainants appeal. Reversed.

H. W. Lewis, E. A. Higbee, and Harry R. Coulomb, for appellants. Bourgeois & Sooy, for respondents.

**VOORHEES, J.** On the 2d day of July, 1903, one Jacobson held the legal title to the Hotel Marsden in Atlantic City, the beneficial ownership whereof was in Selina A. Charlton. There were four mortgages upon the property, one held by the Penn Mutual Life Insurance Company, for \$10,000 and then under foreclosure, the sale under which was advertised to take place within six days; one held by John Young for \$6,000; a third by Oliver Guttridge for \$4,000; a fourth by Lewis E. Jeffries for \$1,500—aggregating \$21,500. On the 2d day of July a written agreement was made between Lewis E. Jeffries and Selina A. Charlton, which recited the above mortgages and the pending foreclosure of the Penn Mutual Life Insurance Company mortgage, and that "the parties hereto are desirous of protecting their respective interests in the premises." The agreement then pro-

vided that Jeffries should acquire the Young and Guttridge mortgages by assignment and allow the premises to be sold under the Penn Mutual mortgage, and at such sale purchase the premises in his own name at a sum not to exceed \$35,000; that if the premises produced at said sale more than \$35,000, then the excess of the purchase price over the amount required to satisfy the mortgages should be paid to Mrs. Charlton. It was also agreed that if Jeffries purchased at the sale he would mortgage the premises for \$10,000, and convey them subject to such mortgage to Jacobson at any time after the purchase, and within two years from the date of the agreement, for the sum of \$24,000, in which event Jacobson was to assume the payment of the \$10,000 mortgage to be placed on the property, to pay Jeffries \$2,000 in cash and execute a second mortgage for \$12,000 on the premises. The agreement also provided that Jeffries should rent the premises, and from the rents pay the fixed charges against the premises—interest, taxes, insurance, etc.—as well as all repairs required, retain for himself 6 per cent. interest on the sum of \$14,000, and pay over the balance of the rentals to Mrs. Charlton, retaining also any sheriff's costs in excess of \$40, and taxes in excess of \$1,000; "it being expressly understood and agreed by and between the parties that the party of the first part (Jeffries) shall at all times during the continuance of this option retain and receive for his own use and benefit six per cent. interest on a sum of money equivalent thereto on the amount of money or balance thereof due to him under this option, and in the event of said premises renting for a sum less than shall be sufficient for the payment of all expenses and repairs against said premises, as aforesaid, and the interest aforesaid, the party of the second part (Charlton) will pay to the party of the first part the deficiency arising from said rentals and in the event of such deficiency arising as aforesaid, the party of the second part paying to the party of the first part such deficiency on or before the 1st of October of the then current year, this option shall continue in force and effect, otherwise to become null and void."

At the foreclosure sale Jeffries purchased the property and went into possession of the premises, rented the same and collected the rents. Mrs. Charlton having failed to carry out the agreement within two years, the bill in this case was filed by the executor and widow and heirs at law of Mr. Jeffries, he having died June 12, 1905, praying that Mrs. Charlton and Jacobson be absolutely debarred and foreclosed of all rights in and equity to the property, and that the aforesaid agreement be delivered up to the complainants. Charlton and Jacobson answered, setting up that pursuant to the agreement Jeffries had purchased the premises at foreclosure sale subject to the rights of Mrs. Charlton under the agreement.

They also filed a cross-bill alleging that Jeffries had entered into the possession of the premises and had received the rents; that no account of the rents and disbursements had been rendered by Jeffries. Mrs. Charlton tendered herself ready upon a proper accounting to pay such sums of money as might be due, and prayed that upon payment by her of such sum the complainants might be decreed to specifically perform the agreement and convey the lands to Mrs. Charlton. The answer to this cross-bill denied that Jeffries did not account, averring that the accounting showed an indebtedness to him of upwards of \$1,700, and that Mrs. Charlton had abandoned her rights in the premises.

By a stipulation signed by the parties, it appears that an attorney in the latter part of May, 1905, at the request of Mrs. Charlton, and with full power to act for her, visited Mr. Jeffries at his home in Baltimore, where he was then lying ill, and stated to him that he was present to make settlement for the Marsden property and pay the amount of \$2,000 due under the agreement, whereupon Mr. Jeffries replied that he would not accept \$2,000, that Mrs. Charlton owed him much more; and after some figuring, in which Mrs. Jeffries assisted, he further stated that the amount due to him was \$3,552.72, and that he would convey to Mrs. Charlton when she paid him that amount.

Mr. Jeffries died June 12, 1905. His will was proved June 24th. After his death and about three days before the so-called option in the agreement expired the same attorney called on the executor, and stated that he was ready to pay the \$2,000 mentioned in the agreement. The executor declined to accept it, stating that there was more than that amount due, and subsequently, on July 10th, filed the bill in this cause. The vice chancellor held the agreement to be a strict option, and not to have in it the equity of the right to redeem after the period of two years had expired. The settled rule in this state is that in equity time is not of the essence of an agreement to convey lands, unless there is an express stipulation by the parties making it so, or a necessary implication arises from the nature of the transaction that the parties so intended. *Bullock v. Adams' Ex'r*, 20 N. J. Eq. 367; *King v. Ruckman*, 21 N. J. Eq. 599; *Dynan v. McCulloch*, 46 N. J. Eq. 11, 18 Atl. 822, affirmed 46 N. J. Eq. 606, 22 Atl. 58. No express agreement to that effect appears in this instrument. Does such result flow from a necessary implication? While in the body of the instrument it is called an option, yet it seems clear that it is really an agreement to reconvey. It is evident not only from its recitals, but from the object disclosed by its terms, that its real purpose and intended effect was for the benefit of the defendant, and to hold that a strict construction should be

given to the time limit would be contrary to all else in the relation of the parties. This is also clear when we consider that during the period of two years, Mrs. Charlton became entitled to the surplus of the rents over such sum as was required to keep down the interest, taxes, insurance, and pay for the improvements, and that it was Jeffries' duty to collect the rents and apply them to the above purposes, Mrs. Charlton being bound to make good to Jeffries any deficiency. Thus the property was treated as if Mrs. Charlton was the owner. The management was wholly left with Mr. Jeffries for his protection, and for which he was to be paid \$2,000 and interest. There is nothing in these arrangements to indicate that failure to carry out the agreement within the strict time would not be satisfied by the equitable rule allowing interest as compensation for the delay.

The provision for the settlement of accounts in October of each year would place Mr. Jeffries under the duty of rendering a statement showing on which side of the account the balance lay. As he was possessed of the only knowledge upon the subject he alone could do this. It does not appear that any account was rendered by him until it was figured up when the attorney applied to him during his illness in the latter part of May, 1906, when he claimed that the amount due was \$3,552.72. Thus, Mr. Jeffries having failed to advise Mrs. Charlton of the amount due to him at the times specified in the agreement for the settlements, and to call upon her for payment, a presumption arose that the rents were ample to meet the expenses. The one and only accounting came about at the instance of Mrs. Charlton when she tendered herself ready to perform the agreement by the payment of \$2,000 shortly before Mr. Jeffries' death. Then, for the first time, the deficiency of the rents was made known to her. The dispute over this amount, the death of Mr. Jeffries following shortly thereafter, both within the two-year limit, the fact that his will was not proved until eight days before the expiration of the two years, within which time the executor also had refused to accept the sum of \$2,000, all present reasonable ground for relief against the forfeiture claimed by the complainants to have resulted from the delay. Nor has there been any change in the relation of the parties or in their condition consequent upon the failure to perform within strict time, whereby an estoppel would arise.

There is nothing in this contract to indicate that time was deemed by the parties to be of its essence, or that it has become such, and therefore Mrs. Charlton's failure to comply within two years does not bar her from relief by way of specific performance.

The decree should be reversed, with costs, and a decree entered directing the complainants to render an account and to specifically perform said agreement by a conveyance of

the property to the defendants upon the said defendants complying with the terms of the agreement within a reasonable time.

(74 N. J. E. 232)

### SCHOCK v. GARRISON.

(Court of Chancery of New Jersey. May 2, 1908.)

#### 1. INJUNCTION—BILL—IRREPARABLE INJURY—GENERAL ALLEGATION.

Where a bill for injunction alleges in general terms that irreparable injury will result by the act complained of, but fails to disclose wherein such irreparable injury will arise, or to aver that defendant is pecuniarily irresponsible, or that the damages will not be easily ascertainable and recoverable, no ground for relief is shown, in the absence of other recognized grounds of equitable jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 223-242.]

#### 2. SAME — RIGHTS IN DOUBT — GRANT BY RIPARIAN COMMISSIONERS.

Where the riparian commissioners granted land below high-water mark, "with the right and privilege \* \* \* to exclude the tide water from so much of the land \* \* \* as lies under water by filling in or otherwise improving the same, and to appropriate the lands under water," the right of the grantee, before appropriation of the land, to exclude others from exercising a common right to fish, is in such doubt that injunction will not issue to protect it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 82-85.]

Bill for injunction by George Y. Schock against Francis Garrison. Order to show cause discharged.

The bill is filed to restrain defendant from completing the erection of a "pound" on certain land below high-water mark on Delaware Bay shore, which land is within the boundaries of a grant made to complainant by the state of New Jersey through its board of riparian commissioners. The terms of the grant held by complainant are identical with the terms of the grant which was considered in *Burkhard v. Heinz Company*, 71 N. J. Law, 562, 60 Atl. 191. The bill asserts that the lands within the boundaries of complainant's grant are chiefly valuable for catching king crabs in May and June of each year, and that defendant is at this time, without right, engaged in erecting a pound, at a certain point on the lands covered by the riparian grant, which pound is to be used by defendant for the purpose of catching king crabs during the approaching crab season.

The defense made is that no part of the lands included in complainant's riparian grant have been reclaimed or in any way appropriated by complainant to his exclusive private use; that the land under water within the boundaries of complainant's grant includes the Delaware Bay shore front between high and low water mark for a distance along the shore of over half a mile, and that for a period which appears to extend beyond the memory of the oldest people this tidal land has been used by the general public for fishing for king crabs and fish; that the



method now commonly adopted in catching king crabs is by the use of pounds similar to that which defendant is constructing; that these pounds or traps are constructed by suspending netting on posts extending at right angles to the shore, and are, when constructed, temporary structures, for use only during the fishing season, and are then removed; that the common right of the public to fish for crabs with pounds is sanctioned by custom; and that the use of the device is in no way exclusive of or derogatory to the equal rights of others to fish for crabs in like manner.

Hearing has been had at the return of an order to show cause upon the bill and answer, accompanied by affidavits in behalf of the respective parties.

Harry S. Douglass, for complainant. William C. French, for defendant.

LEAMING, V. C. (after stating the facts as above). The question for consideration is whether this is one of that class of cases in which a court of equity may, by decree of injunction, protect and enforce the legal rights in real estate now asserted by complainant. It is not alleged that defendant is peculiarly irresponsible or unable to answer in damages. The bill in general terms alleges that irreparable injury will result to complainant if defendant is permitted to complete the structure complained of; but no specific averment of the bill discloses wherein such irreparable injury will arise. The bill alleges that the territory included within the boundaries of the riparian grant is chiefly valuable for catching king crabs, and an affidavit annexed to the bill states that the existence of the pound which defendant is erecting will prevent complainant from using or renting the land so occupied by the pound of defendant, and that defendant has not offered to pay to complainant; but it is nowhere averred that the amount of any damages which complainant may suffer will not be easily ascertainable and recoverable. As no ground of jurisdiction peculiarly equitable is presented, it is manifest that relief, if granted, must be based upon the existence of legal rights which are sufficiently clear and well settled to call for the exercise of the equitable remedy now sought. An exact and authoritative statement defining the limitation of equity jurisdiction in cases within the class to which the present case belongs is contained in *Outcalt v. George W. Helme Company*, 42 N. J. Eq. 665, 676, 9 Atl. 685, in which case the late Justice Dixon, speaking for the Court of Errors and Appeals, said: "When the real gravamen of the bill is the unconscientious refusal of the defendant to yield to complainant the enjoyment of his legal estate, as it is in bills like the present, for nuisance or for trespass, then (in the absence of other recognized grounds of equitable jurisdiction) a condi-

tion precedent to the right of the complainant to bring his adversary into the court of conscience is that the latter's misconduct shall be admitted or shall have been established at law against him, for only such misconduct can be deemed unconscientious as well as illegal."

Defendant does not deny the existence or validity of complainant's grant, but asserts the right to exercise the common right to fish upon the land until complainant shall have made some appropriation of the land inconsistent with the exercise of the common rights referred to. In the case of *Polhemus v. Bateman*, 60 N. J. Law, 163, 37 Atl. 1015, a riparian grant, containing a reclamation clause similar to, but not exactly the same as, complainant's grant, was treated as insufficient to support an action of trespass *quare clausum* until after the grantee should have exercised the power of reclamation conferred by the grant. In the subsequent case of *Burkhard v. Heinz Company*, 71 N. J. Law, 562, 60 Atl. 191, the same court had before it, in an action of ejectment, a riparian grant containing a reclamation clause identical with the grant now held by complainant. While in that case the court held the grant sufficient to sustain an action of ejectment against a defendant who had erected a permanent structure upon a portion of the land included within the boundaries of the grant, I find in the opinion of the court language which I think may be fairly said to warrant a substantial doubt whether that court would have sustained an action under that grant against a defendant who had merely exercised a common right to fish in the sea before the grantee had made some appropriation of the land which was inconsistent with the exercise of such common right. If such a doubt touching the rights conferred by the grant held by complainant exists, it is plain that this case is not one falling within the class of cases in which a court of equity should extend relief for the enforcement or protection of legal rights in land. From the two decisions cited it is clear that, within the field of statutory powers conferred upon the board of riparian commissioners, the grants made by the state through that board must be construed as conferring such rights and privileges as the language of the grants may import. The clause touching the privilege of reclamation and appropriation cannot be without a purpose, and I am not prepared to say, in view of the suggestions contained in *Burkhard v. Heinz Company*, supra, that it should be considered as well settled that such a grant is effective to terminate the common right of fishery before any act of possession or reclamation shall have been exercised by the grantee. Complainant's remedy, if any exists, is at law.

I will advise an order discharging the order to show cause. Should the parties de-

sire to be heard touching the retention of the bill until the termination of a suit at law, I will hear the parties on that question.

(75 N. J. L. 903)

**BOWLER v. OSBORNE.**

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

**1. COURTS—DISTRICT COURT—JURISDICTION—AMOUNT IN DISPUTE.**

A district court is not deprived of jurisdiction where there are mutual demands exceeding the jurisdictional amount, if the balance in dispute is less than \$300.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 422.]

**2. SAME.**

Where a defendant in her set-off claimed more than \$300, but at the trial confessed the plaintiff's claim, and only demanded judgment for the balance between her debt to the plaintiff and the amount of her set-off, which balance was less than \$300, the amount due defendant, less plaintiff's debt admitted, was the balance or matter in dispute over which the district court had jurisdiction. It is not the amount of the claims of the respective parties against each other, but the balance in dispute, that is the test of jurisdiction in such case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 422.]

(Syllabus by the Court.)

Error to Supreme Court.

Action by William Bowler against Rebecca J. Osborne. Judgment for defendant in the district court was reversed on appeal, and defendant brings error. Judgment of Supreme Court (64 Atl. 697) reversed, and of district court affirmed.

Thompson & Cole, for plaintiff in error.  
William M. Clevenger, for defendant in error.

BERGEN, J. The jurisdiction of the district courts of this state is limited to "every suit of a civil nature at law, or to recover any penalty imposed or authorized by any law of this state, where the debt, balance, penalty, damage or other matter in dispute does not exceed, exclusive of costs, the sum of three hundred dollars," etc. P. L. 1902, p. 368. The language is substantially that used to fix the jurisdiction of courts for the trial of small causes in this state, and has been exhibited on our statute book for many years, the only substantial change being amendments increasing from time to time the jurisdictional amount. The question now to be considered is whether the district court had the jurisdiction which it exercised in this cause under the following facts, viz.: The plaintiff instituted his suit in the district court, claiming judgment in his state of demand for \$159.84, and to this the defendant pleaded that she would set off against the claim of the plaintiff that he was indebted to her "in \$239.25 for and on account of his certain promissory note, dated September 27, 1898, payable thirty days after date, which is still due and payable to defendant, and which amount is due and un-

paid, with interest." At the trial before any evidence was offered by the plaintiff, the defendant admitted that there was no dispute as to the correctness of the plaintiff's claim, whereupon the plaintiff's case was rested, and the trial proceeded for the purpose of determining the liability of the plaintiff upon the note which the defendant claimed was a just set-off against the debt admitted to be due from the defendant to the plaintiff. If the interest had been calculated upon the note at the legal rate, and added to the principal thereof, the amount of the defendant's claim would be in excess of \$300. No motion was made to suppress the set-off as filed because it exceeded the jurisdictional amount, but the plaintiff joined with the defendant in the trial of the only issue then remaining, which was whether the plaintiff was liable to the defendant upon the note which the defendant claimed to set off against her admitted liability to the plaintiff for the debt demanded in his declaration. It further appeared that when the note was offered in evidence it was objected to because it was claimed that the indorsement of the note by the plaintiff was irregular, and that no contract had been proven which would make him liable, but it was not objected that more than the jurisdictional amount was due to the defendant. The trial court submitted to the jury the question of the liability of the plaintiff on the note—that is, whether he indorsed as an accommodation for the maker, or the defendant, in these words: "That is the point at issue before you, gentlemen, and if you find that he was a guarantor, that he was an accommodation for Mr. Evans (the maker), then your verdict must be in favor of Mrs. Osborne, for such amount as you may find due on the note with interest, less the account and interest. If he was an indorser as an accommodation for Mrs. Osborne, then your verdict must be in favor of Mr. Bowler for the amount of his claim and interest." A request was made to charge that if the note was found to be legally due and the total was more than \$300, then the set-off must be disregarded and a verdict found for the plaintiff for the full amount of his claim, including interest. This request was refused, and we think properly. Whereupon the defendant waived any sum in excess of \$300 and the court charged the jury that they might bring in a verdict for either party should it not exceed \$300, and "that in the situation of the pleadings, and as the case is now before us, that the matter in dispute is the matter covering the set-off in this case, and if necessary the court will permit the defendant to amend his set-off or offset to cover that point."

On this state of facts the Supreme Court held that when the set-off was filed the court had no jurisdiction to hear the merits of that demand, and that the jurisdiction of the court was restricted to the determination of claims whether contained in the plaintiff's

state of demand or in the defendant's set-off, not exceeding \$300, and that this difficulty was not removed when the defendant admitted the full amount of the plaintiff's claim without requiring proof of it, and demanded only the difference between her claim and the plaintiff's, although when such credit was allowed the balance claimed by the defendant was within the jurisdiction of the court.

We cannot agree with the conclusion reached by the Supreme Court on this point, for manifestly the debt, balance, or matter in dispute did not exceed the sum of \$300, because when the plaintiff's claim was admitted all dispute regarding it was removed, and the only matter disputed was the liability of the plaintiff for any balance due defendant after crediting on her claim, if any was proven, the debt admitted by the defendant to be due to the plaintiff. If in this case the defendant had in writing credited on her set-off plaintiff's claim, the amount, if anything, due her would have been the amount in dispute, and in view of the facts that he plaintiff made no motion to strike out the set-off as filed, because it claimed an amount beyond the jurisdiction of the court; and that after the defendant had conceded the correctness of the plaintiff's claim without requiring proof of it, the plaintiff went to trial upon the issue tendered, the defendant's admission was as effective as if the credit had been indorsed upon the set-off. The cause was tried by both parties upon the theory that the credit had been made, and an amendment to the pleadings to conform to the real issue tried can be made after verdict as well as before. The claim made by the defendant here was within the jurisdiction of the court, because she could in no event recover more than the difference between the amount due on her note and the sum which she admitted to be due to the plaintiff. If she had brought the suit on her note and credited the plaintiff with the amount of his claim, it could not be said that the matter in dispute was more than the amount demanded, which would have been the balance due between the two accounts. As was said in *Smock v. Throckmorton*, 8 N. J. Law, 216-217, "The Legislature designed to give full jurisdiction to the amount of one hundred dollars, and foreseeing that many cases would occur where mutual demands or accounts subsisting, these on the one side and the other might far exceed one hundred dollars, when the balance might be far less, and intending in such cases to give their tribunal jurisdiction, they declared, to remove all doubt, that whatever might be the amount on either side, if the balance did not exceed one hundred dollars, the suit should be cognizable before a justice of the peace."

It is quite true, as was said by Mr. Justice Reed in *Clancy v. Neumeyer*, 51 N. J. Law, 299, 17 Atl. 154, "That whenever one of the parties claims that there is due to him more

than \$200 it ends the power of the court to try that claim. And it does not matter that there is a counterclaim which, if credited, leaves a balance less than the jurisdictional amount." This is so because the party claiming more than the jurisdictional amount does not admit that any sum less than that which he claims is the balance in dispute. However, in the same case the court said that if a defendant filed a counterclaim of \$400 and should credit upon it enough of the plaintiff's demand to bring the balance within the \$200 it would be cognizable because there would then be a dispute about a balance less than the jurisdictional amount. Holding, as we do, that the admission by defendant of plaintiff's debt amounted to a credit on defendant's claim which reduced it to the jurisdiction of the court, the dispute at the trial was, whether the plaintiff owed the defendant the difference between the two sums, and it did not involve a contest over the full amount of the respective demands.

Section 33 of the District Court Act, P. L. 1898, p. 564, declares that "where the debt, balance, or other matter in dispute, or amount really due or recoverable as aforesaid, exceeds, exclusive of costs, the sum or value of \$300.00 the plaintiff or defendant may recover in such court a sum not exceeding \$300.00 and costs." And it is made lawful for the plaintiff, or for the defendant in a set-off, to waive the excess over \$300. The plaintiff having requested the court to charge that it was impossible for the jury to find more than \$300 due defendant, and if they did so find they must deduct from \$300 the sum admitted to be due to the plaintiff, the defendant thereupon waived all of her claim in excess of \$300, and the court charged that the matter in dispute was the offset, and it would permit the defendant to so amend the set-off as to limit it to a claim of \$300. We find no impropriety in allowing the amendment at the time it was permitted, because it conformed to the issue tried, and the directions given by the court to the jury.

The conclusion we have reached on the single question passed on by the Supreme Court requires us to consider the other reasons presented and argued there and in this court. The note was made prior to the adoption of the negotiable instrument act, and it was urged that being an irregularly indorsed note it imports no commercial contract, and that plaintiff is not liable until the nature of this contract is proven. The testimony is conflicting, but there is evidence from which a jury might infer that the plaintiff indorsed the note as an accommodation indorser, or guarantor, for the maker. The son of the defendant, who managed a part of her business, testified that defendant refused to accept the note without security, after which Evans, the maker, procured the indorsement of the plaintiff and delivered the note in that condition to defendant in payment of his debt

to her. The jury found as a fact that the indorsement was made for the benefit of the maker to enable him to secure the acceptance of the note by the defendant. It is the established rule in this court not to review findings of fact upon certiorari if there be evidence from which the facts can be found, and we think such evidence exists in this case.

It is next insisted that plaintiff is not liable as indorser because no property of any kind was parted with by the defendant on the credit of his name, and in support of this claim *Hayden v. Weldon*, 43 N. J. Law, 128, 39 Am. Rep. 551, is cited, but this case does not apply to the present situation for the reason that, in the case cited, the note was delivered to the payee, and was in his hands when the additional indorsement was made, and after the contract between the maker and payee had been finally consummated. In the present case the consideration of acceptance was the security which the indorsement provided. We find no error in the record of the trial on this point.

The next objection is that the trial court permitted the defendant to read before the jury interrogatories and answers taken, under a commission, in a foreign state. The commission was procured by the plaintiff, who prepared and served the interrogatories intended to be annexed to the commission in order, as provided by the district court act, that the adverse party might examine the same and submit cross-interrogatories if he thought proper. In this case no cross-interrogatories were submitted, and the commission was duly executed in the manner required by law. The plaintiff declined to read the interrogatories and answers, but they were read by the defendant against the objection of the plaintiff, and the action of the court in permitting the defendant to read them was excepted to. This question has been disposed of, contrary to the plaintiff's view, by this court in *Wallace v. Leber*, 69 N. J. Law, 312-321, 55 Atl. 475.

The conclusion we have reached is that the judgment of the district court was correct, and the reversal thereof by the Supreme Court was erroneous.

The judgment of the Supreme Court will be reversed, and the judgment of the district court affirmed.

(74 N. J. E. 445)

FIDELITY TRUST CO. v. KLINE et al.  
(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

**BANKRUPTCY—TRANSFERS—ASSIGNMENT FOR CREDITORS—"GENERAL ASSIGNMENT."**

The owner of a city lot which she had contracted to convey for \$50,000 died, leaving the same to the bankrupt, subject to certain legacies. Prior to bankruptcy the bankrupt conveyed the lot to K. to secure a debt due to him, amounting to \$17,500, and later assigned to K. "so much" of the bankrupt's interest in the property in excess of the amount due to K. as might be required to pay all the bankrupt's

creditors in full, whose claims amounted to \$11,000, authorizing K. to use so much of the bankrupt's interest in the property for the payment of the creditors as was necessary for that purpose. *Held*, that such assignment was not a general assignment for the benefit of creditors, under Bankr. Act 1898, § 3, c. 541, 30 Stat. 546, 547 (U. S. Comp. St. 1901, p. 3422, 3423), making a general assignment for the benefit of creditors an act of bankruptcy without any reference to the question of solvency or intent, and was therefore valid.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3052-3054.]

Appeal from Court of Chancery.

Action by the Fidelity Trust Company against George H. Kline and others. From a decree for complainant, defendant Abram L. Jacobs, as trustee in bankruptcy of John Van Sickle and others, appeals.

The following is the opinion of Stevens, V. C., in the court below.

"This case appears to me to lie within a very narrow compass. It is an interpleader bill; the contesting defendants being, on the one hand, Abram L. Jacobs, who is a trustee in bankruptcy of (inter alios) John Van Sickle, and, on the other, George H. Kline, the father-in-law of Van Sickle, to whom Van Sickle made the assignment whose legality is the subject of this controversy. It appears that a Miss Van Sickle was the owner of a lot on the corner of Bank and Halsey streets, Newark, which she contracted, in writing, to convey to one Wood for \$50,000. She died in 1899, and before the contract was carried into effect. She left the greater part of her property to her nephew, John K. Van Sickle. He was willing to convey to Wood, but, owing to defects in the title, the conveyance was not made until August, 1904, when, with the concurrence of all parties concerned, the agreement was carried out. Van Sickle in 1890 was connected with a firm of brokers which failed. A petition in bankruptcy was on December 3, 1900, filed against the firm and against him, in the district court for the Southern District of New York, and they were adjudicated bankrupts. By deed dated August 10, 1900, Van Sickle had conveyed the lot above mentioned to Kline to secure a debt due to him and to enable him (Kline) to raise more money for Van Sickle's benefit. The indebtedness amounted to about \$17,500. No more money was raised. The deed was attacked by the trustee in bankruptcy in the federal court, on the ground that it had been made with intent to hinder and defraud creditors. It was sustained both in the Circuit Court and in the Circuit Court of Appeals, 127 Fed. 62, 61 C. C. A. 598. On October 22, 1900, Van Sickle executed to Kline another paper, which, after reciting the above mentioned deed of August 10th, provided as follows: 'I do hereby assign to the said George H. Kline so much of my interest in said property in excess of the amount due to him as may be necessary to pay all my creditors in full [naming the creditors] whose claims amount to about \$11,000, and I do hereby au-

thorize and request him to use and apply so much of the proceeds of my interest in said property in payment of my said creditors as may be necessary for that purpose.' If the conveyance of August 10th was not made with intent to hinder and delay the creditors, it is difficult to see how this assignment could have been. Indeed, this was conceded by counsel for the trustee in bankruptcy.

"He argued that it was void under that provision of section 3 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 546, 547 [U. S. Comp. St. 1901, pp. 3422, 3423]), which makes a general assignment for the benefit of creditors an act of bankruptcy without any reference to the question of solvency or intent. *West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098. If this were a general assignment, his position would be sound. It seems to me clear that it is not. So far from being a general assignment, it is not even an assignment of all the residue of assignor's interest in a single lot. The lot sold for \$50,000. Of this amount \$500 had been paid before Van Sickle got it. It came into his hands subject to legacies and other claims, amounting at the time the assignment was made to about \$10,000. It was also subject to the Kline debt of \$17,500. This left an equity of over \$21,000 and of this only \$12,000 were then needed to pay all his debts. He did not in terms assign all the money, but only "so much" of it as was necessary to pay his creditors in full. The situation, then, was this: Kline held the legal title to property in trust to pay debts, and he held it as mortgagee. It was subject to Van Sickle's right to redeem. This being so, the case is on all fours with *Muchmore v. Budd* (decided by the Court of Errors) 53 N. J. Law, 369, 22 Atl. 518. I have not been referred to any case in the federal courts which clashes with that authoritative decision.

"I think the claim of the trustee to the fund now in court is not sustained."

A. C. Streltzwolf, Jr., for appellant. Frank Bergen, for the respondents.

**PER CURIAM.** The decree under review herein should be affirmed, for the reasons expressed in the opinion of Vice Chancellor STEVENS.

(76 N. J. L. 499)

#### WENDEL v. BOARD OF EDUCATION OF CITY OF HOBOKEN.

(Court of Errors and Appeals of New Jersey. June 15, 1908.)

#### 1. EMINENT DOMAIN—RIGHT TO EXERCISE POWER—SCHOOL DISTRICTS.

The board of education of the city of Hoboken can acquire lands for school purposes by condemnation proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 85.]

#### 2. SAME—INSUFFICIENT SHOWING.

That a board of education determined to acquire particular lands to erect a high school building thereon, and that the owner refused

to name a price or to sell to the board, does not authorize the board to condemn, since under the general school law, as revised in 1903 (P. L. pp. 26, 27, §§ 73-76), the board is powerless to contract to purchase lands for school purposes until after the board of school estimate fixes the amount to be expended, and since the power to condemn cannot exist where there is no power to purchase, the fundamental prerequisite to the exercise of either power being the ability to pay the agreed price or the commissioners' award.

#### 3. SAME—PETITION.

A petition to condemn land must state all jurisdictional facts, and, unless it shows the right of the condemning party to exercise the power of eminent domain, an order appointing commissioners cannot be properly made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 511, 512.]

#### Error to Supreme Court.

Certiorari by John G. Wendel against the board of education of the city of Hoboken to review an order appointing condemnation commissioners. From a judgment of the Supreme Court (66 Atl. 1075) affirming the order, Wendel brings error. Reversed.

Collins & Corbin, for plaintiff in error. Horace L. Allen, Theodore Backes, and Nelson B. Gaskill, for defendant in error.

**GUMMERE, C. J.** This writ of error brings up for review a judgment of the Supreme Court in a certiorari proceeding affirming the validity of an order made under the "act to regulate the ascertainment and payment of compensation for property condemned or taken for public use" (P. L. 1900, p. 79), appointing commissioners to condemn lands of Wendel, the prosecutor, for public school purposes. The order is attacked upon two grounds: First, that the board of education of the city of Hoboken has no power to acquire lands by condemnation; and, second, if it be considered that such power resides in the board, the right to exercise it in this particular case is wanting, for the reason that the necessary prerequisites are lacking.

The first ground of attack is fully considered in the opinion of the Supreme Court, and the conclusion there expressed that the power to acquire lands for school purposes, by condemnation proceedings, resides in the defendant board. We fully concur in that conclusion, and find the reasoning upon which it is rested so convincing as to require nothing to be added by us in the way of discussion.

The second ground upon which the validity of the order is challenged seems to have been overlooked by the Supreme Court, although it was mooted before that tribunal. The petition of the board of education upon which the order is founded, after reciting that by the general school law of 1903 the right to acquire lands by the exercise of the power of eminent domain is vested in it, sets forth that the board by resolution determined to acquire the lands of the prosecutor for the purpose of erecting a high school building thereon, and delegated one of their members to

call upon him and request him to fix a price therefor; that this was done, and that the prosecutor thereupon refused to name any price for the land or to sell it to the board; that, upon this fact being reported to the board, it passed another resolution, whereby it directed the corporation attorney to institute proceedings to condemn the property. The facts thus exhibited do not, in our opinion, disclose a situation which authorizes the exercise of the power of condemnation by the board. By the seventy-third section of the general school law, as revised in 1903 (Laws 1903 [2d Ex. Sess.] p. 26), a board of school estimate is created in every city school district of the state. The seventy-fourth section (page 27) of the act requires the board of education in each city school district annually to prepare and deliver to the board of school estimate an itemized statement of the amount of money estimated to be necessary for the current expenses of and for repairing and furnishing the public schools of the district for the ensuing year. The seventy-fifth section requires the board of school estimate, upon receiving such statement, to fix and determine the amount of money necessary to be appropriated for the use of the public schools in the district for the ensuing school year, and directs that the amount fixed and determined by it shall be put in the general tax levy. The seventy-sixth section provides that whenever a city board of education shall decide that it is necessary to raise money for the purchase of lands for school purposes, or for erecting, enlarging, repairing or furnishing a schoolhouse or schoolhouses, it shall prepare and deliver to each member of the board of school estimate a statement of the money estimated to be necessary for such purpose or purposes, and that the board of school estimate shall then fix and determine the amount necessary, and certify the same to the board of education, and also to the common council or other financial board of the city, and that such financial board may include it in its annual appropriation or may issue bonds to raise the amount.

It seems quite plain from a perusal of these provisions that the principal function of the board of school estimate is to supervise the expenditures proposed to be incurred by the board of education, and that the latter board is powerless to enter into a valid contract for the purchase of lands for school purposes until after action by the board of school estimate fixing and determining the amount to be expended in such purchase. It is hardly necessary to add that the power to condemn cannot exist where the power to purchase is wanting. The fundamental prerequisite to the exercise of either power is the ability to pay the agreed upon price in the one case, or the amount fixed by the award of the commissioners, in the other. The power of the board of education of the city of Hoboken to acquire the lands of the prosecutor and the jurisdiction of the

justice to make the order under review depend upon whether the board of school estimate has fixed and determined the amount of money necessary to be expended for that purpose. A petition in proceedings to condemn lands must state all jurisdictional facts. Unless it shows the existence of the right of the condemning party to exercise the power of eminent domain, an order appointing commissioners to condemn cannot properly be made. *Winter v. Telephone Co.*, 51 N. J. Law, 83, 16 Atl. 188. In the present case the absence from the petition of any averment that the amount of money to be paid for the lands of the prosecutor had been fixed and determined by the board of school estimate was fatal. Without it the petition disclosed no right on the part of the board of education to condemn them.

The order appointing commissioners was consequently improvidently made, and the judgment of the Supreme Court will be reversed.

(76 N. J. L. 480)

ERVIN et al. v. WOHLFERT.

(Supreme Court of New Jersey. June 22, 1908.)

APPEAL AND ERROR—RECORD—CERTIFICATION  
—STATE OF CASE.

The supplement to the district court act of April 12, 1905 (P. L. 1905, p. 259), allowing a judge of that court to certify the transcript of the proceedings and testimony made by a stenographer at the trial of any cause as a state of the case to be used on the hearing of an appeal or certiorari limits the time within which such certification may be done and transcript filed to a period of 15 days after judgment, and such period may not be extended by the district court.

(Syllabus by the Court.)

Appeal from District Court of Elizabeth.

Action by Mary F. Ervin and Frank W. Ervin against Frederick W. Wohlfert. Judgment for plaintiffs, and defendant appeals. Dismissed.

Argued February term, 1908, before REED, PARKER, and VOORHEES, JJ.

Craig A. Marsh and Frederick S. Taggart, for appellant. Paul Q. Oliver, for appellees.

VOORHEES, J. This case arises on an appeal from the district court of the city of Elizabeth, and is a motion to dismiss such appeal on the ground that the transcript of stenographer's notes was not certified by the judge and filed in this court within the time required by the statute.

The case was tried before a jury, and a verdict rendered October 3, 1907. Notice of appeal was served, and a deposit of money in lieu of a bond was made October 12th. After that there was an application for a new trial and a motion on behalf of the plaintiff to mold the verdict and enter judgment thereon. It appears that the verdict was amended, and judgment actually entered October 21st nunc pro tunc as of October 3,

1907. The record shows that in the meantime the judge, by orders, attempted to extend the time to and including the 30th day of November "within which to agree upon the form of the case upon appeal or the settlement thereof by the judge." The transcript of stenographer's notes was filed November 29th more than 15 days from the entry of judgment. The act of April 12, 1905 (P. L. 1905, p. 259), provides that the transcript of the proceedings and the testimony made by the stenographer shall be certified by the judge as the state of the case and filed in this court within 15 days from the rendition of the judgment.

We are of opinion that the Legislature having failed to incorporate in the Statute of 1905 any provision for extension of the time for certifying and filing the notes no such power can by construction be read into the act and thus be conferred upon the judge of the district court.

The motion to dismiss the appeal, therefore, should prevail.

#### D'AURIA v. BARBIERE et al.

(Court of Chancery of New Jersey. May 15, 1908.)

##### 1. INTERPLEADER—HEARING.

On interpleader, the direction to pay into court, made primarily for the relief of plaintiff, is not intended to deprive defendants, as against each other, of substantial rights or defenses which they may have against each other arising from the choice of forum, or of adverse parties, and the court may direct an issue between two adverse claimants in such form that they alone would be the parties to the action.

##### 2. EXECUTORS AND ADMINISTRATORS—ASSETS—OWNERSHIP.

Where the evidence showed that money in the possession of decedent was the earnings of her son, and that the same was not a gift to her, but that she was accountable therefor, her administrator was not entitled thereto.

Interpleader by Salvatore D'Auria against Joseph R. Barbieri and others. Hearing on claims of defendants.

James M. Trimble, for complainant. A. R. Finelli, Alfonso Larezza, and R. A. Braun, for defendants.

EMERY, V. C. I find on examining the record, that Ernest Barbieri is not a party to either the original or supplemental bill, and that he has put in no answer making claim to any part of the money. The only claimants to the money paid into court on the bill of interpleader are Joseph Rocco Barbieri and the administrator of Teresa Barbieri (who each claim the entire amount paid in), and the infant defendant, Veneranda Barbieri, who submits her rights to the protection of the court. The infant's right, if she has any, arises from a contract made between her half-brother Joseph and her maternal uncle acting on her behalf, called in the case the "family compact," which was made after Teresa's death. On the decree

for interpleader and trial of the claims on the answers filed to the bill and supplemental bill, if the opposing claims be considered as involving only a single record, the party on one side is the administrator, claiming the entire fund as assets of the deceased, and on the other, Joseph R. Barbieri, claiming the entire fund for himself, and the infant defendant, claiming \$500 (about one-third) of the fund. If this is to be considered the status of the parties on the record, and Veneranda as well as Joseph R. is to be considered a party to a suit against the administrator, then, under the statute, Veneranda's evidence as to transactions with or statements by her mother in her lifetime with Joseph, is not admissible. I am inclined to think that Joseph R. cannot, and should not by reason of the mere form of the proceeding on interpleader, viz., the trial of the claims on the answers filed to the bill of interpleader, be deprived of the right to present his claim under such form of record as to parties as would give him the opportunity to make such proof of his claim against the administrator as he would be entitled to make if he were suing the administrator alone at law for the money in the hands of the administrator, or the administrator alone were suing him at law for the money in his hands. In either case the suit would have been solely between Joseph R. on the one side and the administrator on the other, and, had the matter been suggested at the time of decree of interpleader, Joseph's rights to all the evidence which, in an action at law he would be entitled to produce, could have been preserved by directing that the claim of Joseph be settled (by a feigned issue or otherwise) in such action. This method is sometimes taken, and for the very purpose of protecting these rights as between defendants on interpleader who are brought into equity by a plaintiff who has no interest, legal or equitable, in their disputes. The direction to pay into court, made primarily for the relief of the plaintiff, is not intended to deprive the defendants as against each other, of substantial rights or defenses which they may have against each other, arising from the choice of forum or of adverse parties. If, therefore, the only evidence as to the origin of the money in question (outside of Joseph R.) was that of his sister Veneranda, and the status of the parties on the record on interpleader is such that Veneranda must be considered as a party defendant to the same action by or against the administrator to which Joseph is a party, then, in order to give Joseph his substantial rights, I should be inclined to hear an application to open the decree of interpleader for the purpose of directing an issue between Joseph R. and the administrator, in such form that they alone would be the parties to the action. But the evidence of the brother Ernest, who is not a party to the suit and makes no claim to the money, is, I think, admissible beyond ques-

tion, and shows sufficiently and satisfactorily that the money in his mother's possession, at or shortly before her death, came from Joseph, who earned it and supported the family. The mother's possession of the money does not under the circumstances of the case warrant the conclusion that it was a gift to her, or that the mother was not accountable for it to Joseph, either wholly or in part. As I said at the hearing, the court, in order to do justice, must take into consideration the habit of some families, especially those coming from Continental Europe, to keep the earnings of the family together. In this case an amicable division of the fund after the funeral was expected to take place, according to the evidence of nearly all the witnesses who spoke of Rocco's production of the money at his uncle's request, and its subsequent delivery to Dr. Sturchio. This understanding as to division, so far as the infant daughter was concerned, was afterwards actually carried out by the family compact, and, for the reasons given at the hearing, this compact must be affirmed against Rocco's present claim to all the money. This compact was made as the result of their family councils or interviews, without the interposition of counsel, and was drawn up by a notary mutually agreed on. It was made, I think, upon a full consideration, and must be enforced against Joseph. I will advise decree directing that the administrator of Teresa is not entitled to the fund or any part of it, that the infant is, under the contract, called the "family compact," entitled to \$500, and that Joseph R. is entitled to the balance.

(75 N. J. L. 361)

**HARRIS v. DET FARENEDE DAMPSKIBSELSKAB et al.**

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

**1. MASTER AND SERVANT—DUTY TO FURNISH SAFE PLACE TO WORK.**

A master's duty in respect to furnishing his servants a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows or ought to know they are accustomed to use while doing it.

**2. SAME.**

When a master has furnished his servant a safe place in which to work, and has, to the knowledge of the servant, provided a safe method of providing the servant with tools when needed, the master has no duty imposed upon him to care for the safety of the servant, who, of his own volition and without the knowledge of the master, has departed from his safe place and gone to a dangerous place for the purpose of obtaining a tool which the master was in the act of supplying in the customary method, when it does not appear that the master knew or ought to have known that his servants were accustomed to depart from the safe place for such purpose. When the servant has thus departed from the safe place furnished, the master owes the servant no duty of a higher degree than that which is due a licensee.

**3. SAME—"FELLOW SERVANTS"—WHO ARE—"COMMON EMPLOYMENT."**

Fellow servants are those who are serving and controlled by the same master in a common employment. Common employment is service of such kind that, in the exercise of ordinary sagacity, all engaged in it may be able to foresee, when accepting it, that through the negligence of a fellow servant it may probably expose them to injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 486.]

For other definitions, see Words and Phrases, vol. 2, p. 1322; vol. 3, pp. 2716-2730; vol. 8, p. 7662.]

**4. SAME.**

If the servant was lawfully, in the course of his employment, in the vicinity of the place where he was injured, and was a fellow servant with those whose negligence produced his injury, the master, if he be furnished proper means for carrying on the work, is not liable for such injury unless he was negligent in the selection of the servants in fault, or in retaining them after notice of their incompetency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 352.]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Jennie Harris, administratrix of the estate of John Harris, to recover for his death against Det Farene de Dampskibsselskab and others. Judgment for plaintiff, and defendants bring error. Judgment set aside, and new trial awarded.

Joseph D. Bidle and Albert C. Wall, for plaintiffs in error. Thomas F. Noonan, for defendant in error.

TRENCHARD, J. This writ of error brings under review a judgment entered in the Supreme Court upon a verdict of a jury at the Hudson circuit in favor of the defendant in error, the plaintiff below. The action was brought to recover for the death of one Harris, a longshoreman of 25 years' experience.

The proof showed that Harris was at work upon the steamship United States, helping to unload freight. He was engaged in making up "drafts" of barrels of pebbles. A "draft" consisted of three barrels. His duty was to place a sling about them, and with this sling they were hoisted up to the hatchway above him. One of the barrels struck against the side of the hatch, and the head was broken, permitting the pebbles to fall upon the deck where Harris was working. He called for a shovel. The company had a toolhouse on the pier, and maintained a gangway man at the hatch whose business it was to serve the freight gang, and, when a shovel was needed by the men in the freight gang, it was the duty of the gangway man to procure it from the toolhouse and pass it to the men in the freight gang. When Harris called for the shovel, the gangway man replied, "All right, you want a shovel. All right, you will get one"—and at the same time called out to the dock foreman: "Get a shovel. It is needed here." While the shovel was being brought, Harris heard the coal



gang moving about. They were separated from the freight gang, of which Harris was a member, by several tiers of barrels extending across the ship. The coal gang's sole duty was to put coal in the ship. They had come aboard a few minutes before the accident. It was the custom for the coal gang not to start work until after the freight had been removed from the deck by the freight gang, and it was the custom not to open the coal hole until the coal gang was ready to start work. Harris, without waiting for the shovel to be furnished, went from the place where he was working to get a shovel from the coal gang, climbed hurriedly over the barricade of barrels separating the two gangs, and fell into the coal hole, the cover of which had been removed by the coal gang in violation of the custom not to remove the cover until the freight had been cleared away. At the close of the case the defendant moved for a direction of a verdict, on the grounds, among others, first, that there was no negligence shown on the part of the defendant; and, second, that the proximate cause of the injury from which death resulted was the negligence of a fellow servant. The motion was denied by the learned trial judge, and error was assigned thereon.

We think a verdict for the defendant should have been directed in view of the facts which the evidence exhibited. The only ground upon which the case was permitted to go to the jury was the alleged failure of the defendant company to use reasonable care in providing Harris a safe place to work, and the particular failure which the case was considered to have disclosed was the neglect to have a light over the coal hole while it was open, or to warn Harris that the cover had been taken off. A master's duty in respect to furnishing his servants a safe place in which to work extends to such part of his premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows or ought to know they are accustomed to use while doing it. *Morrison v. Burgess Sulphite-Fibre Co.*, 70 N. H. 406, 47 Atl. 412, 85 Am. St. Rep. 634. It is not disputed that the defendant company had provided Harris with a safe place to perform his work as a member of the freight gang. It had provided a safe method of furnishing him with a shovel when needed, and, when he asked for it, was in the act of supplying it, of which he was informed. When Harris, with such knowledge, of his own volition and without the knowledge of the defendant, departed from the safe place provided and occupied a dangerous place for the purpose of getting a shovel which the defendant was in the act of providing, he became either a trespasser, or, at the most, a mere licensee, to whom the defendant owed no duty except to abstain from willful injury, unless his action was justified by a custom of which the

defendant knew or ought to have known. *Collyer v. Pennsylvania R. R. Co.*, 49 N. J. Law, 59, 6 Atl. 437; *Guggenheim Smelting Co. v. Flanigan*, 62 N. J. Law, 354, 41 Atl. 844, 42 Atl. 145; *Haber v. Jenkins Rubber Co.*, 72 N. J. Law, 171, 61 Atl. 382. There was evidence that, on some occasions, the freight gang obtained shovels from the coal gang. But we think there was no evidence that it was a custom of which the defendant company knew or ought to have known. The proof, at most, shows only occasional secret infractions of the company's regulations. If, however, Harris was lawfully in the vicinity of the coal hole in the course of his employment, he was a fellow servant with the men whose negligence inflicted the injury upon him. They were all serving and controlled by the same master in a common employment of such kind that, in the exercise of ordinary sagacity, all engaged in it were able to foresee, when accepting it, that the negligence of a fellow servant would probably expose them to injury. *McAndrews v. Burns*, 39 N. J. Law, 117. A master who has furnished proper means for carrying on the work is not liable to a servant for the negligence of a fellow servant, while the two are engaged in the same common employment, unless for negligence in the selection of the servant in fault, or in retaining him after notice of his incompetency. *McDonald v. Standard Oil Co.*, 69 N. J. Law, 445, 55 Atl. 289; *McAndrews v. Burns*, 39 N. J. Law, 117. In accordance with these principles, Harris cannot recover from the defendant company, for it is not contended that the company was negligent in the selection of the coal gang, and it is manifest that it had no reason to suppose the coal gang would, in violation of custom, prematurely remove the cover from the coal hole and thus negligently expose their fellow servant to injury.

For these reasons, the judgment under review must be set aside and a new trial awarded.

(77 N. J. L. 556)

#### MARONEY v. LA BARRE.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

#### ARREST—RELIEF OF PERSONS IMPRISONED— VALIDITY OF ACT.

The statute entitled "An act for the relief of persons imprisoned on civil process." Gen. St. 1895, p. 1726, is not a general insolvency act in conflict with the national bankruptcy law. (Syllabus by the Court.)

#### Error to Supreme Court.

John Maroney, being imprisoned for debt on civil process in an action against him by Viola La Barre, applied to the court of common pleas for a discharge, under Gen. St. 1895, p. 1726, for the relief of persons imprisoned on civil process, which was refused, and, from the judgment of the Supreme Court, affirming the judgment of the common pleas, he brings error. Reversed and record remitted.

Alexander Simpson and Gilbert Collins, for plaintiff in error. J. Merritt Lane, for defendant in error.

BERGEN, J. The plaintiff in error, being imprisoned for debt on civil process, applied to the court of common pleas of Hudson county for a discharge under the provisions of "An act for the relief of persons imprisoned on civil process." Gen. St. 1896, p. 1726. It is not disputed that he fully complied with the law, but his petition was refused upon the ground that the law invoked was suspended by the United States bankruptcy act. The judgment of the common pleas was removed to the Supreme Court and there affirmed, and the proceedings are now here for review. The importance of the question presented becomes apparent when, as in this case, the basis of the liability is of such character that it is not permitted to be discharged under the federal bankruptcy law, for, if the rule laid down in the court below is the true one, a defendant arrested and imprisoned on charges not dischargeable under the federal statute can be held for life, unless such statute be repealed. That the judgment is in conflict with the opinion of the Supreme Court in *Steelman v. Mattix*, 36 N. J. Law, 344, is admitted, but it is sought to justify this result, because (a) what was said there on the subject was not necessary to the determination of that case; (b) it is contrary to the trend of judicial authority. In the case cited the declaration was founded upon a bond given under the act, and a demurrer was interposed and sought to be sustained upon the ground that the bond was void because the act under which it was given was suspended by the national bankruptcy law. In the opinion overruling the demurrer, Mr. Justice Van Syckel, speaking for the court, said: "It is an act to abolish imprisonment on civil process in certain cases. It applies to the single instance of involuntary confinement, and its aim and purpose is simply to liberate the person. It has neither the scope, nor does it subserve the end of a bankrupt law. The person who invokes its aid must not necessarily be bankrupt or insolvent. He need only be incarcerated on civil process against his will." From this quotation, it cannot fairly be said that the question whether the act was suspended by the federal law or not was not considered or passed upon. Nor was the result contrary to the trend of judicial opinion. It is well settled that a general assignment for the equal benefit of creditors which does not discharge the debtor's obligation is not void. It is made an act of bankruptcy, but, unless proceedings in bankruptcy are instituted, it is valid, and there is no objection to a debtor distributing his property among his creditors unless bank-

ruptcy proceedings intervene. *Randolph v. Scruggs*, 190 U. S. 583, 23 Sup. Ct. 710, 47 L. Ed. 1165. In *Re Slevers* (D. C.) 91 Fed. 366, the rule is laid down, and was subsequently approved in *Randolph v. Scruggs*, supra, that there is a substantial difference between a proceeding under a general insolvency act and one under a statute permitting general assignments where the debtor is not discharged. The one administers upon the estate of an insolvent as a proceeding in the courts, and derives its potency from the law, winds up the estate judicially, and discharges the debtor. The other derives its potency, not from the law, but from the contract or deed of the debtor supplemented only by salutary legislative safeguards, and does not result in a discharge of a debtor from his obligation.

Under our act for the relief of persons imprisoned on civil process, any person imprisoned who may be willing to deliver up his property towards the payment of his debts may apply to be released from imprisonment, upon making an inventory and giving a bond to apply for the benefit of the act. This is done by filing a petition setting forth the causes of his imprisonment, the character of his act, and a list of his creditors, and thereupon executing a deed of assignment of all his estate to assignees. His property is not sequestered by force of law, but the proceeding derives potency, as was said in *Re Slevers*, supra, from the deed of the debtor, and his property is administered according to the deed under legislative safeguards, and does not discharge the debtor absolutely from his debts, but only "so far as regards the imprisonment of his or her person." Such an assignment of property would undoubtedly be an act of bankruptcy, but its distribution would be valid unless disturbed by proceedings in a bankrupt court. The act under consideration has for its principal object the discharge of persons imprisoned under civil process. It undoubtedly has some of the features of a bankrupt act, but it lacks the essential characteristics of a bankruptcy law, in that it does not absolutely discharge the debt, but restrains its use as a basis for imprisonment, and, while the debtor is required to assign his property towards the liquidation of his debts, such assignment is subject, so far as his property and estate is concerned, to proceedings that may be instituted under the national bankruptcy act. The conclusion we reach is that the act is not in conflict with the federal bankruptcy law and is not suspended thereby.

The judgment of the Supreme Court and the judgment of the court of common pleas should be reversed and the record remitted to the latter court to be there proceeded with according to law.

(71 N. J. E. 759)

**SOMERS BRICK CO. et al. v. SOUDER et al.**  
(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

**1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — CONTRACTS—REMEDIES — ISSUES—ORDER ON FUND—PRIORITY.**

Several parties who had furnished materials to a contractor for the building of a fire house for a city served notices of claims against the contractor under the act of 1892 (P. L. 1892, p. 369), and afterward filed bills to enforce their liens upon the contract price due from the city to the contractor. In each bill it was averred that an order had been given upon this fund by the contractor to the Excelsior Terra Cotta Company to pay for materials furnished, which order had been accepted by the financial officer of the city, but averred that the lien of such order was subsequent to the lien of the complainants' notice. The answer of the terra cotta company to each bill averred that the lien of its order was prior to the lien of complainants' notice. *Held*, that the priority and validity of the order was put in issue by the pleadings.

**2. SAME—EFFECT OF ORDER.**

*Held* that, it appearing that the answer of the terra cotta company was true, the order operated as an assignment of such portion of the fund due the contractor, and only the remaining portion of the fund remained to be distributed to the claimants.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by the Somers Brick Company and others against Frank A. Souder and others. Decree for complainants. Michael J. Horan, Lucy E. Freeman and the Atlantic City Lumber Company (70 N. J. Eq. 388, 61 Atl. 840), and Frank A. Souder, the Excelsior Terra Cotta Company, and the city of Atlantic City appeal. Decree modified.

Godfrey & Godfrey, for Michael J. Horan, Lucy E. Freeman, and Atlantic City Lumber Co. E. A. Higbee and Harry R. Coulomb, for the Excelsior Terra Cotta Co. Harry Wootton, for Atlantic City.

REED, J. Upon the original argument of this cause, the question arose whether the point involved in this case should be decided without the presence as appellant of the city of Atlantic City, a defendant below. For this reason, the decision of the cause was postponed until Atlantic City had taken and perfected an appeal, and filed a brief in the cause. It appears that in 1902 one Souder entered into a contract with the city of Atlantic City, by the terms of which contract Souder was to build a firehouse for the city for the sum of \$25,587. The Excelsior Terra Cotta Company contracted with Souder to furnish to Souder all the terra cotta required by him in executing his contract. Up to January 23d the terra cotta company had furnished goods to the value of \$2,359.32, and had \$1,000 worth of goods ready to be shipped. At this point the Terra Cotta Company refused to ship any more goods until the payment of the contract price by Souder was in some way secured. By an arrangement with Mr. Wootton, the

solicitor for the city, and with Mr. Vaughan, the architect in charge of the erection of the firehouse, an order for the payment of the entire amount due, and to become due for the terra cotta was obtained from Mr. Souder, the contractor, drawn upon Mr. Heston, the comptroller of Atlantic City. On January 23, 1903, the comptroller accepted the order, and six days later the remaining terra cotta was shipped. Among those who had furnished materials to Souder for the construction of the firehouse were Mr. Horan, Mr. Freeman, and the Atlantic City Lumber Company. These gentlemen in May and June following filed notices of claims with the financial officer of Atlantic City, under the provisions of the act of 1892 (P. L. 1892, p. 369), "to secure the payment of claims for materials furnished for work done on public improvements in a municipality of this state." Each of these claimants filed bills to enforce their respective liens upon the money due from Atlantic City to Souder.

It may be remarked that subsequent to the filing of the claims already mentioned five others who had furnished materials filed claims, four of whom also instituted suits to enforce their claims. The claims of the latter, however, were excluded by the Vice Chancellor because of nonconformity with the statute, and there is no appeal on their behalf. The several suits to enforce the claims of the materialmen were consolidated, and the causes were tried together. On the trial it was proved by the terra cotta company that its debt was due from Souder: that the order was given and accepted by the city comptroller on January 23d, as already stated. It appeared that all notices of the materialmen were filed subsequently to the giving and acceptance of the order, and that the order was a complete assignment of so much of the amount due from Atlantic City to Souder as equalled the amount of the order. It was not merely an equitable, but a legal assignment of the amount. The learned Vice Chancellor, however, disregarded the existence of this order, and ignored its effect upon the funds in the hands of Atlantic City still due to the contractor. The ground assigned for disregarding the order was that the terra cotta company, having filed a bill to enforce its claim under a notice like the other materialmen, had not relied upon this order for a decree, but solely upon its notice. If the rights of the terra cotta company rested upon this bill alone, the conclusion of the Vice Chancellor would seem to be entirely correct; for it is obvious that no question concerning the validity or precedence of the order was raised, or intended to be raised, by the bill filed by the terra cotta company. The validity and priority of the order, however, was put in issue by the bills filed by the other claimants, in which it was charged that the order was not a lien upon the fund, or if a lien, one subsequent to that of the claimants, to which

charge the terra cotta company by its answer to these bills averred that the said order and its acceptance was a valid lien upon the moneys due from the city of Atlantic City, and a lien prior to that of the claimants. The answer of Atlantic City, also, a defendant to these bills, admits the giving and acceptance of the order. So it is manifest under these pleadings the existence of this order and its effect upon the claims of the materialmen was directly in issue.

The question of the relative priority of the order and the claims being before the court, it is too obvious for discussion that the rights of the terra cotta company as holder of the order were superior. As already remarked, the order was not only an equitable but a legal assignment for the amount of so much of the fund still due the contractor. The notice of claims of the materialmen became liens only from the time of the notice, as was correctly held by the Vice Chancellor, and the notices were given subsequently to the giving and acceptance of the order. In this situation, however, it is not essential, even if regular under the pleadings, that Atlantic City should be directed to pay to the terra cotta company the amount of this order. The relative rights of the claimants, of Atlantic City, and of the terra cotta company in the fund held by Atlantic City can be settled without such an affirmative decree. It is obvious that the question to be settled is what portion of the contract price remained due to Souder at the date when the claims of the materialmen were filed. The Vice Chancellor found there was due the sum of \$7,457.40, and upon this sum he fixed the liens of three claimants whose claims amounted to \$6,784.89. Now, the order of the terra cotta company operating as a previous legal assignment for \$3,359.32 of that fund of \$7,457.40 there was in the hands of Atlantic City due to Souder, not \$7,457.40, but only \$4,098.08, at the moment when the materialmen filed their notices. The latter was all of the fund there was to be distributed by the Court of Chancery. It was essential, therefore, that the order should be recognized, although no specific relief was asked for or should be given to the holder of the order. The terra cotta company is in a position to stand upon its legal right to recover from Atlantic City the amount of the order, and Atlantic City as left by the decree below would be compelled, after paying to Horan, Freeman, and the Atlantic City Lumber Company all but \$672.51 of the original fund, to pay \$3,359.32 to the terra cotta company.

The decree of the Court of Chancery should, therefore, be modified, so that the claims of Horan, Freeman, and the Atlantic City Lumber Company should be paid in the order fixed by the decree below, but out of the fund of \$4,098.08 still existing in the hands of Atlantic City.

(76 N. J. L. 532)

# ELY et al. v. MAYOR, ETC., OF CITY OF NEWARK.

(Court of Errors and Appeals of New Jersey.  
June 16, 1908.)

## MUNICIPAL CORPORATIONS — ESTABLISHMENT OF HOSPITAL—EXPENSES—PLANS.

By the act of 1900 (P. L. p. 321) the board of health of Newark was empowered to resolve that it was necessary to establish a hospital, and directed to set forth in the resolution the estimated cost thereof, and certify the resolution to common council, and thereupon the common council was directed to appropriate a sum of money not exceeding \$100,000, for furnishing buildings for such hospital.

*Held*, that the board of health could not bind the city to pay for plans and specifications for a building which would cost \$200,000, which plans could be of no use in estimating the cost of a building which would cost \$100,000 or less. (Syllabus by the Court.)

### Error to Supreme Court.

Action by John H. Ely and Wilson C. Ely, partners as J. H. & W. C. Ely, against the mayor and common council of the city of Newark. Judgment for defendants, and plaintiffs bring error. Affirmed.

Riker & Riker, for plaintiffs in error.  
Francis Child, Jr., for defendants in error.

REED, J. This action was brought against the city of Newark by the plaintiffs, who are architects, to recover the value of their services for drawing plans and specifications for a hospital building. The plaintiffs did the work by the direction of three members of a committee of the board of health of the city of Newark. The ability of the board of health to bind the city of Newark by this employment, if such ability exists, springs from the act of 1900 (P. L. 1900, p. 321). Section 1 of this act, in substance, provides that when any board of health of any city shall declare by resolution that it is necessary to establish a hospital for persons suffering from contagious diseases, and setting forth the estimated cost thereof, a copy of such resolution shall be transmitted to the financial board of such government, which board shall make an appropriation in cities of over 100,000 population of a sum not exceeding \$100,000 for the purchase of land, if required, and for furnishing a suitable building or buildings for such board of health.

On March 17, 1900, the Newark board of health appointed a committee to prepare a resolution in pursuance of the above act, and to lay the resolution before the common council. In May, 1901, the board of health resolved to ask the common council for an appropriation of \$100,000 for the purpose of buying the necessary land, and building thereon an isolation hospital. On September 12, 1901, the common council resolved that \$17,500 be appropriated to the purchasing of a plot of land, and on November 7th this resolution was rescinded. It was intended that this plot should be used as a site for a hospital, but the project was abandoned. It

does not appear that any resolution was ever presented to the common council in conformity with the provisions of section 1 of the act of 1900. That act, however, is mandatory that the common council shall appropriate such sum up to \$100,000 as may be certified by the board of health. If the board of health had the power to incur expenses in anticipation of the appropriation which it had the right to demand, it might be conceded that such expenses would become a municipal debt.

The plaintiffs insist that the board of health was invested with the implied power to incur the present debt, although incurred before any resolution was passed by the board of health, because the services rendered were essential to enable the board of health to frame its resolution asking for the appropriation.

The act, it is perceived, provides that the resolution to be certified by the board of health shall not only state that it is necessary to establish a hospital, but shall set forth the estimated cost thereof. It is insisted by the plaintiffs that the plans and specifications for the proposed structure were requisite for the purpose of making an estimate on the cost of its erection, and that therefore the implied power to incur expenses for such plans and specifications preparatory to the adoption of the resolution was vested in the board of health. It may be conceded that the board of health had the right to incur reasonable expenses for obtaining such expert information as was necessary to furnish a basis for an accurate estimate of the cost of the proposed structure; and it may be conceded that no accurate estimate could be made by the board of health, or by the experts for the board of health, without some plans or specifications first prepared. The question nevertheless remains whether the plans and specifications prepared by the plaintiffs were necessary or useful for this purpose. The maximum sum to be appropriated for the purpose of purchasing a site and erecting a building was \$100,000. The board of health and the plaintiffs knew, or were bound to know, the limitations upon the ability of the board of health to contract, and the common council to appropriate money for this purpose. The plaintiffs, instead of preparing plans and specifications for a building the cost of which would be within the statutory limit, presented plans and specifications for a building which would cost \$198,236, which, with commissions, would amount to over \$200,000, exclusive of the cost of the land for a site. The plans and specifications were not designed as a basis for calculating the cost of a building which could be erected for \$100,000 or less. They were intended as specimens of what the architects conceived to be a perfectly equipped hospital, to cost whatever was required to erect and equip such an edifice. As an exhibit, it might be of value for the pur-

pose of influencing future legislation to increase the power of common council to make appropriations for hospital buildings; but the board of health had no power to bind the city to pay for such exhibits. For the purpose for which it might be conceded the board of health had power to bind the city to pay, the plans and specifications were of no value whatever. It is manifest that from them no estimate of the cost of a less expensive structure can be made.

The argument of counsel for plaintiffs that these plans can be simplified, or a portion of the structure eliminated so that an estimate can be made, is unsubstantial. Mr. Ely himself says it is impossible to use these plans in the construction of a hospital to cost less than \$100,000, and he says that an alteration of these plans to come within the \$100,000 limit could be done only by changing the entire nature of the structure, and by practically drawing new plans.

We think, therefore, that the work done by the plaintiffs was entirely aside from any work which the board of health had the power to contract for; that the work is of no value for the purpose for which the board of health may have had power to contract; and that the nonsuit was right.

Judgment should be affirmed.

(76 N. J. L. 365)

CREACHEN v. ACHENBERG et al.

(Supreme Court of New Jersey. June 22, 1908.)

LANDLORD AND TENANT—SURRENDER OF TERM—EVIDENCE.

A surrender of a term in demised premises, by act and operation of law, will not be implied upon proof that the lessees had dissolved partnership, and that an unauthorized person had tendered the lessor the key, and nothing more.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 353.]

(Syllabus by the Court.)

Appeal from District Court of Perth Amboy.

Action by Stephen B. Creachen against William Achenberg and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued February term, 1908, before GARRISON, SWAYZE, and TRENCHARD, JJ.

H. W. Kehoe and Lee Goldberger, for appellants. C. C. Hommann, for appellee.

TRENCHARD, J. This is an appeal from a judgment entered on the verdict of a jury ordered by the trial judge in the district court of Perth Amboy. The action was brought to recover the balance of rent of premises alleged to be due the plaintiff from the defendants. Upon trial it appeared that the plaintiff was the owner of the premises in question, and designed, planned, and built the building as a garage to rent to the defendant Achenberg at his request; that the

latter rented it for \$50 per month for no stated time, and took possession May 1, 1906; that shortly thereafter Achenberg introduced to plaintiff one Heidecker, whom Achenberg informed plaintiff was his partner; that the plaintiff knew nothing of the terms of the partnership; that the defendants, or one of them, or some person for them, remained in possession until February 28, 1907; that rent was due for the months of October, November, and December, 1906, and January and February, 1907. By the testimony upon the part of the defendants, it appeared that the partnership between Achenberg and Heidecker was dissolved November 8, 1906, and that the latter agreed with the former that he would pay the partnership debts; that about a month after the dissolution of the partnership, Heidecker "left town"; that when he left he gave one Comegy, who had two cars in the garage on storage, a key to the place saying, "Take this key, and don't let anything go out of here"; that some days thereafter Comegy went to plaintiff's office and "said he wanted to give some one the key"; that plaintiff refused to accept the key, saying, "so far as I am concerned you can keep the cars there." From the whole case it appeared to be undisputed that the plaintiff had no knowledge of the dissolution of the partnership, or of the terms thereof, until February 11, 1907. The only question requiring consideration is whether the trial judge, under the circumstances exhibited by the evidence, was justified in directing a verdict for the plaintiff.

The defendants were monthly tenants of the demised premises. *Decker v. Hartshorne*, 65 N. J. Law, 87, 46 Atl. 755, affirmed 65 N. J. Law, 680, 48 Atl. 1117; *Baker v. Kenny*, 69 N. J. Law, 180, 54 Atl. 526. There was no proof of a surrender of the term in the demised premises by the defendants or by either of them. Such surrender will not be implied from proof that the defendants had dissolved partnership. It is not contended that knowledge of the dissolution was brought home to the plaintiff. The proof is that he had no knowledge thereof. Nor will such surrender be inferred from the proof that the key was tendered to the plaintiff by Comegy. It does not appear that he represented himself to be, or was in fact, the agent of the defendants, or of either of them, for that purpose.

For these reasons we think that the direction of a verdict for the plaintiff was right, and that the judgment should be affirmed.

(76 N. J. L. 3/3.)

#### POLO v. PALISADE CONST. CO

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

#### 1. MASTER AND SERVANT—INJURY TO SERVANT—QUESTIONS FOR JURY.

Plaintiff's intestate, while employed by the defendant as a laborer in a rock excavation for a sewer, was killed by the accidental explosion

of a blast, which had previously failed to explode, and was being prepared for removal by another employe, skilled and careful in such work, and intrusted with that duty. In an action by the administrator against the employer for damages by reason of such death, held that under the circumstances of the case it was a question for the jury (1) whether the employer was guilty of negligence in putting deceased to work in a dangerous place, or undertaking the extraction of the charge while deceased was working in the vicinity, without withdrawing him to a place of safety; (2) whether deceased assumed the risk of the explosion in question; (3) whether he was guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1001-1182.]

#### 2. SAME—NEGLIGENCE OF SUPERINTENDENT.

Held, further, that the negligence, if any, causing the injury and death was not that of a fellow servant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 422-488.]

#### 3. DEATH—DAMAGES.

Held, further, that substantial pecuniary injury to next of kin, by reason of the death, appearing in the evidence, there was no error in refusing to nonsuit or charge that nominal damage only could be recovered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 141.]

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by Marco Polo, administrator of Vincenzo Falcone, against the Palisade Construction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Collins & Corbin, for plaintiff in error.  
J. Phillip Dippel and Alexander Simpson, for defendant in error.

**PARKER, J.** The plaintiff below is the administrator of Vincenzo Falcone, deceased, who, while employed by the Palisade Construction Company as a laborer in the excavation, through rock, of a sewer trench, was killed by the explosion of a blasting charge. In a suit brought under the death act, judgment of \$400 was recovered against the employer in the Hudson circuit court, and is now before us on writ of error.

The material facts connected with the injury which caused the death of Falcone are as follows: The construction company, as already stated, was engaged in the excavation of a sewer trench through rock, requiring blasting, from time to time, with dynamite. One charge failed to explode as intended, and the company's foreman, called "Big Jim," an Italian, but a man of long experience in the use of dynamite, in the course of his duty proceeded to uncover the charge, so as to remove it in preparation for a new one. The tools he used were a "scraper" and a "swab stick," being those habitually used by all skilled workmen for such a purpose, and the method adopted was the usual one. There is no question but that "Big Jim" was a skilled and careful man, and was working according to the approved method; but, while he was thus at work preparing for the new charge, the old charge unexpectedly exploded

ed, killing "Big Jim" himself and also the plaintiff's intestate, who was at work in the trench, but "down in the deep work" on a level some 16 feet lower, and 18 feet away from the bank dividing the two levels. The plaintiff's intestate had been working on the sewer about a week, but had worked before that on sewers; and the unexploded blast had been in place four days, though "Big Jim" was first informed of it on the day of the accident. On the plaintiff's case it appeared that plaintiff's intestate had been told by the "boss" that there was a loaded blast there.

A motion to nonsuit was made, on the grounds, among others, first, that no negligence of the defendant was shown; secondly, that the negligence, if any, was that of a fellow servant; third, that deceased assumed the risk; fourth, that he was guilty of contributory negligence; fifth, that no pecuniary loss to next of kin had been shown. Two other grounds urged were that there was no proof either that "Big Jim" was incompetent, or that improper tools were supplied by the master. As to these, defendant was clearly right; but, as plaintiff's case was rested on the theory of putting deceased to work in a dangerous place, or creating the danger after he was at work there, without giving any warning, they need no discussion here. The motion to nonsuit was denied, and exception entered. On the defendant's case evidence was given tending to show that deceased had been warned generally of the existence of the unexploded blast, and had told one of his fellow laborers, on the morning of the accident, "Frank, here is a loaded blast. We have got to look out." At the conclusion of the evidence a motion to direct a verdict for defendant, on the same grounds as were urged for a nonsuit, was also made and denied, and the case submitted to the jury, who found as already stated. The assignments of error present the same points as those discussed in the motion for a nonsuit and for a direction.

Whether the deceased was put to work by the master in a dangerous place, or the place where he was at work made dangerous by the master, was in our judgment clearly a proper question for submission to the jury. If the work of uncovering an unexploded blast was inherently dangerous, and defendant knew or should have known it, as the jury was fully justified in finding on the evidence, then its action in requiring deceased to work within range while "Big Jim" was attempting to prepare for a new blast, and without warning deceased of the danger, was undoubtedly such as a jury might properly consider negligent.

Nor can the doctrine of fellow servant be invoked in this case, for on the theory just suggested, it was not the negligence of "Big Jim" in doing his work, but the doing of it at all that constituted the danger to other employees, and the duty of the employer to take

care to guard his servants from unnecessary risks would seem to require an avoidance of such work as this in the neighborhood of other workmen. It would have been a simple matter to withdraw them till all danger was over, as is always done when a blast is to be intentionally exploded. And if "Big Jim" was intrusted with discretion as to the time of doing this work, he acted in choosing that time as the representative of the master, and for his negligence in that regard the master would be liable. *Steamship Co. v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. 619, 51 Am. St. Rep. 604; *Burns v. Telegraph Co.*, 70 N. J. Law, 745, 59 Atl. 220, 592, 67 L. R. A. 956.

The question of assumption of risk by deceased is more difficult, but resolves itself, in our view, against the defendant below. If the deceased knew of a special danger involved in working so close to the unexploded blast while it was being uncovered, or if such danger was obvious or ascertainable by the exercise of reasonable care on his part, he assumed it, and his administrator could not recover. That he knew of the existence of the unexploded charge, and of the danger in case it was exploded, is clear; but this is not the same as saying that he knew the danger involved in the work that "Big Jim" was doing, or that it was obvious to him or discoverable by using due care. There is nothing to show that he had ever seen or heard of such an operation as "Big Jim" was engaged in, or that he had any special reason to fear explosion because of that operation. And the moral certainty that "Big Jim" himself would be injured or killed by an explosion under those circumstances, as in fact happened, may well have led deceased to believe that no special danger inhered in the work, especially as he was some distance away on a much lower level, and was killed, not directly by the explosion, but by a mass of debris falling on him.

The testimony above quoted, as to what was said to and by deceased about the loaded blast, was before the jury, who had to pass on its meaning on indicating, or failing to indicate, knowledge of the danger on his part; and the court below correctly charged them that "if he knew, or had reason to know, that the place where he was going to work that morning was a dangerous one to work in under the circumstances, and if they believed that he knew, at the time he went to work there, that the man who was known as "Big Jim," and who himself was killed, was endeavoring to take this charge of dynamite out, and that he had reasonable cause to believe that might result in an explosion, or might result in injury or death to him, and he nevertheless saw fit to go to work there, he could not come into court and ask for damages, and, if he could not, neither could his administrator; the injury having resulted in his death." We think that this question of assumption of risk was properly referred to the

jury, and that the instructions above quoted correctly stated the law applicable to the case.

As to contributory negligence, nothing appeared which is not covered by the discussion of assumption of risk, and if any fair question was raised on this score, it was proper for consideration by the jury. *Grimaldi v. Lane*, 177 Mass. 565, 59 N. E. 451.

Lastly, it was maintained that no proof had been submitted to show any pecuniary damage to the next of kin, and that there should therefore have been a nonsuit, or the verdict for the plaintiff, if any, should have been restricted by the court in its charge to a nominal amount. The evidence showed that deceased had a father and mother in Italy; that he earned \$1.75 a day; that on one occasion his parents had sent a message to him asking for money to help support them, and that \$20 had then been remitted. This would seem to be sufficient to justify the jury in finding the existence of a reasonable expectation of pecuniary benefit by the continuance of his life, of which his parents had been deprived by his death, and which would justify more than a nominal verdict. *Batton v. Public Service Corp.* (N. J.) 69 Atl. 164.

No prejudicial error appearing in the record, the judgment will be affirmed.

(75 N. J. L. 910)

#### ATLANTIC CITY v. FRANCE.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

#### 1. MUNICIPAL CORPORATIONS — POWERS — SMOKE ORDINANCE.

Where a city charter empowers the adoption of ordinances necessary and proper for the protection of persons and property, and for the preservation of the public health, sufficient power is given to sustain an ordinance directed to the suppression of the emission, from smokestacks, of dense smoke, containing soot in sufficient quantities to fall upon the surface of the city, but its application must be limited to smoke of such character as invades the rights of persons and property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1339.]

#### 2. CONSTITUTIONAL LAW—DUE PROCESS OF LAW — EVIDENCE — VIOLATION OF ORDINANCE.

Before a conviction can lawfully be had under such ordinance, the invasion and injury must be determined by a court having jurisdiction over such matters.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Atlantic City against Adam W. France. Judgment for plaintiff (affirmed by Supreme Court, 65 Atl. 894). Defendant brings error. Affirmed.

C. L. Cole, for plaintiff in error. Harry Wootton, for defendant in error.

**BERGEN, J.** The plaintiff in error was convicted, under an ordinance of Atlantic City, of being "the manager of an ice plant, within the limits of Atlantic City, to which

was attached a smokestack connected with a furnace, which smokestack, on the day and days aforesaid, emitted dense smoke, which contained soot in sufficient quantity to permit the deposit of such soot on a surface within the limits of Atlantic City, as set forth in the complaint." The proceedings and conviction were removed to the Supreme Court by certiorari, where the judgment was affirmed, and the judgment of the Supreme Court is now here for review.

The reasons filed in the court below to which the attention of this court was directed are as follows:

First. That the city was without power to pass such an ordinance. We think that section 15 (P. L. 1902, p. 296), which empowers a city council to adopt such ordinances "as they may deem necessary and proper for the good government, order, protection of persons and property, and for the preservation of the public health and prosperity of such city and its inhabitants," is sufficiently broad and comprehensive to sustain an ordinance directed to the suppression of such use of a smokestack as causes to be emitted therefrom smoke containing soot in sufficient quantities to create a nuisance when deposited within the limits of Atlantic City. It would be impossible to define in an ordinance the density of the smoke, the quantity of soot to be deposited, or the precise effect required in each case, to constitute a nuisance; but we think that the creation and emission of dense smoke, containing soot in sufficient quantities to fall upon the surface of the city to the injury of persons, property, and the public health, is a wrong which the powers granted to the city authorizes it to suppress, if such a condition would be a nuisance at common law. We are also of opinion that, while the ordinance is somewhat broad in its terms, its application must be limited to smoke of such character as invades the rights of persons and property, or affects injuriously the public health of the inhabitants of the city, that being the extent of the powers granted, and that before a conviction under it can be lawfully had, such invasion and injury must be shown; for whether in a given case the quantity of dense smoke emitted, soot deposited, and the result therefrom, is an invasion of rights and property, or injurious to health, can only be conclusively determined by a court having jurisdiction over such matters. *Hutton v. Camden*, 39 N. J. Law, 122-130, 23 Am. Rep. 203. The present case shows that the property of the complainant was injured by the dense smoke and soot emitted from defendant's smokestack.

Second. That the city has no power to adjudge, as a nuisance, the emission of smoke, and therefore the ordinance was unreasonable and void. The emission of smoke alone is not what the ordinance is aimed at, but of smoke containing soot, or other substances, in sufficient quantities to permit of



their being deposited on the surface of the city, and which, when deposited on the property of a citizen in sufficient quantity to damage and annoy him, thereby becomes intrinsically such a nuisance as the common council has a right to prevent and suppress under its general powers. "The authority to preserve the health and safety of the inhabitants and their property, as well as the authority to prevent and abate nuisances, is a sufficient foundation for ordinances to suppress and prohibit whatever is intrinsically and inevitably a nuisance." 1 Dill. Mun. Corp. § 379.

Third. That the ordinance is unconstitutional, because it deprives the defendant of his property without due process of law. Laws and ordinances, relating to the comfort, health, and good government of the inhabitants of a city, are ordinarily described as "police regulations," and, though they may disturb the full enjoyment of a personal right, are constitutional, notwithstanding they do not provide compensation therefor; for they do not appropriate private property for public use, but merely regulate its enjoyment by the owner, who is supposed to be compensated by sharing in the benefits which such regulations are intended to secure. He holds his property subject to the restriction that he must so use it as not to injure another, and an ordinance which so controls his use of it that it shall not prove injurious to his neighbor, or the inhabitants generally of the municipality, is not a taking of his property without compensation.

Fourth. That the complaint does not show that the prosecutor had any control over the plant or building. The ordinance is directed against the owner, agent, manager, lessee, or occupant of any building, etc. The complaint charges that the prosecutor was the owner and manager of the building. This we think is sufficient to charge that he had the control of the building. An allegation of ownership and management clearly implies control.

Fifth. That the conviction does not show that the prosecutor had any control over the building, and that there was no finding of fact that the soot was deposited on any surface within the limits of Atlantic City. The finding is that the prosecutor was the manager. This is sufficient to bring him within the class described in the ordinance, and the judgment further declares that the smokestack emitted dense smoke containing soot in sufficient quantities to permit the deposit thereof within the limits of Atlantic City. This finding is all that the ordinance requires, and the evidence shows was based upon proof of injury to property. This disposes of all the reasons assigned which were argued.

The judgment of the Supreme Court will be affirmed.

(75 N. J. L. 893)

**DENTZ et al. v. PENNSYLVANIA R. CO.**

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

**1. COLLISION—NEGLIGENCE—PRESUMPTIONS.**

Negligence is not to be presumed from the mere fact of a moving boat colliding with another moored in a slip, when the plaintiff's case shows several acts of the defendant previous to the actual collision, all of which tended to the result, and might be found to be explanatory of it, without requiring an inference of negligence. Presumptions in favor of plaintiff exist only in the absence, not in the presence, of explanation by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 103.]

**2. NEGLIGENCE—"RES IPSA LOQUITUR."**

Where the plaintiff's case shows the conditions under which an accident happens, and the question is raised whether, under the circumstances specified, the conduct of the defendant was negligent, the rule "*res ipsa loquitur*" does not apply.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 218, 271.]

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by George H. Dentz and others against the Pennsylvania Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

James B. Vredenburg, for plaintiff in error. Davis & Hastings, for defendants in error.

BERGEN, J. The plaintiffs' case showed that defendant's tug was towing a lighter, loaded with 350 tons of iron, from Brooklyn to the New Jersey shore; that while in the East river, and just off the slip between Piers 4 and 5, a swell, caused by a passing boat, caused the lighter to leak, and it began to fill rapidly; that the captain of the tug, in order to save his cargo, endeavored to beach the lighter by entering the slip between the piers mentioned, in which was moored the plaintiffs' tug, with two lighters lying between it and Pier 3; that there were canal boats in the slip along Pier 4, nearly opposite plaintiffs' tug; that the lighter had listed considerably as it approached and entered the slip, though the situation was not then considered dangerous; that when opposite plaintiffs' tug the stern of the lighter, owing to the parting of a hawser, caused by the great strain it was under, swung off slightly from the tug, whereby the whole strain was thrown on the hawser at the bow of the tug, causing a greater listing of the lighter towards the tug, creating a situation in which there was imminent danger that the load of iron upon the lighter would slide over on the tug, and sink both it and the lighter; that at this juncture the captain of the defendant's tug ordered the hawser cut, and when this was done, the tug righted, and the load of iron on the lighter slid into the water, the result being that the side of the lighter towards plaintiffs' tug was raised out of the

water, and the lighter cast on it, causing it to sink.

On this state of facts the trial court charged the jury as follows: "Ordinarily speaking, when one vessel is tied up to a dock, and a tug with a tow collides with the vessel which is tied up to a dock, and a tug with a tow collides with the vessel still tied up, the presumption is that there was some negligence on the part of those who were managing the tugboat. And that presumption would seem to exist in this case, in the first instance, and I think you are entitled to start with that presumption." To this an exception was taken, and error assigned. We think that under the circumstances shown in this case by the plaintiffs, an instruction that the jury should begin their consideration of the facts with the presumption that the defendant was negligent, from the mere fact that the lighter collided with plaintiffs' tug, was an error which requires a reversal of this judgment. When nothing appears, except that a boat, coming into a slip under ordinary conditions, collides with another moored therein, a presumption of negligence in the operation of the moving boat arises, but where, as in this case, the plaintiffs show the conditions under which the accident happened, and the question is raised whether, under the circumstances specified, the conduct of the defendant was negligent, the rule "*res ipsa loquitur*" does not apply. The immediate cause of this collision was the cutting of a hawser, which became necessary to prevent the sinking of defendant's tug and the probable loss of life. By the plaintiffs' case it appeared that, unless the hawser had been cut, the lighter would have sunk and carried defendant's tug down with it. Whether, under the circumstances, it was negligent to bring the lighter into the slip, or to cut the hawser when and where it was done, could only be determined by considering all the explanatory facts introduced by plaintiffs, among which were the bringing of a sinking lighter into the slip; the parting, under strain, of the stern hawser; the not keeping at a greater distance from plaintiffs' tug; and whether the cutting of the hawser and the releasing of the lighter, when it was abreast plaintiffs' tug, was necessary to save life, or justifiable, if defendant had not, up to that point, been negligent. Each of these acts were aids to the collision, and were proven by plaintiffs as reasons for charging negligence, and in explanation of alleged negligent conduct, which went beyond the mere fact of collision as a presumption of negligence. The plaintiffs did not rely upon the presumption of negligence arising from a collision resulting from negligent operation alone, but upon circumstances entirely aside from it, which contributed to that end. The collision did not result from the direct operation of defendant's tug, but because of the separation of the tug from the lighter it had

in tow, and whether the act which parted the tug from the lighter, whereby the lighter collided with the plaintiffs' tug, was a negligent one depended on circumstances proven, and not alone upon the fact of the collision. If a vessel, lying at anchor in plain view, is run into by another—nothing more appearing—the reasonable presumption is that the collision resulted from negligence in the operation of the moving vessel; but, if it appear in the plaintiffs' case that, while the moving boat was being properly navigated, her rudder chains suddenly broke, and she became unmanageable, no presumption of negligence in the operation of the vessel arises. It is only where the cause of such a collision remains undisclosed that the presumption of negligence exists. Presumptions exist in favor of the plaintiff only in the absence, not in the presence, of explanation by him.

In the present case all of the circumstances proven by the plaintiffs as the basis of the alleged negligence were submitted to the jury, with the preliminary instruction that they were to start with the presumption of defendant's negligence. The facts relating to the collision were practically undisputed, and if the accident, as described by the plaintiffs, justified a presumption of negligence, the defense was deprived of the benefit of the consideration by the jury of the questions whether the captain of defendant's tug failed to exercise reasonable care and skill in going into the slip; was there so great an emergency as to justify the cutting of the hawser? did the captain exercise reasonable care toward other vessels in the slip in taking in the lighter? All of these acts of defendant's captain the plaintiffs prove as showing negligence, and an instruction that negligence must be presumed from the collision, necessarily eliminated from the consideration of the jury every explanatory fact offered by the plaintiffs. If negligence is to be presumed the case should have ended there by a direction for plaintiffs, because nothing remained for the jury to pass upon other than the question of the amount of damages, for the testimony on both sides was substantially the same; and, if a presumption of negligence, arising from the fact of the collision, remained after the plaintiffs' explanation of the manner in which it happened, it was of no advantage to the defendant to have the character of its acts submitted to the jury. That they were in fact submitted does not correct the wrong, for the burden of showing negligence is on the plaintiffs, and it cannot be shifted by raising a presumption in favor of the plaintiffs, on evidence which the court submits to the jury for the purpose of permitting it to draw an inference antagonistic to a presumption raised on the same state of facts. It is putting the defendant in an unfair position, as it practically requires him to overcome a presumption which the court directs the jury has been raised out of the very testi-

mony submitted, and upon which the defendant relies for its exculpation.

The judgment under review is reversed, and a venire de novo ordered.

(75 N. J. L. 869)

# HINMON v. SOMERS BRICK CO.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

## 1. NUISANCE—ACTIONS—PLEADING—EVIDENCE— —RES IPSA LOQUITUR.

An allegation in a declaration that the defendant "negligently" allowed noxious fumes to escape from its factory to the damage of plaintiff's crops does not require of plaintiff specific proof of the precise negligence which caused or permitted such fumes to escape; for, from proof of the escape of noxious fumes and consequent damage therefrom, negligence will be inferred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 114.]

## 2. SAME—PLEADING AND PROOF.

The operation of a factory in such manner as to constitute a nuisance may be given in evidence under an allegation that it was "negligently" operated, provided the other allegations of fact make out a case of nuisance and are supported by the proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 114.]

(Syllabus by the Court.)

Error to Supreme Court.

Action by William Hinmon against the Somers Brick Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Thompson & Cole, for plaintiff in error.  
Carrow & Kraft, for defendant in error.

PARKER, J. The plaintiff's declaration contains six counts, all precisely alike except as to time of commission of the grievances complained of. The first count alleges that in the year 1900 the defendant company owned and operated a factory for making brick; that plaintiff worked a farm adjoining or near to defendant's brick works, on which farm he raised fruit, vegetables, etc., for profit; and that during the months of May to October, inclusive, the defendant "so carelessly, recklessly, negligently, and improperly manufactured and produced said burned clay bricks and used and operated improper, insufficient, defective, and unfit machinery, appliances and apparatus in the production, etc., that by the carelessness, etc., of defendant, vast quantities of \* \* \* destructive \* \* \* vapors, gases, fumes, and smoke were permitted and allowed to and did escape," and were blown from the works of defendant to the land of the plaintiff, and injured and destroyed his crops, fruits, and trees. The other counts in the same form are for similar injury in the years 1901 to 1905, inclusive. At the trial the jury found a verdict in favor of the plaintiff, and to the judgment entered thereon this writ of error is taken.

A number of assignments of error appear in the record, based on exceptions sealed at the trial; but only four were relied on at

the argument. Of these, the first is that the court refused to grant a motion to nonsuit; and the second, that the court refused to direct a verdict for defendant. The grounds of both motions were that the declaration was based on negligence in operation of the plant, whereas all that the proof tended to show was that gases, etc., escaped and injured plaintiff's crops, without anything to indicate negligence in permitting such gases to escape and that some specific defect in the machinery or construction, or carelessness in operation, should have been shown. It will be observed that no specific duty was laid in the declaration as is usual and convenient, though unnecessary, in actions based on pure negligence. *Breese v. Trenton Horse R. R. Co.*, 52 N. J. Law, 256, 19 Atl. 204.

That the brick factory if so conducted as to permit the escape of destructive fumes to the injury of plaintiff's land was a nuisance for which a private action at law will lie is clear (*Roessler Chemical Co. v. Doyle*, 73 N. J. Law, 521, 64 Atl. 156); and though it was customary in actions for nuisance of this character, such as a slaughterhouse or candle factory, in the old precedents to allege that the defendant "wrongfully and injuriously permitted foul odors to escape" (2 Chitty, Pl. 773, 774, 11 Am. Ed.), it could not be said at the present day that the omission of those words would render a declaration insufficient either in form or in substance, nor that the substitution of the word "negligently" makes the escape of the gases any the less a nuisance, or puts the defendant's duty on any different basis. One who operates a manufacturing plant liable to give off destructive fumes that will injure his neighbor's herbage must, as the trial justice properly charged, so use it as not to occasion unnecessary damage; and the permitting of such gases to escape in quantities sufficient to do such injury is of itself the negligence which results in a nuisance. Apart from this, however, and taking defendant's theory of the declaration, the fact that such gases did escape (as the jury found) in such quantities as to do great damage to crops, spoke of negligence in operation so plainly that no particulars of such negligence were called for. And the defendant's evidence tending to show the perfect character of the machinery and care in operation still left the matter open as a jury question, especially in view of the defendant's own proof that another brick factory constructed and operated in a similar manner at another place was quite innocuous; which if true only emphasized the inference of negligence from the escape of fumes from defendant's factory. We conclude, therefore, that there was no material variance between pleading and proof; no surprise to defendant; and that the motions to nonsuit and to direct a verdict for defendant were properly denied.

With respect to defendant's claim that any damage to trees should have been excluded by the court from the consideration of the

jury, on the ground that there was no evidence to show that any such damage had been done, or its extent, it is sufficient to say that on examining the case we find ample testimony to justify the jury in finding the existence of such damage and its extent, and in awarding a reasonable sum by way of compensation therefor.

The last point urged by counsel is that the court should have charged as requested that plaintiff below, on finding his crops destroyed in 1900, should in the subsequent years have planted something else, and not exposed himself to probable injury by planting the same kind of crop that had been destroyed; the theory being apparently that by continuing such crops under the circumstances, he assumed the risk of injury, or was guilty of contributory negligence. This is equivalent to saying that plaintiff, having already been injured by an unlawful act of defendant's, amounting to a nuisance in one year, was bound to assume or anticipate its repetition in subsequent years and regulate his planting accordingly. We see no force in this proposition, and think the request was properly denied.

No other assignments of error were argued or discussed in the brief; but we have examined the remaining ones and find no error appearing. With respect to the last one, that the court erred in refusing to require the jury to answer certain specific interrogatories submitted by the defendant at the close of the case, it may be remarked that such a practice, while not illegal and often of practical value, is entirely discretionary with the court.

The judgment will be affirmed.

(76 N. J. L. 353)

**P. BALLANTINE & SONS v. PUBLIC SERVICE CORP. OF NEW JERSEY.**

(Supreme Court of New Jersey. June 23, 1908.)

**WATERS AND WATER COURSES—SUBTERRANEAN WATERS—POLLUTION.**

If a landowner accumulates contaminating matter upon his own land, and negligently permits it to percolate through the soil and pollute a neighbor's well, he is liable for the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 114.]

(Syllabus by the Court.)

Action by P. Ballantine & Sons against the Public Service Corporation of New Jersey. Verdict for plaintiff. Rule to show cause discharged.

Argued February term, 1908, before GARRISON, SWAYZE, and TRENCHARD, JJ.

Pitney, Hardin & Skinner, for plaintiff. Frank Bergen and Richard V. Lindabury, for defendant.

TRENCHARD, J. This suit is brought by the plaintiff to recover damages for the pollution of its wells.

The plaintiff is engaged in brewing ale and porter, and the defendant is generating gas

on adjoining tracts of land in the city of Newark along the Passaic river. In the prosecution of its business, the plaintiff uses large quantities of water of a certain degree of purity and temperature for cooling and other purposes. Since 1871 a supply of water for such purposes has been obtained from two wells on its premises, one a dug well, and the other an artesian well. The entire output of both wells, about 7,800 barrels a day, was required for the uses of the brewery. The water from these wells was of a uniform temperature and unpolluted until July, 1903, except that for six months or a year prior thereto it had given off a perceptible gaseous odor which, however, did not affect its usefulness for plaintiff's purposes. Immediately adjoining plaintiff on the north is the gas plant of the defendant, which it leased from its predecessors June 1, 1903, where it and its predecessors manufactured two kinds of illuminating gas—one by distillation of bituminous coal which it and its predecessors have manufactured since 1870; the other by a combination of superheated steam and petroleum oil, which the defendant and its predecessors have been manufacturing since 1887. A by-product of the manufacture of both of these is tar—that resulting from the manufacture of gas from coal being called "coal gas tar," and that resulting from the manufacture of gas from petroleum being known as "oil gas tar," similar but readily distinguishable substances. The machinery and appliances used by the defendant in the manufacture of gas consist essentially of retorts, storage tanks for the crude oil, cylindrical holders for the gas, and tanks for the storage of gas tar pending use or sale. The defendant produces on its premises about 2,000 gallons of gas tar a day. There is no other gasworks within four miles of the plaintiff, except another plant of the defendant one mile distant.

On July 23, 1903, the water in the plaintiff's wells suddenly became polluted with oil gas tar in large quantities which rendered it useless to the plaintiff. By reason of such pollution of its wells, the plaintiff expended large sums of money in procuring another supply of water, and to recover for such expenditures brought this suit in the Supreme Court. Upon trial at the Essex circuit, the jury rendered a verdict for the plaintiff for \$20,725. The only reasons requiring consideration urged by the defendant why a new trial should be granted are, first, that the trial judge refused to direct a verdict for the defendant; second, that the verdict is against the clear weight of the evidence; and, third that the verdict is excessive. We think the case was properly submitted to the jury.

It is the established law of this state that, if a landowner accumulates contaminating matter upon his own land, and negligently

permits it to percolate through the soil and pollute a neighbor's well, he is liable for the injury. *Marshall v. Welwood*, 38 N. J. Law, 339, 20 Am. Dec. 394; *Righter v. Jersey City Water Supply Co.*, 72 N. J. Law, 298, 63 Atl. 6. Such was the rule adopted by the learned trial judge. In his charge to the jury he plainly rested the plaintiff's right to recover upon proof of negligence upon the part of the defendant in allowing tar to escape from its premises to the plaintiff's wells.

There was evidence justifying the jury in finding that the tar found in the plaintiff's wells came from the adjoining gas works of the defendant after June 1, 1903. The fact that the gas plant had been operated for 30 years without injury to the plaintiff tended to show that with proper care no injury would have occurred. The sudden appearance of oil gas tar in the plaintiff's wells in July, 1903, warranted the inference that a leak had occurred subsequent to June 1, 1903, in some of the receptacles in which the defendant stored its tar bearing substances. It was not incumbent upon the plaintiff to show by proof in just what receptacle the leak occurred. These receptacles were all in the possession and under the control of the defendant and within its peculiar knowledge. There were other circumstances that spoke of negligence—the iron pipes that conducted the tar to the storage tanks were laid underground where they were liable to corrosion, but were not subject to inspection. After the pollution they were examined and some of them were renewed. Three of the five receptacles for tar were upon made ground and were built of concrete underground, and so not readily subject to inspection. After the pollution these tanks were examined and two of them were lined with steel. An old gas holder, built in 1870, whose pit was designed only to hold water, has in later years been used as a relief holder for the storage of gas impregnated with oil gas tar, which, being heavier than water, would settle to the bottom. No examination was made of the bottom of this relief holder to ascertain whether it was impervious, either at the time of its changed use or after the pollution of the plaintiff's wells was brought to the defendant's attention. From such proof negligence may be inferred. *Hinmon v. Somers Brick Co.* (decided June term, 1908, of Court of Errors and Appeals) 70 Atl. 166; *Newark Electric Light Co. v. Ruddy*, 62 N. J. Law, 505, 41 Atl. 712, 57 L. R. A. 624, affirmed 63 N. J. Law, 357, 46 Atl. 1100, 57 L. R. A. 624; *Bahr v. Lombard, Ayres & Co.*, 53 N. J. Law, 233, 21 Atl. 190, 23 Atl. 167. Under these circumstances the case was properly submitted to the jury.

The defendant put before the jury by the testimony of experts and other witnesses the theory that the tar found in the plaintiff's wells came from the Passaic river, where, prior to 1887, coal gas tar was deposited by

the predecessors of the defendant, and was drawn or flowed there between the strata of rock which dip from the river towards the wells. But this was all theory, and seems to be inconsistent with what we understand the proof shows to have been the fact that the tar in plaintiff's wells was oil gas tar. It is perhaps nevertheless true that there was evidence which would have justified the jury in adopting this theory, and thus have found for the defendant, but it is equally true that there was evidence plainly justifying them in adopting the theory of the plaintiff that the tar was negligently permitted to escape from some one or more of the tanks or appliances of the defendant through the intervening soil into the plaintiff's wells. The jury after considering all of the evidence, have found for the plaintiff, and we are not inclined to disturb the verdict. It is not so clearly against the weight of the evidence, if at all, as to justify us in so doing.

Nor do we think the verdict is excessive. It appears to be based upon testimony with respect to reasonable expenditures that the plaintiff incurred prudently and in good faith in endeavoring to remedy the injury, and was confined to compensation for such expenditures as were made from July 23, 1903, the date when the injury complained of began, to August 23, 1906, the date when this action was begun. We cannot say that under the proof this verdict shows any indication of mistake, prejudice, or partiality upon the part of the jury.

The rule to show cause is discharged, with costs.

(76 N. J. L. 535)

**MIGANS v. JERSEY CITY, H. & P. ST. RY. CO.**

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

**1. STREET RAILROADS—RIGHTS IN HIGHWAY.**

The general principle governing the relation of the street railway to the traveling public is that their respective rights in the public highway must be exercised by each of them, with due regard to the rights of the other, in a reasonable and duly careful manner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 190–193.]

**2. SAME—NEGLIGENCE OF MOTORMAN—QUESTION FOR JURY.**

If the evidence submitted to the jury will sustain the inference that the motorman of the defendant company's trolley car, as he approached the crossing, did not have his car under proper control, in view of the conditions within his observation, the question whether the collision could have been avoided by the exercise of reasonable care on the part of the motorman in the operation of his car is one of fact for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 253.]

**3. SAME—CONTRIBUTORY NEGLIGENCE.**

If, from the testimony, the jury may legitimately find that, when the plaintiff started to drive around the corner into the street near or on the trolley tracks there laid, it was apparently safe for him to do so under the conditions

within his observation, one of which was a trolley car running slowly and sufficiently distant to be checked, or, if need be, stopped before it should reach him, the question of the plaintiff's contributory negligence is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 257.]  
(Syllabus by the Court.)

Error to Supreme Court.

Action by George A. Migans against the Jersey City, Hoboken & Paterson Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William B. Gourley, for plaintiff in error.  
Michael Dun, for defendant in error.

TRENCHARD, J. This writ of error brings under review a judgment entered in the Supreme Court upon a verdict of a jury at the Passaic circuit in favor of the defendant in error, the plaintiff below. The action was one of tort for negligence. The proofs exhibited that the plaintiff was the driver of the ambulance of the Paterson Hospital, which was drawn by one horse; that, in answering a call, he was driving the ambulance down Eighteenth street, toward Park avenue, which is traversed by two parallel tracks of the defendant company and which crosses Eighteenth street at right angles; that, as plaintiff, with his horse on a trot, approached Park avenue, he slackened his speed, rang the bell on the ambulance, and was looking to see if his way was clear, and was listening for the noise or bell of trolley cars on Park avenue, but heard none; that, when he reached a point where he could see up Park avenue which was about 30 feet from the crossing, he saw the trolley car of the defendant company coming on his left hand, and he turned his horse to the right, to go around the corner into Park avenue; that the motorman suddenly increased the speed of the car as he came towards Eighteenth street and struck the dashboard and lamp of the ambulance, threw it over against the curb, and injured plaintiff; that both streets are narrow, Eighteenth street being 30 feet wide and Park avenue 38 feet wide from curb to curb.

At the close of the plaintiff's testimony, a motion was made to nonsuit the plaintiff upon two grounds: First, that there was no negligence shown on the part of the defendant; and, second, that the plaintiff was guilty of contributory negligence. This motion was denied by the learned trial judge, and error is assigned thereon. We think that the motion was properly denied. The general principle governing the relation of the street railway to the traveling public is that their respective rights in the public highways must be exercised by each of them, with due regard to the rights of the other, in a reasonable and duly careful manner. *North Jersey St. Ry. Co. v. Schwartz*, 66 N. J. Law, 437, 49 Atl. 683; *Conrad v. Elizabeth, etc., Ry. Co.*, 70 N. J. Law, 676, 58 Atl. 376. With respect

to the negligence of the defendant, besides the proof already referred to, there was testimony, which, if believed, justified the jury in finding that, when the car was about 130 feet away from the point of the accident, the motorman, then running slowly to let off a passenger, saw the plaintiff approaching the crossing; and that, after thus seeing the plaintiff, the motorman suddenly greatly increased the speed of his car. Under these circumstances, the question whether the collision could have been avoided by the exercise of reasonable care on the part of the motorman in the operation and control of the car was one of fact for the jury. *Consolidated Traction Co. v. Glynn*, 59 N. J. Law, 432, 87 Atl. 66; *Consolidated Traction Co. v. Haight*, 59 N. J. Law, 577, 37 Atl. 135; *Zolpher v. Camden & Suburban Ry. Co.*, 69 N. J. Law, 417, 55 Atl. 249; *Searles v. Elizabeth, etc., Ry. Co.*, 70 N. J. Law, 398, 57 Atl. 134; *Conrad v. Elizabeth, etc., Ry. Co.*, 70 N. J. Law, 676, 58 Atl. 376.

On the question of the alleged contributory negligence of the plaintiff, besides the proof already referred to, there was testimony which admitted the finding by the jury that, as soon as the plaintiff reached a point where he could see up Park avenue, he saw the car about 130 feet away moving slowly and saw the motorman looking at him (the plaintiff); that, in order to avoid the danger of attempting to cross in front of the car, the plaintiff checked his horse and turned to the right into Park avenue, with a view of avoiding the tracks; that in making the turn the wagon swung near or on the track and was hit on the left-hand side, and overturned by the rapidly moving trolley car. Under these circumstances, the jury might legitimately have found that, when the plaintiff started to drive around the corner into Park avenue, it was apparently safe for him to do so under the conditions within his observation, one of which was that the car was moving slowly and was sufficiently distant to be checked, or, if need be, stopped before it should reach him. The question of the plaintiff's negligence was therefore for the jury. *Consolidated Traction Co. v. Chenoweth*, 61 N. J. Law, 554, 85 Atl. 1067; *Earle v. Consolidated Traction Co.*, 64 N. J. Law, 578, 46 Atl. 613; *Conrad v. Elizabeth, etc., Ry. Co.*, 70 N. J. Law, 676, 58 Atl. 376.

The other assignments of error have been examined, with the result that no error is found.

The judgment below is affirmed.

(76 N. J. L. 306)

RICE v. BARRINGTON.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

BILLS AND NOTES—HOLDER FOR VALUE—BAD FAITH.

Bad faith, not merely notice of suspicious circumstances, must be brought home to the holder for value of a negotiable note whose

rights accrued before maturity, in order to defeat his recovery upon the note on the ground of fraud in its inception.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 818-829.]

(Syllabus by the Court.)

Error to Circuit Court, Burlington County. Action by Herbert A. Rice against R. C. Barrington. Judgment for plaintiff, and defendant brings error. Affirmed.

John W. Wescott, for plaintiff in error.  
Fred A. Rex, for defendant in error.

GARRISON, J. This writ of error is brought to reverse a judgment entered upon a verdict directed for the plaintiff, Herbert A. Rice, in the court below. The defendant was R. C. Barrington, and the note upon which the action was brought read as follows: "\$380.14. Mount Holly, N. J., Nov. 9, 1905.

"Three months after date I promise to pay to the order of Roger Byrnes three hundred and eighty .14 dollars, at Mt. Holly, value received.  
R. C. Barrington."

Indorsed:

"Roger Byrnes,  
"Dr. H. A. Rice."

The plaintiff testified that he bought the note from its payee, Byrnes, before maturity, to wit, January 8, 1906. On cross-examination the plaintiff was asked: "Q. Well, you had purchased a note from Mr. Byrnes before this date, which you had found out from the party had been fraudulently obtained from him, had you not?"

This question was upon objection overruled. The overruling of this question is the first ground assigned for error. The ruling of the trial court was correct, and may be supported upon any of several grounds. The most comprehensive ground for sustaining the ruling is that the fact that Rice had found out that a note he had previously purchased from Byrnes had been fraudulently obtained was at most a suspicious circumstance as regards the note in suit; and that the fifty-seventh section of the negotiable instrument act of 1902 (P. L. p. 593), read in connection with the decisions of our courts, establishes the rule that proof of circumstances calculated merely to arouse suspicion will not defeat recovery on a negotiable note taken for value before maturity. Bad faith—i. e., fraud, not merely suspicious circumstances—must be brought home to a holder for value whose rights accrued before maturity in order to defeat his recovery on a negotiable note upon the ground of fraud in its inception or between the parties to it. *Hamilton v. Vought*, 34 N. J. Law, 187; *Read v. Abbott*, 45 N. J. 303; *Aldrich v. Peckham* (N. J.) 68 Atl. 345, and the cases there cited.

The rule thus laid down covers the remaining assignments of error, also; for they all rest upon the assumption that notice of suspicious circumstances is the legal equivalent of proof of actual fraud.

This disposes of the assignments of error.

At the very close of the trial, counsel who then represented the defendant made a motion for the direction of a verdict for the defendant, upon the ground that the plaintiff had not proved his title to the note because he had not shown that the name of the payee that appeared to be indorsed on the note was the writing or signature of Roger Byrnes. The trial court denied this motion, and allowed an exception. In view of the decision of this court in *Beckley v. Evans*, 49 N. J. Law, 442, 9 Atl. 381, and the rulings upon evidence made in the pending trial, this motion, if well founded in the testimony, would be open to question. The denial of this motion, however, is not assigned as error. Indeed, the matter is not at all referred to in the brief of counsel for the plaintiff in error, which, on the contrary, speaks of "Rice being the regular indorsee of these notes from Byrnes." We have, therefore, not considered the matter, which is mentioned now merely to guard against the misapprehension that the course thus pursued at the trial is approved as to an indorsee whose ownership was not traced through proof of the indorsement of the payee of the note.

Finding no error upon any point that has been assigned, the judgment of the circuit court is affirmed.

(76 N. J. L. 642)

#### RHOBOVSKY v. NEW JERSEY WORSTED SPINNING CO.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

#### MASTER AND SERVANT—DUTY OF MASTER—WARNING SERVANT.

The duty of a master to warn a servant of peril incident to the employment applies to those dangers only which are known to the master, or are discoverable by him in the exercise of reasonable care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 299.]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Joseph Rhobovsky against the New Jersey Worsted Spinning Company. Judgment for plaintiff. Defendant brings error. Reversed.

Humphreys & Sumner, for plaintiff in error. Lewis A. Allen, for defendant in error.

VOORHEES, J. The plaintiff was employed by the defendant for the first time on the day before the happening of the accident which is the subject of this suit. He was to learn to run a spinning machine. He commenced his work at 7 o'clock in the morning, and was told to watch the men who were operating such a machine, and so continued until noon. At 1 o'clock on the same day he was ordered to put cylinders and weights into a mule spinner, a new machine, which had never been in operation, but was being set up. The boss told him to go under the machine and put in the weights. He crawled

under it, and so worked until 6 o'clock of that evening. The next morning he returned to his work on the mule spinner at 7 o'clock, and was so engaged until between 8:30 and a quarter to 9, when the accident happened. This mule spinner has a movable carriage some one hundred feet in length, designed to move inwardly and outwardly to and from the stationary part of the machine. The accident was in consequence of the sudden movement of this carriage inwardly without any warning, whereby the plaintiff was caught while so at work between the stationary part of the machine and the carriage, producing the injuries which are the foundation of this suit.

The theory upon which the action is brought is the failure of the defendant to instruct the plaintiff as to the dangers surrounding the work, and in directing the plaintiff to go under the machine and work between the parts while the machine was connected by belts and pulleys. The plaintiff's evidence showed that the machine was a new machine; that he was told to go under it and assist in setting it up by putting in the cylinders; that he had never seen such a machine before, and that all the time that he was working the carriage had remained stationary; that he did not know what caused the machine to start. A motion to nonsuit was refused. The uncontradicted testimony of the defendant showed that when the condition of the mule spinner was last observed at 8 o'clock on the morning of the day of the accident, and about an hour and a half before the accident happened, the "brake" was set so that the power for driving the carriage was disconnected; and, also, that the driving belt of the machine was on the loose pulley. The power to move the carriage which caused the injury was applied through a belt by means of a tight and loose pulley, which communicated with a "clutch and cone" friction appliance, which latter was controlled by an appliance which prevented the clutch from closing down upon the cone, called in the case a "brake." The evidence also showed that while either of these conditions prevailed—that is, so long as the belt was on the loose pulley, irrespective of the condition of the brake, or so long as the brake was properly set, irrespective of whether the belt was on the loose or the tight pulley—the carriage could not move inwards. In other words, in order to move the carriage, it was necessary that two conditions should concur: First, that the belt should be upon the tight pulley; and, secondly, that the brake should also be so set that the clutch would engage the cone. At the close of the evidence a motion to direct a verdict for the defendant was refused by the trial court. The jury found a verdict for the plaintiff, upon which the judgment under review was entered.

In the absence of notification to the master of the employee's ignorance, the servant

assumes the inherent risks of the employment and those obvious risks which the law would presume he ought to know. Assuming, however, that in this case the master had implied notice of the ignorance of the plaintiff, yet the plaintiff cannot rely upon the failure of the employer to instruct him. The doctrine of instruction by the master does not extend to those dangers which the employer himself cannot be deemed to have foreseen. It appears that this machine was in its normal condition, with its brake set properly to maintain the carriage in a state of rest, and with a power unapplied; that is, the belt was on the loose pulley and the clutch was disengaged from the cone, each designed to prevent movement of the machine. While the brake and belt were in this condition there was no movement of the machine to be expected or danger to be apprehended. No abnormal condition of the machine was shown, and it cannot be said that the master should have foreseen any danger in this particular so as to charge him with negligence in not giving warning to the employee. Such being the case, the place where the plaintiff was sent was not one of peculiar danger. There was no danger attendant upon the working under this machine which was reasonable to be apprehended by any one. Hence the duty to warn did not arise. *Shearman & Redfield on Negligence*, 185-203; *Wagner v. Jayne Chemical Co.*, 147 Pa. 475, 23 Atl. 772, 30 Am. St. Rep. 745. It must be conceded that, if the machine from previous operation had shown a tendency to start suddenly, even then something in the nature of scienter should have been proved. *Blen v. Unger*, 64 N. J. Law, 596, 46 Atl. 593. A fortiori was it necessary to prove circumstances to the knowledge of the master likely to make the carriage a dangerous agency when the power was thus doubly shut off from it. The evidence left in doubt and did not explain what caused the machine to move. If it arose from a defect in the mechanism, it should have been pointed out, but this was not done. If it was the result of human agency, then, if it was the hand of a stranger which set it in motion, the master would not be liable. If it was the act of a fellow employee in like manner, no liability could be visited upon the master. On this latter subject the case of *Siddall v. Pacific Mills*, 162 Mass. 378, 38 N. E. 969, is instructive. It was there said: "It was negligence of such a kind that no instruction which the defendant could have given the plaintiff in regard to the method of doing his work would have been likely materially to diminish the risk of injury from it. The risk of injury from negligence of his fellow servant is one which an employee assumes by virtue of his contract to engage in the service, even though neither he nor his employer can foresee the dangers which may result from such negligence. Ordinarily the employer is not called upon to instruct



a young and inexperienced person in regard to dangers which can only result from the negligence of fellow servants. It is not to be presumed that others will neglect their duties, and a boy cannot expect to be instructed as to what to do in a situation which is not to be expected in the ordinary course of the business, and which can only exist through the fault of another. But if we assume in favor of the plaintiff, without deciding, that the risk of particular dangers from this cause may sometimes be so great, and so obvious to the employer, that he ought to give an inexperienced boy warning and instructions in regard to them, he is called upon to do so only when he himself ought reasonably to anticipate them, and when his instruction would be likely materially to diminish the danger to his employe. In the present case there is no evidence to warrant a finding that he owed the plaintiff such a duty. The danger of such an injury was very remote and improbable. It could only come from negligence which the employer had no reason to expect." So here it cannot be said that the master ought reasonably to have anticipated that the carriage, secured as it was by two appliances designed for the purpose, was likely to move, or could move except by reason of unwarranted interference not to be presumed. Nor is it clear under the circumstances of this case what instruction the master could have given which would have been effectual to guard the servant. But the plaintiff in his proof has not sustained the burden which the law casts upon him. In *Suburban Elec. Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700, it is said: "The plaintiff must do more than show possible responsibility of the defendant, and, in the absence of direct evidence, he must show such circumstances as would justify the inference that the injury was caused by the defendant's wrongful act and exclude the idea that it was due to a cause with which the defendant was unconnected." There was no direct evidence as to what caused the injury, and the plaintiff by failing to exclude other possible causes for which the master would not be responsible has simply left it to be conjectured by the jury that the defendant was responsible.

The judgment should be reversed.

(75 N. J. L. 322)

#### BROWN v. THOMPSON et al.

(Court of Errors and Appeals of New Jersey.  
June 16, 1908.)

#### FALSE IMPRISONMENT—EVIDENCE—DAMAGES—MITIGATION.

Where an abutting owner was arrested for resisting the cutting of her sidewalk, and sued a street commissioner for causing her arrest, it is competent for the purpose of mitigating punitive damages to show that the commissioner thought that the cutting of the pavement

was necessary to the proper execution of a street paving contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Imprisonment, § 107.]

(Syllabus by the Court.)

#### Error to Supreme Court.

Action by Mary W. Brown against Nathaniel K. Thompson and others. Judgment for plaintiff, and defendants bring error. Reversed.

James C. Connolly, for plaintiffs in error.  
Samuel Kalisch, for defendant in error.

REED, J. In January, 1904, the common council of the city of Elizabeth passed an ordinance ordaining that Front street should be paved from Broadway to Bond street, and that the work should be done under the supervision of the street commissioners, according to the provisions of the city charter and ordinances. The ordinance was duly published, and notices of sealed proposals to do the work duly given, and the contract was awarded to one McCloud, who entered into a contract, on June 15, 1904, to execute the work.

On July 30, 1904, in the course of executing the work, the foreman of the contractor reached a point where the property of the plaintiff fronted on Front street a distance of 175 feet. The city engineer had marked with chalk lines the limits of the improvements, and those chalk marks included a few inches of the then existing sidewalk in front of the plaintiff's property. When the foreman and his workmen proceeded to cut away the portion of the sidewalk outside of the chalk line, the plaintiff resisted. She seized the implements of the workmen, and placed her person upon the pavement at the point of the cutting, so that the work could not be prosecuted without the physical removal of the plaintiff. A communication was sent to police headquarters, but, before the police arrived, Mr. Thompson, the street commissioner, appeared. He held a conversation with Mrs. Brown, the plaintiff, and tried to persuade her to abandon her physical resistance to the progress of the work, and explained to her that her sidewalk was too far out into the street. The plaintiff refused to desist, and then Thompson telephoned to the chief of police, or to Capt. O'Leary, telling him that the workmen on the street would have to be protected. Subsequently, Capt. O'Leary, of the police force, arrived, and held a conversation with the plaintiff, advising her to seek redress by suing the city; but the plaintiff still persisted in obstructing the work. The occurrence in the street naturally attracted a small crowd. The plaintiff was told that she would be arrested, and was requested to go voluntarily with the police officer. This she refused to do, and she was placed in the patrol wagon and taken to the police headquarters, where she was confined for four or five hours and then

discharged. The plaintiff thereafter brought this action against five defendants, and the trial resulted in a verdict against Thompson, the street commissioner, and Capt. O'Leary, captain of the police force. Thompson filed a plea of the general issue and O'Leary an additional plea of justification. The latter plea set up that the plaintiff was disorderly, and was committing a breach of the peace and upon a public street, and interfering with and obstructing the workmen and contractor employed therein, and that the defendant, being a peace officer, to preserve the peace, took her into custody and carried her to a police justice, and there preferred a complaint against her of disorderly conduct. Upon the trial of the cause, the jury was left free to find not only compensatory, but also punitive damages, and the jury found against the commissioner and Capt. O'Leary damages to the amount of \$2,500.

In the course of the trial the defendants offered in evidence the ordinance directing the paving of Front street; the statutory notice of intention, and the contract entered into between the city and McCloud to pave Front street. They offered in evidence the fact that the city engineer had drawn chalk lines upon the pavement of the plaintiff. The engineer was then asked how far in from the curb line he put the chalk marks, and he proceeded to explain how he had placed the marks. He was then asked this question: "Could the contract awarded to Brennan & McCloud have been performed in accordance with its terms, if the workmen were not allowed to cut away a portion of the sidewalk according to the lines laid down by you for the contractor?" This question was overruled; and we think erroneously. It is true the question was not framed so as to elucidate whether the line marked was the true line of the street, or whether it established the dividing line between the sidewalk and the street, or whether there existed the right or custom in paving the street to alter the curb lines to conform to the requirements of the paving work. Nevertheless, we think the question relevant upon the point whether the defendants acted in good faith or maliciously. For if it had appeared to Thompson, the commissioner under whose supervision the work was done, that the intrusion upon the sidewalk was unnecessary for the execution of the work in hand, it might be inferred that his calling in the police to detain Mrs. Brown while her sidewalk was unnecessarily mutilated was a malicious act; while, on the other hand, if it appeared to him that such invasion of the sidewalk was necessary to the execution of the contract work, no such inference would arise. For this reason, the judgment should be reversed. Upon the other questions in the case, there being no exceptions to the charge other than to the refusal to charge these specified requests as framed, no opinion is expressed.

(75 N. J. L. §16)

## GERHARDT v. BOETTGER.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

## 1. APPEAL AND ERROR—OBJECTIONS IN TRIAL COURT—SUFFICIENCY OF EXCEPTIONS.

Exceptions taken at the trial must be sufficiently specific and precise to direct the judge's attention to the exact point objected to, otherwise they cannot be reviewed by an appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1620-1630.]

## 2. EXCEPTIONS, BILL OF—SUFFICIENCY—FACTS NOT SHOWN BY RECORD.

A bill of exception in an action to recover for use and occupation of land, reciting that "plaintiff, after the close of defendant's case, moved that a verdict be directed for plaintiff because it undisputedly appeared that defendant had occupied and used as tenant the property of plaintiff, which motion the judge denied," without alleging any facts to show that defendant had used and occupied plaintiff's property as a tenant, aside from the mere assertion of that fact by counsel, was insufficient to present the correctness of the order for review.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, §§ 8-12.]

## 3. SAME.

A bill of exception in an action to recover for the use and occupation of land directed at a charge that the question for the jury to decide was whether the land was intended to be included in property originally leased by plaintiff to defendant was insufficient, where there was nothing in the bill to show whether or not the land was included in the property covered by the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, §§ 8-12.]

## 4. SAME.

In an action for use and occupation, where defendant claimed to hold under a lease from plaintiff, a bill of exceptions directed at a charge that it was a question for the jury to decide whether plaintiff put defendant in possession of the property when the lease was made, and, if so, there could be no recovery, was insufficient, where no facts were set up in the bill from which it could be determined whether the instruction was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, §§ 8-12.]

## 5. USE AND OCCUPATION—TRIAL—QUESTION FOR JURY.

In an action for use and occupation under 1 Gen. St. 1895, p. 1915, § 3, providing that it shall be lawful for a landlord, where the agreement is not by deed, to recover a reasonable satisfaction for his land held or occupied by another, where it appeared that there was a lease stipulating a certain compensation for the use and occupation of some lands, but the evidence left it in doubt whether the lands to which the action related were covered by the lease, though defendant was put in possession of the lands at the making of the lease, a charge that it was for the jury to decide whether the land was intended to be included in the property originally leased, and whether plaintiff put defendant in possession of the property when the lease was made, in which case there could be no recovery, was proper, since the fact that defendant was put in possession of the lands in question when the lease was made rebutted any presumption that he agreed to pay for their use anything beyond the rent provided by the lease.

Error to Supreme Court.

Action by Samuel P. Gerhardt against Abraham G. Boettger to recover for the use

and occupation of land. Judgment for defendant, and plaintiff brings error. Affirmed.

William M. Clevenger, for plaintiff in error. Clarence L. Cole, for defendant in error.

VROOM, J. The action is to recover for the use and occupation from November 1, 1899, until October 1, 1904, of a lot of land in Atlantic City, and described in the first count of the declaration as being on the north side of Arctic avenue, beginning 20 feet east of the east line of Moore street and fronting 50 feet on Arctic avenue, and being 85 feet in depth. The declaration contains a special count alleging the indebtedness of the defendant for the use and occupation of said premises, and his failure to pay for the same in disregard of his promises, and also a second count containing the common money counts in assumpsit. The defendant pleaded nil debet to the first ground above stated, and also a special plea that the plaintiff "on the 30th of October, 1899, by writing under seal, etc., granted and demised to defendant certain premises, described as being a store dwelling and bakehouse and ovens, known as 711 Arctic avenue, in Atlantic City, with the appurtenances, for the term of five years from the 1st of November, 1899, at the yearly rental or sum of \$1,000," and that thereupon the plaintiff put defendant in possession of the premises described in said lease, which premises so described and which plaintiff put defendant in possession include the premises described in the declaration, for which possession the defendant paid to the plaintiff the rent by him agreed to be paid, and that thereafter, on the 26th of October, 1904, the plaintiff by lease in writing under seal granted and demised unto the defendant "the same store, dwelling, bakehouse and ovens, located at 711 Arctic avenue, and on the land described in lease between the parties hereto, dated October 30, 1899, and which the said Boettger used and occupied by virtue thereof, from the 1st day of November, 1899, to the 1st day of November, 1904, at the rent of \$100, to be paid in advance," which premises so described include the premises described in the declaration, for which the defendant paid the rent agreed to be paid, and surrendered the possession of the premises at the end of the term therein mentioned. To the second count in the declaration the defendant pleaded the general issue. The replication of the plaintiff to the special plea averred, first, that the writing of October 30, 1899, did not include the premises described in the plaintiff's declaration, nor was the plaintiff placed in possession of the said premises by the plaintiff, and, secondly, that the writing dated October 26, 1904, did not include the premises described in the plaintiff's declaration.

At the trial the defendant introduced in evidence the two leases, which were sub-

stantially in form as described in the special plea. The evidence disclosed that the plaintiff rented to the defendant the property in Atlantic City, 20 feet by 85 feet, at the corner of Moore street and Arctic avenue, together with the property 65 feet by 100 feet, containing a bakehouse and stables, by the lease dated November 1, 1899, and that the defendant went into possession of the lot 30 feet by 85 feet which stands at the side of the bakehouse, and started to use that lot from the beginning and continued in possession of it until December 1, 1904; that he built a one-story store on the front part of the lot and a flour shed along one side, and in the rear he built a shed; that he paid no rent for the lot; and that the lot was reasonably worth \$100 a year. The lease of October 30, 1899, contains an option to the defendant to purchase a tract of land therein particularly described by metes and bounds, and which description it is insisted included only the first two lots above mentioned, but it does not appear in the lease that the property of which this option is given is the same property previously demised. There was no dispute as to the continuous possession by the defendant of the property in question with the full knowledge of the plaintiff, and that no demand was made on the defendant for the payment of rent before the bringing of this suit. At the close of the case the defendant moved for the direction of a verdict, as did also the plaintiff, the trial judge refused both motions, and exception was taken to the refusal by the plaintiff.

The trial judge in charging the jury said: "The question for you to decide is whether the land for the use of which suit is now brought was intended to be included in the property originally leased, and whether plaintiff put defendant in possession of that property when the lease was made. If so, there can be no recovery in this case. If it was not leased, not intended to be leased, if he was not put in possession of it as a part of the property which was leased, then the plaintiff would be entitled to recover a fair rental value for the term which the defendant occupied it." The plaintiff in error relies upon three assignments of error, based upon exceptions taken at the trial. The first exception is that "the plaintiff, after the close of the defendant's case, moved that a verdict be directed in favor of the plaintiff, for the reason that it undisputably appeared that the defendant had occupied and used as tenant the property of the plaintiff, which motion, after argument, his honor, the judge, denied, to which ruling of the court the plaintiff prayed a bill of exceptions, and the judge sealed the exceptions accordingly." I find nothing in this bill of exception which would justify a reversal, even if it had appeared beyond dispute in the bill that the defendant had used and occupied as tenant the property of the plaintiff. This fact alone would not have justified a verdict in favor of the

latter, for the reason that from anything that appeared to the contrary the defendant may have paid the rent as it fell due. But it does not appear from the bill that the defendant had used and occupied the plaintiff's property as a tenant. There is but the mere assertion of that fact by counsel for the plaintiff as a ground for his motion that a verdict be directed.

The second exception is to the following extract from the charge of the trial judge, viz.: "The question for you to decide is whether the land, for the use of which suit is now brought, was intended to be included in the property originally leased." Nothing appears in this bill of exceptions to show whether this instruction in the charge was proper or not. The lease is not before us, and, for anything that appears to the contrary, the land described in the declaration may have been included with the lease, and, if that is so, the action of the trial court in leaving the question to the jury, rather than deciding it against the plaintiff, was prejudicial to the defendant, and not to the plaintiff, and affords no ground of reversal.

The third exception is also directed at an extract contained in the charge, viz.: "And whether plaintiff put defendant into possession of the property when the lease was made. If so, there can be no recovery in this case." Without knowledge of the facts, it is impossible to say that there was anything erroneous in this instruction. There are no facts contained in the bill of exception throwing any light upon the matter. As was said by Mr. Justice Pitney in *Addis v. Rushmore*, 74 N. J. Law, 649, 65 Atl. 1036, in this court: "It seems hardly necessary to repeat what has been so often laid down by this court and the Supreme Court that the office of an exception is to direct the mind of the trial judge to the precise point upon which he is alleged to have made an erroneous ruling, and thus obviate mistrials due to inadvertent slips and errors; and if, on the other hand, he adheres to the ruling, when his attention is called to the point, he is to seal a bill of exception as evidence to the court of review that the alleged error has been committed. It is a fundamental principle in the common-law method of trial and review that an exception to be of any avail must be precise and specific. This court does not reverse on grounds not taken in the trial court." The exceptions taken here obviously are not precise and specific, and fail to present the precise view of which a review was sought. The numerous decisions of this court upon this question are collated in *Addis v. Rushmore*, supra, and need not be again cited. I think, however, the charge of the court was correct. The action was for use and occupation, under the third section of the act concerning landlords and tenants (1 Gen. St. p. 1915), which provides that it shall be lawful for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction

for the land held or occupied by the defendant, in an action on the case, for the use and occupation of what was so held or enjoyed; and, if in evidence on the trial of such action any parol demise or any agreement, not being by deed, whereon a certain rent was reserved, shall appear, the plaintiff shall not for this reason be nonsuited, but may make use thereof as an evidence of the quantum of damages to be recovered. By this section the action is necessarily based upon the implied undertaking to pay the reasonable value or the agreed value for the use and occupation of plaintiff's lands by the defendant, where there is an informal agreement or no express agreement of letting. In the present case there was beyond question a stipulated compensation for the use and occupation of some lands, and, in case the lands contemplated by this stipulation included the lands occupied, there could be no action for anything beyond the stipulated rent. The evidence left it in doubt whether the lands for whose use the action was brought included the lands covered by the lease. The description in the lease was uncertain, and the undisputed fact that at the making of the lease the defendant was put in possession of the lands now in question rebutted any presumption that the defendant agreed to pay for their use anything beyond the rent provided by the lease.

The judgment below should be affirmed.

(76 N. J. L. 282)

MILLER v. WEST JERSEY & S. R. CO.  
(Supreme Court of New Jersey. June 22, 1908.)

**PLEADING—AMENDMENT—MATTER IN CONTROVERSY—DECISION.**

Under section 126 of the practice act (P. L. 1903, p. 572), authorizing all such amendments as may be necessary for the purpose of determining in the existing action the real question in controversy between the parties, it is the question which the parties hoped and intended to try, not the question at issue upon the record, which determines the real question in controversy. *Hoboken v. Gear*, 27 N. J. Law, 273, followed.

(Syllabus by the Court.)

Motion to vacate an order permitting amendment of declaration.

For former opinion, see 71 N. J. Law, 363, 59 Atl. 13.

Argued February term, 1908, before GARRISON, SWAYZE, and TRENCHARD, JJ.

Gaskill & Gaskill, for the motion. John W. Wescott, opposed.

SWAYZE, J. After the decision of this court reported in 71 N. J. Law, 363, 59 Atl. 13, the plaintiff obtained from a justice of the court an order allowing him to amend his declaration so as to count upon negligence on the part of the defendant in failing to protect the plaintiff, a passenger, from the conduct of employes of another railroad who were using trucks upon the same station

platform. The original declaration counted upon negligence of defendant's servants in using the freight trucks. The present motion is to vacate the order allowing the amendment.

The authority for the amendment is to be found in section 126 of the practice act (P. L. 1903, p. 572), which requires that all such amendments as may be necessary for the purpose of determining in the existing action the real question in controversy between the parties shall be made. This section was originally section 46 of the act to simplify pleadings and practice in courts of law. P. L. 1855, p. 301. Soon after its passage the question arose whether the real question in controversy was the question put at issue by the pleadings, or the question which the parties hoped and intended to try in the cause. *Hoboken v. Gear*, 27 N. J. Law, 265. In the course of an interesting opinion, Chief Justice Green referred to *Wilkin v. Reed*, 15 C. B. 192, in which, under a somewhat similar statute, the English court held that the amendment should not be permitted because, in fact, the question in controversy appeared from the evidence and opening of counsel to be the question which was at issue upon the pleadings, and the effort to amend was therefore in fact an attempt to try another cause of action than that which the parties hoped and intended to try. Chief Justice Green, in commenting upon that case, said: "What the real question in controversy between the parties was is here ascertained, not from the pleadings alone, but also from the evidence and from the opening of the plaintiff's counsel, and the power of amendment is held to extend to the introduction of matters which the parties hoped and intended to try in the cause, and not to be limited to matters within the issue upon the record. This I conceive to be the sound interpretation of the statute." 27 N. J. Law, 273. Under this ruling what is the real question in controversy becomes a question of fact, and under *Key v. Paul*, 61 N. J. Law, 133, 38 Atl. 823, we ought not to review the action of the justice who made the order.

We have, however, at his request considered the question, and are of the opinion that his action was correct. The opinion of this court upon the rule to show cause demonstrates that the question which the parties sought to try—the real question in controversy which they hoped and intended to try—was that sought to be presented by the amended declaration. The decision did not turn upon the question of pleading, but upon the failure of the plaintiff to establish a case under the evidence. The amendment which was permitted merely made the declaration conform to the case attempted to be made by the proofs on the former trial. Such an amendment is well within the precedents in this state.

In *Hoboken v. Gear* the plaintiff declared in *indebitatus assumpsit* for the value of

services which he had rendered. It turned out that he had been paid for all services actually rendered, and was really seeking to recover unpaid salary for the balance of the term for which he was employed. The amendment was permitted.

In *Farrier v. Schroeder*, 40 N. J. Law, 601, an amendment was permitted after trial, charging the plaintiff, and this met with the approval of the Court of Errors and Appeals.

In *Guild v. Parker*, Receiver, 43 N. J. Law, 430, suit was brought against the executor of Hannah M. Wilson, the devisee of Daniel M. Wilson, upon the theory that Daniel M. Wilson had incurred the liability in his lifetime. It turned out that the liability had been incurred by his executrix after his death. An amendment was permitted, and sustained by the Court of Errors and Appeals.

In *Vunk v. Raritan River R. R. Co.*, 56 N. J. Law, 395, 28 Atl. 593, a husband brought suit alone for injuries to real estate of which he and his wife were seised as tenants by entireties. In order to prevent a failure of justice, the court allowed the wife to be made a party after an award by arbitrators, and ordered judgment in favor of the husband and wife on the award, although in the meantime the wife's right of action had become barred by the statute.

These cases are particularly strong in favor of liberality in allowing amendments because the statute extends only to the real question in controversy between the parties, and the cases permit a change of parties, where the question in controversy is not changed. It is only where a change of parties will introduce an entirely different controversy that amendment has been denied. *Lower v. Segal*, 60 N. J. Law, 99, 36 Atl. 777; *Fitzhenry v. Consolidated Traction Co.*, 63 N. J. Law, 142, 42 Atl. 416.

In the present case, if the facts had warranted the verdict for the plaintiff, an amendment of the declaration might have been made in this court to make the pleadings conform to the facts. We see no reason why, when the case is remitted for a new trial, the same amendment may not be made. Section 126 expressly authorizes amendments at all times. It differs from section 125, which authorizes amendments in the case of variance at the trial, where terms must be imposed if the variance is such as might mislead the adverse party. When the record was remitted for a new trial, the present case stood in the same position as if it had never been tried, and it was manifestly fair to the defendant to apply for the amendment in advance of trial in order to avoid misleading it by the variance at the trial. The case presented by the amendment was one which the plaintiff had attempted to prove at the former trial, and was not different in character from that originally declared upon. Both the original and the amended declaration counted on

negligence of a common carrier toward its passenger arising out of the management of freight trucks upon a station platform. The proof necessary if the trucks were managed by the servants of the defendants differed from that which is necessary when the trucks are managed by the servants of another company, but the gist of the action—negligence in the care of a passenger—is the same. The essential averment is that the defendant negligently permitted an agent of the Pennsylvania Railroad Company to run one of the trucks over the plaintiff's foot. The averment of knowledge on the part of the defendant that the agents of the Pennsylvania Railroad were using the platform is not necessary as a matter of pleading, however essential it may be to prove it in order to establish the negligence charged against the defendant.

The motion is denied, with costs. All concur.

(73 N. J. E. 708)

McCARTER, Atty. Gen., v. VINELAND LIGHT & POWER CO.

(Court of Errors and Appeals of New Jersey. June 22, 1908.)

GAS—GAS COMPANIES—INSOLVENCY—RECEIVER'S SALE—RIGHTS OF PURCHASER.

A purchaser at a receiver's sale held pursuant to what is now section 82 of the general corporation act (P. L. 1896, p. 303) of all the franchises of a gas company (including a franchise to lay gas pipes in the streets) holds such franchises, in view of the act of February 17, 1881 (P. L. p. 33), as a body politic and corporate, and has no power as an individual to convey such franchises to another person; and, when a corporation, the lessee of the person to whom such franchises were attempted to be conveyed, and with no other right, proceeds to exercise such franchises by opening and occupying the streets, it will be restrained on the information of the Attorney General.

Swayze, Bogert, Green, and Garrison, JJ., dissenting.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Robert R. McCarter, Attorney General, against the Vineland Light & Power Company. Decree for complainant (65 Atl. 1041), and defendant appeals. Affirmed.

French & Richards, for appellant. Edwin F. Miller, Louis H. Miller, and Gaskill & Gaskill, for respondent.

TRENCHARD, J. This is an appeal from an order of the Court of Chancery granting a preliminary injunction. The information seeks to restrain the Vineland Light & Power Company from extending its gas mains through the highways of the borough of Vineland and township of Landis. The defendant company was incorporated in the year 1900 under the general corporation act of this state (P. L. 1896, p. 277), having for its object, among others, as stated in its certificate of incorporation, the making, sale, and distribution of gas in the borough of Vineland and the township of Landis. No

permission has been granted the defendant company, by either of the municipalities named, to open and occupy the highways. It claims the right to do so as lessee of the franchises granted by the Legislature to the Vineland Gaslight Company by act approved March 15, 1870, P. L. 1870, p. 577. That act granted to the company last named the right to lay gas pipes in the highways now in dispute. The defendant company claims title to the franchise of the earlier company in the following manner: In the year 1884 the Vineland Gaslight Company became insolvent and a receiver was appointed by the Court of Chancery. Pursuant to an order of the court, the receiver made public sale of all the property and all the franchises belonging to the company and appertaining to the principal work for the construction whereof the company was incorporated, and John R. Farnum became the purchaser at that sale which was duly confirmed by the court. Farnum operated the works until March 27, 1900, when he and his wife conveyed the same to Arthur A. Holbrook. The conveyance included all the real and personal property purchased by Farnum at the receiver's sale, and specifically included the franchises sold by the receiver to Farnum. On March 31, 1900, Holbrook and his wife conveyed the same property, except the franchises, to the defendant company, and, by a separate instrument, leased the franchises to the defendant company for the term of 99 years. Since that date the defendant has operated the works, and has made some extensions. At the time the information was filed the defendant was engaged in making further extensions, and the information was filed to enjoin this new work. The learned Vice Chancellor held that while the purchaser at the judicial sale acquired, under what is now section 82 of the general corporation act (P. L. 1896, p. 303), all the property rights, powers, privileges, and franchises of the insolvent corporation, yet his title, possession, and enjoyment were impaired or wholly destroyed by his failure to comply with the provisions of the act of February 17, 1881 (P. L. p. 33; 1 Gen. St. 1895, p. 3694, §§ 34, 35), by completing the organization of the company as authorized by that act. While we have not found it necessary to decide that precise question, yet we are of the opinion that the preliminary injunction was properly granted for the reasons we will now state.

The rule must be considered settled that no person or corporation can acquire a right to make a special or exceptional use of a public highway, not common to all the citizens of the state, except by grant from the sovereign power. *Jersey City Gas. Co. v. Dwight*, 29 N. J. Eq. 242. We think the defendant company had acquired no right to make the extensions enjoined, because it had no grant from the state. We have pointed out that it was organized under the gen-

eral corporation act, and claims its right to use the streets as lessee of the franchises of the Vineland Gaslight Company acquired by the latter company by P. L. 1870, p. 577. Although, technically speaking, franchises are property, they are property of a peculiar character, arising only from legislative grant, and are not subject to sale and transfer without the authority of the Legislature. *Stockton v. Central R. R. Co.*, 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; *Randolph v. Larned*, 27 N. J. Eq. 557; *Black v. Delaware & Raritan Canal Co.*, 22 N. J. Eq. 130. We find no legislative authority for the conveyance of the franchises by Farnum to Holbrook, from the latter of whom the defendant claims title. Section 82 of the general corporation act (P. L. 1896, p. 308) provides: "Whenever a receiver of a corporation shall have charge of a canal, railroad, turnpike or other work of a public nature, in which the value of the work is dependent upon the franchise, and in the continuance of which the public as well as the stockholders and creditors have an interest, the receiver may sell or lease the principal work for the construction whereof the said corporation was organized, together with all the chartered rights, privileges, and franchises belonging to it and appertaining to such principal work; and the purchaser or purchasers, lessee or lessees of such principal work, chartered rights, privileges and franchises, shall thereafter hold, use and enjoy the same during the whole of the residue of the term limited in the charter of said corporation, or during the term in such lease specified, in as full and ample a manner as such corporations could or might have used and enjoyed the same; subject, however, to all the restrictions, limitations and conditions contained in such charter; provided, that nothing in this section contained shall be so construed as to apply to or in any wise affect any corporation authorized by law to exercise banking privileges." This legislation, in substance, was originally enacted March 11, 1842 (P. L. 1842, p. 164), and with minor changes has been preserved (Rev. St. 1847, p. 136, tit. 5, c. 3, § 20; Revision, p. 192, § 85; P. L. 1896, p. 303, § 82), and is relied upon by the defendant to protect it in the enjoyment of the franchises originally granted to the Vineland Gaslight Company and sold by the receiver to Farnum. The rights, if any, acquired by the defendant, are derived from the deed of Farnum to Holbrook as affected by the provisions of the corporation act and the independent statute of 1881, hereinafter particularly referred to, which establishes a mode of procedure when the property and franchises of a gas company are sold pursuant to a process or decree of the courts. That act of February 17, 1881 (P. L. 1881, p. 33; Gen. St. 1895, p. 3694, §§ 34, 35), in relation to the sale and reorganization of turnpike, gas, and other companies, provides that, upon the sale of the property, rights,

powers, privileges, and franchises of any turnpike or gas company under any process or decree of any court of this state or of the Circuit Court of the United States, "the person or persons for or on whose account such property, rights, powers, immunities, privileges and franchises may be purchased shall be and they are hereby constituted a body politic and corporate, and shall be and they are vested with all the rights, title, interest, property, possession, claim and demand in law and equity of, in and to such \* \* \* company, with its appurtenances and with all the rights, powers, immunities, privileges and franchises of the corporation as whose the same may have been sold." The act further provides that such persons for or on whose account any such property, rights, powers, immunities, privileges and franchises of such corporation may or shall have been purchased "may organize said new corporation, elect directors and officers, issue stock, create and issue preferred stock and issue and secure bonds." We have pointed out that Farnum in 1884 properly acquired title at the receiver's sale to the property of the Vineland Gaslight Company, including all the chartered franchises belonging to the Vineland Gaslight Company. Instead of availing himself of the provisions of the act of 1881 above referred to, Farnum continued to maintain and operate the gas works as an individual in his own name and as sole owner, until on or about March 27, 1900, when he conveyed all the property and franchises which he had acquired at the receiver's sale to Holbrook, who on the 31st of March, 1900, conveyed the property, real and personal, to the defendant company, a new corporation, just organized under the general corporation act, and leased to the same company all the chartered franchises granted to the original Vineland Gaslight Company by the Legislature. It will be seen, therefore, that a construction of what is now section 82 of the general corporation act, as modified by the act of 1881, is necessary to a determination of this case. It is a rule of construction well established that all acts in *pari materia* are to be taken together as if they were one law. *Perth Amboy v. Piscataway*, 19 N. J. Law, 173; *Jersey v. Demarest*, 27 N. J. Eq. 301; *Mickle v. Matlack*, 17 N. J. Law, 93; *Newark City Bank v. Assessors*, 30 N. J. Law, 22. Construing the acts in question together, viz., section 82 of the corporation act and the act of 1881, we find a definite disposition of the title to the chartered rights, privileges, and franchises of the insolvent corporation.

Under section 82 of the act concerning corporations, Farnum's rights as a purchaser would seem to be absolute. The title to the chartered rights, privileges, and franchises of the corporation passed to the purchaser, who became entitled to hold, use and enjoy the same during the whole of the residue of the term limited in the charter of said corpora-

tion in as full and ample a manner as such corporation could or might have used and enjoyed the same, subject, however, to all the restrictions, limitations, and conditions contained in such charter: If this statute stood alone, Farnum might well claim that he acquired these franchises, although of a public nature, as an individual with the right of perpetual succession, analogous to an indefeasible estate in fee simple of lands, including not only *jus in re*, but *jus disponendi*. But in 1881 (P. L. 1881, p. 33), before Farnum's purchase at the receiver's sale, the Legislature in exercising control of gas companies and others modified the character and conditions of the title of purchasers of public franchises at a judicial sale. The state did not take away or abridge the rights and franchises acquired under the receiver's sale, but prescribed a mode of procedure, whereby such rights and franchises, together with the right of perpetual succession, should be thereafter held and enjoyed. The legislative intent seems to be clear to create a new corporation, and not to permit public franchises to pass to an individual to be used and enjoyed, sold, and transferred, bequeathed, and devised in the same manner as ordinary real or personal property. Accordingly the act of 1881 created a corporation in which the title to the franchises in question was *ipso facto* vested. The effect of this enactment is the same whether or not the purchaser exercised his right to organize "the new corporation" already created by the election of directors and officers and the issue of stock and the securing of bonds. The act effectually transferred the title and the right of perpetual succession to a corporation sole, and the purchaser, as an individual, ceased to have any title which he could convey or lease in his lifetime or transmit by testamentary disposition. It is quite probable that the Legislature, in formulating the provisions of the act of 1881, concerning the sale and reorganization of turnpike, gas, and other companies, used as a guide the act of March 25, 1875 (P. L. 1875, p. 41), concerning the sale of railroads, canals, turnpikes, bridges, and plank roads (Revision, p. 945, § 167). It is true that this court had before it for construction this latter act in the case of *Boylan v. Kelly*, 36 N. J. Eq. 331. But it is a misapprehension of the language of that opinion to consider that it decided that the purchaser at a sale had under that act—or a person for whose account the purchase was made—was not by the express provision of the act made a body corporate. In the cited case one Kelly was the purchaser. He conveyed to Boylan, who "in due time proceeded to effect a corporate organization," under the statute. Chancellor Runyon in the court below (*Kelly v. Boylan*, 32 N. J. Eq. 581) held that Boylan (the person on whose account the purchase was made) was by force of the statute a body corporate. Whether the statute had this effect, or whether it permitted Boylan to hold

as an individual, or as a corporation, as he might elect, was a question, the decision of which the case did not require. Certainly, if it did not expressly make the purchaser a body corporate, it authorized him to hold as a corporation, if he wished to do so; and that he did so wish was conclusively shown by his proceeding to effect a corporate organization under the act. The question which the Court of Errors and Appeals was called upon to determine was whether parties having judgments against Boylan personally could reach the property and franchises acquired by him through the sale made under the act of 1875. If he held them as an individual, they were subject to levy under the judgments against him. If he held them in a corporate capacity, they were not. Dealing with this question, the court uses this language: "The Chancellor, following the case of *Commonwealth v. Central Passenger Railroad Co.*, 52 Pa. 506, considered the act of purchase by Boylan as creating him a corporation under the statute. The act certainly does confer upon such purchaser the right, at his election, to take and hold and exercise such property and franchises in a corporate capacity, to the full measure in which they were enjoyed by the corporation sold out, with power to organize for its management in the usual mode of controlling such interests. The purchaser, Boylan, left it in no doubt as to the character in which his purchase was designed to be held; for he proceeded in due time to effect a corporate organization." Nothing more than this is said by the court as to the meaning of the act. No declaration that the Chancellor's construction is erroneous; no pointing out where the error lies; no citation of the language of the statute; nothing to suggest that the court differs with the Chancellor, except the use of the word "certainly." As we read the opinion of Mr. Justice Knapp, he says in effect that the act at least gives Boylan the right to become a corporation, and that right he has exercised. It is therefore not necessary for us to go as far as the Chancellor, and say that under the statute his purchase made him a corporation *nolens volens*. To hold that he meant anything more than this is to say that he deliberately overrode what seems to us to be the plain declaration of the statute without a word of explanation by way of showing why that declaration was not to be accepted as it reads. The language of the statute is that "the person or persons for or on whose account such railroad, canal, turnpike or plank road may be purchased, shall [be] and are hereby constituted a body politic and corporate." It seems to us that the words could not be plainer. We should require something more than the words used by the learned justice in the cited case to convince us that he, and the other judges who sat with him, intended to declare that the word "shall" was not mandatory but permissive only, and that the expression "are hereby constituted a body politic



and corporate" did not create a corporation in presenti, but merely conferred the privilege of becoming a corporation in futuro, should the purchaser or purchasers so desire.

It should be noted, also, that the act of 1881 differs from somewhat similar acts in New York and North Carolina, which have been discussed in leading cases and which confer the privilege of applying for a charter for a new corporation, but do not require the purchasers to form a corporation. Accordingly it was held in *People v. Brooklyn F. & C. I. R. Co.*, 89 N. Y. 75, that, although a purchaser at a foreclosure sale of a railroad was authorized to create a new corporation for the purposes of the transfer, it was not essential to do so, for he might transfer the property and franchises to a corporation already existing and capable under the law of its creation of holding the property and exercising the franchises which passed to the purchaser by the mortgage sale. So, in the case of *Julian v. Central Trust Co.*, 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629, the railroad act of North Carolina was discussed, in a suit to enjoin a sale of property under execution against the Western North Carolina Railroad Company, the property and franchises of which had been sold under foreclosure and purchased by the Southern Railroad Company, a foreign corporation. In support of the right to enforce the executions upon the judgments against the old company, it was claimed that unless the purchaser should, under the railroad law of North Carolina, organize a new domestic corporation to take the place of the old one, the property continues liable, though in the hands of the purchaser, to claims and judgments against the old corporation. The United States Supreme Court said: "It is true the sections of the North Carolina Code herewith given clothe the purchaser with the right and privilege of organizing a corporation to operate the purchased property, but we find no requirement that he shall do so." After quoting the provisions of the act, which provides that the purchasers may file articles of association and such purchasers and associates shall thereupon become a new corporation, the court continues: "This confers a privilege, but does not prevent the purchaser from transferring the property to a company already formed and authorized to purchase and operate a railroad." The court therefore held that the judgments could not be enforced against the Southern Railroad Company, and that the purchaser at the foreclosure sale without reincorporation had the capacity to acquire the title to the property and franchises free from the judgments against the former company. The act of 1881 created a new corporation when the purchase is consummated. There is, we think, no room for argument or difference of opinion as to the meaning of the act. The purchaser is constituted a body politic and corporate by the express language of the act, and vested with all

the property of the company, and all its rights, powers, immunities, privileges, and franchises. Under the act of 1881 there is no option to the purchaser to apply for a charter or not as he pleases. There is no privilege conferred upon the purchaser to accept or reject at his will. The act itself confers the charter and creates the corporation, which comes into existence at the completion of the purchase. Whether the organization of the corporate body by election of directors and officers is required may be in question, but the legislative intent is unmistakable to prevent the anomaly of public franchises passing by assignment or devolution by operation of law or by last will and testament. It is against the policy of the state to have public franchises operated by individuals, by executors, administrators, guardians of infants, or trustees in bankruptcy. If the claim of Farnum to exercise the *jus disponendi* is sound, and his title as an individual is absolute, the transfer of the franchises to an alien or a foreign corporation might be sustained, and the anomaly would be presented of public franchises operated in some parts of the state by individuals in other parts by foreign corporations or foreign executors or trustees or assignees who claim title by purchase, and in still other parts by companies organized under laws regulating public service corporations. The policy of uniform legislation must be adhered to, and public corporations should be amenable to a fixed code of laws regulating and controlling their operations, and defining the duties and obligations of their officers and agents in the interest of the public.

A strict construction of similar legislation was made in *Snell v. City of Chicago*, 152 U. S. 191, 14 Sup. Ct. 489, 38 L. Ed. 408, where the president of a plankroad company was authorized by statute to sell to the county of Cook the franchise, property, and immunities of the company, or to any other party, and the right was exercised by the execution of a deed, conveying all the property of the company, consisting of the charter and its amendments and franchises, the right of way, grading, planking, ditches, bridges, and drainages, tollhouses, etc., to one Snell, who went into actual possession and control of the property and franchises, and continued to exercise them until his death 18 years later. The city of Chicago commenced proceedings to remove a toll gate maintained by the heirs of Snell, who thereupon filed a bill for an injunction. The court of Illinois dismissed the bill, and the appeal was dismissed by the United States Supreme Court. While the Supreme Court did not expressly decide that the strict construction given by the court below was correct, and decided that no federal question was involved, yet the court said: "The mere grant of franchises to a corporation carries with it no power of alienation, and many cases have arisen in which an attempted

alienation by the corporation has been declared by the courts to be void as divesting it of the power to discharge the duties imposed by the charter." The Supreme Court of Illinois in the same case below (*Snell v. Chicago*, 183 Ill. 413, 24 N. E. 532, 8 L. R. A. 858) declared that the person who was to enjoy the rights and privileges of the corporation was the purchaser of the franchise and road, and this did not include his heirs and assigns. It was stated that, at most, Snell had merely the "right to organize as a corporation." The court used this language: "If Snell in his lifetime was the owner of such franchise by express legislative grant he could not assign it, and it could not descend to his heirs. He failed to use it for the purpose of effecting any corporate organization and it died with him." We point out that the act of March 24, 1899, entitled "An act concerning corporations" (P. L. 1899, p. 334), has no application to the present case, for the reason that it only provides for a transfer of franchises by lease or assignment by one corporation to another corporation, and does not refer to a conveyance by an individual to another individual, or to a lease by an individual to a corporation, such as are in the chain of title of the defendant. It is a well-settled rule that a corporation created by statute, possesses no rights and can exercise no powers which are not expressly given or to be necessarily implied. *Stockton v. Central R. R. Co.*, 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036. In accordance with these principles, Farnum, the purchaser at the receiver's sale, held the franchise as a body politic and corporate, and had no power as an individual to convey them to Holbrook. Since the defendant claims the franchises as the lessee of Holbrook, it follows that the defendant was not possessed of them. This being so, there can be no doubt of the power of the court to restrain the act complained of at the instance of the Attorney General. *Stockton v. Central R. R. Co.*, 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97.

The order of the court below granting the preliminary injunction is therefore affirmed, with costs.

**PITNEY, Ch.** My vote for affirmance is based substantially upon the grounds expressed by Vice Chancellor Leaming in his opinion delivered in the court below, and reported in 65 Atl. 1041.

**SWAYZE, J. (dissenting).** The opinion of the court rests upon the view that the act of 1881 superseded section 85 of the general corporation act of 1875 (Revision, p. 192) so far as it was applicable. I think differently. The act of 1881 was modeled after section 1 of an act concerning the sale of railroads, canals, turnpikes, bridges and plank roads, approved March 25, 1875. P. L. 1875, p. 41.

It follows that act so closely in its essential features that it was evidently copied therefrom. Prior to the sale of the gas works of the old Vineland Company, the act of 1875 had been before this court in *Boylan v. Kelly*, 36 N. J. Eq. 331. In that case, at page 335, we referred to the opinion of Chancellor Runyon that the act of purchase constituted the purchaser a corporation, but did not approve of that opinion which would have been decisive of the case. On the contrary, we distinctly said that the act conferred upon the purchaser the right, at his election, to take and hold and exercise the property and franchises in a corporate capacity, and we pointed out that the conduct of the purchaser in that case sufficiently evinced his purpose to receive and hold the property and rights in a corporate relation, and not as a natural person. The reasoning of this court was quite unnecessary. If the view of the majority in the present case is correct. The fact that we decided the *Boylan Case* upon the ground that the purchaser had evinced an election to hold as a corporation, and not as a natural person, amounted to a disapproval of the view expressed by Chancellor Runyon and now adopted by us. With that decision upon a similar statute, Farnum evinced his election to take as a natural person under section 85 of the corporation act. All the orders of court and the conveyance to him are couched in language taken from that section. He had a right to rely on what we said in the *Boylan Case*, and it is too late for us, after property rights have been acquired in reliance upon that ruling, to change our position. When the Legislature in 1896 revised the corporation act, it had before it not only the act of 1881, but the act of 1875, and it then re-enacted section 85 as section 82 (P. L. 1896, p. 303), and repealed all inconsistent acts. Section 82 of the act of 1896 mentions by name railroads, canals, and turnpikes, so that it cannot be said that the Legislature did not have in mind the very classes of corporations mentioned in the acts of 1875 and 1881. I do not think these acts were repealed by the act of 1896, for the reason that I think there is no necessary inconsistency. The re-enactment of section 85 by the Legislature is an indication that the revisers, experts as they were in our corporation law, were of opinion that it had not been superseded either by the railroad and canal act of 1875 or the so-called turnpike act of 1881; and the Legislature adopted that view which was the same view expressed by us in the *Boylan Case*.

The object of section 85 was not the advantage of the corporation or its creditors. It was to preserve for the benefit of the public the right to continue the operations of corporations having charge of a work of a public nature in which the value of the work was dependent upon the franchise, and in the continuance of which the public, as

well as the corporators and creditors of the company, had an interest. The Legislature recognized the fact that there was a public interest to be served by the continuance of the operations of the company, and that this end could not be accomplished if the physical property was to be severed from the right to use and operate the same. The present case illustrates the difficulty. It follows logically from the view of the court that the present defendant is without power to conduct the business of supplying Vineland with gas, and, since Farnum has died without organizing a corporation under the act of 1881, no one has the legal right to supply this important municipality with one of the necessities of modern life.

My view I think harmonizes with other well-established legal principles. Before a corporation can actually exist, there must not only be a charter, but an acceptance of that charter. Farnum, instead of accepting the corporate powers conferred by the act of 1881, did all in his power to show that he did not accept them. By our present decision the purchaser becomes a corporation *nolens volens*, and is at once, by the act of purchase, constituted a corporation sole—a corporation quite anomalous in our law. Upon this anomaly is ingrafted another, for the corporation sole is empowered by the act to organize "said new corporation" by the election of officers and directors, the issuing of certificates of stock, and the creation of preferred stock. A corporation sole with attributes of this character is a legal novelty; yet what other view can be taken? The words "said new corporation" point necessarily to the former language of the section, which, the opinion holds, create a corporation sole. The only other view possible is that the corporation sole created by the mere act of purchase can at once proceed to convert itself into a corporation aggregate, a legal novelty hardly less striking than the former. These difficulties are enough to lead me to conclude that we took the correct view in *Boylan v. Kelly*, that the purchaser does not become a corporation by the mere act of purchase, but has his election to hold as an individual or to organize a corporation aggregate under the act of 1881.

There is no insuperable difficulty in an individual exercising such franchises as those now in question. He must have express legislative authority, but that is given by section 85 of the old corporation act. The charter of the old Vineland Company gave it express authority to borrow money upon a mortgage of its lands, works, property, and franchises. At the date of the charter, and for many years thereafter, such mortgages were usually given to individuals, and the mortgage upon the franchises or even upon the property could be of little value to the mortgagee, unless in case of foreclosure he might purchase the mortgaged property and

exercise the franchises. *New Orleans, etc., R. R. Co. v. Delamore*, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. Ed. 244. The franchise to maintain and operate the works may be exercised by natural persons. *Memphis, etc., R. R. Co. v. Berry*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 831. Our statute is careful to define the right acquired by the purchaser. It is the right to exercise the franchise "during the whole of the residue of the term limited in the charter of said company." In this respect the case differs from *Snell v. Chicago*, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858, and on appeal, 152 U. S. 191, 14 Sup. Ct. 489, 38 L. Ed. 408. The term limited in the charter of the Vineland Company was perpetual, and a right to exercise the franchises for the whole of the residue of the term necessarily includes a right which shall outlast the life of a natural person, and, to be available at all, must therefore involve the right to convey. In the absence of legislation forbidding the exercise of such a franchise by a natural person as grantee, I see no reason why one natural person who is by statute authorized to exercise the franchises may not convey them with the works to another natural person. This was done in the case of *Boylan v. Kelly*.

I do not question the power of the Legislature to control within the constitutional limits the business of supplying gas to a municipality. Section 85 of the corporation act of 1875 itself enacts that the purchaser shall hold, use, and enjoy the franchises subject to all the restrictions, limitations, and conditions contained in the charter of the insolvent company, and no doubt this would authorize any regulations of the exercise of the rights by Farnum or his grantees which might have been made with reference to their exercise by the Vineland Gaslight Company.

I do not understand whether the court holds that the franchises conveyed to Farnum ceased with his death, or whether they are still in existence. The reference to *Snell v. Chicago* seems to indicate that the court favors the former alternative. If that view is correct, the effort of the Legislature both by section 85 of the corporation act of 1875 and by the act of 1881 to preserve these franchises for the public benefit was singularly inefficacious, since it was made to depend upon the uncertain tenure of the purchaser's life.

If these franchises are still subsisting, they must have passed as property of a corporation sole, since the opinion clearly indicates that they could not pass by will or intestacy. If that view is correct, it is of considerable importance to know in whom they are now vested. Whoever it may be, it would seem that he holds the franchises separate from the physical property, the works, gas holder, pipes, etc., and no one is at present authorized by law to supply this municipality with gas.

I prefer the more simple but less novel view which I have already indicated.

BOGERT and GREEN, JJ., concur in the views herein expressed.

GARRISON, J. (dissenting). If it be conceded that the Vineland Light & Power Company is mistaken in its contention that it is the legal owner of the franchises of the Vineland Gaslight Company under color of which it has been and still is rendering the public service for which that company was incorporated, I am of opinion that the temporary opening of a street in the performance of that supposed duty and in the public interest is not such an irreparable injury or such a public nuisance as presents a proper case for interference by a court of equity.

"If a mistake has been made by the company," said Chancellor Vroom in Attorney General v. Stevens, 1 N. J. Eq. 369-385, 22 Am. Dec. 526, "acting without fraud or corrupt intent but seeking to comply with the requisitions of law, it does not present a proper case for the interference of this court by the extraordinary remedy of injunction."

In *Morris & E. R. R. Co. v. Attorney General*, 20 N. J. Eq. 530, the Chancellor had held that the defendants were not authorized to lay their track upon the street, and granted the injunction applied for by the information. Upon appeal this was reversed. Justice Depue, in delivering the opinion of this court, said: "It must not be overlooked that the defendants are engaged in a public work, by the completion of which the public interests will be greatly advanced. The injunction by which the progress of the work is arrested must not only cause great injury to the defendants, but also is the occasion of great inconvenience to the public."

In the case of *Allen v. Freeholders of Monmouth County*, 13 N. J. Eq. 68, it was held "that, although a bridge which was being erected over navigable waters without competent authority was technically a nuisance, yet as it was being built in good faith, and for the public benefit, a court of equity would not restrain its erection even on an information by the Attorney General in behalf of the public." *Morris & E. R. R. Co. v. Attorney General*, 20 N. J. Eq. 530.

In *Atty. Gen. v. Del. & B. B. R. R. Co.* the court said: "There is still another consideration constraining me to the conclusion at which I have arrived. The defendants have acted bona fide under what they believed to be sufficient legislative authority. They have expended a very large sum of money in their enterprise. \* \* \* The defendants have been permitted to make their immense expenditure upon their enterprise in the confidence of their convictions that they possessed all requisite legislative authority without even a word of protest or remonstrance. Under such circumstances, equity will refuse to aid even to the state, leaving it to its remedy

at law." *Atty. Gen. v. D. & B. B. R. R. Co.*, 27 N. J. Eq. 1.

Conformity to the views thus expressed by Chancellors and by equity judges in this court requires that we reverse the decree in the present case, which more than any of those cited is inopportune for interference by the injunction power of the Court of Chancery. The statute that granted the charter of the original gas company was enacted in the interest of the public. The statutes that were enacted to prevent the lapsing of these public service franchises had the same interest in view. The new corporations that were authorized and capacitated to continue such franchises were conceived in the same spirit. The present corporation is in form and effect identically such a corporation. The technical flaw in its mode of organization is technical merely, and does not appeal to a court of equity. The only matter we are asked to decide is a sharp legal point about which, if mistake was made, it was made upon the advice of conscientious and eminent counsel years ago, and now raised after acquiescence, expenditure of money and years of acceptable performance of a public duty.

The overt act with which the defendant is charged at this late day is that of continuing to serve the public interests that all the statutes referred to were enacted to subserve. In its most heinous aspect the defendant's offense consists in opening up the soil of the highway to lay a gas pipe—a matter of a few inches in point of depth and of a few hours in point of time, by which no substantial injury to the public is done, and by which no member of the public is even pretended to be injured. On the other hand, the injunction we are asked to approve will be a grievous hardship to the very public in whose name alone it is or can be demanded. Its effect will be to deprive an entire community of a convenience of modern life necessary to its comfort, and all but essential to its safety. This must be the result of our decision, unless indeed there be a business competitor of the defendant waiting to avail itself of our decision of the sharp legal point involved. The case does not show that there is such a competitor, hence we are not to assume that there is; but, if there is, it does not constitute a public in whose interest we should disregard the interests of the real public, and depart from the salutary and well-considered declarations with which this memorandum is prefaced. The case is peculiarly one where a court of equity should decline to interfere.

(73 N. J. E. 669)

STARRETT v. BOYNTON et al.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

1. FRAUDS, STATUTE OF—CONTRACT TO CONVEY LAND—PART PERFORMANCE.

Where plaintiff purchased, by oral contract, certain land from defendants, through their agent, believing that the land purchased

included the strip in controversy, and, not knowing that the description in the deed did not include the strip, took possession thereof, paid the consideration, and remained in possession, caring for the strip for two months, when defendants for the first time disputed his ownership thereof, there was such part performance of the contract, so far as such strip was concerned, that it could not be avoided by defendants under the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 303-310.]

## 2. SPECIFIC PERFORMANCE—DEFENSES.

Protest of vendors against a retention by the vendee of a disputed strip of land, included in the contract of sale, but not in the description in the conveyance, not having been made until two months after the vendee had entered into possession thereof, constituted no defense to a suit to compel specific performance.

Appeal from Court of Chancery.

Suit by Paul Starrett against Harriet G. Boynton and others. From a decree for complainant, defendants appeal. Affirmed.

Edward M. Collie, for appellants. Guild & Martin, for respondent.

**GUMMERE, C. J.** The defendants, Harriet G. Boynton and her husband, conveyed to Starrett, the complainant, a house and lot in East Orange, known as No. 73 Harrison street. The negotiations leading up to the transfer were conducted on the part of the Boyntons, by one Bruen, a real estate agent, who was employed by them to sell the property, and who prepared the deed for the same from a description furnished to him by his principals. The price agreed upon and paid by Starrett for the property was \$22,500. About two months after receiving his deed and entering into possession, Starrett was informed by his grantors that the description of the property contained in the conveyance stopped 10 feet short of a privet hedge, which apparently separated No. 73 Harrison street from other property of the Boyntons. Claiming that, by the terms of his contract with Bruen, he was to have a conveyance of all the land within the privet hedge, he demanded of the Boyntons a conveyance of the omitted parcel. This they refused to give him, asserting that the land described in his deed was all that Bruen was authorized to sell to him, and all that he had purchased. He thereupon filed his bill for relief, and at the hearing the learned Vice Chancellor, before whom the cause was tried, concluded, from the evidence submitted, that "Bruen offered to the complainant, and that the complainant agreed to buy, the property extended to the privet hedge"; and further that "Bruen had been originally authorized (by the Boyntons) to sell up to the hedge, and that in this respect his instructions were never varied." Finding these facts, he advised a decree compelling the Boyntons to execute to Starrett a conveyance of the strip of land in dispute. A decree so directing was accordingly entered, and from it this appeal is taken by the defendants.

Two grounds of reversal are insisted upon

before us: (1) That the conclusion reached by the learned Vice Chancellor that Bruen was authorized by the defendants to make sale of all the land up to the privet hedge was not justified by the evidence; (2) that if he was so authorized, and contracted to that effect, the contract is unenforceable under the statute of frauds, for the reason that it was not in writing—which is the fact. Our examination of the proofs entirely satisfies us that the conclusion reached by the Vice Chancellor on the facts was justified, that the property which Bruen was authorized by the defendants to sell included the strip of land in dispute, and that the contract which Bruen, on behalf of his principals, made with the complainant embraced the whole tract up to the privet hedge. The question of the effect of the statute of frauds upon the right of the complainant to enforce the performance of the contract was not considered by the learned Vice Chancellor. It apparently was not even raised before him, and the proofs bearing upon the respective rights of the parties under the statute are of the most meager description. It was in evidence, however, that the complainant, after entering into possession of No. 73 Harrison street, assumed charge of the disputed strip, and had taken care of it thereafter until the time of the hearing, although Mr. Boynton had twice protested by letter against his action.

Although the statute of frauds declares that no action shall be brought upon any contract for sale of lands unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, equity will intervene to enforce a verbal contract for such sale, notwithstanding the statute, when there has been a part performance thereof by the payment of the purchase money by the vendee, and entry into possession of the land by him, in pursuance of the contract, and with the consent of the vendor. So universally is this principle recognized that a citation of authority in support of it would be out of place. Not attempting to dispute the principle, counsel for the appellants contends that the present case is not within it. His contention seems to us to be unsound. The payment of the purchase money by the complainant and his entry into possession of No. 73 Harrison street are uncontroverted. His assumption of the charge of the disputed strip, and of its care, is not denied, and constitutes prima facie proof of possession thereof. His entry into the possession of 73 Harrison street, and of the disputed strip, as a single parcel of land, under the belief that it constituted the property purchased by him, is proof that such entry was in pursuance of the contract if it was acquiesced in by the defendant. That his entry was with their consent may be deduced, with reasonable certainty, from the fact that they waited for

two months after he had gone into possession before notifying him that his deed did not cover the disputed tract—and in this way: If the delay in the notification was due to the fact that the misdescription in the deed was the result of an honest mistake, the defendants supposing, at the time of its delivery, that the description contained in it covered all of the property which they had agreed to sell to him, and not discovering the mistake, or conceiving the idea of taking advantage of it to defraud the complainant, until after the latter had entered into possession, that entry was demonstrably with their consent. If, on the other hand, the disputed strip was intentionally omitted by the defendants from the description contained in the deed, as a step in a scheme to defraud the complainant, then the only reasonable explanation of their delay, in notifying him of its omission, until after he had entered into possession, is that they desired the whole transaction to be completed, so far as the complainant was concerned, before he should learn of the fraud which they were attempting to perpetrate upon him, and so prevent him from refusing to complete the purchase and pay the purchase money. Such a scheme contains, as a necessary ingredient, the consent of the vendors to the entry into possession by the vendee. We conclude, for the reasons we have expressed, that the statute of frauds affords no bar to the complainant's right to specific performance.

The protest of the defendants, against the retention of the disputed tract by the complainant, not having been made until after entry into possession thereof by the latter, affords no reason for the refusal by a court of equity to compel the specific performance of the contract of sale.

The decree appealed from will be affirmed.

(74 N. J. E. 287)

### BRIGHAM v. H. G. MULOCK CO.

(Court of Chancery of New Jersey. July 1, 1908.)

#### 1. COVENANTS—BUILDING RESTRICTIONS—SCOPE.

Where a covenant provided that no building should be erected within 20 feet of the front property line of any street, except on A. avenue, or within 5 feet of the side line of any lot, the building line applied to both the front and side street lines of corner lots.

#### 2. SAME—ENFORCEMENT—RIGHT OF LOT OWNERS.

Where a street line building restriction was inserted in the deeds to a city addition, whether the rights of an owner of a single lot to enforce the restriction had become barred by acquiescence in the violation of the covenant by others must be measured by the relation of the asserted violation to the individual lot.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 180.]

#### 3. SAME—ACQUIESCENCE BY LAND COMPANY.

Where a land company sold lots in a city addition with a building line restriction, no subsequent failure of the company to enforce such covenants in behalf of its remaining unsold lots

could destroy the right of a purchaser of a lot subject to such restriction to enforce the same on behalf of his lot; the covenant having been made for the benefit thereof, pursuant to a general building plan.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 180.]

#### 4. SAME.

Where a building line restriction provided that no building should be erected within 20 feet of the front property line of any street, except A. avenue, or within 5 feet of the side line of any lot, the fact that various encroachments on the 5-foot restriction had been permitted did not show the abandonment of the restriction of 20 feet.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 180.]

#### 5. SAME—IMPROPER ERECTION—OPEN PORCHES—BAY WINDOWS.

The erection of open porches and bay windows extending over a building line of 20 feet, pursuant to a popular interpretation of the restriction, was not evidence of an abandonment of the general building line scheme.

#### 6. SAME—ABANDONMENT.

A lot owner, entitled to the benefit of a building line restriction, could not be charged with abandoning such rights because he did not interfere to enforce the covenant in a case in which he had no substantial interest to protect for his own benefit.

#### 7. SAME—NATURE OF ERECTION—DOUBLE HOUSE.

The erection of a double house, consisting of two houses under one roof, constituted a violation of the building restriction forbidding more than one building to be erected on one lot for dwelling house purposes.

#### 8. SAME—ABANDONMENT.

Where deeds to a city addition were made containing a building restriction that no more than one building should be erected on each lot for dwelling house purposes for the benefit of each lot, the fact that ten such buildings had been erected on the tract, only two of which were within two blocks of plaintiff's property, did not show complainant's abandonment of the right to enforce such restriction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 180.]

Suit by Martin E. Brigham against the H. G. Mulock Company. Decree for complainant.

Thompson & Cole, for complainant. Bourgeois & Sooy, for defendant.

LEAMING, V. C. The bill does not disclose whether the deeds of complainant and defendant and the several deeds in their respective chains of title contain the restrictive covenants sought to be enforced, or the extent to which defendant may be charged with notice of these covenants; but as the right of complainant to enforce against defendant the observance of the restrictive covenants in question was conceded by defendant's counsel at the hearing, provided complainant had not lost the right by reason of his own violation of the covenants, or by reason of acquiescence in the violation of the covenants amounting in effect to their abandonment, the question of the bar to complainant's rights, as urged by defendant, will alone be considered.

The case of Collins v. Waters (not officially reported) 70 Atl. —, determines that the

20-foot building line covenant here in question applies to both the front and side street lines of corner lots.

The case of Chelsea Land Company v. Adams (N. J.) 66 Atl. 180 (another suit touching the covenant now in question), must be regarded as conclusive as to the right of that company to enforce in this court the covenant against the erection of a building nearer than 20 feet from the street line. That was a case in which the town site proprietor, owning property in all parts of the tract, had stood by and permitted violations of the covenant without complaint. While that was held to operate as a bar to the right of that company to prevent further violations of the same covenant, the adjudication clearly has no application to the rights of the owner of a single lot who may not have so acquiesced. It would scarcely be possible for any single violation of the covenants to occur without the interests of the original land company being directly affected; but the owner of a single lot may have no concern whatever in a violation of the covenants on a part of the tract distant from his lot. I am convinced that any claim of bar asserted against the rights of an owner of a single lot by reason of acquiescence in the violation of restrictive covenants of this nature must be measured by the relation of the asserted violation to the individual lot. This view was taken by me in *Barton v. Slifer* (N. J. Ch.) 66 Atl. 899, in harmony with the views expressed by Vice Chancellor Emery in *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369, 371. The title to the lot now owned by complainant passed from the Chelsea Beach Company in the year 1889. Clearly no subsequent failure upon the part of that company to enforce similar covenants in behalf of its remaining unsold lots should operate to destroy the right of the owner of that lot to enforce in behalf of that lot the covenants which defendant now concedes to have been made for the benefit of that lot, pursuant to a general building plan.

The covenants in question provided that no building shall be erected within 20 feet of the front property line of any street, except on Atlantic avenue, or within 5 feet of the side line of any lot, and also that "not more than one building be built or erected upon each lot for dwelling house purposes." The bill asserts that a building is about to be erected by defendant at the northwest corner of Artie and Chelsea avenues, across the street from complainant's property, and is to be erected with the main body of the building within 10 feet of Artie avenue, and the porch within 10 feet of Chelsea avenue, and that the first story of the main body of the building will project over the porch and be less than 20 feet from Chelsea avenue, and also that, while the building will be under one roof, it is intended for and is to be used as a double dwelling house. This is not denied by defendant. The affidavits filed by defend-

ant describe 116 buildings, erected at various parts of the tract, which are claimed by defendant to be erected in violation of the terms of some of the covenants above referred to. I have had great difficulty in locating these buildings. They are described with reference to street numbers, and cannot be located by the record as filed. At the hearing a map of Chelsea was handed to me and the system of numbering explained. With its aid I have endeavored to comprehend the affidavits filed by the defense. These affidavits disclose that a great number of buildings have been erected nearer than 5 feet to the side line of lots; the encroachment over the 5-foot restriction varying from a few inches to 3 feet. While this part of the covenant is not in question in this case, its violation may have been set forth under a claim that it tends to show a general abandonment of the original plan. I do not think it can be given that effect as against complainant. Whether a building is 3 or 5 feet from the side line of a lot is a matter of little concern to any one except the owner of the adjacent lot or lots in the immediate vicinity, and I cannot think it strange that this part of the covenant has not been strictly observed; but, whatever effect these violations of this part of the covenant may have against parties seeking its enforcement, I am unable to conclude that it should operate as a bar to the enforcement by complainant of those parts of the covenants which he now seeks to enforce.

The affidavits also disclose that a large number of buildings have been erected with open porches, and some with bay windows, extending over the 20-foot restriction line. The building which defendant is about to erect is of that nature. I entertain grave doubts whether the covenants in question were intended to apply to open porches and bay windows not extending to the ground. The fact that so many buildings have been erected with the main body of the building located with reference to the building line, and with open porches and bay windows extending over the line, measurably indicates a popular interpretation of the restriction to that effect. As is said in *Morrow v. Hasselman*, 69 N. J. Eq. 612, 617, 61 Atl. 369, if these porches have been erected under an erroneous construction of the covenant, that fact is no evidence of an abandonment of the general scheme.

Defendant's affidavits also disclose that six buildings have been erected on the tract with the main body of the buildings less than 20 feet from the street line. I cannot be entirely certain that I have accurately located these buildings. The one nearest to complainant's property I take to be that referred to in the 105th subdivision of the affidavit of Mr. Ashmead. That building is on Artie avenue and one block from complainant's property. Another is on Chelsea avenue at the corner of Atlantic, also a block away from complainant's property. Another is on Chel-

sea avenue, south of Pacific, two blocks away; another on Montpelier avenue, with the location not given. The others are too far away to be of possible concern to complainant. It may be that the two buildings referred to as a block from complainant's property are sufficiently near to have imposed upon complainant, or upon such person as may have been the owner of complainant's lot when these buildings were erected, the duty of appeal to this court for protection; but I think not. Their erection contrary to the terms of the covenants could have affected complainant's property but slightly, if at all. I cannot believe that, to escape the burden of the charge of abandonment of a restrictive covenant of this nature, it becomes the duty of a party who it entitled to enforce the covenant to interfere in any case where he has not at least a substantial interest to protect for himself.

The covenant forbidding more than one building to be erected upon each lot for dwelling house purposes is, in my judgment, broken by the erection of what is commonly known as a "double house"; that is, two houses under one roof. Such a structure is as much two buildings for dwelling house purposes as though separate roofs existed. The two dwellings may pass to separate owners, and the dividing wall become a party wall. Defendant's affidavits disclose ten such buildings on the tract. Most of these are on Atlantic avenue. One is on Chelsea avenue, not quite a block from complainant's property; and another on Artic avenue, nearly two blocks away. These, in my judgment, afford no evidence of complainant's abandonment of the covenants.

The claim that complainant has violated the covenants now sought to be enforced is based upon the fact that his porch extends beyond the 20-foot restriction line. As already stated, I do not deem that a violation of the covenants, in view of the fact that the covenants do not appear to have been regarded as applying to open porches.

I will advise a decree enjoining defendant from building the main body of his house nearer to either Artic or Chelsea avenues than 20 feet, and from erecting what has been referred to as a double dwelling house.

#### PURNELL v. PURNELL.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

#### 1. HUSBAND AND WIFE—PERSONAL RIGHTS AND DUTIES.

A wife cannot dictate to her husband their mode of living, or determine where they shall live, and compel him to come to her, but it is her duty to go to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 7.]

#### 2. DIVORCE—DESERTION—BURDEN OF PROOF.

A wife who refused to live in the home provided for by the husband, and who remained away, though the home was a proper one, has

the burden, when sued by the husband for divorce, to show that she changed her attitude, and notified the husband of her willingness to return, and the burden does not shift by merely showing that, without notification to the husband, she drove in a carriage with her child to his residence, and had an interview with him, and then rode back; the carriage remaining waiting for her during the call.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 361.]

#### 3. SAME—EVIDENCE.

In a suit by a husband for divorce on the ground of desertion, evidence held to justify a finding that the wife, after willfully and obstinately remaining away from the home provided for by the husband, did not make a bona fide effort to return to the home, and thereby defeat the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 446-449.]

#### 4. SAME.

Where a husband has, by his conduct toward his wife, contributed in any degree to her original desertion, he must make such advances or concessions to the wife as may be reasonable to induce her to return to him; but, where it is manifest from the circumstances under which the desertion took place, or from the wife's temper and disposition, that an honest effort on the husband's part to terminate the separation will be unavailing, or, if successful in bringing the desertion to an end, would be so only temporarily, the duty of making advances or concessions does not exist.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 114.]

#### 5. SAME—EVIDENCE—SUFFICIENCY.

In a suit by a husband for divorce on the ground of desertion, evidence examined, and held not to require the husband to make concessions with a view of terminating the separation, caused by the wife willfully and obstinately remaining away from the home which he had provided, authorizing a decree of divorce.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 446-448.]

Appeal from Court of Chancery.

Petition for divorce by John W. Purnell against Maud Dickerson Purnell. From a decree granting a divorce, defendant appeals. Affirmed.

The following is the opinion of Stevenson, V. C., of the court below:

"In this case, as I indicated at the close of the argument, the testimony satisfies my mind that in the summer of 1902, this man and wife were living in a state of separation, wholly on account of the fault of the wife. She had, as I think the testimony clearly showed, willfully and obstinately remained away from the home which her husband provided for her. It was a good home, the providing of which was a full discharge of his duty to her. It was the home where he had lived, and where his work lay. The young wife preferred to live in New York. She declined to go down to this place, Pine Brook I think it was called, and share the life that her husband there lived. These are colored people, but unusually intelligent. The man was well educated. He is a teacher. He was earning a good, fair living, and he had a nice little home in this country place, and my mind rested very firmly upon the conclusion



that this wife was guilty of gross misconduct—an entirely inexcusable violation of her duty to her husband—in remaining away from him. She undertook to dictate their mode of life, to say where they should live, and to compel him to come to her, when it was her duty to go to him. The testimony indicates that it would have been difficult for him to live elsewhere. There might be great risk in his going elsewhere. The absence of the wife without justification naturally had brought about an estrangement between them. Their relations were not friendly, and this unfriendly state of mind, as I have said, was wholly due, in my judgment, to the misconduct of the wife. What they were quarreling about is indicated beyond any doubt by this brief note, produced here by the wife in the handwriting of the husband, which she received by mail July 15, 1902, to 'Maud Purnell—I am willing to support you only at the home I have provided. J. W. Purnell.' It does not indicate a very affectionate feeling in this husband towards his wife, but the wife was to blame for that. This note unmistakably shows what the position of this man was. 'You come to me, and live in the home that I have provided, and I will receive you. I will not support you elsewhere.' The note strongly indicates that she was seeking to compel her husband to support her where she wanted to live, apart from him. Now then, that being the situation of affairs, we have to deal with the single interview that is proved to have taken place between this couple after this note was written.

"In October, 1902, about three months after the note was written, the husband was maintaining this little home, a furnished house, entirely comfortable, and the wife appeared on the scene, without giving him any warning. She says she came to stay. She brought with her a suit case and a valise, and she brought with her the infant child of the couple. She came with her mother. She drove some 10 or 12 miles, and suddenly appeared at the house, and then the wife went in, was followed by her mother; and the driver, the witness William Oby, was near enough to hear what was first said, or what was said at the early part of the interview. Now the wife desires the court to believe that she went there in good faith, accepting the reasonable demand of the husband, indicated by this letter, that she should return to him; that she proffered herself ready to return, and the husband repelled her, and practically told her that he did not care where she went. The wife's mother is not produced, because she is dead. The husband gives an entirely different account of this interview. He says that the wife appeared suddenly with the child, and demanded that he should make arrangements for the support of the child. It is conceded that the wife went back to the carriage, got in, and the husband gave the driver \$5, with which to pay the fare which was due from these pas-

sengers, and the balance was to be given to the wife, and the driver says that he did give the balance to the wife later.

"Now, if the wife's story is true, no doubt the husband's action for divorce entirely falls. If the wife's story is true of what occurred in October, although she had been entirely to blame up to that time, although she was obstinately refusing, without any justification whatever, to accept the home which her husband provided, yet if in October she went there, and tendered herself ready and willing to accept his proposal and live with him, that is the end of this man's case. After a very careful consideration of the testimony, however, I am satisfied that the wife's story is entirely false; that the husband's story is substantially true that the wife went to this place in October, not to make a bona fide effort to have a reconciliation and to accept the home which her husband had provided, but that she went there to demand that the husband should do something for her and her child. Now, in the first place, all the probabilities favor that view. I now treat the story of the wife and the story of the husband as flatly contradictory on this crucial point, and we have to discover where the truth lies. In my judgment the true conclusion from the evidence is that the husband is telling the truth. The wife being in the wrong, it seems to me that the burden of proof is upon her to show that she changed her attitude, and notified her husband of her willingness to return. I do not think that she shifts the burden by merely showing that, without any notification to her husband, she drove in a carriage, with her child and a suit case and a bag, to his residence and had an interview with him, and then drove back in the carriage, which remained waiting for her during the call. The important question is what took place between this couple upon this occasion. The story that the wife tells seems to be a somewhat unnatural one. This note of July 15, 1902, shows precisely what the position of the husband was 'I am willing to support you,' he says—'I am willing to support you—but,' he adds, 'only at the home I have provided,' and that was within his right. This woman had this letter in her possession. Why should she secretly, without notice to the husband, pack her things in a valise, and the child's clothing in a suit case, and drive with her mother 10 miles, and drop in upon the husband at this time? She had this note in her possession, and knew perfectly well what his position was; that he was ready to take her back and keep her in this home which he had provided. She undertakes to make us believe that she went back secretly, without giving her husband notice, for fear that he would avoid her. In my judgment that is highly improbable. The wife produced here, as a witness to corroborate her, another colored man, the hack driver, apparently an

intelligent young man, who is friendly to her beyond all doubt. He knew her and was a playmate of hers at school, when they were children. He says that he did not know the husband. He drove this woman and her mother these 10 miles for the accomplishment of this purpose, whatever it was, and he stopped very near the door, and he heard, as he tells us, what occurred at the early part of the conversation between the wife and the husband, when she went in the door. While I cannot now from memory repeat what was said then, and I have no notes of the testimony, the substance of it is this: That he heard the wife make the bold demand: 'What are you going to do for me or for the child?' That exactly agrees with the husband's testimony that this woman came there, dropped upon him, not in order to accept his offer and live with him, but to demand what he would do about this child, which she was very anxious to have cared for. There are other circumstances in the case which corroborate the story of the husband, which I shall not detail.

"I kept this case under advisement in order to consider whether the husband was guilty of a violation of duty in not subsequently, after this interview, inviting his wife to return. It was upon that point alone that I kept the case for consideration, and now, having considered it, I am thoroughly satisfied that the husband was relieved of any duty to again invite his wife. The rule in this class of cases is laid down in the case of *Hall v. Hall*, 60 N. J. Eq. 469, 46 Atl. 886, by the Court of Errors and Appeals. I read from the opinion of Mr. Justice Gummere, on page 470 of 60 N. J. Eq., and page 886 of 46 Atl.: 'That a desertion, in order to be obstinate, must be persisted in against the willingness of the injured party to have it concluded is declared by our cases; and ordinarily, when the husband has by his conduct towards his wife contributed in any degree to her original desertion, the law requires that he should evidence that willingness by making advances or concessions to his wife as might be reasonable to induce her to return to him.' It will be observed that the Chief Justice here is dealing with the case where the husband was in part responsible for the separation, whereas the case before this court now is one where the conclusion of fact is reached beyond doubt that the husband was not responsible, in any degree whatever, for the separation. Chief Justice Gummere proceeds: 'But the law does not impose this duty upon the husband, in every case, rigidly and without regard to the facts and circumstances by which it is surrounded. The husband is bound to make such advances and concessions only where there is reasonable ground to suppose that such action on his part will terminate the wife's desertion. Where it is manifest from the circumstances under which the de-

sertion took place, or from her temper and disposition, or from any other fact in the case, that honest effort on the husband's part to terminate the separation would be unavailing, or if successful in bringing the desertion to an end, would be so only temporarily, the duty of making it does not exist'—citing cases. That is the rule which I think disposes of the present case. In my judgment, under the circumstances, this husband had no reason to suppose that any bona fide invitation on his part to the wife would bring her back. She had persistently, during a long period of time, obstinately maintained the position that she would not come to him. She wanted him to provide for her somewhere else. She had his letter, which was a standing invitation to return.

"The conclusion is that a decree for divorce will be advised."

Pierre F. Cook, for appellant. Edmund Wilson, for respondent.

PER CURIAM. The decree under review herein should be affirmed, for the reasons expressed by Vice Chancellor Stevenson.

(76 N. J. L. 580)

#### BERNADSKY v. ERIE R. CO.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

#### 1. MASTER AND SERVANT—INJURIES TO THIRD PERSONS—TESTIMONY OF SERVANT—ADMISSIBILITY.

In an action against a railroad company and its servant for an assault committed by such servant, his testimony is admissible on the question of the company's liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1270, 1271.]

#### 2. DAMAGES—MENTAL SUFFERING.

In an action for personal injuries from an assault committed by defendant, mental suffering resulting from the injuries is a proper element of damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 100.]

#### 3. EVIDENCE—OPINION EVIDENCE—DANGER OF HYDROPHOBIA.

In an action for personal injuries from an assault, and from the bites of a dog, expert testimony showing the possibility of hydrophobia was improperly admitted, where about two years had elapsed since the bite, and there were no symptoms of hydrophobia, and the dog did not have the disease.

#### 4. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF TESTIMONY—CURE BY INSTRUCTION.

In an action for personal injuries from an assault and the bites of a dog, the erroneous admission of expert testimony as to the possibility of hydrophobia was rendered harmless by an instruction that such testimony should not be considered in determining the damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4178-4184.]

Error to Supreme Court.

Action by John Bernadsky against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The per curiam opinion of the Supreme Court is as follows:

"The plaintiff brought suit to recover damages for personal injuries sustained by him on November 6, 1902, and resulting from an assault committed on him by the defendant Burns, while the latter was in the employ of the defendant the Erie Railroad Company. The plaintiff was about seven years of age at the time of the alleged assault. At the trial of the cause the jury rendered a verdict in favor of the plaintiff, and judgment was entered thereon.

"The defendant the Erie Railroad Company sues out this writ of error, and assigns, first, that there was no evidence upon which the verdict against it could be sustained. The case made by the plaintiff was that, while he was in the yards of the defendant company at Weehawken, he was attacked and beaten with a stick by Burns, and was bitten by a dog belonging to Burns, which the latter 'sicked' upon him. The contention on the part of the defendant railroad company is that there was nothing in the proofs to show that, in committing the alleged assault, Burns was acting within the scope of his employment, as its servant. We think the jury could properly find, from the testimony of the plaintiff, and of the defendant Burns, that the plaintiff was a trespasser in the company's yard; that Burns, in the discharge of his duty as watchman, undertook to drive him off; that in doing so he committed the assault referred to; and that this abuse of the plaintiff was unnecessary and excessive. It is contended, on behalf of the defendant in error, that the testimony of Burns could not be considered by the jury in determining the question of the liability of the railroad company. No reason is given by counsel in support of this contention, and it seems to us to be without merit.

"It is also assigned for error that the court improperly permitted the jury, in determining the compensation to which the plaintiff was entitled (in case a verdict should be found in his favor), to consider the mental suffering subsequently undergone by the plaintiff as a result of the attack upon him. There was no error in this judicial action. In the case of *Consolidated Traction Co. v. Lamberton*, 60 N. J. Law, 457, 38 Atl. 684, it is declared by the Court of Errors and Appeals that in actions for personal injuries the mental suffering resulting from the injuries is a proper element of damages to be taken into consideration by the jury.

"The only other assignment of error argued before us is directed at the admission of expert testimony showing the possibility of hydrophobia resulting from the bites of the dog. We concur in the view of counsel that this testimony was improperly admitted; but the error was rendered harmless by the instruction of the judge to the jury, which was as follows: 'With respect to the danger of hydrophobia occurring, the case is barren of anything from which you would be entitled to assess any damages on that item. The

boy has not had hydrophobia. The dog did not have hydrophobia, either at the time of biting him, or afterwards, and the dog is dead. So far as the dog is concerned, the hydrophobia question is settled. So far as the boy is concerned, it is two years since the bite was inflicted, or nearly two years, and nothing has transpired, and you cannot imagine damages in favor of anybody. So your estimation of damages would be properly restricted to those points that I have adverted to as being proper to consider under the circumstances.'

"Finding no harmful error, the judgment under review must be affirmed."

Collins & Corbin, for plaintiff in error.  
Weller & Lichtenstein, for defendant in error.

PER CURIAM. The judgment of the Supreme Court should be affirmed, for the reasons expressed in the opinion delivered in that court.

(76 N. J. L. 502)

#### COLLOTY v. SCHUMAN.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

##### 1. WORK AND LABOR—SERVICES OF BROKER.

In an action for services as a real estate agent in procuring defendant a tenant for her hotel, plaintiff was not required to prove a special contract of employment, but could recover on proof of rendition of the services at defendant's request under circumstances negating the idea that they were gratuitous, from which the law would imply a promise to pay their reasonable value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, § 3.]

##### 2. CONTRACTS—ACTION—PLEADING—CONTRACT, EXPRESS OR IMPLIED.

Where plaintiff's state of demand in an action for services was silent as to whether the contract sued on was express or implied, plaintiff was entitled to recover on proof of either an express or implied contract to pay for his services.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1740-1748.]

##### 3. BROKERS—ACTION FOR COMPENSATION—QUESTION FOR JURY.

Where, in an action for services of a real estate agent in procuring defendant a tenant for her hotel, plaintiff claimed that his services were reasonably worth 5 per cent. of the rent for the term, evidence that defendant paid plaintiff 5 per cent. of an installment of rent was sufficient to require submission to the jury of the question whether the sum so paid was in full compensation for plaintiff's services, or a recognition that plaintiff was entitled to 5 per cent. of all the rents collected.

Error to Supreme Court.

Action by Eugene M. Colloty against Kate Schuman. Judgment for plaintiff was affirmed by the Supreme Court (66 Atl. 933), and defendant brings error. Affirmed.

Clarence L. Cole, for plaintiff in error. Eli H. Chandler, for defendant in error.

GUMMERE, O. J. This action was originally brought in the district court of Atlan-

tic City to recover the sum of \$107.50, which, according to the averment of the state of demand, was due to the plaintiff, Collopy, from the defendant, Schuman, upon a contract, by the terms of which the latter "undertook and promised to pay said plaintiff for procuring a tenant for the Hotel Wellington" in Atlantic City. The proofs submitted at the trial on behalf of the plaintiff (who was a real estate agent) were to the effect that the defendant called upon him with her son and requested him to try and rent the hotel for her; that she was the owner of the hotel property; that he subsequently secured a tenant for it at an annual rent of \$3,000, and that the tenant was put in possession by the defendant; that the defendant's son agreed with him that he should receive a commission of \$150 for his services, being 5 per cent. of the annual rent; that he collected \$850 on account of the rent, and turned it over to the defendant, and that she then paid him 5 per cent. of that amount, viz., \$42.50. It was further proved that afterwards the defendant's son collected \$1,400 more on account of the rent, and that no commission on that amount was paid to the plaintiff, and that he received no further payment from the defendant for his services in procuring her a tenant. There was a verdict and judgment in favor of the plaintiff. On appeal to the Supreme Court, many exceptions taken at the trial were argued, but were all considered to be without merit, and the judgment of the district court was affirmed. The present writ of error brings up the judgment of affirmance.

The only assignment of error argued before us, and the only one, therefore, which requires consideration at our hands, is directed at the adjudication of the Supreme Court that it was not error in the district court to refuse to nonsuit the plaintiff, or to direct a verdict for the defendant. The argument in support of this assignment is that the plaintiff's right to recover depended upon the existence of an express agreement made by the defendant, either personally or through a regularly authorized agent, to pay the plaintiff \$150 for his services, that the only proof of such a contract was the agreement between the plaintiff and the defendant's son, and that there was no evidence of any authority on the part of the son to bind his mother by such an agreement. But this argument rests upon the fallacy that the plaintiff cannot recover except upon proof of an express contract. His right of recovery is not so limited. Proof of services rendered by him at the request of the defendant, under circumstances which negative the idea that they were gratuitous, entitles him to compensation for those services from the defendant, notwithstanding the absence of an express promise by her to pay for them. A promise to pay what they are reasonably worth is implied from her request to him to

render them. This is elementary. It is contended that the plaintiff below was not entitled to recover on a quantum meruit, however, for the reason that the state of demand counts solely upon an express contract. But this is not the case. The pleading is silent upon the question whether the contract sued upon is an express or an implied one. The refusal to nonsuit the plaintiff, and the overruling of the motion to direct a verdict in favor of the defendant, were therefore, each of them, proper, if there was any evidence to show that the plaintiff had not been paid what his services were reasonably worth. Such evidence, we think, is to be found in the fact that the defendant paid the plaintiff 5 per cent. on the installment of rent actually collected by him. It was for the jury to say whether, under all the circumstances proved in the case, this was a full compensation for his services, or whether it was a recognition on the defendant's part that he was entitled to receive as compensation for his services 5 per cent. of all rents actually collected.

The judgment under review will be affirmed.

(74 N. J. E. 521)

#### EDISON et al. v. MILLS-EDISONIA.

(Court of Chancery of New Jersey. June 1, 1908.)

#### 1. CORPORATIONS—CORPORATE NAME—RIGHT TO USE—INJUNCTION—BILL.

Where, in a suit by Edison and corporations manufacturing and selling, by his authority, phonographs and kinetoscopes invented by him, seeking to restrain the use of the word "Edisonia" in the name of defendant corporation, engaged in conducting musical, phonographic, and moving picture exhibitions, the bill alleged that because of said inventions by Edison, and that his name was universally associated with them in the public mind, and the fact that the Edison phonograph was manufactured and sold by complainant phonograph company, and because the kinetoscope was manufactured and sold by complainant Edison Manufacturing Company, and because of the use of "said" kinetoscope and phonographs by defendant, the public was led to believe that the arcades maintained by defendant were conducted by complainants, and that they were interested or in some way connected therewith, it would be presumed that the instruments exhibited in defendants' arcades were Edison machines.

#### 2. PATENTS—RIGHT TO USE PATENTED ARTICLES—DESCRIPTION BY NAME OF PATENTEE.

Where defendant corporation became the owner, or legally possessed, of patented Edison phonographs and kinetoscopes, it was entitled to use such machines for public entertainment, and to advertise that the machines used were in fact Edison machines, both under the rule authorizing a statement of the truth in the conduct of a business, and the law with reference to the use of patented articles.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 305, 329.]

#### 3. TRADE-MARKS AND TRADE-NAMES—RIGHT TO USE NAME—DESCRIPTION BY TRADE-NAME OR NAME OF PATENTED ARTICLE.

The right to describe an article by the trade-mark or patented name passes by implication of law to the person who purchases the article from the inventor or his assignee while

the patent is in force, and passes to the general public after the patent has expired, on the ground of the assumed dedication of the name by which the patented article was known.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 39.]

**4. CORPORATIONS—CORPORATE NAME—RIGHT TO USE—INFRINGEMENT OF RIGHTS IN USE OF NAME OF INDIVIDUAL.**

The use of the word "Edisonia" in the name of defendant corporation, Mills-Edisonia, organized for the purpose of conducting phonographic and moving-picture exhibitions by the lawful use of Edison phonographs and kinetoscopes, was not calculated to mislead the public, to believe that either Edison, or the other complainants, manufacturers under his authority of such phonographs and kinetoscopes, were in any manner interested in defendant corporation, or in its exhibitions, and did not constitute an infringement of any property right of the complainants or of any personal right possessed by complainant Edison, in his name.

**5. TRADE-MARKS AND TRADE-NAMES—RIGHT TO USE—NAME OF INVENTOR—DESCRIPTION OF INVENTION.**

A corporation which is lawfully using machines, the invention of an individual, has authority, implied from the purchase of the machines from the inventor or his grantees, to use the name of the inventor for the purpose of truly and properly describing the machines.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 14.]

Suit by Thomas A. Edison and others against Mills-Edisonia. On demurrer to bill. Sustained.

Hartshorne, Insley & Leake, for demurrant. McCarter & English, for complainants.

**EMERY, V. C.** The object of this bill is to enjoin a corporation from the use of the name by which it was incorporated. Defendant was incorporated under the general corporation law, March 10, 1906, under the corporate name "Mills-Edisonia," for the purpose of conducting arcades, moving picture exhibitions, amusements, games, etc., with a capital stock of \$3,000. The three incorporators were E. W. Mills, M. P. Mills, and P. G. Klaub. This corporation has established in many cities and towns in the United States and other countries places of amusement known as "Penny Arcades," which are fitted up with machines, in some of which machines kinetoscopic or moving picture exhibitions are given, and in others phonographs for reproducing music. Over the entrances to these "Penny Arcades" are displayed conspicuous signs of electric light globes, lighted at night, and made up of or containing the words "Mills-Edisonia" or "Mills Edisonia Co." Thomas A. Edison, the individual complainant, is known throughout the business and scientific world as an inventor, and among his inventions are the phonograph and the kinetoscope. The National Phonograph Company, one of the corporate complainants, manufactures the phonographs invented by Edison, is the assignee of the trade-mark of Edison for the phonographs, and sells these phonographs by express permission and authority of Edison, and is his authorized agent for that purpose.

The Edison Manufacturing Company, the other corporate complainant, manufactures the kinetoscopes invented by Edison, is the assignee of the Edison trade-mark for the manufacture, and manufactures and sells the same by Edison's express permission, and is his authorized agent therefor. The right of the complainant Edison to relief is based in the bill on the statement that, when his name or any derivative of it is used in connection with any business, the public assumes that he is interested in the business and is sponsor therefor, and that the articles used in the business were invented or manufactured by him, or that the business is in some way countenanced by him, and, by reason thereof, "the value thereof is very greatly enhanced in the public mind." The National Phonograph Company as its basis of claim alleges that because of the great reputation the Edison Phonographs have obtained and its extensive sales thereof, and its extensive use in the commercial world, the use of the name "Edison" or any of its derivatives, in connection with any business in which phonographs are employed, causes the public to assume that the phonographs used in said business are the Edison Phonographs used and sold by it, and that the business is in some way connected with this Phonograph Company, and that it is sponsor thereof, and by reason of this "the value of said business is very greatly enhanced in the public mind." The Edison Manufacturing Company makes like allegations as to the use of the name "Edison" in connection with the kinetoscope. All three complainants then unite in the allegation that because of the fact that these inventions, the phonograph and kinetoscope, were made by Edison, and his name is universally associated with them in the public mind, as is also the fact that the Edison phonograph is manufactured and sold by the phonograph company, and the kinetoscope by the Edison Manufacturing Company, and because also of the use of said kinetoscopes and phonographs in the said Penny Arcades so conducted by defendant, "the public are led to believe that the arcades are being conducted by complainants, and that they have an interest therein or are in some way connected therewith." They further allege that they have no connection with the corporation, have never authorized the use of the name; that defendant has adopted it without authority, because of the reputation of Edison and of the commercial value which attaches to the use of his name; that this is done without any compensation to complainants, and "tends to deceive and defraud the public, and to greatly injure the name and reputation of the complainant Edison." The prayer for relief is an injunction against continuing the use of the name or any of its derivatives in the corporate title or in connection with the business or its advertisement, and from holding out in any way that complainants are connected with,

countenance, or stand sponsor for the business.

From this statement of the bill it is obvious that the improper use by defendant of complainant Edison's name, in unfair competition or infringement of trade-marks, is not relied on, and that the claim for relief is not based on rights of this character. It is not claimed that defendant is engaged at all in the manufacture or sale of either phonographs or kinetoscopes, and it appears affirmatively that it is engaged in a business which none of the complainants are engaged in, viz., the use of machines for exhibition, and I think it must also be taken as appearing that the instruments used for exhibition by defendant are those manufactured and sold by the corporate complainant. In view of the allegation in the bill that "said kinetoscopes, etc., are used," this must be the inference, in the absence of any direct allegation that the instruments used are not the Edison phonographs and kinetoscopes, and that the sign and name are on that account fraudulent. Assuming that the defendant owns, or has properly and legally possession of, the Edison machines, by purchase or otherwise, then the right to use the machines for public entertainment passes with the purchase or other legal possession. It must be assumed that part of the value realized by complainants on the manufacture and sale of the inventions is derived from the adaptability to this public use. With this right so to use the machine goes, also, the right to advertise that the machines used are in fact the Edison machines. This results, not only from the general rule of law authorizing the statement of the truth in the conduct of a business, but from the special principles relating to the use of patented articles. The right to describe the article by the trade-mark or patented name must pass by implication of law, as it seems to me, to the person who purchases from the inventor or his assignee while the patent is in force, and that it passes to the general public after the patent has expired, on the ground of an assumed dedication of the name by which the patented article was known is settled by the highest authority. *Singer Manufacturing Co. v. June Mfg. Co.*, 163 U. S. 169, 19 Sup. Ct. 1002, 41 L. Ed. 118 (1896). No manufacture or sale of the machines appear to be intended by this defendant, and its right to conduct its business of exhibiting the machines by properly advertising that it exhibits the Edison machines (which presumably it has purchased directly or indirectly from the complainants themselves) cannot be enjoined. To hold that a proper use of the name of Edison as describing the character of the machines exhibited can be enjoined would probably result in containing indefinitely and as a property right the use of a name which was protected for a limited period, under the patent laws, against the gen-

eral public, and for which use the public by the privileges given under the patent laws have made a compensation that entitled them to the proper use of the name after that period.

The substantial question, therefore, is whether the mere use of the word "Edisonia," or the manner in which it is used, by a company which has the right to exhibit the Edison phonographs and kinetoscopes, and which intends to exhibit genuine instruments, is such use as to infringe any property right of either of the complainants or any personal right of the individual complainant Edison. The case differs from *Edison Storage Battery Co. v. Edison Automobile Co.*, 67 N. J. Eq. 44, 56 Atl. 861 (1904), where the use of the name of Edison in the corporate name was enjoined by Vice Chancellor Pitney, because one of the objects for which the defendant was incorporated was the manufacture of storage batteries of complainant, and the circumstances showed that the purpose of using the name was to obtain in their business of selling automobiles, and in competition with complainant, the benefit of the name of Edison, who had assigned his storage battery for automobiles to complainant. In *Edison v. Edison Polyform Co.* (N. J. Ch.) 67 Atl. 392 (July, 1907), Vice Chancellor Stevens, on the application of present complainant, enjoined the use of his name in the defendant's corporate name, because on all the facts of the case it appeared that this use of the name was part of a fraudulent contrivance of the company in connection with the use of certificates appearing to be signed by him and of his pictures, to lead the public to believe that Edison was connected with the business. There are no circumstances here showing that any fraud on the public is intended by exhibiting as Edison instruments those which are not such, and the injury to the public is alleged to be that, by the defendant's manner of using this name, the public are led to believe that in some way the defendants are connected with this business. This general allegation of the bill is not of itself sufficient, unless made in connection with such specific allegations as will enable the court to judge whether there is any reasonable ground for alleging that the public are likely to be so deceived by the representation. The only specific allegation here made is that of the use of the word "Edisonia" in the corporate name and in the advertisements or signs; and the whole question therefore is: Can it be reasonably said that by this use the public are reasonably entitled to believe that either of the complainants are connected with the business. As to the National Phonograph Company, the use of the word would seem to be no basis whatever for supposing them to be connected with the exhibition business; nor as to the Edison Phonograph Works, which is apparently the name of a manufacturing company. Com-

plainant Edison stands in a different relation, of course, because his well-known name is used as part of the entire word "Edisonia," but, even as to him, the inference that by the mere use of the word "Edisonia" the public would believe him to be connected with this business of exhibiting his machines seems to me to be a strained one. The name in this form indicates, if it has any descriptive meaning, things made by Edison, or Edison's instruments, and it cannot be reasonably supposed that this name, even if used alone, would refer to any thing except to describe the instruments, and I think it would not of itself to any reasonable person indicate that Edison was personally connected with the company, even if without the prefix "Mills Edisonia." The addition of this prefix of a proper name makes the name even less likely to indicate Edison's personal connection with the company. In *Edison v. Hawthorne* (C. C. 106 Fed. 172, affirmed on appeal, 108 Fed. 839, 48 C. C. A. 67 (1901)), it was held that the words "Edison Phonograph Agency" in defendant's sign did not indicate that defendants were agents of Edison, but that it was an agency for the sale of Edison phonographs, and that complainant had no right to enjoin the continued use of the name even by persons who had formerly been his agents, Edison's claim for relief must therefore be based, not on the protection of any property right, but on his personal right to enjoin the use of his name, or any plain derivative of it, by any corporation with which he was not personally connected. No court has ever yet gone to this extent, and in our decisions the question of the existence of such personal right, as distinct from a property right, has been reserved. *Vanderbilt v. Mitchell* (N. J.) 67 Atl. 97, 102 (June, 1907); *Edison v. Edison Polyform Co.* (N. J. Ch.) 67 Atl. 395.

In this case there exists a circumstance which specially affects the protection of any merely personal right, and this is that, if the defendant is lawfully using and exhibiting Edison's inventions, the authority to truly and properly describe them as such, including the use of Edison's name for that purpose, must be considered as given to it by Edison, and under the authority of Edison himself, implied by the purchase of the machines from him or his grantees. If, having sold the machines to exhibitors, Edison or his grantees can now enjoin any proper descriptive use of Edison's name by the purchasers, the legal situation would be that the vendors have on the sale retained a right to control to that extent the conduct of defendant's business in the use of their machines. Such right in vendors under the patent or trade-mark laws is absolutely new in our law, and might practically lead to an indefinite extension of the benefit of some of the privileges of those special laws.

The demurrer will be sustained.

(76 N. J. L. 555)

**MORRIS & E. R. CO. et al. v. MAYOR, ETC.,  
OF CITY OF NEWARK.**

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

**1. MUNICIPAL CORPORATIONS—CONTRACTS—  
ELEVATION OF RAILROAD TRACKS.**

An agreement, executed December 26, 1901, was entered into between the railroad companies and the city of Newark, providing for the elevation and depression of their railroads over and under certain streets and avenues within the city in order to avoid the dangers to life and property incident to street grade crossings. For its share of the cost of such changes the city agreed to pay, upon the completion of the work, to the companies, certain sums of money. *Held*, that the agreement was intra vires of the municipality under the act of the Legislature passed and approved March 20, 1901 (P. L. 1901, p. 116).

**2. STATUTES—TITLE OF ACT.**

The title of the act sufficiently expresses its object.

[*Ed. Note.*—For cases in point, see *Cent. Dig.* vol. 44, Statutes, § 171.]

**3. MUNICIPAL CORPORATIONS—MISAPPROPRIATION OF FUNDS—"DONATION OR APPROPRIATION OF PUBLIC FUNDS."**

The payment by the city of a recognized moral obligation assumed by it for services rendered at its request is within the legislative power to authorize, and does not constitute a donation or appropriation of the public funds within the prohibition of either section 19 or section 20 of article 1 of our state Constitution.

[*Ed. Note.*—For other definitions, see *Words and Phrases*, vol. 1, pp. 471, 472.]

(Syllabus by the Court.)

**Error to Supreme Court.**

Action by the *Morris & Essex Railroad Company* and the *Delaware, Lackawanna & Western Railroad Company* against the mayor and common council of the city of Newark. Judgment for plaintiffs, and defendant brings error. Affirmed.

Herbert Boggs and Francis Child, Jr., for plaintiff in error. Conover English and Robert H. McCarter, for defendants in error.

**VREDENBURGH, J.** The above railroad companies on December 26, 1901, entered into written agreement with the city of Newark, providing for the elevation and depression of their railroads within the city's corporate limits above and under the grade of numerous streets and avenues crossed by their tracks. The work contemplated by the agreement has been fully completed by the railroad companies, and this suit was brought by them to enforce payment from the city of the last installment of \$150,000 still remaining unpaid of the total consideration of \$600,000, agreed to be paid by the city to the companies for the completion of the entire work. The plaintiffs declared specially for breach by defendant of its agreement to pay the last installment, adding to such special count the common counts for work done at defendant's request, etc., in the usual form in assumpsit. To this declaration the de-

defendant filed plea of the general issue, and, upon plaintiffs' demand of a specification in writing of the defenses intended to be made under that plea, the defendant has served a specification of defenses, setting up that it (the municipality) "had not the power, right, or authority in law to make the alleged contract." By a stipulation of counsel, it is admitted that the agreement, to which reference is above made, was in fact "signed and duly executed" by the defendant municipality with the plaintiffs; that the work required to be performed by the terms of the agreement was, in fact, duly performed by the plaintiffs; that the sum of \$450,000 had been duly paid to the plaintiffs by the defendant for that work in accordance with those terms, and that the balance of \$150,000 sued for, although previously demanded, had not been paid. At the trial of the cause before the Supreme Court circuit of the county of Essex, the city defended, first, that the contract declared upon was ultra vires and void; and, second, that, the city not having (as claimed by it) the power to make the contract, none could be implied so as to sustain a recovery upon the common counts.

This defense was overruled by the trial court, and a verdict for the balance of money sued for, with interest, was, under exception by defendant, directed in favor of the plaintiffs below. The plaintiff in error makes before this court substantially the same insistence it made before the trial court. It is to be noted that the city does not claim there was any legal defect or informality whatever in the preliminary proceedings of the municipality, authorizing its agents to execute the agreement, nor any fraud, mistake, or surprise in its execution. The city's sole contention in this behalf is that the agreement to pay money to the railroad companies for this work was ultra vires because not conferred by any legislative enactment, and was therefore void and unenforceable. We deem this position to be untenable, and that the statutory grant of power contained in the act of Legislature approved March 20, 1901 (P. L. 1901, p. 116), entitled "An act to authorize any town or city of this state to enter into contracts with railroad companies whose roads enter their corporate limits, to change or elevate their railroads, and, when necessary for that purpose, to vacate, change the grade of, or alter the lines of any streets or highways therein," is amply sufficient. This title we think sufficiently expresses the object of the law. Its first section expressly empowers the proper municipal authorities of any city of the state to enter into such contracts with any of the railroad companies whose roads enter or lie within those cities as shall secure greater safety to persons and property therein, or facilitate the construction and maintenance of other than grade crossings of streets or highways, whereby the said railroad companies may locate, relocate, change, alter grades of, depress, or elevate

their railroads within said cities, as in the judgment of such municipal authorities, respectively, may be best adapted to secure the safety of lives and properties, or to provide for other than grade crossings of streets or highways therein, or to promote the interest of said cities, respectively, and for that purpose shall have power to open, vacate, alter the lines of, change the grades of any streets or highways within said cities, and to do all such acts as may be necessary and proper to effectually carry out such contracts. Its second section directs that such city shall provide the money necessary to do the work and make the payments required by any such contract by the levy of a general tax for one or more years, or by the issue and sale of bonds of such city, and that such city shall have power, by annual taxation, or otherwise, to provide a sinking fund for the retirement of said bonds. The intention of the Legislature thus to provide a method by which cities (co-operating with railroads which enter their corporate limits and cross their streets at grade) can, by proper agreements with the latter for the purpose, procure the construction of such important public works in order to guard their citizens against the dangers of such crossings, could not have been, I think, much more plainly expressed. The route of the railroads in question extended, both as to their main as well as their Montclair branch lines, through the city of Newark, crossing very numerous streets and avenues at grade.

We take judicial notice of the fact that Newark is a growing city, with a constantly expanding population and traffic, and that a large number of trains must be required to be run on the railroad tracks over the grade crossings there. This must constitute a constant menace to the lives of its citizens, and fully justified, in our opinion, its municipal authorities in taking advantage of the aid and authority of the statute in the execution of an enforceable contract between the city and the railroad companies in order to guard against such dangers. Without the action of the railroads in elevating and depressing their tracks at these grade crossings, and the concurrent act of the city in vacating the right of the public in the streets and highway involved, the relief from such dangers designed by the statute could not have been afforded. To accomplish this object and obtain this relief, the agreement in question became necessary. The mutuality and interdependence of the several undertakings of the contracting parties to each other under this agreement is apparent upon an examination of its very voluminous terms. They cannot be inserted here, but I think it will be sufficient, by way of a summary of them, to say that the city, on its part, contracted to vacate the public easements in, and change the grades of, certain streets, and to pay the companies a fixed sum towards the work of construction agreed to be performed by them. That work embraced,



not only the elevation and depression of the track beds of the railroads, so as to avoid the grade crossings of the various highways, but also the erection of extensive stone, cement, and brick retaining walls and abutments for highway bridges, and along the streets affected by the work, the building of steel bridges, and the maintenance and renewal of the iron work (including the painting and concrete filling) of all bridges over the depressed tracks, together with a variety of other structural and expensive work. The intent of the parties to the agreement to make these structures a permanent improvement to the city, and, as far as possible, ornamental to the locality where placed, is evident from the specifications of the expensive materials required to be used and the elaborate work to be done. For its share of the cost of these important works and extensive changes the city covenanted to pay the companies upon completion the total sum of money mentioned, including the amount now in controversy. We think the agreement was within the capacity of the city to enter into by force of the statute cited above, and was not in excess of its corporate powers.

The contention in the brief of counsel for the city, that the payment of the stipulated sums of money by the city to the railroad companies should be regarded as a voluntary "contribution" by the municipality, and therefore prohibited by the constitutional mandates, sections 19, 20, art. 1 (19), declaring that "no county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual association or corporation, or become security for or be directly or indirectly the owner of any stock or bonds of any association or corporation," and (20) that "no donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever," does not seem to be sound for at least two reasons: First. In addition to the said quid pro quo support of the consideration of this contract, the conceded facts and circumstances show that the promise of the city to pay the sum in controversy was not intended as a contribution or donation, but was founded also upon other valuable considerations passing to it from the companies. The latter, under the terms agreed upon, covenanted to convey, dedicate, and abandon to the city for public uses certain considerable tracts of land and rights of way within the city limits owned and occupied by the companies, the value of which is not fixed by the writing, and therefore is incapable of computation by the court upon the record before us. Presumably it was at least a valuable, if not an adequate, consideration for the city's promise to pay. But whether an adequate or only partial consideration cannot be a subject of inquiry here. Hence the money agreed by the city to be paid

in pursuance of the contract was in no legal or proper sense a contribution or donation by it. Second. The purpose recited in the statute of securing the safety of the lives and properties of the citizens sought to be accomplished by this work was a beneficent and important public object, and was, it must be admitted, the performance of a highly moral duty of the city towards its inhabitants. The payment of a recognized moral obligation assumed for services rendered has been held repeatedly by this court to be within the legislative power, and its discharge does not constitute a donation of the public funds. *Rader v. Township of Union*, 39 N. J. Law, 509; *Rutgers College v. Morgan*, Comptroller, 70 N. J. Law, 460, 474, 57 Atl. 250. These authorities seem to be conclusive of this point.

Entertaining the view that, for the reasons stated, the city's legal liability to pay the sum in controversy is clear, we have not deemed it necessary to decide the further question of the effect of the city's acquiescence in the doing and completion of the work by the railroad companies, it being evidently unable to restore them to their former position. See *Camden & Atlantic R. R. Co. v. Mays Landing, etc.*, R. R. Co., 48 N. J. Law, 530, 7 Atl. 523; *Chapman v. Iron Clad R. Co.*, 62 N. J. Law, 497, 41 Atl. 690, and *First Presbyterian Church v. State Bank*, 57 N. J. Law, 31, 29 Atl. 320, laying down the rule as to private corporations, and what was said, obiter, in this court relating to the question of estoppel as to public corporations in the opinion of Mr. Justice Hendrickson on page 648 of 65 N. J. Law, on page 530 of 48 Atl., in the case of *Meday v. Rutherford*, citing 1 Dillon, Mun. Corp. 548.

But, without regard to the effect of acquiescence by the city, the judgment below should be affirmed.

(29 R. I. 276)

**CARR v. AMERICAN LOCOMOTIVE CO.**  
(Supreme Court of Rhode Island. July 9, 1908.)

**1. MASTER AND SERVANT—INJURIES TO SERVANT—VERDICT—EVIDENCE.**

In an action for injury to a servant while operating an oil-burning rivet heater, by the valve stem being blown out, the preponderance of the evidence held not to support a finding that the stem introduced in evidence was not the same as that in the valve at the time of the accident.

**2. APPEAL AND ERROR—PREJUDICE—RULINGS ON EVIDENCE.**

Where, in an action for injuries to a servant, the court ruled out all evidence as to the wages of boilermakers, defendant was not prejudiced by the allowance of a question as to how long it takes the average boy, who starts in heating rivets, before he becomes a boilermaker.

**3. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—EVIDENCE.**

Where a servant was injured by an alleged defective appliance, it was proper to show whether witness had had any trouble with the appliance before the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 912-916.]

#### 4. WITNESSES — CROSS-EXAMINATION — EXHIBIT.

The court properly excluded evidence of a witness as to defendant's exhibit in cross-examination after the witness had refused to identify the exhibit.

#### 5. MASTER AND SERVANT—INJURIES TO SERVANT—EXERCISE OF CARE—EVIDENCE.

In an action for injuries to a servant by an alleged defective oil burner, it was proper to show the number of such burners in defendant's shop at the time of the accident as a basis for showing the amount of care bestowed on them by defendants, and also as relevant to plaintiff's claim that the valve stem offered by defendant as an exhibit which appeared to be in good order was not the same stem that blew out and injured plaintiff.

#### 6. EVIDENCE—OPINION EVIDENCE—EXAMINATION OF EXPERT—QUESTIONS—DEFINITENESS.

In an action for injuries to a servant by the blowing out of an oil burner valve stem, a question, "If one of these stems in a burner valve such as witness used and such as was on the valve when plaintiff was burned has the wheel lost from the end of the stem, and a cross-piece of boiler iron is \* \* \* riveted on, and then the stem is pounded and the valve is pounded, and the pipe around the valve is pounded, what effect would that probably have on the stem in the valve?" was objectionable as too indefinite.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2369-2374.]

#### 7. SAME.

Where plaintiff was injured by the blowing out of an alleged defective oil burner valve stem, the question: "If one of these stems in a burner valve like the one that plaintiff was working on is turned two or three times in order to regulate the fire, and then is blown out onto the floor a distance of four or five feet, and the oil follows it, what would you say as to the working condition of the stem?" being based on the testimony, was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2366.]

#### 8. SAME.

A question, "Now, then, considering this valve, and considering and weighing the testimony that you have heard about the treatment of it, what in your opinion would be the probable effect of such pounding and hammering as you have heard these witnesses swear to, upon the working condition of this valve?" was limited to the testimony, and was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2366.]

#### 9. SAME — DECEASED WITNESSES — EVIDENCE AT FORMER TRIAL.

The evidence of deceased witnesses given at a former trial may be read.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2401-2405.]

#### 10. SAME.

Facts may be established by evidence thereof, given at a former trial if the party against whom the evidence is offered, or his privy, was a party on the former trial, if the issues are substantially the same, if the witness who proposes to give the former evidence is able to state it with satisfactory correctness, and if sufficient reason is shown why the original witness is not produced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2401-2413.]

#### 11. APPEAL AND ERROR — FORMER APPEAL — LAWS OF CASE.

Where an exception taken to the overruling of an objection to a question on a former trial was overruled on a former appeal, such decision constitutes the law of the case as to

the admissibility of such question on a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4661.]

#### 12. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—EVIDENCE.

In an action for injuries to a servant by the blowing out of an alleged defective valve stem on an oil burner, it was proper to ask a witness how many turns he had been able to take in turning any of the valve stems on the middle valves of oil burners he had used, which defendant's counsel admitted were similar to those in use by defendant, where they were in good working order.

#### 13. SAME—ASSUMED RISK—PRIOR CONDITION OF APPLIANCES.

In a suit for injuries to a servant by the alleged defective condition of a valve, it was proper to ask plaintiff as to his knowledge of the previous condition of the valve.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 937.]

#### 14. WITNESSES—CROSS-EXAMINATION.

In an action for injuries to a servant by an alleged defective oil burner valve, a witness presented to identify defendant's Exhibit A, which defendant claimed was the valve stem in question, testified that the valves had been taken off; that they were there in the afternoon and the next morning they were gone; and that he could tell a different valve had been substituted, by looking at it. *Held*, that a question, "What about the new valve that looked different?" was proper cross-examination.

#### 15. MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—EVIDENCE—PHOTOGRAPHS—CHANGED CONDITIONS.

In an action for injuries to a servant by the blowing out of an oil burner valve, photographs of the fire box and burners taken after the valves in question had been removed, and different valves substituted, were properly excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 912-917.]

#### 16. EVIDENCE—IMPROPER ISSUES.

Testimony which tends to raise an irrelevant and improper issue is inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 123-137.]

#### 17. WITNESSES—CROSS-EXAMINATION.

Where a witness testified to striking the valve stem of an oil burner, by the blowing out of which plaintiff was injured, evidence as to his treatment of the stem and valve was proper cross-examination.

#### 18. EVIDENCE—RELEVANCY.

In an action for injuries to a servant a question asked of defendant's superintendent: "Who was there in the works, aside from the operator himself, who would have had any reason for feeling any responsibility for this accident?" was properly excluded as immaterial, responsibility being a matter of law predicated on proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2170.]

#### 19. SAME—OPINION.

In an action for injuries to a servant by the blowing out of a defective oil burner valve stem, a witness not called or qualified as an expert was asked: "If a valve like that, equipped with a wheel, fits so that the stem could not be removed by taking hold of it by the fingers and the wheel becomes lost, and a man puts a crossbar on it to take its place after which the stem is found to be loose in the valve, would you say the doing of the work had anything to do with the changed condition in the stem of the valve?" *Held*, that such question was objectionable as too indefinite to be addressed even

to an expert, and because the witness was not an expert.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2290, 2317-2323.]

**20. SAME—OPINION EVIDENCE—CROSS-EXAMINATION OF WITNESS—SCOPE.**

A hypothetical question asked on cross-examination, which did not relate to any subject on which the witness had been examined in chief, should have been excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2379.]

**21. WITNESSES—CROSS-EXAMINATION—SCOPE—DISCRETION.**

Discretion in allowing questions relating to facts not alluded to in a witness' examination in chief to be asked of him on cross-examination, on offer of the examining party to make the witness his own, should be limited to facts of a simple character relevant to the issue, and is solely for convenience to avoid the necessity of recalling the witness, and cannot be exercised to convert a nonexpert into an expert.

**22. EVIDENCE—HEARSAY.**

In an action for injuries to a servant by an alleged defective valve, a question as to whether there was any talk among the men in the shop about the condition of the valve after the accident was irrelevant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1174, 1181.]

**23. APPEAL AND ERROR—RULINGS ON EVIDENCE—DISCRETION.**

No exception lies to the admission of evidence in the discretion of the court which had been overlooked in direct examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3849-3857.]

**24. WITNESSES—INCONSISTENT STATEMENTS—FORMER TESTIMONY.**

It was proper to permit plaintiff's counsel to read testimony of a witness given at a former trial, where the testimony had been read to the witness, and he had stated that he did not do the acts stated in the testimony, and did not remember having so testified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1252-1256.]

**25. MASTER AND SERVANT—ACTION FOR INJURIES TO SERVANT—QUESTIONS FOR COURT OR JURY—DIRECTION OF VERDICT.**

Where, in an action for injuries to a servant by an alleged defective oil burner valve, the evidence was conflicting, the court properly denied defendant's motion for the direction of a verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010-1050.]

**26. SAME—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—DUTY OF MASTER.**

A master is bound to furnish reasonably safe machinery for his servants to operate, and cannot divest himself of that duty by delegating it to others, and, if he does so, he remains responsible for their negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171-175.]

**27. SAME—ACTION—INSTRUCTIONS—MODIFICATION.**

In an action for injuries to a servant by an alleged defective oil burner valve, a request to charge that if the jury believed the accident was caused by unusual pressure, due to the formation and explosion of gas in the pipe which supplied oil to the furnace, the verdict must be for defendant, was properly modified by adding: "Unless such pressure was due to the negligence of the defendant in permitting such formation or explosion."

**28. SAME.**

A request to charge that if the jury believed that the valve stem produced in court

was not the stem in use at the time plaintiff was injured, but that another stem then in use was the cause of the accident, and defendant had no actual notice that the stem which was in use was defective, then it was not liable, was properly modified by adding the words: "Or might have had notice by the exercise of reasonable diligence."

Exceptions from Superior Court, Providence County.

Action by Peter F. Carr against the American Locomotive Company. A verdict was rendered for plaintiff, and defendant brings exceptions. Sustained. Remanded for new trial.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

John W. Hogan, for plaintiff. William A. Morgan, for defendant.

JOHNSON, J. The facts in this case are stated in the opinion reported in 26 R. I. 180, 58 Atl. 678. It was then before the court on a petition for a new trial. Upon the new trial then granted the jury found the defendant corporation guilty as charged in the declaration, and assessed the plaintiff's damages at \$20,000. They also found on the special issues submitted to them: (1) That the thread on the stem of the burner valve operated by the plaintiff at the time of the accident was not then in good working order. (2) That the thread in the body of the burner valve operated by the plaintiff at the time of the accident was then in good working condition. (3) That the valve stem produced in court as part of the burner valve in question, and forming a part of Defendant's Exhibit A, was not the stem operated by the plaintiff at the time of the accident. (4) That the burner valve exclusive of its stem produced in court as a part of Defendant's Exhibit A was the burner valve operated by the plaintiff at the time of the accident. (5) That the accident to the plaintiff was not due to the formation and explosion of gases in the pipe which supplied the furnace with oil. The defendant moved in the superior court for a new trial on the grounds that the verdict and the first and third special findings of the jury were against the evidence and the weight thereof, and that the damages awarded the plaintiff were excessive. This motion was denied, and the case is now before us on the defendant's bill of exceptions.

We will first consider the exception to the refusal of the superior court to grant the defendant's motion for a new trial on the grounds that the verdict and the first and third special findings of the jury were against the evidence and the weight thereof.

The justice presiding at the trial charged the jury that, if the Defendant's Exhibit A was the same appliance which was in use at the time of the accident, their verdict must be for the defendant. As the evidence showed conclusively that the thread in the body of the burner valve and the thread on the stem in the exhibit were both in good work-

ing condition, this instruction was correct. The jury found that the thread in the body of the valve was in good working condition at the time of the accident, but found that the thread on the stem of the burner valve operated by the plaintiff at the time of the accident was not then in good working order; and, further, that the valve stem produced in court as a part of the burner valve in question, and forming a part of Defendant's Exhibit A, was not the stem operated by the plaintiff at the time of the accident. The identity of the stem, therefore, is the crux of the case.

On the question of the identity of the valve, the plaintiff testified: "Q. Were the valves in the pipe that are there now the same valves in the pipe that were there then? A. I don't think so." He also testified that the upper valve was equipped with a wheel. On cross-examination: "Q. Will you look at this apparatus marked 'Defendant's Exhibit A,' Mr. Carr, and tell us whether or not that is the apparatus that you were working with at the time of the accident. A. I don't know." And: "Q. Do you remember what kind of a piece of metal it was that La Forge put upon this burner valve that you were using at the time of the accident? A. It was much like this one—might have been this one; might not. Q. Was it put on in the same manner that this is put on that middle valve in Defendant's Exhibit A? A. I couldn't say. Oh, it looked the same; yes. Might have been hammered down as good." Alfred McCool testified that the top valve was a valve with a wheel on it, a throttle. He said: "I wouldn't say that was the valve in use for the valve was thin and similar to the one we had on, the same make of a valve and all; but to the best of my ability that ain't the handle that was on the valve when we used it." And: "Well, that is the same style of a valve, a valve same as that; but I wouldn't say that was the handle that was on it when we used to use it for that cross-piece was a wider piece, to the best of my knowledge." Oscar Nelson testified that there were two wheels and a crossbar on the apparatus. George Hammer testified that there were wheels, both on the air valve and the oil valve; that the flat part of the middle valve did not look anything like the piece that was on at the time of the accident. John F. Scallan, when asked to describe the piece of iron that was on the stem in place of a wheel, answered: "Well, it would be pretty hard to say exactly, but just to notice it going by, that is all, and I noticed I should judge it would be anywheres from  $\frac{1}{2}$  to  $\frac{3}{16}$  thick and in the neighborhood of an inch wide and about  $3\frac{1}{2}$  long." He testified that it was sheet iron, and not boiler iron; that the middle valve was not on it at the time of the accident; that the crossbar on the stem was not on at the time of the accident; that everything else looked the same, but that he could not remember the bar on the lower

valve. Daniel Flynn testified that the top valve had an iron wheel; that the handle on the stem was about  $\frac{3}{16}$  of an inch thick; that there was no crossbar on any other valve.

For the defendants John McFarlane testified: "Yes; that is the burners and valves that was on there at the time of the accident," that he could identify it by the two crossbars, and by the vise marks on the stem of the middle valve. Edward McLaughlin testified that the burner valve was on the furnace about 10 days or two weeks after the accident; that he took it off under the orders of his foreman, Mr. Rawlings; that he took off the three valves, cleaned the apparatus up, and gave it to Mr. Rawlings; that the stem in the burner valve was the same stem which figured in the accident; that the burner valve appeared to be in working condition; that the valves in Defendant's Exhibit A are the same three valves that were in use at the time of the accident. Edwin Smith testified that he was foreman boiler maker at defendant's shop at the time of the accident; identified Defendant's Exhibit A as the apparatus that was on the furnace at the time of the accident; recognized the burner valve by the crossbar on the stem; remembered that it was put on by La Forge, that La Forge called his attention to it after he had riveted it on the stem, and asked him if it was satisfactory; that he examined the crossbar and stem at the time; and, on cross-examination, identified the stem as the one which was in the burner when plaintiff operated the fire at the time of the accident; testified that he recognized the crossbar and stem both, that, if the crossbar was not there, he would still recognize the stem by the vise marks where it was gripped in the vise when the end was riveted over. Fred La Forge testified that he put on the crossbar; and, as to Defendant's Exhibit A, testified: "Appears to be the same apparatus we had when the accident happened." Said he was positive that the crossbar on the stem of the middle valve was the one he put on the stem. He could not read English or French. He said the other valve with a wheel is for air. He had not noticed the crossbar on the upper valve stem. He first noticed it in court. He positively identified the middle stem of the exhibit as the stem in use on the day of the accident, but said he was not positive as to the other valves. George S. Rawlings testified: "Looks to me to be the burner that was on there at the time of the accident." That the apparatus was in use "somewhere around a couple of weeks" after the accident, and worked all right. The superintendent, Mr. Gurry, told him to have it taken off, and he told the piper to take it off. McLaughlin took it off, and gave it to the witness, and he gave it to Mr. Gurry. There were two crossbars on the apparatus the same as now. That the stem in the middle valve was the same as in the exhibit, that

he identifies it by the handle and the way it looks, and that is the only identification he can make. Mr. Gurry testified that, when Mr. Rawlings gave him the apparatus, he put it in a box and put it in a vault in his office, and kept it there until it was turned over to the court.

In rebuttal, Hammer, when asked whether the valve and burner on Exhibit A were the same that were in use the day Peter Carr was burned, answered: "I won't say whether it is or not; only the cross-piece don't appear the same, because it is much heavier." When asked the difference between that cross-piece and the one that was on there, he answered: "This piece is much heavier in thickness than the piece that was on at the time I see it. In regards to the other part of it, I won't say, only the valves appear much closer than the valves I see at that time, they were much closer than on this piece now." He testified that they were about two inches apart, that the crossbar he had seen on there was about an inch wide and about as long as the one on the exhibit, about three inches long; that it was square in the center and that it was No. 8 stock; that the thickness of the crossbar was a little over an eighth of an inch; that he considered the one on the exhibit as about five-sixteenths of an inch in thickness. Nelson testified that the crossbar on the exhibit did not look like the one that was on the apparatus before the accident; that it looked to him to be thicker than the one on it at the time of the accident; that the one on the stem at the time was all roughened up from pounding; that he had often seen McCool start it with a pair of tongs or tools, or anything he got hold of, and that it was all roughened up; that the crossbar at the time of the accident was about three-quarters of an inch or probably an inch wide. When asked what thickness of stock it was, he answered: " $\frac{3}{16}$  or so." Said it did not look as thick as the one on the exhibit. McCool, when asked: "Is that the same stem and crossbar and valve that was on the fire when Peter Carr got burned?" answered: "No, I don't think it is, to the best of my knowledge. That ain't the crossbar." He testified that the other was wider; that it was all marked up; that the crossbar on the exhibit is not marred or marked up; that the marks on there have been put on with a hammer. He described the other crossbar as being made out of a piece of No. 10 or No. 8 iron, he should judge,  $\frac{1}{8}$  of an inch thick, about an inch wide, probably  $2\frac{1}{2}$  to 3 inches long, to the best of his memory. He said that along the edge where they had been hitting it with the tongs it was rough, and that there were two wheels on the apparatus at the time of the accident; that is, a wheel on the oil valve and a wheel on the air valve.

The defendant's witnesses McFarlane, McLaughlin, Edwin Smith, La Forge, Rawlings,

and Gurry all testified that the stem in the burner valve was the one which figured in the accident. As to the body of the valve, there was no attempt on the part of the plaintiff to contradict them, and the jury found specially that the body of the burner valve was in use at the time of the accident, and that the thread was in good condition. All three of the witnesses, Hammer, Nelson, and McCool, were boilermakers, and had nothing to do with operating the rivet heater, except occasionally to light the fire. None of them had ever paid special attention to the crossbar, nor had any of them ever measured it, or measured anything else about the heater, and they all testified from their impressions from their memory. Hammer's memory of the crossbar which figured in the accident was that it was about an inch or an inch and a quarter wide, and three-sixteenths of an inch thick, and about three inches long. He estimated the bar on the defendant's exhibit, when he had it before him in the courtroom, as three-eighths of an inch wide and  $\frac{3}{16}$  of an inch thick. The bar on the exhibit actually measured  $1\frac{1}{16}$  of an inch wide and  $\frac{3}{8}$  of an inch thick. Nelson from his memory of the bar in use at the time of the accident, estimated the width of it as  $\frac{3}{4}$  of an inch or an inch. McCool, from memory, estimated the crossbar at  $2\frac{1}{2}$  to 3 inches long, 1 inch wide, and  $\frac{1}{8}$  of an inch thick. He testified that he picked the stem up after the accident and put it into the valve. The estimates of the three witnesses as to the dimensions of the bar on at the time of the accident are as follows: Hammer, 1 to  $1\frac{1}{4}$  inches wide,  $\frac{3}{16}$  inch thick; Nelson,  $\frac{3}{4}$  inch or an inch wide,  $\frac{3}{16}$  inch thick. McCool, 1 inch wide,  $\frac{1}{8}$  inch thick. Defendant's exhibit measures  $1\frac{1}{16}$  inches wide,  $\frac{3}{8}$  inch thick. The plaintiff himself had as much reason to be acquainted with the appearance of the crossbar as any person in the works, for it had been his business to operate it for a long period prior to the accident. On page 40 the plaintiff admitted that, at the first trial, the Defendant's Exhibit A was presented to him, and that he made the following answer to the following question: "Q. Was that central valve with a handle on it the one you were using (at the time of the accident)? A. It looks like the same; yes." Flynn, the plaintiff's witness who testified to seeing La Forge put on the crossbar, and who operated the furnace prior to the plaintiff, when he had the Defendant's Exhibit A presented to him, and was asked if the crossbar on the burner valve was the one that he saw La Forge put on, answered: "Well, I couldn't say that it is. I couldn't say that it is not, but it was riveted over on the top like this." The defendant's witnesses La Forge, McFarlane, McLaughlin, Edwin Smith, Rawlings, and Gurry testified that the stem and valve were put in use almost immediately after the accident and worked satisfactorily for

from ten days to two weeks, when they were taken off the furnace and turned over to the superintendent. This was not disputed, and was further supported by the testimony of the plaintiff's witness McCool that he picked the stem up from the floor after the accident and put it back into the valve, and that the apparatus was used the same day and for a part of the week following, but McCool was unable to state just how many days. McFarlane testified that he lighted the furnace about half an hour after the accident; that the valve worked all right; and that, when he went to light the fire, the stem was screwed up tight against its seat. It thus appears from the testimony of witnesses, both for the defendant and for the plaintiff, that the stem worked properly in the valve just before the accident, immediately after the accident, and for the ten days or more that it remained on the furnace after the accident. The evidence very strongly preponderates against the plaintiff as to the condition of the stem at the time of the accident and as to the identity of the stem in the exhibit with the stem in use at the time of the accident. As there must be a new trial, we will consider the defendant's other exceptions.

As to the defendant's first exception to the question, "Do you know how long it takes the average boy, who starts in heating rivets, before he becomes a boiler-maker?" as the court ruled out all evidence as to the wages of boiler-makers, we do not see that the defendant was injured by the question.

As to the second exception we think it was proper to ask the witness McCool if he had had any trouble before the accident with this burner valve which figured in the accident. The condition of an appliance before an accident may properly be shown as bearing on the question of negligence in not repairing the defect. *Smith v. Old Colony, etc., R. R. Co.*, 10 R. I. 22; *Moran v. Corliss Eng. Co.*, 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267; *McGarrity v. R. R. Co.*, 25 R. I. 269, 55 Atl. 918; *Nelson v. Union R. R. Co.*, 26 R. I. 251, 58 Atl. 780; *Hardacre v. Sayles*, 28 R. I. 235, 63 Atl. 298. The exception is overruled.

The third exception was to the exclusion of evidence as to Defendant's Exhibit A in cross-examination of a witness after he had refused to identify the exhibit. It was properly excluded.

The fourth exception was to the admission of evidence of the number of oil burners, like the one which figured in the accident, in use in defendant's shop at the time of the accident. The evidence was competent. It was proper to show the number of burners as a basis for showing the amount and kind of care bestowed upon them by the defendant, and also in view of the plaintiff's claim of a change of stems.

The fifth exception was to a similar ruling and subject to the same comment as the fourth.

The sixth exception was to the allowance of the following question: "If one of these stems in a burner valve such as you used at the Nicholson, and such as was on the valve where Peter Carr got burned, has the wheel lost from the end of the stem, and a cross-piece of boiler iron is put on there and riveted on and then that stem is pounded, and the valve is pounded and the pipe around the valve is pounded, what effect, in your opinion, would that have upon the stem in the valve? What effect would it probably have?" This question was too indefinite. The exception is sustained.

The seventh exception is overruled. The question: "If one of these stems in a burner valve like the one that Peter Carr was working on, in fact, the one he was working on, is turned out two or three turns in order to regulate the fire, and then is blown out onto the floor a distance of four or five feet, and the oil follows it, what would you say as to the working condition of the stem where that thing happened?" was based on the testimony and was proper.

The eighth exception was to the exclusion of evidence as to Defendant's Exhibit A in cross-examination; the exhibit not having been identified. The exception is overruled for the same reason as No. 3.

The ninth exception was to the allowance of the following question: "Now, then, considering this valve and considering and weighing the testimony that you have heard about the treatment of it, what in your opinion would be the probable effect of such pounding and hammering as you have heard these witnesses swear to upon the working condition of this valve?" The question was limited to the testimony, and was proper.

The tenth and eleventh exceptions were noted to rulings of the court permitting the testimony of deceased witnesses given at a former trial of this case to be read to the jury at this trial. The ruling was proper. "Facts may be established by evidence thereof given on a former trial, provided the court is satisfied (1) that the party against whom the evidence is offered, or his privy, was a party on the former trial; (2) that the issue is substantially the same in the two cases; (3) that the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness; and (4) that a sufficient reason is shown why the original witness is not produced. The first three of these conditions render the reported evidence relevant. The fourth is necessary to justify the court in receiving it." 16 Cyc. p. 1083. "The principle upon which depositions and former testimony should be resorted to is the simple principle of necessity; i. e., the absence of any other means of utilizing the witness' knowledge. If his testimony given anew in court cannot be had, it will be lost entirely for the purposes of doing justice if it is not received in the form in which it survives and can be had. The

only inquiry, then, need be: Is his testimony in court unavailable?" 2 Wigmore on Evidence, § 1402. No case has come to our attention which makes a distinction in this regard between the testimony of deceased witnesses swearing to facts in issue and witnesses giving opinion evidence, nor does there seem to be any good ground for such distinction in principle.

The twelfth exception is overruled. This exception was taken at a former trial to the question put to plaintiff's expert, Turner, and the answer thereto: "From what oil burners you have seen where the oil was under pressure and being fed into the fuel burner, and closed by the valve and valve stem, have you seen in common use such a valve without a checking device?" This exception was overruled in *Carr v. Locomotive Co.*, 28 R. I. 180, 189, 190, 58 Atl. 678, 682.

As to the thirteenth exception, it was proper to ask the witness Gibbons how many turns he had been able to take in turning any of the valve stems on the middle valves of oil burners he had used, where they were in good working order. The proper working order of the valve and stem was material. Further, it had just been admitted by defendant's counsel that the oil burners were similar to the ones used in defendant's works.

The fourteenth exception is substantially identical with the sixth exception, and is sustained for the same reasons.

The fifteenth and sixteenth exceptions are similar to the third and eighth exceptions, and are overruled for the same reasons.

The seventeenth exception is similar to the fourteenth, and is sustained for the same reason.

The eighteenth exception came too late.

The nineteenth exception is overruled. It was proper to ask the plaintiff as to his knowledge of the previous condition of the valve. Knowledge of unsafe condition would have carried with it an assumption of a known risk.

The twentieth exception is like the nineteenth.

The twenty-first exception is sustained for the same reason as the fourteenth and seventeenth.

The twenty-second exception was noted to cross-examination of a witness presented to identify Defendant's Exhibit A. He had testified that the valves in question had been taken off; that they were there in the afternoon, and the next morning they were not there; that there was a different valve there; that he could tell it was different by the looks of it. "Q. What about the new one that looked different?" This question was allowed and exception taken. The question was proper in cross-examination.

The twenty-third exception is like the fourteenth, seventeenth, and twenty-first exceptions, and is sustained for the same reasons.

The twenty-fourth exception was taken to the exclusion of photographs of the fire box and burners taken after the valves in question had been removed and different valves substituted. The exclusion was proper.

The twenty-fifth exception is like the fourteenth, and is sustained for the same reasons.

The twenty-sixth exception was taken to the admission of testimony relative to checking device on stem. The testimony in question tended to raise an irrelevant and improper issue, and should have been excluded.

The twenty-seventh exception is not pressed.

The twenty-eighth exception was taken to proper cross-examination of the witness La Forge as to his treatment of the stem and valve, in view of his testimony as to his striking it while in use.

The twenty-ninth exception was taken to cross-examination of the witness La Forge respecting his testimony at a former trial made from the official record of his testimony in the case. The exception is overruled.

The thirtieth, thirty-first, and thirty-second exceptions are sustained for the same reasons as the fourteenth.

The thirty-third exception was taken to the exclusion of a question asked of the superintendent of defendant's works by defendant's counsel: "Who was there in the works, aside from the operator himself, who would have had any reason for feeling any responsibility for this accident?" Responsibility in a case of this kind is a matter of law predicated upon proof, and it is entirely immaterial who would have had any reason for feeling any responsibility for the accident. The exception is overruled.

The thirty-fourth exception was taken to the exclusion of a practical repetition of the same question, and is overruled for the same reason.

The thirty-fifth exception was taken to the allowance of the following question: "If a valve like that equipped with a wheel fits so that the stem could not be moved by taking hold of it with the fingers, and the wheel becomes lost, and a man does a job like that on the end of the stem by putting a cross-bar on it to take the place of the wheel, and after that job is done the stem is found to be loose in the valve, so that it wobbles and so that it can be taken out by the fingers, would you say the doing of the work had anything to do with the changed condition in the stem in the valve?" The question was improper for three reasons: (1) Because it was too indefinite to be addressed even to an expert; (2) because the witness was not called and qualified as an expert, and (3) because it did not relate to any subject upon which the witness had been examined in chief. The discretion sometimes exercised by a court in allowing questions of fact not alluded to in the examination in chief to be asked of a witness in cross-examination upon offer by the examining counsel to make the witness

his own witness should properly be limited to questions involving facts of a simple character relevant to the issue, and is solely for convenience to avoid the necessity of recalling the witness. It should not be exercised to the extent of converting a nonexpert into an expert. The exception is sustained.

The thirty-sixth exception is similar to the seventh, and is overruled for the same reason.

The thirty-seventh, thirty-eighth, thirtieth, fortieth, forty-first, and forty-second exceptions are sustained for the same reason as the fourteenth.

The forty-third exception was taken to the exclusion of the question: "Was there any talk among the men in the shop about the condition of the valve after the accident?" The ruling was proper. Talk by the men, if shown, would bind neither the plaintiff nor the defendant.

The forty-fourth exception was taken to the admission of evidence in the discretion of the court, which had been overlooked in direct examination. No exception lies to the exercise of such discretion.

The forty-fifth exception was taken to a ruling permitting counsel for plaintiff to read testimony of the witness given at a former trial of this case, which testimony had been read to the witness, and he had stated that he did not do the acts stated in such testimony and did not remember having so testified. The ruling was proper.

The forty-sixth exception was taken to the court's denial of a motion to direct a verdict for the defendant upon all the testimony. The evidence was conflicting and was properly left to the jury.

The forty-seventh exception is not pressed.

The defendant also excepted to the instructions and refusals to instruct the jury as follows: That the judge erred in charging the jury that "it was not necessary that the defendant have actual knowledge. It is only necessary that the defendant either have actual knowledge or might have had actual knowledge by the exercise of reasonable diligence to ascertain the condition. If the defendant company by the exercise of reasonable diligence might have ascertained or known that the stem in question was not in suitable condition for use and negligently omitted to ascertain that fact, they would be just as liable to the plaintiff as though they had actual knowledge of it." That the judge erred in refusing the defendant's request to charge the jury that "if the jury believe that the valve stem in use at the time of the accident was injured by La Forge, and such injury was the cause of the accident, and the defendant had no notice of such injury, the accident was due to the act of a fellow servant, and their verdict will be for the defendant." That the judge erred in charging the jury as set forth in the last aforementioned request of the defendant,

but with the following modification thereof, to wit: "That, if the defendant by the exercise of reasonable diligence might have known of the injury in time before the accident to the plaintiff to have repaired it, it was its duty to repair it or to substitute another." That the judge erred in refusing the defendant's request to charge the jury "that the defendant is not guilty of negligence in not repairing defects in its burners, burner valves, and stems, unless it is shown that it had actual notice of such defects." That the judge erred in charging the jury as set forth in the last aforementioned request of the defendant modified by adding thereto the words, "Or might have had notice by the exercise of reasonable diligence." (Exceptions 48 to 52, inclusive.) These instructions and refusals to instruct were correct. "It is the duty of a master who furnishes machinery for his servants to operate or work about to see to it that it is reasonably safe. He cannot divest himself of this duty by devolving it on others, and, if he does devolve it on others, they will simply occupy his place, and he will remain as responsible for their negligence as if he were personally guilty of it himself." *Mulvey v. R. I. Locomotive Works*, 14 R. I. 204, 209. That the judge erred in refusing the defendant's request to charge the jury "that if the jury believe that the accident was caused by unusual pressure, due to the formation and explosion of gas in the pipe which supplied oil to the furnace, their verdict must be for the defendant," and in giving the same with a modification, adding the words, "Unless such pressure was due to the negligence of the defendant in permitting such formation or explosion." The request was properly refused. The modification was correct. (Exceptions 53 and 54.) That the judge erred in refusing the defendant's request to charge the jury that "if the jury believe that the stem produced in court is not the stem in use at the time of the accident, but that another stem then in use, was the cause of the accident, and the defendant had no actual notice that the stem which was in use was defective, then the defendant is not liable, and your verdict will be for the defendant"; and in giving the same with a modification, adding the words, "or might have had notice by the exercise of reasonable diligence." The request was properly refused. The modification was correct. (Exceptions 55 and 56.)

The defendant's exception to the refusal of the superior court to grant a new trial on the grounds that the verdict and the first and third special findings were against the evidence and the weight thereof is sustained.

The case is remanded to the superior court for a new trial.



(6 Pen. 495)

**ANDERSON v. MAYOR, ETC., OF CITY OF WILMINGTON.**

(Superior Court of Delaware. New Castle. Dec. 3, 1907.)

**1. JURY—COMPETENCY OF JURORS—INTEREST—TAXPAYERS.**

In an action against a city for injuries alleged to have been caused by a defective street, a citizen and taxpayer was not for that reason incompetent to serve as a juror.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 411.]

**2. EVIDENCE—EXPERTS—KNOWLEDGE.**

Where, in an action for injuries to plaintiff by an alleged defective street, a physician testified that on examining plaintiff he found him suffering from erysipelas, but did not know what caused it, witness was competent to testify that, assuming plaintiff was thrown from a wagon shortly before and injured about the nose, such injury could have been the cause of plaintiff's diseased condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2356.]

**3. SAME—PLEADING—ISSUES AND PROOF.**

Where, in an action for injuries caused by an alleged defective street, a physician testified that on examination he found plaintiff suffering from a chronic inflammation of the right shoulder joint, and that an injury such as that testified to by plaintiff could have caused the condition he found, and probably did cause it, the witness would be allowed to state whether, in his opinion, plaintiff's arm would ever be in its normal condition again, though there was no allegation of permanent injury in the narr.

**4. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—CARE REQUIRED.**

Where a city, through its street and sewer department, had control of all its streets, it was bound to exercise due and reasonable care to keep the same in a safe condition for persons driving or walking along the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1612-1616.]

**5. SAME—NATURE OF LIABILITY.**

A city is not an insurer of the safety of travelers on public streets under all circumstances; its liability to persons injured by reason of a defect in a street being based on negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1616.]

**6. SAME—NOTICE.**

In order to render a city liable for injuries to a traveler by a defect in a street, it must appear that it had notice or knowledge of the defect for such time as would have been reasonably sufficient to have repaired the same or warned the public of the danger; but such notice may be either express or constructive, arising from the lapse of time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1641-1651.]

**7. SAME—STORMS—WASHOUTS.**

A city is not liable for injuries occasioned by holes in the streets resulting from sudden storms or washouts until it has had a reasonable time to fill or repair the defect.

**8. SAME—CONTRIBUTORY NEGLIGENCE.**

A traveler, exercising due care, who does not see or know that the street is in a dangerous condition, may presume that it is reasonably safe; but, if he does not exercise reasonable care to avoid the defect, he is negligent, and cannot recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1672-1683.]

**9. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.**

Where plaintiff's injury results from the concurrent negligence of himself and the defendant, he cannot recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 84.]

**10. SAME—BURDEN OF PROOF.**

Negligence of either party is not presumed, but the burden of proving it is on the party by whom it is alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 217-234.]

**11. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—INJURIES—INTOXICATION OF TRAVELER.**

Where there was evidence that plaintiff was intoxicated at the time he was injured by an alleged defective street, the jury was entitled to consider such intoxication, as bearing on the question whether plaintiff exercised such reasonable care as a sober, prudent, and reasonably careful person would have exercised under similar circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1676.]

**12. DAMAGES — INJURIES TO PERSONS AND PROPERTY.**

Where plaintiff and his horse sustained injuries as a result of a defect in a city street, plaintiff, if entitled to recover, was entitled to such a sum of money, as would reasonably compensate him for the injuries to himself and the horse, including a reasonable compensation for plaintiff's pain and suffering, his loss of time, and expenses in endeavoring to obtain a cure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 222-254.]

Action by Lewis Anderson against the mayor and council of the city of Wilmington to recover damages for injuries to himself and for injuries to his horse by defendant's alleged negligence. Jury disagreed.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Daniel O. Hastings, for plaintiff. Reuben Satterthwaite, Jr., Asst. City Sol., for defendant.

At the trial, when the first juror residing in the city of Wilmington was called, counsel for plaintiff objected to said juror, as incompetent to serve, on the ground that he was a citizen of Wilmington and therefore interested as a taxpayer in any verdict that might be rendered against the city.

THE COURT held that, while jurors had been excused theretofore upon such a ground, yet that there was no good reason for following such a rule, and overruled the objection.

Dr. Francis L. Springer, a practicing physician, testified on behalf of the plaintiff that he examined the plaintiff on January 12, 1906, and found him suffering with erysipelas, but witness did not know what caused it. Witness was then asked by plaintiff's counsel the following question: "Assuming that this man was thrown from a wagon on December 24, 1905, and was injured about the nose, could erysipelas have been caused by the injury received on that date?"

Objected to by defendant's counsel on the ground that the witness had not shown suffi-

cient knowledge of the facts to answer such a hypothetical question. Objection overruled; the witness answering that it probably could.

Dr. Daniel I. McColley, another practicing physician, testified on behalf of the plaintiff that a few days before the trial, after getting a history of the case, he had made a thorough examination of the plaintiff and found that he had a chronic inflammation of the right shoulder joint, termed "sine vitas"; that an injury such as described in the testimony could have caused the condition he found, and probably did cause it. The witness was then asked: "In your opinion, will this man's arm ever be in its normal condition again?"

Objected to by defendant's counsel on the ground that there was no allegation in the narr. that the plaintiff was permanently injured. Counsel for plaintiff admitted that there was no such allegation in the narr.

SPRUANCE, J. A majority of the court overrule the objection and allow the question to be put.

SPRUANCE, J. (charging jury). This action was brought by the plaintiff, Lewis Anderson, against the defendant, the mayor and council of Wilmington, a municipal corporation of this state, to recover damages for injuries to the plaintiff and his horse, alleged to have been occasioned by the negligence of the defendant. It appears from the evidence, and is not denied, that on the 24th day of December, 1905, the plaintiff was driving in a buggy or road cart along Third street, near Woodlawn avenue, in this city, when his horse stepped or fell into a hole in said street, throwing him from his vehicle. It is conceded that said Third street, where said accident occurred, was at that time a public street of this city, and used as such, but was not paved or entirely graded.

The plaintiff contends that the defendant, not regarding its duty, negligently permitted the said hole to be and remain in said Third street, without proper safeguards to warn persons traveling along said street, for such time as by the exercise of due and proper diligence it would have known of the existence of said hole and filled the same, or put proper guards about it to notify travelers. The defendant denies that the said injuries were occasioned by the negligence of the defendant, and insists that it had no notice or knowledge of the existence of said hole before said accident, and that its failure to know of the existence of said hole in time to fill or repair the same, or to put proper guards about it, before said accident, was not due to any negligence or carelessness on its part.

The corporation defendant, by its agent, the street and sewer department, had control of all the streets of the city, and was bound to exercise due and reasonable care and dili-

gence to keep the same in such condition as to be safe for persons driving or walking along the same. The care and diligence required of the defendant is reasonable care and diligence, proportioned to the danger or mischief liable to ensue from the omission of such care and diligence. The defendant is not an insurer of the safety of travelers on the public streets under all circumstances. Its liability to persons injured by reason of a defect in the street must be based upon its negligence; that is, upon its failure to exercise reasonable care, skill, and diligence in the performance of its duty to keep the street in a safe condition.

It is not claimed by the plaintiff that the said hole was made by the defendant or any of its agents. In order to render the defendant liable, it must appear from the evidence to your satisfaction that the defendant had notice or knowledge of the hole for such time as would have been reasonably sufficient to fill or repair the same, or warn the public of the danger. This notice or knowledge need not have been actual or express notice or knowledge. It is sufficient if there was implied or constructive notice or knowledge. If the hole was dangerous to public travel, and had so existed for a time before the accident reasonably sufficient for the defendant to have known of its existence and condition, the law presumes or implies that the defendant had notice or knowledge of it, and its failure in a reasonable time after such notice or knowledge to fill or repair the same, or to place about it proper safeguards to warn persons traveling along said street, would be negligence.

The defendant is not bound for injuries occasioned by holes in the streets resulting from sudden storms or washouts, until it has had a reasonable time to fill or repair the same or place proper guards about the same; but if after notice, actual or constructive, it neglects in a reasonable time to make the needed repairs or place guards to warn the public, it is guilty of negligence. The defendant denies that the injuries complained of were caused by its negligence, and insists that they were caused by the negligence of the plaintiff in carelessly driving into the hole, which he could have seen and avoided by the exercise of reasonable care. If the traveler, exercising due care, does not see or know that the street is in a dangerous condition, he has the right to assume that it is in a reasonably safe condition.

Even if the defendant was negligent in not filling or guarding the hole, the plaintiff was required to exercise reasonable care and diligence to avoid falling into it, and if he failed to do so he was guilty of negligence, and cannot recover. Where the injury complained of was the result of the negligence of both parties, the plaintiff is held to be guilty of contributory negligence, and cannot recover, as the law will not in such case undertake to

measure and balance the degree of responsibility attributable to each of the parties.

Negligence, whether of the plaintiff or defendant, is not presumed, and the burden of proving it is upon the party by whom it is alleged.

If you should be satisfied from the evidence that the plaintiff at the time of the accident was intoxicated, this is a proper subject for your consideration in determining whether, at the time of the accident, he exercised such reasonable care as a sober, prudent, and reasonably careful person would have exercised under similar circumstances.

Where the testimony, as in this case, is conflicting, the jury should reconcile it, if they can; but, if they cannot do so, they should give credence to that part of it which in their opinion is entitled to belief. The verdict should be for that party in whose favor is the preponderance or greater weight of the evidence.

If your verdict should be for the plaintiff, it should be for such a sum of money as will reasonably compensate him for the injuries to his horse and to himself, including therein a reasonable compensation for the plaintiff's pain and suffering, his loss of time, and his expenses incurred in endeavoring to be cured of his injuries.

(103 Me. 478)

#### ROGERS v. BROWN et al.

(Supreme Judicial Court of Maine. Feb. 25. 1908.)

#### SALES—ACTION FOR PRICE—ASSUMPSIT—ASSIGNEE OF CHOSE IN ACTION.

In the case at bar Frances H. Rogers, assignee, brought an action of assumpsit in the name of John Rogers, assignor, against the defendant to recover payment for the items specified in the following agreed statement, to wit: "The plaintiff in his account annexed, among other articles, claims to recover for certain coupon books sold and delivered by the plaintiff to the defendant, to be paid for in money. Each coupon book appears upon the books aforesaid and in the account annexed to the writ. The said coupon books were made up of coupons, each coupon representing from one cent up to five cents, according to the price of the coupon book. The coupons were redeemed by the store by the sale and delivery of goods until all the coupons in each book were redeemed. The name of the purchaser of each book and the seller's name were written in each book." The defendant contended that the plaintiff could not recover in this form of action, that the sale and delivery of the coupon books disclosed a special agreement, and that consequently special assumpsit was the only appropriate remedy. The defendant also denied the right of the said Frances H. Rogers to maintain her action in the name of the assignor. *Held*, that the action of assumpsit was properly brought, and, also, that the action was maintainable in the name of the assignor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 927; vol. 4, Assignments, §§ 207, 208.]

(Official.)

Action by John Rogers against Wallace C. Brown and trustee. Submitted on agreed statement of facts. Judgment for plaintiff.

Assumpsit on account annexed to recover for certain coupon books alleged to have been sold and delivered by the plaintiff to the defendant, "to be paid for in money." Plea, the general issue and statute of limitations. The action originated in the Dover municipal court, Piscataquis county, and probably reached the Supreme Judicial Court on appeal, although the record is silent on that point. The action came on for trial, and an agreed statement of facts was filed, and the case was then sent to the law court for determination.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, PEABODY, SPEAR, and CORNISH, JJ.

Hudson & Hudson, for plaintiff. J. S. Williams, for defendant.

SPEAR, J. This is an action of assumpsit brought by Frances H. Rogers, assignee, in the name of John Rogers, assignor, against Wallace C. Brown, to recover payment for the items contained in the following account:

Wallace C. Brown to John Rogers, Dr.		
1898. February 10,	Coupon book,	\$ 2 50
" 22,	"	10 00
March 12,	"	10 00
" 30,	"	15 00
May 28,	"	15 00

The case comes here on an agreed statement, and presents two questions, which will be considered in their order.

The agreed facts pertaining to the first point are: "The plaintiff in his account annexed, among other articles, claims to recover for certain coupon books sold and delivered by the plaintiff to the defendant, to be paid for in money. Each coupon book appears upon the books aforesaid and in the account annexed to the writ. The said coupon books were made up of coupons, each coupon representing from one cent up to five cents, according to the price of the coupon book. The coupons were redeemed by the store by the sale and delivery of goods until all the coupons in each book were redeemed. The name of the purchaser of each book and the seller's name were written in each book."

The first question of law presented is: "Can the plaintiff recover in this action, upon the above statement, for said coupon books?" The contention of the defendant is that the plaintiff upon the agreed statement cannot recover under this form of action; that the coupon books should have been declared upon specially; that the sale and delivery of the coupon books disclosed a special agreement; and that consequently special assumpsit was the only appropriate remedy.

But we are unable to discover any evidence in the agreed statement of a special contract attending the sale of the books which brings the transaction within the rule of special assumpsit. The agreed statement admits that the plaintiff seeks "to recover for certain coupon books sold and delivered by the plaintiff to the defendant, to be paid for in mon-

ey." The accomplished fact of a sale and delivery is admitted by the quotation.

So far as the legal aspect of the sale is concerned, we think it is precisely the same as it would have been if the charge had been made for a spelling book instead of a coupon book.

Whatever agreement the plaintiff entered into with respect to the redemption of the books was a separate contract, and might, perhaps, upon the failure of the plaintiff to carry out his agreement, have been set up in defense for total or partial want of consideration, or by way of recoupment, to the right of the plaintiff to recover, but not to his form of action. The case shows a sale and delivery upon which the plaintiff is entitled to recover in an action of assumpsit. *Cape Elizabeth v. Lombard*, 70 Me. 396.

The agreed statement seems to present a case analogous to the sale and delivery of a chattel with a warranty. The rule of law is elementary that the plaintiff, in such a case, could bring assumpsit to recover for the article sold, without reference to his contract of warranty, while the defendant could plead such contract as a defense to the merits of the action but not to the form of it.

But it has been held that a recovery may be had under a declaration in assumpsit for the price of goods sold and delivered under an express agreement, when the plaintiff has fully executed the agreement on his part and nothing remains for the defendant but the payment of the price in money. *Holden Steam Mill Co. v. Westervelt et al.*, 67 Me. 446.

While, so far as the form of action is concerned, we believe it to be immaterial, yet it is admitted that the plaintiff has fully redeemed the coupon book, and had therefore fully performed on his part every stipulation arising out of the contract of sale. Conceding a special agreement *arguendo*, and it would then seem to be fully covered by *Holden Steam Mill Co. v. Westervelt*, *supra*.

It also appears from the agreed statement that John Rogers, in whose name this action is brought, before the date of the writ, assigned in writing all of his right, title, and interest in the above account annexed to Frances H. Rogers, his wife. The second question therefore submitted by the agreed statement is: "Do the papers from John Rogers to his wife, Frances H. Rogers, as introduced in the case by the defendant, bar the plaintiff from recovery?" The defendant admits the validity of the assignment, but denies that the plaintiff can maintain her action in the name of the assignor.

This question was fully settled in *McDonald v. Laughlin*, 74 Me. 490. It was there held that the right of an assignee of a chose in action to bring suit in his own name was a remedy in addition to, but not exclusive of, that already established by the common law. The opinion says: "Acts 1874, c. 235, authorizes, but does not require, assignees of

chooses in action assigned in writing to bring actions upon them in their own names. There is nothing in it to limit or exclude remedies previously existing."

This interpretation of the statute has never been questioned, nor do we think it reasonably could be. In accordance with the stipulation in the agreed statement, the entry must be:

Judgment for the plaintiff.

(103 Me. 474)

# INHABITANTS OF YORK v. STEWART et al.

(Supreme Judicial Court of Maine. Feb. 25, 1908.)

## 1. OFFICERS—ACTIONS ON OFFICIAL BONDS— DECLARATION—SUFFICIENCY.

In an action upon the official bond of a town treasurer, it is sufficient to declare in the writ only upon the penal part of the bond and allege a breach by the nonpayment thereof.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 37, Officers, §§ 245-249.]

## 2. SAME.

In debt on bond, it is not necessary for the plaintiff, in his declaration, to count upon any other than the penal part of the instrument, leaving the condition to be pleaded by the defendant if it affords him any defense.

## 3. SAME.

The penal part of a bond alone constitutes, *prima facie*, a right of action; the breach being the nonpayment of the money. *Waterman v. Dockray*, 56 Me. 52, approved.

(Official.)

Exceptions from Supreme Judicial Court, York County.

Action by the inhabitants of York against John C. Stewart and others. Judgment for defendants, sustaining a demurrer to the declaration, and plaintiffs except. Exceptions sustained, and demurrer overruled.

Action of debt on the official bond given by the principal defendant John C. Stewart, as treasurer of the town of York, York county, for the year beginning March 12, 1906. The defendants prayed oyer of the bond, and the same was produced in court and read. The defendants then filed a special demurrer to the declaration, which was sustained by the presiding justice, and thereupon the plaintiffs excepted.

The declaration in the plaintiffs' writ was as follows: "In a plea of debt, for that the said John C. Stewart, J. Perley Putnam, Charles F. Blaisdell, Ernest F. Hobson, Edward E. Young, Edward S. Marshall, Samuel A. Preble, Charles H. Young, and Joseph W. Simpson, on the 31st day of March, in the year of our Lord one thousand nine hundred and six, at York, aforesaid, by their writing obligatory of that date, sealed with their seals, and here in court to be produced, bound and acknowledged themselves to be indebted to the plaintiffs in the sum of \$15,000, to be paid to the plaintiffs on demand, and said plaintiffs aver that said defendant Blaisdell executed said writing obligatory by and under the name of Charles F. Blaisdell; that

said defendant Hobson executed said writing obligatory by and under the name of E. F. Hobson; that said defendant Young executed said writing obligatory by and under the name of E. E. Young; that said defendant Marshall executed said writing obligatory by and under the name of Edw. S. Marshall; that said defendant Simpson executed said writing obligatory by and under the name of Jos. W. Simpson—yet, though requested, the said defendants have never paid the same to the said plaintiffs, but wholly refuse and neglect so to do, to the damage of the said plaintiffs (as they say) in the sum of \$30,000, which shall then and there be made to appear, with other due damages.”

At the return term of the writ the defendants filed pleadings as follows:

“Now come the defendants in the above-entitled cause, and having claimed oyer of a certain writing obligatory, mentioned in plaintiffs’ declaration annexed to the writ, in the above-entitled cause now pending before said court, the same is read to them in this language:

“Know all men by these presents that John C. Stewart, J. Perley Putnam, Charles F. Blaisdell, Ernest F. Hobson, Edward E. Young, Edward S. Marshall, Samuel A. Preble, Charles H. Young, and Joseph W. Simpson, all of York, in the county of York and state of Maine, are holden and stand firmly bound and obliged unto inhabitants of York in the county of York and state of Maine in the sum of \$15,000, to be paid to said inhabitants, their successors, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

“Sealed with our seals. Dated the 31st day of March, in the year of our Lord one thousand nine hundred and six.

“The condition of the above obligation is such that, whereas John C. Stewart has been elected treasurer of the town of York for the year beginning March 12, 1906:

“Now, therefore, if the above-bounded John C. Stewart shall well and truly perform all the duties of said office, then this obligation shall be void; otherwise it shall remain in full force.

“Witness our hands and seals on the day and year above written.

“John C. Stewart.	[L. S.]
“J. Perley Putnam.	[L. S.]
“Chas. F. Blaisdell.	[L. S.]
“E. F. Hobson.	[L. S.]
“E. E. Young.	[L. S.]
“Edw. S. Marshall.	[L. S.]
“Samuel A. Preble.	[L. S.]
“Charles H. Young.	[L. S.]
“Jos. W. Simpson.	[L. S.]

“In presence of

“Ellen M. Welch.”

“And now comes the defendants, and demur to the plaintiffs’ declaration, and each

and every count thereof, and for causes of special demurrer show:

“First. That the defendants say that the declaration annexed to plaintiffs’ said writ is insufficient in law, in that it is not claimed or declared that there has ever been any breach by any or all of the defendants of the writing obligatory declared upon.

“Wherefore the said defendants pray for their costs.”

The plaintiffs joined issue as follows: “And the plaintiffs say that said declaration is sufficient in law, wherefore they pray judgment.”

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and KING, JJ.

James O. Bradbury and Geo. F. & Leroy Haley, for plaintiffs. Cleaves, Waterhouse & Emery, for defendants.

SPEAR, J. In this case the plaintiffs brought an action upon the official bond of the defendant, as treasurer of the town of York, and sureties, declaring in their writ only upon the penal part of the bond, and alleging a breach by the nonpayment thereof. The defendants prayed oyer of the bond, and it was produced in court and read. They then filed a special demurrer to the declaration “that the defendants say that the declaration annexed to plaintiffs’ said writ is insufficient in law, in that it is not claimed or declared that there has ever been any breach by any or all of the defendants of the writing obligatory declared upon.” The demurrer was sustained, and exceptions taken to the ruling. The exceptions must be sustained. This form of pleading is now too well established to admit of discussion. It follows the directions prescribed in Oliver’s Precedents, Chitty’s Pleading, Stephen on Pleading, and Gould’s Pleading. It is also the well-established method under our own decisions.

In *Waterman v. Dockray*, 56 Me. 52, involving an action upon a probate bond, the court say: “The real controversy seems to be, on which party is the duty of setting out the condition? \* \* \* Usually there is no difficulty in such actions on bonds. The plaintiff declares on the penal part of the bond, and makes profert of the whole instrument.”

In *Colton et al. v. Stanwood et al.*, 68 Me. 482, the precise question now before us was raised, the defendants contending that the “plaintiffs should allege breaches of the condition of the bond.” With respect to this contention the court say: “All authorities concur in holding that, in debt on bond, it is not necessary for the plaintiff, in his declaration, to count upon any other than the penal part of the instrument, leaving the condition to be pleaded by the defendant if it affords him any defense, for the penal part of the instrument alone constitutes, *prima facie*, a right of action; the breach being the

nonpayment of the money." *Waterman v. Dockray* is approved by citation.

Exceptions sustained.

Demurrer overruled.

(708 Md. 541)

ALEXANDER v. FIDELITY & DEPOSIT CO.

FIDELITY & DEPOSIT CO. v. ALEXANDER.

(Court of Appeals of Maryland. June 25, 1908.)

**1. EXECUTORS AND ADMINISTRATORS—SALE OF ASSETS—AUTHORITY OF EXECUTOR.**

Under Code Pub. Gen. Laws 1904, art. 93, §§ 282, 284, providing that no executor shall sell any property of his decedent without an order of the orphans' court, and that any sale without obtaining an order shall be void, and no title shall pass to the purchaser, etc., an executor, directed by the will of testator to keep the estate invested during the lifetime of the beneficiary and pay her the income therefrom, has no authority without leave of court to sell reinvested proceeds of portions of the estate, and a sale without order of the court of a mortgage purchased by him is void, and the purchaser having notice of the facts acquires no claim on the proceeds of a sale of the mortgaged premises superior to that of the persons interested in the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 634, 635.]

**2. SAME—"PROPERTY."**

A mortgage is "property," within Code Pub. Gen. Laws 1904, art. 93, § 282, prohibiting an executor from selling any "property" of his decedent without first obtaining an order of the court, since the laws recognize the right of property in mortgages and regulate the acquisition and transfer of the same, and since article 66, § 21, provides that on the death of a mortgagee his interest in the mortgaged lands and his right to the mortgage debt shall devolve on his executor; the word "property" ordinarily embracing every species of valuable right and interest including real and personal property, easements, franchises, and hereditaments.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

**3. SAME—ASSIGNMENTS—BONA FIDE PURCHASER—NOTICE.**

The assignment of a mortgage, which shows on the face thereof that it is made by the assignor as executor, notifies the assignee that the assignor does not hold the mortgage in his own right, but in the capacity of executor, and furnishes information of the particular estate to which it belongs, and the assignee is not a bona fide purchaser, without notice of any infirmity in the title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 644.]

**4. EXECUTORS AND ADMINISTRATORS—DISPOSITION OF ASSETS—POWER OF EXECUTOR.**

An executor is presumed to hold the assets in his hands not for sale, but for distribution, it being the policy of the law to require a distribution in kind of the estates of deceased persons unless a sale is necessary for a satisfactory division or payment of debts, and it being for the court to determine whether such necessity exists.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 634, 635.]

**5. SUBROGATION—PAYMENT OF OBLIGATION BY SURETY—RIGHTS OF SURETY.**

Under the equitable doctrine of subrogation, the surety who has paid the debt of his principal becomes thereby entitled to all the rights and remedies of the creditor against the principal debtor, and all liens and securities to which the creditor could have resorted to the payment of his debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Subrogation, §§ 17, 97.]

**6. SAME.**

An executor holding a mortgage as assets of the estate assigned it without order of court to an assignee who had notice of the facts. The assignee paid the price to the executor who devastated the estate. A trustee authorized to sue for the funds, misappropriated by the executor settled with a surety of the executor pursuant to an order of the court directing the trustee representing all parties claiming under the will to transfer to the surety all claims to the mortgage. The surety performed its part of the settlement, and paid a part of the loss to the estate. *Held*, that the surety was entitled to receive the proceeds of the mortgage as against the assignee, irrespective of the question whether the executor held the mortgage as executor or as trustee, and though the surety settled its liability by the payment of a sum less than the face value of the loss.

Appeal from Circuit Court, Cecil County in Equity; Wm. H. Adkins and Philemon B. Hopper, Judges.

Proceedings for the distribution of proceeds of sale of mortgaged property sold under the decree of a court of equity. From an order sustaining exceptions to two alternative auditor's accounts, John E. Alexander and the Fidelity & Deposit Company of Maryland bring cross-appeals. Affirmed in part, and reversed in part, and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

William S. Evans, for John E. Alexander. Washington Bowie, Jr., for the Fidelity & Deposit Company of Maryland and George R. Ash, administrator of John S. Wirt.

SCHMUCKER, J. The cross-appeals in this case are from an order sustaining exceptions to two alternative auditor's accounts, distributing the proceeds of sale of mortgaged property sold under the decree of a court of equity and giving directions for the statement of a new account. The contesting claimants to the fund are John E. Alexander, who claims under an alleged assignment of the mortgage, and the Fidelity & Deposit Company of Maryland, which claims under an alleged right of subrogation which will be more fully stated later on in this opinion.

The facts giving rise to the controversy may be stated as follows: Benjamin Pearce of Cecil county died in 1895 leaving a will, by which he gave the income and profits of his entire estate to his wife for her life and the estate itself to his children after her death. The will directed the executor to keep the estate safely invested during the widow's life and pay her the income produced by it. John S. Wirt was named in the will as executor,

and he duly qualified as such with the Fidelity & Deposit Company as surety on his bond which was in the form prescribed by section 48 of article 93 of the Code of Public General Laws of 1904. By what was called upon its face "the first and final account" of Wirt as executor of Benjamin Pearce, passed in the orphans' court of Cecil county on May 13, 1896, there appeared to be in the hands of the executor a net cash balance of \$13,515.72. By an order of that court, passed on the same day, this balance was distributed to the executor, and he was directed to invest it in good securities and pay the income arising therefrom to the testator's widow during her life. On January 14, 1896, the orphans' court, upon the petition of Wirt as executor, authorized him to invest \$3,000 of the moneys of the Pearce estate in his hands by the purchase from Elizabeth B. Groome of a mortgage for that sum upon his (Wirt's) own residence. In pursuance of this order the mortgage for \$3,000 was purchased, and the assignment thereof taken "to John S. Wirt, executor of Benjamin Pearce." On August 11, 1903, Wirt, without authority from any court or from the parties beneficially interested in the mortgage for \$3,000, sold it at its face value for cash to John E. Alexander and assigned it to him, executing the assignment as "executor of Benjamin C. Pearce." Wirt died in May, 1904, insolvent having completely devastated the estate of Benjamin C. Pearce. After the death of Wirt, letters of administration d. b. n. c. t. a. on the estate of Benjamin C. Pearce were issued to James C. Morrow, who brought suit against the Fidelity & Deposit Company, as surety upon the bond which had been given by Wirt as executor, but it was held by the circuit court, and affirmed by us on appeal in 100 Md. 258, 59 Atl. 735, 108 Am. St. Rep. 410, that the administrator d. b. n. being entitled only to the assets on which there had been no administration, could not maintain the suit. Morrow was then appointed, by the circuit court for Cecil county, trustee to execute the trusts of the will of Mr. Pearce, and authorized as such to sue for and recover the funds and property misappropriated or wasted by Wirt as executor, and to that end to put in suit the bond given by him as executor. George R. Ash having, in the meantime, been made administrator of the estate of John S. Wirt filed the bill in the present case against all persons interested in the estate, including the Fidelity & Deposit Company, James C. Morrow, trustee, John E. Alexander, and all others claiming to have liens against the real estate owned by Wirt at the time of his death, and praying among other things for a sale of the said real estate and a distribution of the proceeds among them according to their respective priorities, and for an administration of his estate under the direction of the circuit court in equity. A decree was passed in due course in the case for the sale of the realty, and the sale was made

clear of the liens of all parties to the suit, and the proceeds of sale were brought into court for disposition.

Before the filing of the bill Morrow, as trustee, had brought suit against the Fidelity & Deposit Company as surety on the executor's bond of Wirt to recover \$13,515.72 as the amount of the devastation alleged to have been committed by him, and the company had admitted its liability on the bond, and Morrow, as trustee, under the direction of the circuit court, subsequently settled with the company by accepting, in satisfaction of the sum of \$13,425.72 ascertained to be due on the bond, the sum of \$10,000 in cash, with a conditional guaranty for the payment of the further sum of \$2,000. It was agreed as part of the terms of this settlement that the claims of the plaintiff to certain securities including the \$3,000 Groome mortgage should be assigned to the company. The Fidelity & Deposit Company having complied with the terms of the settlement on its part filed a petition in the equity suit setting out the litigation on the bond and its settlement and praying that, in the distribution of the proceeds of sale of Wirt's real estate, it might by way of subrogation be allowed the amount of the \$3,000 mortgage and interest which was a first lien on Wirt's residence. In that attitude of the case it was referred to the auditor to state an account distributing the proceeds of sale. He returned alternative accounts stated in accordance with the respective theories of the counsel for Alexander and those for the Fidelity Company. The net proceeds of sale amounted to \$4,328.54, out of which Auditor's Account A allowed to the Fidelity & Deposit Company the principal and interest of the Groome mortgage debt amounting to \$3,371, and to George R. Ash, administrator of Benjamin C. Pearce's estate, the remaining \$957.54. Account B allowed to Alexander as owner of the Groome mortgage the \$3,371 and the remaining \$957.54 to Ash as administrator. Each party excepted to the account allowing the fund to the other, and upon the hearing of the exceptions the court held that the Fidelity Company was entitled to be subrogated to the claim of Mr. Pearce's estate to the \$3,000 Groome mortgage to the extent that it had satisfied that claim, but, as the company had settled the case against it on Wirt's bond for less than the face amount of its indebtedness, a corresponding deduction, ascertained to amount to \$358, should be made from the \$3,371 due under the mortgage in favor of Alexander, and the balance of \$3,013 only be awarded to the company. The court, having reached that conclusion, passed an order setting aside both accounts, and remanding the case to the auditor to state a new one in accordance with its conclusions. From that order both Alexander and the company appealed.

The first and most important question presented by the record is whether Alexander took a good title to the Groome mortgage for

\$3,000 when he purchased it from Wirt as executor of Mr. Pearce's estate. It is conceded that Alexander acted in good faith in making the supposed purchase and paid the face value of the mortgage to Wirt for it. The real question is one of the power of Wirt as executor without the authority of some court of competent jurisdiction to divest the title to the mortgage which was confessedly one of the assets of the estate in his hands. There is no doubt in our minds that the question must be answered in the negative. Whatever may have been the extent of an executor's power to convey to third persons the assets of the estate in his hands prior to the passage of the act of 1843, c. 304, now section 282 of article 93 of the Code of Public General Laws of 1904, there can be no doubt that that act imposed distinct limitations upon his power. Its provisions are as follows: "No executor or administrator shall sell any property of his decedent without an order of the orphans' court granting his letters first had and obtained, authorizing such sale; and any sale made without an order of court previously had, as aforesaid, shall be void, and no title shall pass thereby to the purchaser."

Section 284 of the same article provides that section 282 shall not apply to cases where the executor has been authorized by the will of his testator to make sale of any property without application to the orphans' court, but as no such power appears in the will of Mr. Pearce we are not concerned with or affected by section 284. Not only is this prohibition against the sale, by an executor, of any property of his decedent without an order of the orphans' court, except in cases provided for by section 284, expressed, in language too plain to admit of any doubt as to its meaning, in section 282, but it is there followed by an equally clear provision that no title shall pass to the purchaser by any such sale. The clear and comprehensive character of section 282 has been fully recognized by us in the cases of *Brooks v. Bergner*, 83 Md. 352, 35 Atl. 98, and in *Marbury v. Ehlen*, 72 Md. 215, 19 Atl. 648, 20 Am. St. Rep. 467.

The counsel for Mr. Alexander, however, contend that section 282 does not apply to the present case because the mortgage which was sold to him by Wirt was not property of his decedent, but merely property which the executor had purchased with the funds of his decedent's estate by way of investment. They insist that, as the section operates to restrict the powers of executors existing before its passage, it must be interpreted in the light of the familiar principle that statutes in derogation of the common law must be strictly construed. They also contend that a mortgage is not "property" within the meaning of section 282.

We cannot yield our assent to either of these contentions. The sale by an executor, without the authority of the orphans' court of the converted or reinvested proceeds of

portions of the estate of his decedent is a sale of property of his decedent within the meaning of the statute. The mere change in the form of the property while in the hands of the executor should not be held to alter his relation to it or relieve him from responsibility for its safe custody. The statute must receive a construction in harmony with its plain purpose, which was to give to the orphans' court, to which the law has confided supervision of the administration of estates of deceased persons, power to protect the parties interested in them by preventing improper or unnecessary alienations of the assets by executors. The sale without authority of the assets, in their converted form, is as much within the mischief aimed at by the statute as a sale of them in their original form would be. We also hold that a mortgage is property within the meaning of the statute. The term "property" ordinarily embraces every species of valuable right and interest, including real and personal property, easements, franchises, and hereditaments. *Bouvier, Law Dict.* vol. 2, p. 781. The laws of Maryland not only recognize the right of property in mortgages and regulate the acquisition and transfer of them by providing for the public record thereof, but section 21 of article 66 of the Code of Public General Laws of 1904 provides that upon the death of a mortgagee of lands his interest both in the mortgaged lands and his right to the mortgage debt shall devolve on his executor.

The fund in controversy is also claimed for Alexander upon the ground that he was a bona fide holder of the mortgage for value and without notice of any infirmity in the title thereto acquired by him. That contention cannot be successfully maintained. The assignment of the mortgage under which he claimed title was on its face made by Wirt as executor of Benjamin C. Pearce, and thereby notified the purchaser that Wirt did not hold the mortgage in his own right, but in the capacity of executor, and furnished information of the particular estate to which it belonged. We have repeatedly held that ordinarily the appending of the word "trustee" to his signature by a vendor carries with it notice of a trust. *Marbury v. Ehlen*, supra; *Nat. Bank v. Lange*, 51 Md. 144, 145, 34 Am. Rep. 304; *Swift v. Williams*, 68 Md. 249, 11 Atl. 835; *Safe Deposit Co. v. Cahn*, 102 Md. 530, 62 Atl. 819. Without determining that the mere presence of the word "executor" in the signature to a document would under all circumstances amount to notice of a trust, we are clear that under the facts of this case the execution of the assignment of the mortgage by the executor as such imparted such notice to Alexander, the purchaser, as to put him upon inquiry and affect him with knowledge of the facts which he would have discovered if he had examined the land records touching the acquisition of the mortgage by Wirt and the records of



the orphans' court touching Mr. Pearce's will and the administration of his estate.

It is further to be said that the transaction with the executor into which Alexander entered involved an out and out sale to him of an asset of the estate. Under the decisions of this court an executor is presumed to hold the assets in his hands not for sale, but for distribution, for it is the policy of our testamentary system to require a distribution in kind of the estates of deceased persons, unless a sale is necessary for a satisfactory division or the payment of debts, and it is for the court to determine whether the necessity exists. *Williams v. Holmes*, 9 Md. 281; *Kuykendall v. Devecmon*, 78 Md. 543, 28 Atl. 412. In view of this settled policy of our law and the statutory limitation, to which we have referred, upon an executor's power of sale and the notice imparted to Alexander as purchaser of the mortgage, it must be held that he took no legal title to it under the assignment from Wirt, nor acquired by his supposed purchase any equitable claim upon the proceeds of sale superior to that of the parties interested in Mr. Pearce's estate or those entitled to stand in their place.

The Fidelity & Deposit Company contends that having made good the persons entitled to Mr. Pearce's estate the loss suffered by them from the defalcations of the executor, it is entitled to be substituted to their rights and claims against the executor as well as against the assets wrongfully divested by him. The company claims to be so entitled as well upon the general principles of subrogation as applied to sureties who have made good the losses included within their contracts of indemnity, as upon the terms of the settlement made of the suit on the executor's bond in the present case. The operation of the general equitable doctrine of subrogation in favor of a surety, who has paid the debt of his principal, by which he becomes entitled to all the rights and remedies of the creditor against the principal debtor, and all liens and securities to which the creditor could have resorted for the payment of his debt, has received such full consideration and discussion at our hands in the recent case of *American Bonding Co. v. Nat. Mechanics' Bank*, 97 Md. 598, 55 Atl. 396, 99 Am. St. Rep. 466, that we deem it unnecessary to again review that subject in the present case where it is not essential to rely entirely upon that doctrine to sustain the company's claim. The order of the circuit court, authorizing the settlement of the suit against the Fidelity Company on Wirt's testamentary bond, directed the plaintiff Morrow, trustee, who as such represented all parties claiming under Mr. Pearce's will, to transfer to the company all of his claims to the Groome mortgage. The record does not show whether the assignment of the mortgage to the company was actually made, but for the purposes of this case equity will

regard it as having been made. The acquisition thus made by the company, of the rights of the persons entitled to Mr. Pearce's estate under his will, establishes the validity of its claim to the \$3,371 of the fund in court applicable to the payment of the mortgage, and it becomes unnecessary to rely solely in its behalf on the doctrine of equitable estoppel.

It is also contended on behalf of Alexander that the company was not liable on the bond of Wirt because, at the time he transferred the mortgage to Alexander, it was in his hands as trustee, and not as executor, and that therefore the company in paying the loss was a mere volunteer, and no right of contribution arose from the payment. As there was no formal trust created by Mr. Pearce's will and Wirt was not designated a trustee therein, this contention in effect is that the retention of the mortgage by Wirt so long after the time prescribed by law for the administration of the estate was beyond the time and scope of his duty as executor, and he must be regarded in that connection as a trustee by implication of law. Whatever effect that situation might have had upon the operation the doctrine of equitable estoppel in favor of the company, no impairment results therefrom of its right to the proceeds of the mortgage as assignee of the claims thereon of the parties entitled to Mr. Pearce's estate under his will. Alexander took no title to the mortgage, as against the devisees of Mr. Pearce, under the assignment of it from Wirt, whether the latter be regarded as having held it as executor or trustee.

We therefore think the learned judges below were right in holding that the Fidelity Company were entitled to receive the proceeds of the mortgage, but we are unable to agree with them in deducting from those proceeds and awarding to Alexander the sum of \$358 on the theory that the company, having settled its liability as surety by the payment of a sum less than the face value of the loss, should suffer a pro rata deduction from the amount of its recovery. That theory might have found place in determining the extent of a mere equitable subrogation of the company, but it has no bearing upon its rights as assignee of the entire claim of the devisees under Mr. Pearce's will to the proceeds of the mortgage.

The order appealed from will be affirmed in so far as it establishes the right of the Fidelity Company to the \$3,371 of the fund in court applicable to the payment of the mortgage in question, but the portion of the order directing the deduction from that amount of the sum of \$358 and allowing it to Alexander must be reversed.

Order affirmed in part, and reversed in part, and the case remanded for further proceedings in conformity with this opinion, each party to the appeals to pay its own costs.

(108 Md. 501)

**KIRBY v. WYLLIE.**

(Court of Appeals of Maryland. June 25, 1908.)

**1. LANDLORD AND TENANT—COVENANT TO MAKE REPAIRS—IMPLICATION.**

A covenant that the lessor will keep the buildings on the demised premises in repair is never implied in a lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 538.]

**2. SAME—RESTORATION OF BUILDING DESTROYED—CAUSE OF DESTRUCTION—"ELEMENTS"—"ACT OF GOD."**

A provision in a lease that, in case the building on the leased premises is destroyed or rendered untenable by "the elements or act of God," the lessor shall rebuild the same, does not require the lessor to restore the building where it became so dilapidated from age, gradual decay, and frequent alterations made by the lessee and tenants who preceded him that it was condemned, and destroyed by municipal authorities as unsafe, since such destruction of the building did not result from the "elements" or the "act of God."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 118-126; vol. 3, p. 2345.]

**3. APPEAL AND ERROR—RECORD—SCOPE OF REVIEW.**

On the affirmance of a decree denying a tenant specific performance of a provision in the lease requiring the lessor to restore the buildings on their destruction, the appellate court will not remand the cause for the purpose of determining the rights of the tenant as to expenditures made by him in removing the building on the order of the building inspector, where there is nothing contained in the record showing that he had expended money for that purpose.

Appeal from Circuit Court No. 2 of Baltimore City; James P. Gorter, Judge.

Suit by Fred M. Kirby, trading as F. M. Kirby & Co., against Mrs. A. E. O. Wyllie. From a decree for defendant, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

William C. Smith and William S. Bryan, Jr., for appellant. John Philip Hill and Charles E. Hill, for appellee.

**BURKE, J.** The controlling facts in this case are practically undisputed. In March, 1901, Morris K. Wyllie leased to Albert A. Brager the property known as No. 223 West Lexington street for the term of five years, beginning on the 1st day of January, 1905, and ending on the 31st day of December, 1909, at the annual rent of \$4,500, payable in equal monthly installments of \$375, beginning on the 1st day of January, 1905. It was provided that the lessee should have the option of continuing the tenancy for another term of five years; provided he gave a written notice, at least six months before the 31st of September, 1909, of his intention of availing himself of this option. The lease provided that the lessor should keep the roof of the building in good order and condition. This was the only obligation as to repairs assumed by the lessor, and in other

respects the lessee covenanted to keep the premises in good order and condition. On the 8th day of November, 1902, Brager assigned his interest in the lease to Fred M. Kirby, the appellant. Morris K. Wyllie is now dead, and under his will, and appropriate proceedings had in the orphans' court, his reversionary interest in this property became and is now vested in his widow, Mrs. A. E. O. Wyllie, the appellee in this case. In April, 1907, Mr. E. D. Preston, the building inspector of Baltimore city, under the power conferred upon him by the charter and the ordinances of Baltimore city, condemned the building, because, in his judgment, it was in a dangerous condition, and a menace to the safety of persons and property. In consequence of this condemnation the building was torn down. In the lease from Wyllie to Brager there is found this covenant: "If the said premises are destroyed or rendered untenable by fire, flood, the elements or act of God at any time prior to the commencement of this lease or at any time during the continuance of this lease, or any renewal thereof, the said lessor shall within a reasonable time rebuild and restore the same at his own expense, and if such damage or destruction shall take place during the continuance of the term hereby created or in any renewal thereof all rents reserved hereunder shall cease until the said premises are rebuilt or restored ready for occupancy again." In May, 1907, the appellant filed a bill of complaint in the circuit court No. 2 of Baltimore city, based upon the above-quoted covenant. The ground upon which the bill rests is stated to be that, on or about the 15th day of April, 1907, during the continuance of said lease, the premises became and were rendered untenable by the elements and the act of God, of which the said landlord had due and timely notice, and demand had been made upon the said defendant to immediately, and within a reasonable time, rebuild and restore the same at her own expense; but that the defendant had refused and still refuses to abide by and perform the covenants and agreements on her part, as she had covenanted and agreed to do. The specific relief prayed for was that the covenants and agreements in the said lease might be specifically enforced, and that the defendant be decreed to, within a reasonable time at her expense, rebuild the said store No. 223 West Lexington street, so that the same might be restored to a tenable condition. There was also a prayer for general relief. Testimony was taken in open court upon the issues made by the pleadings, and from the decree dismissing the bill the plaintiff has appealed.

The evidence shows that the building was an old one, that it was originally a dwelling house, and that by the removal of partition walls, and other changes and alterations, which weakened the structure, it was converted into a store. From 1892 to 1900 a Mr.

Eisenberg occupied the building as a dry goods store. He made extensive improvements to the property. He put in a new front, extending from the pavement to the roof, and removed the third floor, thus making the front a two-story building. A Mr. Pickering, who followed Eisenberg as a tenant of the property, also made a number of repairs and alterations in the building, and thereafter, in December, 1902, transferred his interests in the premises to the appellant, who occupied the premises as a store. Before Mr. Kirby took possession of the building, two iron girders had been placed above the roof from the east to the west walls of the front building, and iron rods from these girders had been extended down to support the stair framing and second floor. These iron girders had been placed above that portion of the building from which the third floor had been removed. The west wall of the building, extending back for some distance from Lexington street, was a four-inch wall, and the rest of the wall was nine inches in thickness. There was a one-story structure, in a very bad condition, attached to the rear of the building, and used as a receiving department. After the plaintiff had acquired the assignment of the lease from Brager, he made costly improvements to the property. Among other things he cut through the walls between Nos. 223 and 225 West Lexington street, and made three large openings on the first floor, and one opening in the basement. In the report made to Mr. Preston, the building inspector, by J. S. Busick and C. E. Stubbs, two employes of his office, the causes why the building was condemned are stated as follows: "No. 223, on roof of this building, there are two iron beams supporting stair headers below, which have not sufficient bearing. These should be remedied at once. The roof girders are badly sagged, and walls under one are cracked. There is also a break in east wall, which seems to be a straight joint. The joists of the receiving department are 3"x10" Va. 2' centres—18' 6" span, good for only 54 lbs. per square foot." Mr. Preston, when asked to state what he found the general condition of the building to be, replied: "Well, the general dilapidation and depreciation from age, wear, and tear, and affected more or less by frequent alterations which had taken place." It is no doubt true that decay and disintegration resulting from old age had weakened the strength and affected, to some extent, the safety of the building; but it is by no means clear that it should or would have been condemned or caused to have been taken down for that reason alone. It is apparent from the evidence that the unsafe condition of the building was really due to the insufficient thickness of a part of the wall, and more particularly to the removal of the third floor, and to the iron girders placed upon the top of the building, and the cutting, by the plaintiff, of the large openings through the

walls on the first floor. The building was torn down by Mr. Bresnan, and this witness, who was produced by the plaintiff testified that the removal of the third floor weakened the building, that the taking away of this floor weakened the four-inch wall, and that, the heavy weight of the roof being on it, the big girders pressed the wall out. Asked to state what caused the dilapidated condition of the building, he said: "Well, taking out that floor in the first place of course weakened the building. The ceiling, I judge, was about 15 feet high, and taking the joists out weakened the walls to a certain extent, and, cutting those openings out, the four-inch wall was not strong enough to hold the weight of the roof, and these two iron beams, thrown across the roof, 20 feet long, and these long rods down to the second floor, was the cause of buckling this wall in the center. It was only a matter of time for the whole thing to go down." This witness, having taken the building down, had the very best opportunity to learn the true causes of its unsafe condition. His evidence was corroborated, in these particulars, by witnesses Jones and Owens. Mr. Owens testified he thought that the weakening of the four-inch west wall was mainly caused by cutting the large openings and the removal of the third floor.

Upon this state of facts the question to be decided is: Does this proof show that the premises were destroyed by the elements or act of God within the meaning of the covenant? If not, the decree appealed against must be affirmed, because, confessedly, there is no other covenant by which the lessor assumed the obligation to rebuild or restore the demolished premises. In the absence of an agreement to that effect the law imposes no such obligation on the landlord. This is a settled rule upon the subject. In *Gluck v. Mayor and City Council of Baltimore*, 81 Md. 315, 32 Atl. 515, 48 Am. St. Rep. 515, it is said: "The common law has always thrown the burden of repairs upon the tenant, although it imposes no obligation on him to make them unless he covenants to do so. *Taylor, Land. & Ten. § 327*. A covenant is never implied that the lessor will make them. *Moyer v. Mitchell*, 53 Md. 176; *Sheets v. Selden*, 7 Wall. (U. S.) 423, 19 L. Ed. 166; *Gott v. Gandy*, 2 Ellis & Bl. 845; *Pomfret v. Ricraft*, 1 Wms. Saund. 321, 322, note; *Kramer v. Cook*, 7 Gray (Mass.) 550; *Doupe v. Genin*, 45 N. Y. 123, 6 Am. Rep. 47. So unvarying is this doctrine that even a court of equity will not compel the landlord to expend, in making repairs, the money received by him upon fire insurance policies after the destruction of the demised premises, unless he has expressly agreed to so apply the proceeds. Nor will a court of equity, when the premises have been burnt down, and the landlord has collected the insurance, prevent him from suing for the rent, even though he refuses to rebuild, if he be under no covenant to repair."

It appears to be settled by the authorities that damage by the elements and damage by the act of God are synonymous or convertible terms in the law of leases. The expression "act of God," in its broad and comprehensive sense, includes many acts which the law does not recognize as sufficient to exempt from responsibility. To the Christian mind many events and occurrences may be ascribed, either mediately or immediately, to an act of God, which the law would not regard as such. The legal meaning of the term is not, perhaps, susceptible of a definition which will include every case to which it may be applied. There appears, however, to be a unanimous concurrence in the authorities that an occurrence which is directly produced, wholly or partly, by the intervention of human agencies is not an act of God within the meaning of the law. In 1 Amer. & Eng. Ency. of Law, 584-585, will be found a number of definitions of this term, and instances of its application, and in every case the event or occurrence declared to be an act of God was "something superhuman, in contradiction to the act of men." It was said by this court in *Fergusson v. Brent*, 12 Md. 31, 71 Am. Dec. 582, that: "It is difficult exactly to find in all cases, what is an act of God." "By the act of God, is meant a natural necessity, which could not have been occasioned by the intervention of man, but proceeding from physical causes alone, such as the violence of the winds or seas, lightning, or other natural accidents"—per Lord Mansfield, in *Forward v. Pittard*, 1 Term Rep. 27; 2 Greenlf. on Ev. § 219. This definition is about as accurate and specific as, perhaps, any that could be given. It excludes all circumstances produced by human agency, so that, if divers causes concur in the loss, the act of God being one, but not the proximate cause, it does not discharge the carrier. As we have seen from the examination of the evidence that many of the causes which led to the condemnation and removal of the building were due, in a large measure, to changes and alterations made by the plaintiff and others, it cannot be successfully claimed, under the principle stated, that the building was destroyed by the elements or the act of God, within the meaning of the law, and upon this ground alone the decree should be affirmed. But if it be conceded that the destruction of the building was caused by gradual decay from natural causes, we have found no case, or have we been referred to any, where it has been decided that a loss resulting from such a cause was an act of God, within the meaning of the law. According to the adjudged cases, the courts have held that such an expression has reference to some sudden, unusual, or unexpected action of the elements. The case of *Van Wormer v. Crane*, 51 Mich. 363, 16 Mich. 686, 47 Am. Rep. 582, does not support the contention of the appellant, because the question as to whether ordi-

nary decay resulting from old age was an act of God was not presented for decision in that case, although there are some general expressions in the opinion which indicate that the court might have so held had the question been directly in issue. But that question did not lie so squarely in the pathway of the judgment that the case could not be adjudged without deciding it, and therefore it cannot be accepted as a judicial precedent upon the point. The loss in that case was caused by a fire, and the court said that "no fault in connection with it is charged upon the defendant, and it seems to be taken for granted on both sides that the fire was accidental. We may therefore assume that the fire was one which occurred without traceable fault, and that it is to be classed as a calamity for which no one is responsible, except as he may have expressly undertaken to do so." In *Harris v. Corlies, Chapman & Drake*, 40 Minn. 106, 41 N. W. 940, 2 L. R. A. 349, the court laid down the safe and reasonable rule upon the subject: "Every case of damage to or destruction of human structures, not caused by animal force, may in one sense be said to be caused by the elements, as, for example, ordinary, gradual decay, but it would hardly be claimed that such a case would be within the meaning of the provisions of the lease. Or suppose, because of the manner of its construction, it should be proved, when winter arrives, that the basement was untenable because of cold, it would scarcely be urged that this case came within the terms of the lease. We think that the language of the lease refers only to some sudden, unusual, or unexpected action of the elements, occurring during the term, such as flood, tornadoes, or the like, extraordinary disasters, not anticipated by either party, the efficient causes of which originated after the term began, and which either destroyed the building, or left it in a materially and essentially worse condition than it was when leased." This rule has been applied by the courts of New York, California, Connecticut, and Mississippi.

Being of opinion, for the reasons stated, that the appellee, under the facts disclosed by the record, is not bound by the covenant contained in the lease to rebuild the destroyed building, the decree must be affirmed. Counsel for the appellant contended that the bill ought not to have been dismissed, even if the court found that the appellee was not bound to rebuild; but that there should have been a decree in his favor for the expenses incurred by him in removing the condemned building. But whatever the rights of the appellant might be in this respect, they cannot be determined in this case, because there is no evidence in the record that he had expended any money in removing the building. We have no power to remand the cause, except from matter appearing upon the record at the time of the reversal or affirmance of the decree from

which the appeal is taken. *McCann et al., Administrators, v. Sloane & Calwell*, 26 Md. 82.

Decree affirmed, with costs to the appellee above and below.

(108 Md. 377)

**MARYLAND APARTMENT HOUSE CO. OF BALTIMORE CITY v. GLENN.**

(Court of Appeals of Maryland. June 25, 1908.)

**1. APPEAL AND ERROR—SCOPE OF REVIEW—QUESTIONS PRESENTED BELOW—PRAYERS NOT REFERRING TO PLEADINGS.**

Prayers based on the evidence and facts in a case, without reference to the pleadings, will be considered on appeal without regarding the state of the pleadings.

**2. SAME—HARMLESS ERROR—REJECTION OF TESTIMONY—FACTS OTHERWISE SHOWN.**

Rejection of proper testimony is harmless, where the facts involved are otherwise shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194-4199.]

**3. CORPORATIONS—CORPORATE LIABILITY—CONTRACTS BEFORE INCORPORATION—SUBSEQUENT ACCEPTANCE OF BENEFITS.**

Where the promoters of an apartment house project, for parties who subsequently became incorporators of defendant corporation, undertook to procure, for the purposes of the project, a certain loan upon a mortgage of the apartment house and ground, and in performance of their undertaking, plaintiff was engaged to and did procure the loan, and the corporation, when perfected, accepted and received the loan, and applied the proceeds to the construction of the apartment house, plaintiff is entitled to reasonable compensation for his services, not exceeding the sum agreed to be paid therefor by the promoters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1789, 1790.]

Appeal from Baltimore Court of Common Pleas; Henry Stockbridge, Judge.

Action of assumpsit by John Glenn against the Maryland Apartment House Company of Baltimore City. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PAGE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

J. Walter Lord and W. H. De C. Wright, for appellant. Edgar Allan Poe and John R. Poe, for appellee.

BRISCOE, J. This is an action of assumpsit upon the common count for work and labor done, in a suit brought in the court of common pleas of Baltimore city, by the appellee against the appellant company, to recover a commission for obtaining a loan for it of \$70,000 from the Title Trust & Guarantee Company of Baltimore. There is filed with the declaration a bill of particulars, showing the nature of the plaintiff's demand, and it is as follows: "1903 and 1904. To this amount payable by the defendant to the plaintiff for work and labor done by the plaintiff for the defendant, at the instance and request of M. & J. Brandt, its agents and representatives, in securing a loan of \$70,000 for the defendant on its mortgage, \$1,750, with

interest until paid." The defendant pleaded never indebted, and never promised as alleged. The case was tried before the court sitting as a jury, and from a judgment in favor of the plaintiff, the defendant has appealed.

The questions brought here for our consideration are presented upon two bills of exception, one to the refusal of the court to admit certain testimony offered upon the part of the defendant, and the other to the ruling of the court in granting the plaintiff's prayer, as modified, and in rejecting all of the defendant's prayers. The prayers, it will be observed, make no reference to the pleadings, but were granted upon the evidence and facts in the case, so we are confined to the evidence to which they refer, and are precluded from considering the state of the pleadings. The rule is well settled that suitors must recover according to the allegata and probata. *Stockton v. Frey*, 4 Gill, 406, 45 Am. Dec. 138; *Giles v. Fauntleroy*, 13 Md. 126; *Fletcher v. Dixon*, 68 Atl. 875. There was no error, we think, in sustaining the objection to the testimony set out in the first bill of exception. The testimony sought to be introduced appears to have been irrelevant and immaterial to the issue between the parties, but its rejection could not have injured the defendant's case, because the defendant company had the benefit of the fact, in the testimony of the witness Glidden, who testified on cross-examination, that the Brandts have not been paid at all, but that they do hold some stock in the corporation, which they obtained from George H. Thomas as a commission for securing the contract for the construction of the apartment house for the said Thomas. The vital questions in the case arise upon the prayers, and it will be necessary to state, somewhat in detail, the facts disclosed by the record, in order to have a clear understanding of their application. The court granted the plaintiff's prayer, with a certain modification, which will hereafter be set out, but rejected the four prayers offered by the defendant. It will be seen that the defendant's prayers presented the converse of the proposition contained in the plaintiff's prayer as granted, and a consideration of one will practically dispose of the others.

The facts, upon which the instructions were asked, appear to be these: The appellant company was incorporated under the general incorporation laws of the state, on the 19th of March, 1903, and subsequently, on March 31, 1903, its certificate of incorporation was amended by increasing its capital stock to \$200,000. The incorporators were Messrs. Jacob Brandt, John Henry Keene, John Glenn, Jr., Henry S. King, George H. Thomas, Edward H. Glidden, of Baltimore city, and John H. Wight, of Baltimore county. The corporation was to be managed by seven directors, and the incorporators were named as such for the first year. The object for which it was formed is stated to be for

the purpose of buying, selling, mortgaging, and leasing, or otherwise dealing in lands, or other property, and also for the purpose of carrying on, in the city of Baltimore, the industrial business of conducting an apartment house in all its branches. The firm of M. & J. Brandt of Baltimore were among the promoters of the organization; and, according to the evidence, the firm was authorized to negotiate a loan of \$70,000, on the bonds of the appellant company to be incorporated. Mr. Glidden was employed, as the architect, to build the apartment house, on a lot to be purchased from Messrs. Keene and Wight; provided the matter could be financed. On the 13th of February, 1903, Messrs. Brandt, who were promoting the plan, entered into negotiations with the appellee to secure a loan of \$70,000 from the Title Guarantee & Trust Company. This was subsequently effected by the appellee with the trust company, and the loan was secured by a duly executed mortgage, dated the 8th of May, 1903. The contract between the appellant and appellee is evidenced by the following letter: "Baltimore, Maryland, March 6, 1903. John Glenn, Jr., Esq.—Dear Sir: We inclose herewith letter to the Title Guarantee & Trust Company making application for a loan of \$70,000 on the apartment house to be erected on the lot at the northeast corner of St. Paul and Preston streets. Will you be kind enough to hand this to Mr. Miller, and have company take action? We agree to pay you a commission of 2½ per cent. on the amount of the loan secured. This payment to be made as money on \$70,000 loan is paid over to the company. Yours very truly, M. & J. Brandt, Promoters." It is admitted that the money, as secured by the appellee, was accepted by the appellant company, and was used in the construction of the apartment house, that it was paid according to the terms of the mortgage, and was obtained through the services of the appellee, and that no commissions have been paid him or to M. & J. Brandt, on account of the services rendered. There is evidence tending to show that all of the directors, except one or two, knew of the employment of the appellee to negotiate the loan, and that all of them knew it before the first of June, when the first installment upon the mortgage became due. It also appears that, at a meeting of the board of directors, held on the 6th of April, 1903, the matter of the loan was discussed, and the following resolution was passed: "Whereas it is necessary to the fulfillment of the purpose of the company to obtain a loan of not less than \$70,000, and therefore it is to its interest to adopt the agreement made in its behalf by M. & J. Brandt with the Title Guarantee & Trust Company in reference to the loan, now, therefore, be it resolved, that the board of directors be and they are hereby authorized to accept and adopt for the company the agreement entered into on its

behalf by M. & J. Brandt and the Title Guarantee & Trust Company." The agreement here referred to appears from a letter from M. & J. Brandt to the Title Company, dated the 6th of March, 1903, set out in the record. And on March 12, 1903, the appellee received the following letter from M. & J. Brandt, in acknowledgment of his connection with the negotiations with the Title & Trust Company: "March 12, 1903. John Glenn, Jr., Esq.—Dear Mr. Glenn: We are in receipt of your letter of March 12, 1903, inclosing letter of the Title Guarantee & Trust Company accepting our proposition in our letter of March 6, 1903. Yours truly [Signed] M. & J. Brandt, Promoters." These are the prominent and material facts in the case, and are the basis for the rulings of the court upon the prayers.

The plaintiff's prayer, as modified, we think, correctly presented the law of the case. It is as follows: "If the court shall find from the evidence that M. & J. Brandt, acting as promoters for parties who afterwards became the incorporators of the defendant, undertook to procure for it a loan of \$70,000, or thereabouts, upon a mortgage of its apartment house and ground, upon which the same was to be erected, and that said M. & J. Brandt, in the performance of their said undertaking as such promoters, engaged the plaintiff to procure the said loan for the use and benefit of the defendant, and that the plaintiff accepted such employment, and did procure for the defendant the said loan under such employment, and that the defendant accepted and received the same, and applied it to the construction of said apartment house, and if the court shall further find that the defendant has never paid any compensation whatever to the plaintiff, and that said M. & J. Brandt have never paid any compensation to the plaintiff for his services in negotiating and procuring said loan, then the plaintiff is entitled to recover from the defendant such sum as the court shall find to be reasonable compensation for his said services, not exceeding 2½ per cent. upon the amount of said loan of \$70,000, with interest in the discretion of the court."

In the case of Grape Sug. and Vin. Co. v. Small, 40 Md. 395, a somewhat analogous case, this court said: "If the company, after its incorporation was complete, accepted the work done under the contract, it will be estopped, both in law and in equity, from denying its liability, on account of the same. In other words, the appellant will not be permitted to accept the work done and materials furnished by the plaintiff, under a contract made prior to the recording of the certificate, and at the same time deny its liability under it."

In Preston v. Liverpool, etc., Railroad Co., 7 Eng. Law, Equity, 124, the chancellor held that, where projectors of a company enter into contracts on behalf of a body not existing at the time of the contract, but to be

called into existence afterwards, then, if the body for whom the projectors assumed the act does come into existence, it cannot take the benefit of the contract without performing that part of it which the projectors undertook that it should perform; that is, the projectors are treated, for that purpose, as agents of the company so afterwards called into existence.

Mr. Alger, in his work on Promoters and the Promotion of Corporations (pages 210 and 224), in treating of the liability of corporations for these contracts, says: "When, however, the contract is made in the name or in behalf of the projected corporation, or is treated as a proposal to such corporation, then, in the absence of other controlling circumstances, acceptance of benefits under the contract justifies the inference that the corporation has accepted or adopted it. If the corporation has power to pay for the service and expenses necessary to bring it into existence, and has actually taken the benefit of such service and expenditures by entering upon the corporate enterprise, and if, as a fact, the work was not done or the expense incurred gratuitously, or upon the credit of a third party, but with the expectation that the corporation, when formed, would make payment, it would seem that the corporation ought, in equity, to be held for payment to a fair and reasonable amount."

In *Little Rock & Ft. Smith Railway Co. v. Perry*, 37 Ark. 191, the court thus announces the law: "From all the authorities it seems clear that, in order to recover in an action at law, the plaintiff must show, either an express promise of the new company, or that the contract was made with persons then engaged in its formation, and taking preliminary steps thereto, and that the contract was made on behalf of the new company, in the expectation on the part of the plaintiff, and with the assurance on the part of the projectors, that it would become a corporate debt, and that the company afterwards entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it."

And Judge Paxson, in delivering the opinion of the court in *Bells Gap Railroad Co. v. Christy*, 79 Pa. 59, 21 Am. Rep. 39, says that the principle is well established in England, and to some extent recognized in this country, that when the projectors of a company enter into contracts in behalf of a body not existing at the time, but to be called into existence afterwards, then if the body for the projectors, assumed to act, does come into existence, it cannot take the benefit of the contract without performing that part of it which the projectors undertook that it should perform. And if such acts are necessary to the organization and its objects, and are subsequently accepted by the company, and the benefits thereof enjoyed by them, they must take such benefits cum onere, and make compensation therefor.

We think the plaintiff's prayer, in view of

the principles here announced, was free from error, and correctly stated the law applicable to the facts of the case.

The facts of the case are sufficient to furnish evidence from which the court sitting as a jury could find that the negotiation of the loan by the appellee was necessary to the organization of the corporation and its objects; that the money was accepted, and the benefits thereof enjoyed by it. The prayer left to the court sitting as a jury to find the facts set out in the record essential to a recovery; and, as we find no error in the rulings of the court upon the prayers, the judgment will be affirmed.

Entertaining this view of the case, we find it unnecessary to discuss the defendant's prayers, as the whole law of the case was properly, and correctly submitted by the plaintiff's prayer.

Judgment affirmed, with costs.

(108 Md. 532)

STATE, to Use of MAYOR, ETC., OF  
HAVRE DE GRACE, v.  
FAHEY et al.

(Court of Appeals of Maryland. June 25, 1903.)

1. MUNICIPAL CORPORATIONS—OFFICERS—APPOINTMENT—TIME OF APPOINTMENT—STATUTORY PROVISIONS.

The requirement in Acts 1902, p. 181, c. 127, § 150a, fixing the time for the appointment of a treasurer of a city as on or before a designated day in each year, is directory merely, and an appointment at a subsequent date is valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 86, Municipal Corporations, § 306.]

2. OFFICERS—DE FACTO OFFICERS—COLLATERAL ATTACK—TITLE TO OFFICE.

The title of a de facto officer cannot be collaterally attacked in an action to which he is not a party, nor in an action in which he is a party when he has no personal interest, but is prosecuting or defending in his official capacity.

3. SAME—OFFICIAL ACTS.

The acts of a de facto officer are valid so far as they concern the public or third persons having an interest in the things done, and they cannot be collaterally questioned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, §§ 173, 175.]

4. MUNICIPAL CORPORATIONS — LIABILITIES ON OFFICIAL BONDS—DEFENSES.

A defect in the title of one to the office of treasurer of a city, because the condition of his official bond does not conform to the statutes, cannot be inquired into in an action by the state for the use of the city, on the official bond of his predecessor in office, failing to pay over the money in his hands as such officer.

5. SAME—RECOVERY OF INTEREST.

Where the treasurer of a city failed to pay over to his successor in office the money in his hands after the expiration of his term, and after the city had directed him to pay the money to his successor, the city was entitled to interest, as a matter of right, on the amount retained from the date of the demand.

6. INTEREST—RECOVERY—QUESTION FOR JURY.

The rule that the question of interest is for the jury does not apply in cases of bills and notes, or contracts for the payment of interest, or where the money claimed has actually

been used, in which cases interest is recoverable as of right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Interest, § 157.]

Appeal from Circuit Court, Harford County; Geo. L. Van Bibber, Judge.

Action by the state, for the use of the mayor and city council of Havre de Grace, against Michael H. Fahey and another. From a judgment for defendants, plaintiff appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and HENRY, JJ.

Peter Lesley Hopper and Wm. H. Harlan, for appellant. A. Freeborn Brown and Fred R. Williams, for appellees.

BURKE, J. Only two questions of any importance are presented by this appeal, neither of which, we think, presents any special difficulty. It appears from the evidence and the admissions of the pleadings that Michael H. Fahey was, on the 18th day of June, 1906, duly appointed by the mayor of the city of Havre de Grace, treasurer of that city; that the appointment was ratified and confirmed by the city council; that the term of his office was for one year, and until his successor should be appointed and qualified. He executed a bond in the sum of \$25,000, with the National Surety Company as surety, conditioned for the faithful performance of his duties as such treasurer, and entered upon the discharge of the duties of that office. As such treasurer he received and still has in his possession the sum of \$4,222.39 due the city of Havre de Grace, and also certain bonds of the value of \$5,000 belonging to the city, which had been purchased by the city on account of its sinking fund. On July 1, 1907, Charles T. Wilson, the mayor of Havre de Grace, appointed Millard F. Tidings to the office of treasurer of that city as the successor of Michael H. Fahey, and his appointment was confirmed by the city council. Tidings took the oath of office prescribed by the charter, and executed a bond as treasurer, which bond was approved by the mayor on the 15th day of July, 1907. Under this appointment and qualification, he took possession of the office of treasurer, and ever since has been acting as such, and discharging its duties. Mr. Fahey took no action to test the appointment and qualification of Tidings as his successor, and has permitted him to continue undisturbed in the possession of the office, exercising all its rights and discharging all its duties. On August 5, 1907, the mayor and city council of Havre de Grace passed a resolution directing Mr. Fahey to turn over the funds in his hands belonging to the city to the new treasurer, Mr. Tidings; but this order Mr. Fahey refused to obey, and still retains the money and the bonds to which we have alluded, and because of his refusal and failure to turn over this money and property

the city instituted suit against him and his bond on the 6th day of November, 1907, in the circuit court for Harford county, and from a judgment in favor of the defendants entered by that court as the result of the trial, the plaintiff has brought this appeal. Millard F. Tidings, the acting treasurer, is not a party to this case; the suit being brought in the name of the state for the use of the mayor and city council of Havre de Grace. Section 150a of the Act of 1902, p. 181, c. 127, provided for the appointment and qualification of a treasurer of the city of Havre de Grace and defined his duties. It declares that: "The mayor, by and with the advice and consent of the city council, shall annually, on or before the first Monday in June, appoint a competent person, skilled in accounts, a taxpayer and qualified voter of said city, and not less than twenty-five years of age, to be treasurer of the city of Havre de Grace, and who shall hold office for one year from the date of his appointment and until the qualification of his successor; before entering upon the discharge of the duties of his office, the treasurer shall take and subscribe, before some justice of the peace of Harford county, the oath prescribed by section 6 of article 1 of the Constitution of this state, and shall execute a bond to the state of Maryland in the penalty of twenty-five thousand dollars, to be approved by the mayor, with the condition that if the above bound shall well and faithfully execute his office, and shall account to the mayor and city council of Havre de Grace for and pay into the treasury of said city or to his successor in office, the several sums of money, bonds, securities or other property, which he shall receive for the city or be answerable for by law at such times as the law shall direct, then such obligation shall be void; and the mayor is authorized to approve as surety upon said bond a guarantee company, and the premium for said bond, if any, shall be paid out of the city treasury. In case the person appointed treasurer shall fail to execute the bond required by this section within twenty days after the date of his appointment, or in the event of the treasurer's removal from the city, death, resignation, or removal from office, the mayor shall at once proceed to make a new appointment to fill the vacancy thereby occasioned." The declaration, after stating the appointment and confirmation of Fahey as treasurer and the execution of the bond sued on, alleged the appointment, confirmation, and due qualification of Millard F. Tidings as the successor of Fahey as the treasurer of the city. It then assigned the breaches of the condition of the bond in the following words: "And the plaintiff says that the said Michael H. Fahey has not faithfully executed his office, in that he has not accounted to the mayor and city council of Havre de Grace for and paid into the treasury of said city or to his successor in office the several sums of money, bonds,



securities, and other properties which he, during his term of office as treasurer, received from said city, and is answerable for by law; but on the contrary the plaintiff says the said Michael H. Fahey has collected and received and is answerable for various sums of money, amounting in the aggregate to \$8,000.00 which he has neglected and refused, and still neglects and refuses, to turn over to his said successor in office, and likewise has in his hands various securities and other property belonging to the equitable plaintiff, amounting in value in the aggregate to \$10,000.00 which he likewise has refused, and still refuses, to turn over to his successor in office, all of which sums of money, securities, and other property the said Michael H. Fahey still retains in his possession, to the great wrong and damage to the equitable plaintiff." The provision of the charter, which we have quoted, provides that the treasurer shall be appointed annually, "on or before the first Monday in June"; but Tidings was not appointed until the 1st day of July, 1907. This circumstance at one time was considered fatal to the plaintiff's case, and was made the basis of several pleas on the part of the defendant; but the court finally treated this provision of the charter as merely directory, and held that an appointment at a subsequent time might be validly made. In so holding we think the court was clearly right. The Act of 1868, p. 777, c. 411, provided that the county commissioners of Baltimore county, within 20 days after the passage of the act, should order an election in each primary road district, for 5 supervisors of roads and bridges to hold their office for 5 years. This provision of the act was considered in *State ex rel. Webster v. County Commissioners of Baltimore County*, 29 Md. 516. The court said: "Where the duty prescribed is of a public nature, and intended for the public benefit, and is directed to be performed within a specified time, courts have adopted a general rule in the construction of statutes, that they are, in respect to the time, to be regarded as directory merely, unless, from the nature of the act to be performed, or the language employed in the statute, it plainly appears that the designation of time was intended as a limitation of power of the officer." In the case of *State, Use of the County Commissioners for Baltimore County, v. Horner*, 84 Md. 569, the precise question we are now considering was before the court, and it was held that a statutory requirement as to the time of appointing a collector of taxes is directory only, with respect to the particular day on which the appointment is to be made, and that an appointment on some other day would be legal and binding. To the same effect are the cases of *Cox v. Bryan*, 81 Md. 290, 31 Atl. 447, 852, and *Sterling v. McMaster*, 82 Md. 164, 33 Atl. 461. Tidings being in possession of the office under the circumstances mentioned, and Fahey having in his possession

money belonging to the corporation, why should he not have turned it over upon the demand of the city? The only reason assigned for his refusal to do so is that Tidings had not properly qualified as treasurer, because the condition of the bond given by him did not conform to the requirements of the charter. This is the ground relied upon by the defendants' fifth and sixth pleas. It is true that the conditions of the bond given by Tidings are not in conformity with the requirements of the act; but for reasons of public policy the law will not permit the defendants to attack collaterally his qualification as treasurer. It is admitted that Tidings is the de facto treasurer of the city, and "it is the general rule that the title of a de facto officer, whether a public officer, or an officer of a private corporation, cannot be collaterally attacked in an action to which he is not a party, nor in an action in which he is a party, when he has no personal interest, but is merely prosecuting or defending the same in his official capacity. Nor can such an officer's title be questioned in any other collateral way." 8 Am. & Eng. Ency. of Law, 823. The acts of such an officer are valid and binding so far as concern the public, or third persons who have an interest in the things done, and they cannot be collaterally questioned. This is the accepted rule in England, in the United States courts, and in all the state courts, with one or two exceptions, and has been applied by this court in *Koontz v. The Burgess and Commissioners of Hancock*, 64 Md. 134, 20 Atl. 1089, where a bill had been filed for injunction to restrain the collection of taxes, upon the ground that the assessment of the taxes was invalid, because the officials who made it had not qualified as required by law. In disposing of this objection, Judge Robinson speaking for the court, said: "Now, admitting for the purposes of this case that it was necessary for them to take the oath prescribed by the Constitution, to constitute them officers de jure, it is conceded they entered upon and had continued to discharge the duties of their office; and no principle is better settled than that the acts of officers de facto in regard to public matters affecting the public interests are to be regarded as valid and binding; as much so as if the same act had been performed in the same manner by an officer de jure." We are therefore of opinion that the question as to the due qualification of Tidings as Fahey's successor as treasurer was not properly an issuable fact in the case, and no defect as to his title to the office could be inquired into in this action. It follows that there was error in granting the defendants' second prayer, which told the jury that if they found that the bond offered in evidence purporting to be the bond of Millard F. Tidings as treasurer of the city of Havre de Grace was executed and delivered in pursuance of the appointment of said Tidings to that office on the 1st day of July, 1907,

that then said bond was not such a bond as was by law required to be given by said treasurer, and that it did not entitle him to enter upon the office of treasurer, and by reason thereof it became the duty of the mayor and city council of Havre de Grace to reappoint to said office within 20 days from the 1st day of July, 1907, and the defendant remained the treasurer of said city de jure until such reappointment was made and the appointee had duly qualified, and that if they further found no such reappointment had been made, then the jury must find the verdict in favor of the defendants. This prayer practically took the case from the jury.

2. The only other question which need be noticed is that relating to the plaintiff's right to recover interest on the money retained by Mr. Fahey. The court remitted the allowance of interest to the discretion of the jury. The question of interest is ordinarily left to the jury, but in many cases it is a question for the court. The general rule upon the subject is thus stated in *Newson's Adm'r v. Douglas*, 7 Har. & J. 328, 16 Am. Dec. 317: "The question of interest, arising on the third exception, is one of frequent occurrence in the books, and has been found to be a subject not susceptible of the application of any fixed and general rule of law, the dealings between man and man being so various in their nature that scarcely two cases are to be met with presenting the same aspect, but each depending upon its own peculiar circumstances. There are indeed cases, not to speak of bonds, etc., in which interest is recoverable as of right. Such as on a contract in writing to pay money on a certain day; as in the case of a bill of exchange on a promissory note, or on a contract for the payment of interest, or where the money claimed has actually been used. But with such exceptions, it has long been the settled practice of the courts of this state to refer the question of interest entirely to the jury, who may allow it or not in the shape of damages, according to the equity and justice appearing between the parties or a consideration of all the circumstances of the particular case as disclosed at the trial." It was the duty of the defendant Fahey to account to the mayor and city council of Havre de Grace for and pay into the treasury of the city, or to his successor in office the several sums of money or property for which he was answerable by law at such times as the law should direct. He was directed on August 5, 1907, by a resolution of the mayor and city council to pay the money to Tidings, the acting treasurer of the city. The money became due and payable from the date of that order, and we cannot see upon what principle the equitable plaintiff can be deprived of interest upon it from that date. We think the city is entitled as a matter of right to interest upon the amount retained by Mr. Fahey from the date of that demand. Upon the facts con-

tained in the record it is the duty of Mr. Fahey to turn over to Millard F. Tidings, the acting treasurer of the city of Havre de Grace, the bonds and money in his possession belonging to the city, with interest on the money from August 5, 1907. For error committed in granting the plaintiff's sixth prayer as modified and the defendants' second prayer, the judgment must be reversed.

Judgment reversed, and new trial awarded, with costs to the appellant.

(108 Md. 391)

EGE et al. v. HERING.

(Court of Appeals of Maryland. June 25, 1908.)

# 1. WILLS—CODICILS—EFFECT.

Where the first codicil to a will, which gave legacies to persons named, was revoked by a second codicil, which contained no provisions for gifts, the will must be construed as if no codicil had been made.

# 2. SAME—DEATH OF BENEFICIARY IN LIFE—TIME OF TESTATOR—EFFECT.

A provision in a will in favor of the beneficiary, in the event of her surviving testator, becomes inoperative on the beneficiary predeceasing testator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1997.]

# 3. SAME—EXECUTORY GIFTS—VALIDITY.

An executory gift, made to take effect on a prior devisee neglecting or refusing to accept the devise or perform some prescribed act, will take effect, notwithstanding the object of the prior gift never happens to come into existence; such a contingency being implied and virtually contained in the event described.

# 4. SAME.

Testatrix gave property to the "Bishop of the Protestant Episcopal Diocese of Maryland and his successors," on condition that the gift should be accepted within a specified time, and that a charitable institution should be established and maintained, and provided that if he declined to accept, the property should go to the "Presbytery of Baltimore," on similar conditions, and declared that if neither of the beneficiaries named should accept, the executor should sell the property, and pay the proceeds to persons named. The correct names of the beneficiaries were "The Convention of Protestant Episcopal Diocese of Maryland" and "The Trustees of the Presbytery of Baltimore," and they declined the gifts. *Held*, that the gifts to the beneficiaries named were merely preceding executory or contingent limitations of the property, and not conditions precedent, so that their failure to take effect for any reason did not render inoperative the provisions directing the executor to sell the property and pay over the proceeds.

# 5. SAME—CONSTRUCTION OF WILLS—INTENTION OF TESTATOR.

The court in construing a will must ascertain the intention of the testator; and, having discovered the intention, it must declare and enforce the will, if consistent with the rules of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 955.]

# 6. SAME—CONDITIONS PRECEDENT OR SUBSEQUENT.

The question whether words in a will create a condition precedent or subsequent is generally one of intention, especially when the condition is annexed to a devise or bequest; and the courts are averse to construing conditions to be precedent when they may defeat the vesting of

estates under a will, especially as to residuary bequests.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1551.]

#### 7. PERPETUITIES—GIFTS TO CHARITIES.

A testamentary gift to an incorporated missionary society capable of taking gifts, "to be applied for the purposes of its organization," is not void for remoteness because of the rule against perpetuities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, § 60.]

#### 8. CHARITIES—PURPOSES OF GIFT.

A testamentary gift to the "Church Home and Infirmary of Baltimore City, \* \* \* to endow a bed according to the custom and purpose of that institution," is valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Charities, § 34.]

#### 9. WILLS—PARTIAL TESTACY.

Testatrix gave specific property and the residue of her estate to a beneficiary named, on condition that he should accept it within a specified time, and establish and maintain a charitable institution, and provided that if he declined to accept, the property should go to another named beneficiary on similar conditions, and declared that if neither of the beneficiaries should accept, the gift, including the gift of the residue, should be void, and the executor should convert the property into money, and pay a part of the proceeds to a person named, and then declared that "all the residue" of the estate, "not hereinbefore devised and bequeathed or made void," should be equally divided between missionary societies named. The beneficiaries named did not accept the gift. *Held*, that there was no partial intestacy, the quoted phrases including all the estate not previously disposed of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 965.]

Appeal from Circuit Court, Carroll County, in Equity; Wm. Henry Forsythe, Jr., Judge.

Suit by Joshua W. Hering, executor of Sallie Longwell, deceased, against Andrew G. Ege and others, for the construction of the will of the deceased. From a decree construing the will, defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and HENRY, JJ.

F. Neal Parke and James A. C. Bond, for appellants. Thomas A. Murray, for appellee Hering. Randolph Barton, for appellee Domestic & Foreign Missionary Society.

SCHMUCKER, J. The single issue presented for our consideration by this appeal is the proper construction of certain portions of the last will of Miss Sallie Longwell, late of Carroll county. There is no dispute as to the facts of the case, all of which are set out in an agreement of counsel appearing in the record. Dr. Joshua W. Hering, the executor named in the will, having duly qualified as such, proceeded with the administration of the estate, in the orphans' court, to the extent of paying the debts of the deceased and the legacies given by the first 11 clauses of her will and passing his first administration account. He then filed, in the circuit court for Carroll county, the bill in the present case, for the purpose of procuring a construction of the twelfth to nineteenth clauses, inclusive, of

the will, and completing the administration of the estate under the jurisdiction of that tribunal. All parties claiming any interest under those clauses, and also the heirs at law and next of kin of the testatrix, were made defendants to the bill, and answered it and submitted their rights to the court for determination.

As the clauses of the will to be construed are somewhat voluminous, we will state only their purport and effect, with such quotations from their language as we deem pertinent, leaving it to the reporter to insert their full text in his report of the case. The twelfth clause of the will gives to "the Bishop of the Protestant Episcopal Diocese of Maryland and his successors in office a body corporate of the state of Maryland" a large brick mansion, with its curtilage of 15 acres, lying in the city of Westminster, and also a pecuniary legacy of \$10,000, on condition that the devisee shall, within one year from due notice to it, accept the devise and bequest, and proceed to establish on the devised land, and permanently maintain, an institution designed for benevolent, charitable, or educational purposes only, to be permanently conducted and maintained under the auspices of said Protestant Episcopal Diocese of Maryland. The thirteenth clause provides that if the above devise of the mansion house and the legacy be accepted, and effective steps be taken to carry out its purposes, the residue of the estate should go to the same devisee for the same purposes. The fourteenth clause provides that if said corporation of the Protestant Episcopal Church of Maryland shall "decline to accept" the devise and bequest within the time limited, then the mansion house and legacy shall go to "the Presbytery of Baltimore" upon the same conditions, except that, in that event, the institution provided for is to be conducted under the auspices of the presbytery. The fifteenth clause is similar in terms to the thirteenth, except that it gives the residue of the estate to the presbytery of Baltimore on the compliance by it with the conditions of the fourteenth clause. The sixteenth clause declares that if "neither of said corporations [Protestant Episcopal or Presbyterian] shall accept said devise and bequest" so given to them, respectively, within the time limited, that the devise and bequest, including the gift of the residue of the estate, shall be void and of no effect, and directs the executor, in that event, to convert into money the subject of the devise and bequest, including the residue of the estate, and to pay, out of the proceeds, three legacies, which are enumerated in the next two clauses as follows: In the seventeenth clause the first of the three legacies is given to the Church Home and Infirmary of Baltimore City, being one of \$5,000, to endow a bed according to the custom and purpose of that institution; and in the eighteenth clause the entire residue of the estate, "not hereinbefore

devised, bequeathed or made void," is equally divided between the Domestic & Foreign Missionary Society of the Protestant Episcopal Church in the United States of America and the Board of Foreign Missions of the Presbyterian Church in the United States of America, the portion taken by each corporation to be applied to the purposes of its organization. The nineteenth clause provides that if the Episcopal Diocese or the Presbytery of Maryland shall accept the gift of the mansion house and grounds, and at any time thereafter fail to effectively maintain thereon the institution provided for in the gift, or divert the property to other uses, or abandon it, the entire gift to such devisee shall become void, and the property which formed the subject of the gift shall go, in equal shares, to the two corporations mentioned in the eighteenth clause. As there was no acceptance, by either the Diocese or the Presbytery, of the devise and legacy given to them alternately, in the manner above mentioned, the limitation over, made by the nineteenth clause, never became operative, and that clause of the will requires no further consideration at our hands.

It appears from the record that there is no such corporation as the Bishop of the Protestant Episcopal Diocese of Maryland, but there is one known as "The Convention of the Protestant Episcopal Diocese of Maryland," which formally declined, in writing, to accept the devises and bequests of the will, upon receipt of notice thereof from the executor, as did also the bishop of the said diocese, who is ex officio president of the convention. It further appears that there is no such corporation as the Presbytery of Baltimore, but there is one known as "The Trustees of the Presbytery of Baltimore," which formally declined the devises and bequests of the will, upon receipt of notice thereof from the executor. The Church Home and Infirmary of Baltimore City and the Domestic & Foreign Missionary Society of the Protestant Episcopal Church in the United States of America and the Board of Foreign Missions of the Presbyterian Church in the United States of America are duly incorporated, and capable of taking the legacies given to them, respectively, under the will, if those legacies are valid. Two codicils were made by the testatrix. By the first codicil a few small legacies were given to persons therein named, but by the second one all of those legacies were revoked, and no others given, so that the one codicil annulled the other, and the will comes before us for construction as if no codicil at all had been made.

The case having come to a hearing below in due course, the court passed the decree appealed from, in which it determined that, by the true interpretation of the will, the devise and bequest thereby made, respectively to the Church Home and Infirmary of Baltimore City, to the Domestic & Foreign Mis-

sionary Society of the Protestant Episcopal Church in the United States of America, and to the Board of Foreign Missions of the Presbyterian Church in the United States of America are valid, and have now become effective through the declination of the prior legatees, and that the said corporations are capable in law of taking and receiving them. The decree also directed that the further administration and the distribution of the estate be made accordingly, by the executor, under the direction and supervision of the circuit court. We think the learned judge below arrived at the correct conclusion as to the true meaning and operation of the will in question. The contents of the will plainly disclose the purpose of the testatrix, who was an aged spinster, with no relatives nearer than cousins, to devote her entire estate to the promotion of education, charity, and religion. By the clauses of her will preceding the twelfth she had already given eight separate pecuniary legacies, amounting to \$31,000 in the aggregate, to religious or educational institutions. By the twelfth and later clauses, of which we have stated the substance, she made detailed and careful provisions for the application of the residue of her estate to similar purposes. The only provision made by the will for relatives was one contained in the second clause for the benefit of her mother, in the event of her surviving the testatrix. As the mother predeceased the testatrix that provision never became operative.

It is equally clear to our minds that, by the clauses of her will now in controversy, the testatrix, for the purpose of carrying out the general intent of her will, provided a series of independent alternative or substitutional devises and bequests, so that her purposes might not fail of execution by the neglect or refusal of one, or even two, of the associations which she had selected to receive and utilize her bounty. In 2 Jarman on Wills (page 1645) it is said that it cannot be doubted that "an executory gift, made to take effect on the prior devisee's neglect or refusal to accept the devise or perform some other prescribed act, would take effect, notwithstanding the object of the prior gift never happens to come into existence; such a contingency being implied and virtually contained in the event described." And this court, speaking through the late Chief Judge Alvey, in *Pennington v. Pennington*, 70 Md. 436, 437, 17 Atl. 329, 331, 3 L. R. A. 816, said: "The principle is that, as the preceding executory or contingent limitations have failed to arise or take effect (and whether it be by the death of the devisee, in the lifetime of the testator, or the nonexistence of such devisee, the consequence is the same), the remainder over will nevertheless take effect, the first estate being considered only as a preceding limitation, and not as a preceding condition to give effect to the subsequent

limitation. \* \* \* For, as was declared by Lord Hardwicke, in *Avelyn v. Ward*, 1 Ves. Sr. 420: "If the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place." For a similar statement of the law on this subject, and reference to the cases supporting it, see 24 A. & E. Encyl. of Law, 453.

Applying the principle, thus clearly stated, to the case before us, and treating the two gifts made by the twelfth, thirteenth, fourteenth, and fifteenth clauses of the will as preceding limitations, as the testatrix doubtless intended them to be, to the three subsequent gifts over, made by the sixteenth, seventeenth, and eighteenth clauses, and not as preceding conditions to give effect to those subsequent gifts, we have the precise situation to which the principle is intended to apply. The two earlier alternative gifts having failed to take effect (whether by the neglect or refusal of both devisees to accept the gifts offered them, or by the nonexistence of one devisee and the failure of the other to accept, is immaterial), the subsequent gifts over to the Church Home and Infirmary and the two missionary societies take effect. Both the general intent of Miss Longwell to devote her entire estate to charitable, religious, and educational purposes and her particular intent to provide, by substitutional gifts over, against a failure of any portion of her plans through the inaction or nonexistence of the devisees of her first choice are so plainly manifested by her will as to render especially appropriate to this case what we have said in *Re Stickney's Will*, 85 Md. 102, 36 Atl. 654, 655, 35 L. R. A. 693, 60 Am. St. Rep. 308: "While in the books there may be found much learning, and many nice distinctions, in the law relating to conditions precedent and subsequent, yet in the construction of wills we should constantly keep in mind the great object in cases like this; which is, to ascertain the testator's intention, and having discovered that, to declare and enforce it if consistent with the rules of law. The question as to whether certain words create a condition precedent or subsequent is generally one of intention, and this is especially so when the condition is annexed to a devise or bequest."

\* \* \* Courts are averse to construing conditions to be precedent when they might defeat the vesting of estates under a will (*Pennington v. Pennington*, supra), and especially is this so in regard to residuary bequests (*Dulany v. Middleton*, 72 Md. 75, 19 Atl. 146)."

The contentions made on the learned and elaborate brief of the appellants, however sound they may be as legal propositions, should not, in our opinion, be permitted to control the present case. We have already adverted to, as unsound, the contention that the first and second gifts, made by clauses 12 to 15, inclusive, of the will, should be considered as conditions precedent, to give ef-

fect to the limitation over to the Church Home and the two missionary societies, and have stated that, in our opinion, those earlier gifts should be regarded as preceding executory or contingent limitations of the property, given by them within the meaning of the authorities cited by us, and that their failure, for any reason, to take effect did not render inoperative or void the subsequent limitation over of the same property.

Nor can we yield our consent to the appellants' next contention that the gifts over to the Church Home and the missionary societies are void as being too remote, because of the rule against perpetuities. It is stated in the agreement of facts appearing in the record that all three of those legatees are duly incorporated, and capable of taking the gifts made to them, respectively, under the will, if they have been validly given and are sustainable at law. The legacies to the two missionary societies, which are foreign corporations, having been distinctly given to be used and applied by each corporation for its corporate purposes, belong to a class which have frequently been sustained by this court. *Church Extension Socy. v. Smith*, 56 Md. 389; *In re Stickney's Will*, 85 Md. 79, 36 Atl. 654, 35 L. R. A. 693, 60 Am. St. Rep. 308; *Woman's For. Miss. Socy. v. Mitchell*, 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711.

We also think that the gift to the Church Home and Infirmary "to endow a bed according to the custom and purpose of said institution" was a valid one. The mere fact that it was, by the terms of the will, to be applied to a particular, clear, and well-defined object, plainly within the sphere and function of the institution, has been several times held by us not to avoid a gift which would have been good if it had been made to the same institution for its general corporate purposes. *Eutaw Baptist Church v. Shively*, 67 Md. 494, 10 Atl. 244, 1 Am. St. Rep. 412; *Halsey v. Convention of P. E. Church*, 75 Md. 275, 23 Atl. 781; *Hanson v. Little Sisters of the Poor*, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293; *Woman's For. Miss. Socy. v. Mitchell*, supra.

The record before us does not, in our opinion, present a state of facts falling within the appellants' third contention that "if the rejection of a part of a will on account of its invalidity destroys the general testamentary purpose the void and valid portions will both fail." There has been no rejection of any part of the will in this case.

The appellants' final proposition is that a partial intestacy results from the inadequacy of the eighteenth clause of the will to pass the entire residue of the testatrix's estate. The description of the subject of the gift there made is "all the residue and remainder of my entire estate, not hereinbefore devised and bequeathed or made void as aforesaid." This language may be regarded as not being exact or felicitous; but, in view of the evident general intention of the testatrix to

devote her whole estate to the worthy objects already adverted to, and the manifest efforts made by her not to die intestate as to any part of her property, the description there adopted by her must be held to have been adequate for the purpose for which it was obviously intended, and to have included all of her estate which had not been disposed of by the previous clauses of her will.

The appellants' brief, creditable as it is to its authors, presents neither any rule of interpretation nor principle of law preventing us from giving full effect to the generous and worthy purposes which controlled the testatrix in disposing of her estate, and we will affirm the decree appealed from.

Decree affirmed, with costs.

(108 Md. 317)

**BARRON et al. v. SMITH.**

(Court of Appeals of Maryland. June 25, 1908.)

**1. STATUTES—REPEAL OR "AMENDMENT."**

Acts 1908, c. 118, § 1, providing that Code Pub. Gen. Laws 1904, art. 93, § 205, is thereby repealed, so far as it applies to the city of Baltimore, is a partial repeal, and not an amendment within the provision of the Constitution that no law shall be amended by reference to its title or section only.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 368-370; vol. 8, pp. 7573-7574.]

**2. SAME—TITLES.**

Const. art. 3, § 29, providing that every law shall embrace but one subject, which shall be described in its title, is not contravened by Acts 1908, c. 118, entitled "An act to repeal Code Pub. Gen. Laws 1904, art. 93, § 205, title 'Testamentary Law'; subtitle 'Inventory and List of Debts,' so far as said section applies to the city of Baltimore, and add a new section to Code Pub. Loc. Laws, art. 4, title 'City of Baltimore,' subtitle 'Register of Wills,' to follow section 354, and to be designated as section 354a"; as the portion of the title which refers to the repeal of the section of the Public General Laws can be taken to aid in throwing light on the subject to be dealt with in the new section to be added to the local code for Baltimore; and the section repealed, in part, providing for the appointment of appraisers of the estates of decedents for the entire state either by the orphans' court or the register of wills, and the new section, in providing that the register of wills shall exclusively exercise the power of appointment for Baltimore, and in prescribing the number of appraisers and their duties and compensation, being germane to the subject as indicated by the title.

**3. EXECUTORS AND ADMINISTRATORS—NUMBER OF APPRAISERS.**

It having been the practice from time immemorial for two persons to appraise the estate of a decedent, Acts 1908, c. 118, § 2, providing that the register of wills of Baltimore shall appoint four "general" appraisers to appraise all estates under administration in that city, will be construed not as intending that all four appraisers shall serve in the appraisement, but that from the four general appraisers so appointed two shall be designated by such register of wills to serve in each case.

Appeal from Circuit Court No. 2 of Baltimore City; James P. Gorter, Judge.

Suit by Joseph Barron and another against Bart. E. Smith, register of wills. From an

adverse decree, complainants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and HENRY, JJ.

William S. Bryan, Jr., for appellants.  
Isaac Lobe Straus, Atty. Gen., for appellee.

HENRY, J. This is an appeal from a suit in equity, brought by the appellants, Joseph Barron and Emil H. Goetzke, in circuit court No. 2 of Baltimore City, against Bart. E. Smith, register of wills of said city, the appellee, praying that the defendant may be enjoined from carrying into effect the provisions of chapter 118 of the Acts of 1908 of the General Assembly of Maryland. The bill of complaint, the demurrer thereto, the agreement of counsel, were all filed on the same date, and the avowed object of the suit is to have this court decide upon the validity of the aforesaid chapter 118 of the Acts of 1908.

The bill of complaint, with the amendment thereto, alleges that the said Joseph Barron and Emil H. Goetzke are each of them a taxpayer of Baltimore City, and that for a long time past they have been appointed and selected by the orphans' court of Baltimore City as the persons to whom shall be issued the warrants for the appraisal of the estates of deceased persons under the provisions of sections Nos. 204 to 213 of article 93 of the Code of 1904, and that a great number of such warrants are now in their hands unexecuted, but which will shortly and in due course be executed unless the said orators are interfered with by the defendant. The bill then recites the passage of chapter 118 of the Acts of 1908, and states that the said defendant threatens to appoint, and will attempt to appoint under the provisions of said chapter 118 of the Acts aforesaid, four appraisers, who will attempt to interfere with the plaintiffs in the appraisement of the estates of deceased persons for which warrants have been issued, as well as in the appraisement of estates of deceased persons for which warrants may hereafter be issued to the said plaintiffs. The bill alleges that the said chapter 118 of the Acts of 1908 is invalid on account of its defective title, and also because the said act is unintelligible and impossible of execution, and also because it is in conflict with the Constitution of the state of Maryland. The bill also sets forth in full rule No. 10 of the orphans' court of Baltimore City, which, it is conceded, was passed by virtue of proper statutory authority, and is the only regulation prescribing the compensation of appraisers in Baltimore City, the first section of which, being the only one pertinent to the question at issue, reads as follows:

"For the time and labor by them, necessarily occupied and expended in and about the inspection, valuation and appraisement of the goods, chattels and personal estate of a de-

cedent and the making of an inventory thereof in conformity with the requirements of the statute law the appraisers shall be entitled to compensation as follows; that is, to say—for every day, or fraction of a day, necessarily occupied in reviewing, examining and valuing the articles to be included in the inventory, exclusive of the time employed in writing out the inventory in form to be delivered by them to the executor or administrator in order to its return to the proper officer, as required by law, they shall be entitled to charge and receive from the executor or administrator so served, three dollars each; and for the preparation of the said inventory in form for delivery and return, as aforesaid, they shall be entitled jointly to charge and receive from the same, ten cents for every one hundred words thereof, including necessary recitals and certificates, to be divided between them in equal shares.”

To the bill of complaint the defendant filed a demurrer, alleging that it is insufficient in law because chapter 118 of the Acts of 1908 is a valid and effective act of the General Assembly of Maryland. An agreement between counsel was filed in the case, waiving any objection to the suit because brought in equity instead of in an appropriate action of law. The demurrer to the bill of complaint having been sustained by the court (Gorter, J.), from the order sustaining the demurrer and dismissing the bill the plaintiffs entered an appeal to this court.

Chapter 118 of the Acts of 1908 reads in full as follows:

“An act to repeal section 205 of article 93 of the Code of Public General Laws (as said section stands in the Code of 1904), title ‘Testamentary Law’; subtitle, ‘Inventory and List of Debts,’ so far as said section applies to the city of Baltimore, and a new section to article 4 of the Code of Public Local Laws, title ‘City of Baltimore’; subtitle ‘Register of Wills,’ to follow section 354 and to be designated as section 354-A.

“Section 1. Be it enacted by the General Assembly of Maryland, that section 205 of article 93 of the Code of Public General Laws title, ‘Testamentary Laws,’ subtitle, ‘Inventory and List of Debts’ be, and the same is hereby repealed so far as the same applies to the city of Baltimore.

“Sec. 2. And it be enacted that a new section be and the same is hereby added to article 4 of the Code of Public Local Laws, title, ‘City of Baltimore,’ subtitle, ‘Register of Wills,’ to be designated as section 354a, to immediately follow section 354 of said article and to read as follows:

“354a. The register of wills of Baltimore City shall immediately after the enactment of this bill into law appoint four general appraisers to appraise the goods, chattels and personal estate of all estates under administration in the orphans’ court of Baltimore City, who shall serve the entire term of the present register of wills unless their

places shall become vacant by removal from cause, death, resignation or otherwise; and thereafter, when any other register shall be elected or appointed, he shall in like manner appoint four appraisers for his full term of office. The said appraisers shall appraise the goods, chattels and personal estates of all decedents under administration in the orphans’ court of Baltimore City, and shall in each case make the charges therefor now allowed by law and certify the same to the register of wills; they shall receive an annual salary of sixteen hundred dollars each, to be paid by said register out of the fees of the office returned by said appraisers. The said register shall keep an accurate account of all the monies received for such appraisal, and shall account for and pay the same except the amount required to pay the salaries of said appraisers into the State Treasury, as he is now required by law to account for and pay other monies for which he is accountable to the state.’

“Sec. 3. And be it enacted that this act shall take effect from the date of its passage.”

The appellants contend that this act is a nullity for the following reasons: (1) That the first section of the act is in effect an amendment of section 205 of article 93 of the Code of Public General Laws, and therefore could not be made by a mere reference to the section only. (2) That the title of the act is defective as being in conflict with section 29 of article 3 of the Constitution of the state, which provides, in part, that “every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title.” (3) That the act is unintelligible and impossible of execution.

Concerning the first of the objections to the validity of the act, we cannot agree with the argument of the appellants’ counsel. The insertion of additional provisions in the body of a section, the expunging of phrases, clauses, or sentences therefrom, the alteration or substitution of words by mere reference to the place in the old law where the change should be introduced, would require an examination of the former act and a comparison with it of the new act, in order to understand the change, entailing confusion and uncertainty, particularly after repeated amendments in such manner, when it would be difficult to determine the state of the law. It was to guard against such methods of amendment as this that the constitutional requirement was adopted, providing that “no law, or section of law, shall be revived or amended by reference to its title or section only; and it shall be the duty of the General Assembly in amending any article or section of the code of laws of this state, to enact the same as the said article or section would read when amended.” Sutherland on Statutory Construction, § 131; Cooley’s Constitutional Limitations, § 181. The first section of chapter 118 of the Acts of 1908 is, in our judgment, a partial repeal of the existing law,



and not an amendment that comes within the meaning of the constitutional provision above referred to. The right to repeal a law by reference to its title or section only is not questioned, and if a total repeal is properly accomplished in this manner, we can see no reason why a repeal of this section, as affecting a certain political and territorial division of the state, cannot be regularly made in the same way. By a long series of decisions, running through half a century, this court has given a liberal construction to the provision of section 29, art. 3, of the Constitution of the state, which says "that every law enacted by the General Assembly shall embrace but one subject and that shall be described in its title," the disposition being always to uphold rather than to defeat an act of the Legislature, and this principle is in harmony with those laid down by standard text-books on the same subject. *Cooley's Con. Lim.* fols. 175 and 216. But we do not think it necessary to invoke this principle of liberal interpretation in order to hold that the title to the act under consideration fully gratifies the constitutional provision.

While the act repeals a section of the Code of Public General Laws, so far as the same may apply to Baltimore City, and then adds a new section to the Code of Public Local Laws for said city, yet it is but one act, with one title, dealing with the same subject as applicable to the same city, and the whole title must be considered together. In doing this, we think that portion of the title which refers to the repeal of the section of the Public General Laws can be taken to aid in throwing light upon the subject to be dealt with in the new section to be added to the local code for Baltimore City, and an examination of the section to be repealed would indicate to the members of the Legislature and to the public that the matter of the appointment of appraisers for Baltimore City was to be dealt with by a provision in the local code for said city. Moreover, the title places the new section under the subtitle "Register of Wills" in the local code, and while it might have been more aptly located at the end of the sections under such subtitle, rather than betwixt two sections dealing with the bond of the register of wills, yet the subject of the new section, as well as of those between which it is placed, concerns the duties, or powers, or obligations of the said officer, the appointment of appraisers being but one of such duties. As section 205 of article 93 of the Code of Public General Laws provided for the appointment of appraisers of the estates of decedents for the entire state, including Baltimore City, either by the orphans' court or the register of wills for the city or counties, as the case may be, a new section in the local code intended to supplant the general law, in providing that the register of wills for said city shall hereafter exclusively

exercise the power of appointment of appraisers, and in prescribing the number, the duties, and compensation of such appraisers is, in our opinion, entirely germane to the subject as indicated by the title to the act. *Baltimore v. Reitz*, 50 Md. 574; *County Commissioners v. Meekins*, 50 Md. 28; *Fout v. Frederick Co.*, 105 Md. 545, 66 Atl. 487. In the case last cited, the court has fully stated certain general principles which must be considered when it is asked to strike down a legislative act, and it is unnecessary to report them here.

While the act increases the number of appraisers for Baltimore City from two to four, it does not follow that it was intended that all four of these appraisers should serve in the appraisement of every estate. The law says that the register of wills shall appoint four general appraisers, and we think that emphasis may be laid upon this word "general" in order to distinguish from the special appraisers who may be selected to serve for any particular estate. When we consider that from time immemorial it has been the practice in Maryland for two persons to appraise the estates of deceased persons, we do not think the Legislature would have changed this method, without, in specific terms, so declaring, but think in order to accommodate so large and populous territory as Baltimore City, and to facilitate the transaction of business therein, it was intended by the act that four general appraisers should be appointed, and that from this number two should be designated by the register of wills to serve in particular cases.

By holding this to be the proper construction of the act, all difficulty disappears as to the amount to be charged by the appraisers for the services rendered by them. The act introduces a new scheme for the compensation of these officials by substituting an annual salary in lieu of paying a stated per diem to each of them. Under this act, the salary is fixed at \$1,000 a year, and no more, and in order to create a fund out of which these salaries are to be paid a charge is to be made against every estate, being the amount now allowed by law, which under the rule of the orphans' court above quoted, is \$6 per day, or portion of a day, together with the charge fixed in the rule for making out the inventory in proper form. This amount is to be certified to the register of wills for collection by him from the administrator or executor of every decedent whose estate is appraised under authority of the act in question.

The other provisions of the act are clear, and we deem it, as an entirety, intelligible and capable of execution.

For the reasons above mentioned, the decree appealed from must be affirmed.

Decree affirmed with costs.



(108 Md. 340)

**ANDERSON v. STEWART.**

(Court of Appeals of Maryland. June 25, 1908.)

**1. APPEAL AND ERROR—RIGHT OF REVIEW—PERSONS ENTITLED.**

Where a replevin bond was given by the equitable plaintiffs on behalf of the legal plaintiff, such fact was sufficient to create a presumption that the entry of the suit to their use was to protect them, and that the legal plaintiff still retained an interest which justified an appeal by him.

**2. SAME—NOTICE OF APPEAL—CLERICAL ERROR.**

Where, prior to the trial of a replevin suit, it was entered to the use of a certain firm who executed the replevin bond, the fact that the attorneys signed the notice of appeal as attorneys for plaintiff instead of attorneys for plaintiffs will be regarded as a mere clerical error.

**3. PRINCIPAL AND AGENT — UNDISCLOSED PRINCIPAL—RIGHT TO SUE.**

Where plaintiff purchased certain goods in controversy for his own account, but directed that sale papers be made in the name of A. & Co., explaining that he used the firm name for convenience in shipping and handling the goods, he was an agent for an undisclosed principal, within the rule authorizing either such an agent or the principal to sue subject to the limitation that if the principal sues, the defendant is entitled to be placed in the same position at the time of the disclosure of the principal as if the agent had been the real contracting party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 692.]

**4. SAME — PROOF OF AGENCY.—PAROL EVIDENCE.**

In an action by the agent of an undisclosed principal, the agency may be proved by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 37.]

**5. REPLEVIN—PARTIES—VARIANCE.**

Where plaintiff sued in replevin to recover certain goods, evidence of the sale contract, showing the sale to have been made to a firm to which plaintiff belonged, was not a variance under the rule that plaintiff in replevin need only show a right to possession of the property at the issuance of the writ, and not an absolute title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 63.]

**6. SAME.**

Where, in replevin, plaintiff's averment of ownership is supported by proof of an interest from which ownership of some kind can be inferred, there is no variance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 278.]

**7. PARTNERSHIP — ACTIONS — PARTIES — REPLEVIN BY PARTNER.**

The possession of one partner being the possession of all, one cannot maintain replevin against another, but a single partner may maintain replevin for firm property from a third person, his recovery being in right of the firm.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 362.]

**8. APPEAL AND ERROR — OBJECTIONS NOT RAISED AT TRIAL.**

An objection that copies of certain orders were not signed by the brokers so as to bind both parties not made at the trial, cannot be made on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1079-1120.]

**9. EVIDENCE—WRITTEN INSTRUMENTS—SIGNING.**

Where a contract of sale was shown to have been executed in triplicate, each original being signed by the brokers, one being given to

each party and one retained by the brokers, a fac simile of all three, except that the signatures were omitted, was not objectionable when offered in evidence because not signed by the brokers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 667.]

**10. PARTIES—DEFECT OF PARTIES—WAIVER—PLEA IN ABATEMENT—PLEADING OVER.**

A variance between the declaration in replevin by A. individually and the contract under which plaintiff claimed, which ran to A. & Co., was waived by defendant's failure to plead in abatement and by his pleading to the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 167, 170.]

**11. SAME—SUBSTITUTION—NEW PARTIES.**

Where the amendment of a declaration in replevin would have substituted surviving partners for the individual plaintiff, it was properly refused, as introducing entirely new parties.

**12. APPEAL AND ERROR—REVIEW—DISCRETION—AMENDMENT OF PLEADINGS.**

No appeal lies from the refusal of the trial judge in an action at law to permit the amendment of a pleading.

**13. TRIAL—DIRECTION OF VERDICT.**

Material evidence for plaintiff having been erroneously excluded, a request to charge that plaintiff had "offered" no evidence legally sufficient to entitle him to recover, etc., in the form requested was erroneously granted.

**14. REPLEVIN—PROPERTY—DESCRIPTION.**

Where property replevied was sufficiently described in the writ, bond, and declaration so that it could be made definite by extrinsic proof, and the sheriff's return was "Replevied and delivered to plaintiff," the description was not objectionable for indefiniteness.

**15. SAME—WRIT—MOTION TO QUASH—DECLARATION—DEMURRER.**

Where a replevin writ is defective for failure to sufficiently describe the property, the proper remedy is a motion to quash, and if the same defect is in the declaration, the objection should be raised by demurrer.

Appeal from Circuit Court, Harford County; Frank I. Duncan, Judge.

Replevin by James W. Anderson, to the use of Christian Smith and others, trading as Smith, Rouse & Webster, against John H. Stewart. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

F. R. Williams, for appellant. Harry S. Carver and John S. Young, for appellee.

PEARCE, J. This is an action of replevin instituted by James W. Anderson against John H. Stewart to obtain possession of "fifteen hundred cases of three-pound cans, together with their contents, cases, and labels," which the narr. charges the defendant took and unjustly detained in Harford county. Subsequent to the bringing of the suit, and before plea filed, the suit was duly entered to the use of Christian Smith, Willard G. Rouse, and R. Harry Webster, copartners, trading as Smith, Rouse & Webster. The single plea filed was that the defendant "did not take the goods and chattels mentioned in the schedule." James W. Anderson was a resident of St. Louis, Mo., and the equitable plaintiffs and the defendant were all resi-

dents of Harford county, Md. A replevin bond in the penalty of \$4,000 was given before the writ issued, by Christian Smith, Willard G. Rouse, R. Harry Webster, and John G. Rouse, for and in behalf of the said James W. Anderson, with condition as required by law.

At the trial of the case, R. Harry Webster testified that he was a member of the firm of Smith, Rouse & Webster, canned goods brokers in Harford county, Md., during the year 1904, the other two members being Christian Smith and Willard G. Rouse, and that his firm during 1903 and 1904 were factors for the defendant, John H. Stewart, under written contracts for each year, both of which were similar, and were produced by the witness, and identified, and the execution thereof proven by him, the contract for 1904 being as follows:

"No. 405. Contract for Advances and Commission Sales between John H. Stewart, Packer, and Smith, Rouse & Webster, Factors. Bel Air, Md., March 31, 1904. Advanced to John H. Stewart, Rocks, Md., hereinafter called Packer, by Smith, Rouse & Webster, commission merchants, Bel Air, Md., acting as factors for packer in his or their business of packing fruits and vegetables, the following supplies and materials to be charged at the prices and delivered upon the terms herein mentioned: 750 No. 2 cases at 9 cts. each; 3,000 No. 3 cases at 11 cts. each; 18,000 No. 2 tomato cans at \$1.50 per hundred; 72,000 No. 3 tomato cans at \$1.95 per hundred; sufficient pounds solder at 14½ cts. per lb.; sufficient labels at 90 cents per thousand No. 3's; seed, sufficient tomato at \$1.25. Packer's option of increasing or decreasing the above amount to the quantity needed by him at his factory during the season of 1904. Delivery: F. o. b. Baltimore, Md. Shipment to be made as follows, subject, nevertheless, to any strike, fire, or other unavoidable casualty which may interfere with our obtaining shipment from manufacturers: Last half of May.

"Terms: Packer agrees to give promissory note payable Nov. 25, '04, with interest from May 1, '04, for amount of materials hereunder, and to place with us for sale his or their entire pack of canned goods, and to allow us five per cent. (5 per cent.) commission for selling the same. We to guarantee the payment of all goods sold by us, provided same are approved and accepted by purchasers, and to bill all goods sold, collect the proceeds, and apply same to any indebtedness to us until same is paid in full, and to pay balance to packer promptly as soon as returns are received. And it is hereby understood and agreed that the cans and other materials herein mentioned; or such cans or other materials, supplies, fertilizers, or cash as may be at any time hereafter delivered to packer by us, are advanced by us, as factors, to the packer to enable packer to engage in the packing business, and such advances, as well

as any cash which we may from time to time advance packer for the purpose of his or their business, are made only because of our relation to the packer as factors and on account of our rights growing out of this relationship to a lien upon the materials advanced as well as the manufactured product, and it is therefore understood and agreed that the indebtedness to us for any advances made either hereunder, heretofore or hereafter, shall constitute a lien upon packer's pack of canned goods and the proceeds of the sale thereof, whether collected by us, or in process of collection, and also upon any materials or canned goods that packer may have left over after the packing season, and as an incident to such relationship, it is understood that we are entitled to full title to and possession of the manufactured product at any time we may demand. And as a condition to and as a part of the consideration of the contract between us, it is agreed that in the event of the death of the packer or packer's failure to meet his or their obligations to us as they mature, or packer petitioning or being petitioned against in bankruptcy or insolvency, or in the event of any assignment by packer for the benefit of packer's creditors, or any writ of execution, levy, or attachment being issued against packer, packer directs us to take and ship said goods, either for sale or storage, and when sold to apply the proceeds of the sale of them as hereinbefore mentioned, and packer hereby authorizes any one in possession of said goods to deliver them to us upon our request, it being the intention of this agreement that in any of the aforesaid events we shall have the exclusive right to the possession of all of said goods.

"The above memorandum of advances with the terms and agreement thereunder is accepted and agreed to by each of us.

"John H. Stewart, Packer.

"Smith, Rouse & Webster, Factors."

That during the canning season of 1904 the defendant, John H. Stewart, was largely indebted to the said firm for advances, and said firm sold 1,500 cases of No. 3 canned tomatoes for the defendant to the plaintiff on two separate occasions—500 cases at one time, and 1,000 cases at another; that the contract for said sales was made in triplicate, one copy of which went to the plaintiff, one to the defendant, and the other was kept by said firm as brokers, and the defendant returned to witness' firm his warehouse receipt for said goods to J. M. Anderson & Co.; that the plaintiff was well known personally to the witness' firm, and was himself in Harford county in June, 1904, looking after the purchase of canned tomatoes; that said purchase was made on plaintiff's own account, but when the contract was drawn plaintiff directed to have it made in the name of J. M. Anderson & Co., the plaintiff's firm, which he used for his convenience in shipping and handling said goods; that said contracts were fac similes of each other, all made by

the same impression, and were separated by being torn apart on perforated lines; and that said contracts or sales tickets were duly signed by said Smith, Rouse & Webster, brokers, but that the copies of said contracts or sales tickets hereinafter set forth are fac similes of said contracts or sales tickets except that such signatures are omitted—witness could not say that the defendant was informed with reference to said sale other than by the delivery to him of a copy of the contract, nor can he say that defendant knew that the purchase had been made by the plaintiff for his own account or that the defendant knew that the plaintiff was a member of said firm. The plaintiff's firm beside himself consisted of James M. Anderson and Louie A. Anderson, the former of whom has died since this suit was brought, leaving the plaintiff and said Louie his surviving partners. The plaintiff then offered to read in evidence the copy of the said contracts or sales tickets in the possession of witness' firm, which are as follows:

"Rating. No. 3,146.

"Bel Air, Md., Sept. 2, 1904. Sold to J. M. Anderson & Co., St. Louis, Mo. For account of John H. Stewart. 500 cases No. 3 standard tomatoes, Stewart brand at 70c. per doz. Terms; Cash, less  $1\frac{1}{4}\%$  in ten days from date of invoice which is to be dated Sept. 20. Delivered f. o. b. Rocks, Md., M. & P. R. R. To be shipped during the month of October, 1904. Swells guaranteed for six months from date of invoice. All other claims must be reported in 30 days from date of invoice. —, Brokers.

"Accepted.

"Rating. No. 3,181.

"Bel Air, Md., Sept. 14, 1904. Sold to J. M. Anderson & Co., St. Louis, Mo. For account of John H. Stewart. 1,000 cases No. 3 standard tomatoes, Stewart brand, at 70c. per doz. Terms; Cash, less  $1\frac{1}{2}\%$  in ten days from date of invoice which is to be rendered Oct. 5th. Delivered f. o. b. Rocks, Md., M. & P. R. R. To be shipped when requested before Jan. 1, 1905.

"July 1, 1905. Swells guaranteed for six months from date of invoice; all other claims must be reported in 30 days from date of invoice. Goods to be held free of storage until Jan. 1, 1905. Buyers to pay insurance after Oct. 15, 1904. —, Brokers."

The defendant objected to this offer because of an alleged variance between said contract and the declaration, in respect of parties, and the court sustained the objection, and declined to permit the contract to be given in evidence, and the first exception was taken to this ruling. The plaintiff thereupon asked leave to amend the writ and declaration by introducing Louie A. Anderson as an additional plaintiff, and describing him and the plaintiff, as surviving James M. Anderson, formerly partners, trading as

J. M. Anderson & Co., to which amendment the defendant objected, and the court sustained the objection and refused to allow the amendment, to which ruling the second exception was taken. The plaintiff then stated to the court that, though he had other evidence, it would all be affected by the court's ruling, and it was therefore not offered. The defendant then asked an instruction that the plaintiff had offered no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be in favor of defendant for the return of the property replevied, 1 cent damages and costs, which instruction the court gave, and the plaintiff excepted to that ruling, which constitutes the third exception. Verdict was rendered accordingly, and judgment entered on the verdict, and an appeal was ordered in the following words: "Mr. Forwood, clerk. Please enter an appeal in the above-entitled case to the Court of Appeals of Maryland. F. R. Williams, S. A. Williams, Attorneys for plaintiff."

There was a motion to dismiss the appeal for the reason that it was taken, as alleged by the appellee, by the plaintiff James W. Anderson, who at the time the appeal was taken had no interest in the result of the suit as it had been, some time before the trial, entered to the use of Smith, Rouse & Webster. This contention is based upon the fact that, in signing the order for appeal, the Messrs. Williams signed as attorneys for the plaintiff (singular) instead of for the plaintiffs (plural), and the appellee draws from this the arbitrary conclusion that the purpose was to appeal for Anderson only, and not for the equitable plaintiffs, and in support of this motion we are referred to *Patterson v. Gelston*, 23 Md. 446, and *Trayhern v. Nat. Mech. Bank*, 57 Md. 596. In the former case it was held, as we think correctly, "that every appellant must appear to be aggrieved by the judgment complained of, in order to be heard on his appeal; and, ordinarily, no one can properly be said to be aggrieved by a judgment unless it be rendered upon a matter in which he has some interest or right of property." That was an appeal from a decision of the Commissioner of the Land Office, and it was held that this rule was not applicable to cases arising on application for patents. In the latter case, the appeal was from an order ratifying an auditor's account. Before the order of ratification, the appellant, Mrs. Trayhern, had entered all her interest in the cause to the use of her solicitor, but it appeared that this was done to secure his fee in the matter, and this was held sufficient to show that Mrs. Trayhern had an equitable interest which justified her appeal. Here the bond was given by the equitable plaintiffs in behalf of the legal plaintiff, James W. Anderson, and this is sufficient to create a presumption that the entry to their use was to protect them in that matter,

and that Anderson still retained an interest that justified an appeal by him. This is upon the theory that the appeal was designed to be taken by him only. But we are of opinion that this appeal should be treated as taken for all the parties both legal and equitable. In *Newcomer and Wife v. Kean*, 57 Md. 121, there was a judgment in an action for slander of Newcomer's wife. The declaration concluded to the damage of the plaintiff (singular). The verdict was for the plaintiffs, and the defendant moved in arrest of judgment on the ground that the damages must be claimed for both plaintiffs, they being husband and wife, and the lower court so held, and arrested the judgment. On appeal, this court, while agreeing with the view of the lower court as to the law, held that the word "plaintiff," instead of "plaintiffs," was a "mere clerical mispision in the pleader, the omission of a letter 's.' That the case was tried on its merits before a jury, and every legal intendment ought to be made in support of the verdict." We think that the reason of that decision is applicable to the present case, and that the motion to dismiss should not prevail.

The first and second exceptions here go to the vital points in the case, for if there was error in the first exception there was necessarily error in withdrawing the case from the jury.

The first exception raises two questions: (a) Was there a fatal variance; and (b) if so, was it waived by pleading in bar?

(a) The testimony of Mr. Webster is explicit that the purchase of the 1,500 cases of canned tomatoes was made by James W. Anderson in person and for his individual account, and that when the contract was drawn he directed it to be made in the name of J. M. Anderson & Co., explaining that he used the firm name for convenience in shipping and handling the goods. He was therefore, as to Stewart, an undisclosed principal. It is too well settled to be disputed that where a contract, not under seal, is made with an agent in his own name for an undisclosed principal either the agent or his principal may sue upon it, the only limitation upon this doctrine being that, if the principal sues upon a contract thus made with an agent in the name of the latter, the defendant is entitled to be placed in the same position at the time of the disclosure of the principal as if the agent had been the real contracting party. *Oelrichs & Lurman v. Ford*, 21 Md. 507; *Balt. Coal & Tar Co. v. Fletcher & Murdock*, 61 Md. 295; *Ford v. Williams*, 21 How. (U. S.) 287, 16 L. Ed. 36. In such case the agency may be proved by parol evidence. *Higdon v. Thomas*, 1 H. & G. 139. But if there were no evidence to show that James W. Anderson was the real contracting party, we do not think there would be a fatal variance. In most jurisdictions, and certainly in Maryland, it is not necessary that a plaintiff in replevin

should show absolute title to the property. *Lamotte v. Wisner*, 51 Md. 548. In this state the issue is the right of possession at the time of the issuing of the writ, and not the absolute title to the property for all time. *Cumberland Coal & Iron Co. v. Tilghman*, 13 Md. 83. "Under particular circumstances, in some cases, a single partner may sue in replevin in his own name, especially where he is entitled to possession himself." 18 Enc. Pl. & Pr. 508-9. Where averment of ownership is supported by proof of an interest from which ownership of some kind can be inferred, there is no fatal variance. 22 Enc. Pl. & Pr. 604. *Cook v. Champlain Trans. Co.*, 1 Denio (N. Y.) 99. The possession of one partner is the possession of all; and it is this principle which forbids that one partner or tenant in common should maintain replevin against another. Where a single partner recovers in replevin firm property from a third person, his recovery is in right of the firm, and is the recovery of the firm. His possession before the wrongful taking was the possession of the firm, and his possession, after recovery and delivery of the property, is still the possession of the firm. The title is never put in issue at any time, and is in no manner affected in such case. A case in point is *Bostick v. Brittain*, 25 Ark. 482, successfully argued on appeal by the late Attorney General Garland. The action was replevin by Bostick individually against Brittain for 16 bales of cotton. Bostick was a member of the firm of Bostick & Pennewit. The trial court instructed the jury that plaintiff must prove he was entitled to possession as his individual property; also, that if they believed from the evidence that the cotton was the property of Bostick & Pennewit, and not the individual property of Bostick, they must find for defendant. This was held error, the court saying: "If it be true that the firm had the general property in the cotton, yet Bostick's interest and right of possession, as clearly shown by the evidence of May and Neal, entitled him to maintain replevin under our statute." In *Smith v. Wood*, 31 Md. 293, replevin was brought by the appellee in his own right. The judgment was reversed in this court for error not necessary to advert to in this case, but the court, on pages 298 and 299 of 31 Md., distinguishing between actions in tort and actions in contract, said: "The first prayer of defendant, in the twenty-third exception, presents the question whether the plaintiff can recover in this action property to the possession of which he may be entitled, as surviving partner, without having declared as such. The only authority referred to by the appellant's counsel on this point (1 Chitty's Pleading, 19) is in reference to actions on contract. In actions of that sort it is necessary to declare as surviving partner. The reason of the rule is, as argued by the counsel for the appellee 'a supposed variance be-

tween the contract proved, and the contract laid.' 1 Saunderson's Rep. (8th Ed.) 291, 1. This rule does not apply to the present action. It is not founded upon contract, but is an action of tort. The question here involved is the right of possession. The proof of the right of possession is sufficient to enable the plaintiff to recover under the allegation in his declaration, and the quo modo of that right cannot be held to be a variance. We therefore think the prayer was properly rejected." The case of *Wright v. Gilbert*, 51 Md. 150, cited by the appellee here, was a case in contract, and therefore is not in conflict with *Smith v. Wood*. Upon these authorities we think there was no variance, and there was therefore error in rejecting the sales tickets offered in evidence.

(a) It will be observed that the only objection to them was the alleged variance in respect of parties. Something was said in the appellee's brief about the copies offered not being signed by the brokers so as to bind both parties. This objection not being made below could not be made here. But it is clear from the evidence that the contract of purchase was executed in triplicate, and that each original was signed by the brokers, one being given to each party, and one being retained by the brokers, and that the paper offered in evidence was a fac simile of all three except that the signature was omitted. This objection therefore, if made below, would not have availed.

(b) But even if there were held to be a variance in this case, it would, upon the authority of *Brown v. Ravenscraft*, 88 Md. 216, 44 Atl. 170, be waived by failing to plead in abatement, and pleading over to the merits. In that case we adopted the reasoning and results of the decision in *Wright v. Bennett*, 3 Barb. (N. Y.) 451, where it was said: "The plaintiff, as one of the joint owners of the property, is entitled to the possession as against a stranger, in which position the defendant stands, as he does not connect himself with the title of the other owners, who have been omitted as plaintiffs, and there is great propriety in holding him to his plea in abatement, if he desires to avail himself of that omission, and the bare fact that the plaintiff with others, and not alone, owns the property is no bar, either under the plea of non detinet, or when specially pleaded, though it would be proper matter for plea in abatement."

As to the second exception, we are of opinion that the proposed amendment would have introduced entire new parties, as it would have substituted surviving partners for an individual, and the ruling was therefore correct. But apart from this, the amendment of a pleading in an action at law is a matter within the discretion of the trial judge, from whose action in this respect no appeal will lie. *Hearn v. Quillen*, 94 Md. 39, 50 Atl. 402.

As to the third exception: Having held

that the evidence offered under the first exception should have been admitted, it follows that the defendant's prayer, in the form offered, was erroneously granted. Under the ruling on the first exception, there was no evidence actually in legally sufficient to entitle the plaintiff to recover, and, if so framed, the prayer would have been technically correct, under the previous rulings. But the prayer went further, and asserted that no such evidence had been offered. At the oral argument, the appellee contended that the description of the property in the writ, bond, and declaration was too indefinite. It is not perceived how that question arises here. The writ is not set out in the record, but if that was defective, the proper procedure would seem to have been a motion to quash the writ; if the defect was in the declaration, the objection should have been made by demurrer. The general rule is that a description which can be made definite is good. *Cobbey on Replevin*, § 547. "Although the description is indefinite, if the property can be pointed out it is sufficient. It need not be so definite that the sheriff can find the property without aid." *Id.* § 547; *Warner v. Aughenbaugh*, 15 S. & R. (Pa.) 11; *Lea v. Terry*, 15 La. Ann. 159.

In the present case the sheriff's return, "Replevied and delivered to plaintiff," raises at least a presumption that he was able to locate and identify the property described in the writ, and the burden is upon the defendant to show that the property replevied is not the same which the plaintiff intended should be replevied.

The question of the effect of the proposed amendment, upon the bond, it is not necessary to consider, as we have said the refusal to allow the amendment is not the subject of review. If it were, the case of *Jamison v. Capron*, 95 Pa. 19, would be found interesting and instructive upon that question.

For the reasons stated, the judgment will be reversed, and a new trial will be awarded.

Judgment reversed, with costs to the appellant above and below, and new trial awarded.

(108 Md. 285)

# SEABOARD AIR LINE RY. CO. v. PHILIPS.

(Court of Appeals of Maryland. June 24, 1908.)

## 1. CARRIERS—CARRIAGE OF GOODS—"CONVERSION"—DELIVERY TO WRONG PERSON.

A delivery of goods by a carrier or warehouseman to the wrong person constitutes a conversion for which an action of trover will lie.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 357.

For other definitions, see Words and Phrases, vol. 2, pp. 1562-1569; vol. 8, p. 7618.]

## 2. TROVER AND CONVERSION—DEFENSES—RETURN OF GOODS.

An offer to return or an actual return of converted goods will not afford a good defense

to trover for their conversion, but if the goods have been returned to and received by the owner that fact may be shown in mitigation of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 153, 277.]

### 3. SAME—MEASURE OF DAMAGES.

The measure of damages, as a general rule, for conversion is the value of the converted goods at the time of conversion with interest to the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 260-272.]

### 4. CARRIERS—CARRIAGE OF GOODS—ACTION FOR CONVERSION—PRAYERS.

A prayer, in an action against a carrier for conversion of goods shipped, that if the jury found for plaintiff to allow the value of the goods shipped at the time of conversion with interest in the jury's discretion, was defective in that it ignored evidence tending to show that the carrier, in response to plaintiff's demand for a return of the goods, had them retransported and tendered them to plaintiff in substantially the same condition in which it had received them, and had thereafter held them subject to plaintiff's order, for if the jury believed such evidence, and regarded the time at which the tender was made as a reasonable one, it should have been considered by them in mitigation of damages.

### 5. SAME—CARRIAGE OF GOODS—CONVERSION—DELIVERY WITHOUT SURRENDER OF BILL OF LADING.

A delivery of goods by a carrier, shipped by consignor to himself as consignee, in violation of the express terms of the bill of lading that the goods were not to be delivered without its surrender properly indorsed, was a conversion of the goods.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 310, 311, 318.]

### 6. SAME—QUESTIONS FOR JURY.

Where goods ordered reshipped by a seller to himself did not arrive until nearly three months after the date of the waybill, though the seller had been informed that the goods would arrive in three or four days, it was not proper to leave it to the jury to find that the goods had arrived in due course.

### 7. TRIAL—INSTRUCTIONS—IGNORING EVIDENCE.

An offered prayer, in an action against a carrier for conversion of goods shipped, that if plaintiff, with knowledge that the carrier had made a delivery of the goods to the buyer, directed the carrier to reship the goods, and if the carrier did reship the goods and the same were returned in due course and plaintiff given notice thereof, that it became plaintiff's duty to accept the goods, and the verdict must be for the carrier, was defective, where it ignored evidence tending to prove that direction for reshipment was made after plaintiff had been assured by the carrier that the goods had never been delivered to the buyer, but were safe and intact in the carrier's hands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 613-623.]

### 8. CARRIERS—CONVERSION OF GOODS—PRESUMPTIONS AND BURDEN OF PROOF.

In an action against a carrier for conversion of goods shipped, it was not incumbent on the owner to prove that goods tendered him by the carrier were not those which he had shipped, but it was incumbent on the carrier, if it desired to show a return in mitigation of damages, to prove both the identity and unimpaired condition of the goods.

### 9. SALES—ACTS CONSTITUTING DELIVERY—DELIVERY TO CARRIER.

Where goods were sold on condition that they were not to be delivered to the buyers until payment of an installment on the price

and were shipped to the seller's own order on condition that they were not to be delivered except on surrender of the bill of lading properly indorsed, the buyers were not entitled to delivery of the goods, as such, without surrender of the bill of lading properly indorsed, on their depositing with the carrier a certified check for the amount of the installment on the price and promising either to return the goods, if demanded, or to stand good for any difficulty that might arise from the delivery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 377-380.]

### 10. TRIAL—INSTRUCTIONS—MODIFICATION.

An offered prayer, in an action against a carrier for conversion of goods shipped, that if the carrier delivered the goods to the buyer, and thereafter, and before any of the goods had been used or injured, they were repacked in the original cases and returned to the carrier, and the seller knew that the goods had been so delivered, and thereafter directed the carrier to return the goods to him and the carrier caused the goods to be returned, it was the seller's duty to ascertain by inspection whether the goods so returned were the goods he had directed to be returned, and, if so, to accept the same, and that if an opportunity was given him to inspect the goods and he failed to do so he could not recover, which was defective in that it assumed that the goods were returned within a reasonable time, and in that it was predicated on the hypothesis that a return of the goods would destroy the right of recovery instead of being in mitigation of damages only, was not cured by a modification of the court which merely required a further finding by the jury that at the time the opportunity for inspection was offered and continuously thereafter the goods were held by the carrier subject to the seller's order.

### 11. SAME—MATTERS OF EVIDENCE.

In an action against a carrier for conversion of goods shipped, there was no error in granting an offered prayer modified so as to read that all matters of opinion as to liability of the carrier expressed in correspondence introduced in evidence were to be excluded and disregarded by the jury as such matters of opinion did not constitute evidence of or proof of the issues between the parties.

### 12. CARRIERS—CONVERSION OF GOODS—EVIDENCE—ADMISSIBILITY.

In an action against a carrier for conversion of goods shipped, it was not error to admit in evidence a series of letters and telegrams which passed between defendant carrier and another, who jointly issued the bill of lading, touching the handling and movement of the goods while in the possession of one or the other of the carriers, for while in a certain sense res inter alios it related to the transaction which formed the basis of the action, and tended to throw light on its true character, and might be regarded as constituting part of the res geste.

### 13. EVIDENCE—BEST AND SECONDARY—FOUNDATION FOR SECONDARY EVIDENCE.

A copy of parol testimony to show the contents of a letter is inadmissible where there is no evidence tending to show the loss or destruction of the letter itself or any effort to secure its production.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 605-637.]

Appeal from Superior Court of Baltimore City; Alfred S. Niles, Judge.

Action by Samuel Phillips against the Seaboard Air Line Railway Company for a conversion of goods shipped. Judgment for plaintiff, and defendant appeals. Reversed, and new trial awarded.

Plaintiff offered the following prayer:

"The jury are instructed that if the jury find for the plaintiff, then, in assessing damages, they may allow the plaintiff the value of the goods shipped to Atlanta (as described in the testimony) on the twenty-seventh of October, 1905; with interest in the discretion of the jury, from that date to the date of their verdict." Granted.

And the defendant offered the seven following prayers:

"(1) The defendant prays the court to instruct the jury that the plaintiff has offered no evidence legally sufficient under the pleadings in this case to entitle him to recover, and their verdict must be for the defendant." Refused.

"(2) The defendant prays the court to instruct the jury that if they shall find that the plaintiff with knowledge of the fact that the defendant had made a delivery of the goods mentioned in the declaration to L. Pfeiffer at Atlanta, Georgia, ordered and directed the defendant to ship the said goods to him at Baltimore, Maryland, and shall further find that the defendant did in fact act upon such instructions, and ship or cause to be shipped to the plaintiff at Baltimore, Maryland, the said goods, and shall further find that the said goods did in fact reach Baltimore in due course, and that the plaintiff received due notice thereof, that then and thereupon it became the duty of the plaintiff to accept said goods so shipped to him, and under the pleadings in this case their verdict must be for the defendant, as there is no evidence to show that the goods so shipped were not the identical goods ordered to be shipped by the plaintiff." Refused.

"(3) The defendant prays the court to instruct the jury that if they shall find that the defendant on or about the 27th day of October, 1905, at the city of Atlanta, Georgia, delivered to L. Pfeiffer & Company, to whom the same had been sold, the goods mentioned in the declaration, and that thereafter at the request of the defendant, and before any of said goods had been used or otherwise injured, the said goods were all repacked in the original cases and returned to the defendant, and shall further find that the plaintiff had knowledge that the goods had been so delivered by the defendant, and that thereafter the plaintiff through his attorney directed and ordered the defendant to return said goods to the plaintiff at the city of Baltimore, and shall further find that acting and relying upon the orders so given the defendant did in fact cause the said goods to be returned to the city of Baltimore, and shall further find that the plaintiff received due notice of the arrival of said goods at the city of Baltimore, and in response to such notice visited the wharf of the Baltimore Steam Packet Company, but did not inspect or examine said goods other than the outside of the cases in which they were packed, and thereupon refused to accept or

receive the same; and if they shall further find from the evidence in this case that an opportunity was given to the plaintiff to inspect said cases in order to ascertain whether they were, in fact, his goods or not, and he failed and refused so to do that—then, under the pleadings in this case, their verdict must be for the defendant." Refused.

"(4) The defendant prays the court to instruct the jury that if they shall find that the defendant on or about the 27th day of October, 1905, at the city of Atlanta, Georgia, delivered to L. Pfeiffer & Company, to whom the same had been sold, the goods mentioned in the declaration, and that immediately thereafter at the request of the defendant, and before any of said goods had been used or otherwise injured, the said goods were all repacked in the original cases and returned to the defendant, and shall further find that the plaintiff had knowledge that the goods had been so delivered by the defendant, and that thereafter, with said knowledge, the plaintiff through his attorney directed and ordered the defendant to return said goods to the plaintiff at the city of Baltimore, and shall further find that acting and relying upon the order so given the defendant did in fact cause the said goods to be returned to the city of Baltimore, and shall further find that the plaintiff received due notice of the arrival of said goods at the city of Baltimore, and in response thereto visited the wharf of the Baltimore Steam Packet Company, and saw the cases in which said goods were packed, that it then and thereupon became the duty of said plaintiff to inspect said goods, and if he found to be all the goods sued for in this cause to accept the same, and if they shall further find from the evidence in this case that an opportunity was given to the plaintiff to inspect said cases in order to ascertain whether they were in fact his goods or not, and he failed and refused so to do, that then, under the pleadings in this case, their verdict must be for the defendant." Refused.

"(5) The defendant prays the court to instruct the jury that if they shall find that the defendant on or about the 27th day of October, 1905, at the city of Atlanta, Georgia, delivered to L. Pfeiffer & Company the goods mentioned in the declaration, and that thereafter at the request of the defendant, and before any of said goods had been used or otherwise injured, the said goods were all repacked in the original cases and returned to the defendant, and shall further find that the plaintiff had knowledge that the goods had been so delivered by the defendant, and that thereafter, with said knowledge, the plaintiff through his attorney directed and ordered the defendant to return said goods to the plaintiff at the city of Baltimore, and shall further find that, acting and relying upon the order so given, the defendant did in fact cause the said goods to be returned to the



city of Baltimore, and shall further find that the plaintiff received due notice of the arrival of said goods at the city of Baltimore, and visited the wharf of the Baltimore Steam Packet Company, and saw the cases in which the said goods were packed, that then and thereupon it became the duty of the plaintiff to ascertain by inspection whether the said goods so returned were in fact the goods that he had through his attorney ordered and directed to be returned to him, and, if so, to accept the same, and if they shall further find from the evidence in this case that an opportunity was given to the plaintiff to inspect said cases in order to ascertain whether they were in fact his goods or not, and he failed and refused so to do, that then, under the pleadings in this case, their verdict must be for the defendant."

"(6) The defendant prays the court to instruct the jury that as matter of law under the terms of the bill of lading at the time the delivery to L. Pfeiffer & Son was made that the defendant had ceased to hold the two cases in question as carrier, but held them as an ordinary warehouseman." Refused.

"(7) The defendant prays the court to instruct the jury that all matters of opinion expressed in the correspondence introduced in evidence are to be excluded and disregarded by them, as such matters of opinion do not constitute evidence of or proof of the issue between the parties."

And the court modified the defendant's fifth and seventh prayers, and, as modified, granted them as follows:

"(5) The defendant prays the court to instruct the jury that if they shall find that the defendant on or about the 27th day of October, 1905, at the city of Atlanta, Georgia, delivered to L. Pfeiffer & Company the goods mentioned in the declaration, and that thereafter at the request of the defendant, and before any of said goods had been used or otherwise injured, the said goods were all repacked in the original cases and returned to the defendant, and shall further find that the plaintiff had knowledge that the goods had been so delivered by the defendant, and that thereafter, with said knowledge, the plaintiff through his attorney directed and ordered the defendant to return said goods to the plaintiff at the city of Baltimore, and shall further find that acting and relying upon the order so given the defendant did in fact cause the said goods to be returned to the city of Baltimore, and shall further find that the plaintiff received due notice of the arrival of said goods at the city of Baltimore, and visited the wharf of the Baltimore Steam Packet Company, and saw the cases in which the said goods were packed, that then and thereupon it became the duty of the plaintiff to ascertain by inspection whether the said goods so returned were in fact the goods that he had through his attorney ordered and directed to be returned to him, and, if so, to accept the same,

and if they shall further find from the evidence in this case that an opportunity was given to the plaintiff to inspect said cases in order to ascertain whether they were in fact his goods or not, and he failed and refused so to do, and if they shall further find that at the time the said packages were shown said plaintiff on the wharf at Baltimore and continuously from that time to the time of bringing this suit said goods were held by the defendant subject to the order of the plaintiff, then, under the pleadings in this case, their verdict must be for the defendant." Granted as modified.

"(7) The defendant prays the court to instruct the jury that all matters of opinion as to the liability of the defendant expressed in the correspondence introduced in evidence are to be excluded and disregarded by them, as such matters of opinion do not constitute evidence of or proof of the issue between the parties." Granted as modified.

Argued before BOYD, C. J., and BRISCOE, PEAROE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

C. Baker Clotworthy, for appellant. Arthur L. Jackson, for appellee.

SCHMUCKER, J. On September 27, 1905, the appellee, Samuel Phillips, shipped from Baltimore to Atlanta, Ga., two cases of clothing via the Merchants' & Miners' Transportation Company and the Seaboard Air Line Railway. He took for the goods at the time of their shipment an "order notify" bill of lading to his own order containing directions to notify L. Pfeiffer & Sons, Atlanta, Ga. The bill on its face stated that it was non-negotiable, and it provided that its surrender properly indorsed should be required before the delivery of the goods at their destination. It further provided that the goods, if not removed by the party entitled thereto within 24 hours after arrival at their destination, would be at the owner's risk, and might be retained by the railway company in its cars or depot or stored for account of the owner.

On February 13, 1906, Phillips brought the present action of trover against the Seaboard Air Line Railway for an alleged conversion of the clothing which he had so shipped to Atlanta. The declaration contains but one count, to which the railway company as defendant pleaded the general issue. The verdict and judgment having been against the company it took the present appeal. During the trial of the case below the defendant took three exceptions to rulings on evidence, and one to the disposition made of the prayers.

There is evidence in the record tending to prove the following state of facts: In September, 1905, before the shipment of the goods to Atlanta, Samuel Phillips sold them in Baltimore to L. Pfeiffer & Sons of Atlanta for \$557.62, of which \$25 were paid in cash and \$232.62 were to be paid on the delivery



of the goods, and the balance in 30 and 60 days. Phillips then shipped the goods, in the manner already stated, and drew a sight draft on Pfeiffer & Sons for \$232.62, and sent it with the bill of lading attached to Atlanta for collection. The draft, going by mail, reached Atlanta on September 30th, while the goods, going by freight, did not arrive there until October 6th. On the arrival at Atlanta of the draft, with the bill of lading attached, the bank to which it had been sent notified Pfeiffer & Sons by postal card to take it up, but they, being short of money at that time, waited until after the arrival of the goods before going to bank to take up the draft. Some days after they had received notice from the railway company of the arrival of the goods Pfeiffer & Sons went to the bank to take up the draft, but it, not having been honored, had been recalled, with the bill of lading attached, by Phillips to Baltimore. In that state of affairs the railway company delivered the clothing to Pfeiffer & Sons on October 27th without the production of the bill of lading, upon their depositing with it a certified check for \$232.62, and promising either to return the goods if demanded or to stand good for any difficulty that might arise from the delivery. Pfeiffer & Sons having gotten possession of the goods took them to their store and unpacked them, but on the following day, before, as they say, they had sold any of them or mixed them with their other stock, the railway company sent for the goods, and took them again into its possession. Phillips, in the meantime, having gotten back into his possession on October 20th the draft with the bill of lading attached, had gone at once to the office of the Merchants' & Miners' Transportation Company in Baltimore and requested the immediate return to him of the goods. Upon being informed by Mr. Dillingham, the agent of the company, that he could have the goods in three or four days by paying the cost of a telegraphic order for their return, Phillips paid the cost, and the order was sent by the agent. On October 28th Dillingham informed Phillips that the goods had arrived in Baltimore by the Bay Line Steamers and gave him an order on that line for them, but it turned out that the goods were not there. They did not actually arrive in Baltimore until January 27, 1906.

There is also evidence in the record tending to show that a waybill for the return of the goods from Atlanta to Baltimore, via the Seaboard Air Line and the Bay Line of Steamers—issued by the defendant at Atlanta on October 24, 1905, showing the defendant's agent, Mock, as shipper, and designating the number of the car containing the goods—was delivered by the defendant to the Bay Line Steamer Alabama at Portsmouth, Va., on October 30th. This waybill was brought by the Alabama to Baltimore on the morning of October 31st, when it was exhibited to Phillips by the agent of the Bay Line, but

the goods were not in the car designated in the waybill, nor were they delivered by the defendant company to the Bay Line until January 24, 1906, when they were transported by that line to Baltimore. While the goods were thus detained at Atlanta in the possession of the defendant, Phillips made frequent inquiries after them of it and of the agents of the Merchants' & Miners' Company by which he had shipped them, and of the Bay Line Steamers by which he had been told that they would be returned. Having been finally informed, in reply to his inquiries, that the goods had not been delivered by the defendant at Atlanta, but were still in its hands intact with nothing missing, he had, in the latter part of December, 1905, and early in January, 1906, demanded their return to him. There is evidence on the contrary tending to show that before Phillips made the later ones of his demands for the return of the goods he knew all about their delivery and recall at Atlanta by the railway company, and had been in correspondence with Pfeiffer & Sons in reference to making some arrangement for redelivering the goods to them.

On January 29, 1906, after the goods had been returned to Baltimore via the Bay Line, Phillips and his counsel went to the Bay Line wharf where they were shown two cases bearing the name of Pfeiffer & Sons, and were informed that they contained the returned clothing, but Phillips declared that they were not his boxes at all and refused to accept them. Phillips and his counsel having expressed a desire to see the contents of the boxes, Mr. Surratt, the agent of the line, said to them that he was afraid that if they opened the boxes they would have to accept the goods, whereupon they declined to be put in that position and went away. Surratt's account of that interview tends to prove that no desire was expressed by Phillips or his counsel to have the boxes opened, and that no suggestion was made to them by him as to the probable consequence to them of opening the boxes. There was also evidence tending to show that when the goods were received back in Baltimore on January 27, 1906, and the plaintiff notified of their return, the season for their sale had gone by, and their market value had for that reason greatly depreciated.

At the close of the case the plaintiff offered one prayer and the defendants offered seven. The court granted the plaintiff's prayer and rejected all of the defendant's prayers except the fifth and seventh, which it granted with certain modifications. It will simplify the discussion of those prayers and the disposition of them made by the court below to briefly advert to the legal principles applicable to an action of trover against a carrier for the misdelivery of goods.

The authorities agree that a delivery of goods by a carrier or warehouseman to the wrong person will constitute a conversion

for which an action of trover will lie. Poe on Pleading, §§ 216, 217, 522; Hutchinson on Carriers, vol. 2, § 669; Forbes v. Boston & Maine R. R. Co., 133 Mass. 154; Security Trust Co. v. Express Co., 178 N. Y. 620, 70 N. E. 1109; St. Louis & I. M. Ry. Co. v. Larned, 103 Ill. 293; Louisville & Nashville R. R. Co. v. Barkhouse, 100 Ala. 543, 13 South. 584; Bruhl v. Coleman, 113 Ga. 1102, 39 S. E. 481. After a conversion has taken place, neither an offer to return nor an actual return of the converted goods will afford a good defense to an action of trover for their conversion, but if the goods have been returned to and received by the plaintiff that fact may be shown in mitigation of damages. Cooley on Torts (3d Ed.) § 535; 2 Addison on Torts, \*513, § 534; 28 A. & E. Encycl. 684; Greenfield Bk. v. Leavitt, 17 Pick. (Mass.) 1, 28 Am. Dec. 268; Stillwell v. Farewell, 64 Vt. 286, 24 Atl. 243; Cernahan v. Chrysler, 107 Wis. 645, 83 N. W. 778; Sparks v. Purdy, 11 Mo. 219. Our attention has not been called to any direct decision by this court upon that proposition, but in the cases of Hepburn v. Sewell, 5 Har. & J. 211, 9 Am. Dec. 512, and Buel v. Pumphrey, 2 Md. 269, 56 Am. Dec. 714, our predecessors recognized as valid the doctrine that where goods wrongfully converted are afterwards returned trover will still lie for the conversion. In the latter case the court said that, if the goods were returned speedily and in as good plight as when taken, the damages would be merely nominal. The measure of damages applicable, as a general rule, to a recovery in actions of trover has repeatedly been held by this court to be the value of the converted chattels at the time of their conversion, with interest thereon to the date of the verdict. Stirling v. Garritee, 18 Md. 468; Thomas v. Sternheimer, 29 Md. 268; Hopper v. Haines, 71 Md. 76, 18 Atl. 29, 20 Atl. 159; Bonaparte v. Clagett, 78 Md. 105, 27 Atl. 619.

Turning now, in the light of the legal principles to which we have adverted, to the consideration of the prayers before us which will be set out in full by the reporter, we find that the plaintiff's prayer, which relates solely to the measure of damages in the event of a verdict in his favor, is well within the general rule on that subject. It is defective, however, in ignoring the evidence in the record tending to show that the defendant, in response to the plaintiff's demand for a return of the goods, had them retransported to Baltimore, and tendered them to him in substantially the same condition in which it had received them from him, and that it still held them subject to his order. If the jury believed that evidence, and regarded the time at which the tender of the goods was made as a reasonable one, it should have been considered by them in mitigation of damages in fixing the amount of their verdict. An unqualified statement of the general rule as to the measure of damages

does not always form a proper instruction to a jury. Where there has been a total deprivation of the property converted, the general rule would form a proper instruction to the jury, but where there is evidence tending to show the existence of circumstances calling for a mitigation of damages the instruction to the jury should call their attention to that evidence and direct them to give it due consideration if they believe it to be true, so that the measure of damages may be determined in accordance with what are found to be the facts of the particular case.

The defendant's first prayer, which asked the court to take the case from the jury for want of legally sufficient evidence to entitle the plaintiff to recover under the pleadings was properly rejected. The goods were shipped by the plaintiff to himself as consignee upon the express terms appearing upon the face of the bill of lading that they were not to be delivered without its surrender properly indorsed. They were deliberately delivered without its surrender to a person other than the consignee. Under those circumstances, it could not be said, whatever elements of mitigation the case presented, that there was no evidence legally sufficient to enable the plaintiff to recover in trover.

The defendant's second prayer is predicated upon the assumption that, if the jury find that the plaintiff, with knowledge of the delivery of the goods by the defendant to Pfeiffer & Sons at Atlanta, directed the defendant to reship them to him at Baltimore, and it sent them to Baltimore in response to plaintiff's direction, and they arrived there in due course, and the plaintiff received due notice thereof, he should have accepted them, and, as there was no evidence that the goods returned were not the same that had been shipped by him, the verdict must be for the defendant. That prayer was properly rejected. The uncontradicted evidence showed that the plaintiff on October 20, 1905, as soon as he had received notice of the dishonor of the draft, had a telegraphic order sent to the defendant to send the goods back to him at Baltimore, and there is evidence in the case tending to show that the defendant issued a waybill or manifest at Atlanta on October 25th for the shipment of the goods to Baltimore via the Bay Line. The goods did not arrive at Baltimore until January 27, 1906, nearly three months after the date of waybill, although Dillingham, the agent of the Merchants' & Miners' Company who sent the telegraphic order, informed the plaintiff that the goods would arrive in Baltimore in three or four days. If the prayer was intended to refer to the order of October 20, 1905, for the return of the goods, it was not proper to leave it to the jury to find that the goods reached Baltimore in due course. Nor could that order for the return of the goods have been given by the plaintiff with knowledge of the delivery of the goods to Pfeiffer & Sons,

for the delivery was not made until a week after the sending of the order. It, on the other hand, the prayer refers to the demands made in December and January for the return of the goods, the prayer is defective in ignoring the evidence tending to prove that those demands were made after the plaintiff had been assured by the agents of the defendant that the goods had never been delivered to Pfeiffer & Sons, but were safe and intact in the hands of the defendant at Atlanta. Nor do we think that it was incumbent upon the plaintiff, as the prayer assumes, to prove that the goods tendered him in January, 1906, were not those which he had shipped. A wrongful delivery amounting in law to a conversion of the goods by the defendant having been shown, it was incumbent upon it, if it desired to show a return of the goods in mitigation of damages, to prove to the satisfaction of the jury both the identity and the unimpaired condition of the articles tendered in return.

The defendant's third prayer was properly rejected for the reasons already stated, and for the further reason that it assumed that Pfeiffer & Sons were the owners of the goods and entitled to their possession on October 27th, when the delivery was made. In view of the facts that the contract of sale of the goods was made upon the condition that they were not to be delivered to Pfeiffer & Sons until the payment of the installment of \$232 of the purchase money, and that they were shipped upon condition that they were not to be delivered except upon surrender of the bill of lading properly indorsed by the shipper, it was erroneous to assume that Pfeiffer & Sons were entitled to the delivery of the goods, as purchasers of them, in the manner and at the time when it was made. Nor did the shipment of them to Atlanta by the vendor consigned to himself constitute such a delivery of them to the carrier as to pass title to the purchaser. *Hopkins v. Gowen & Murray, Receivers*, 90 Md. 152, 44 Atl. 1062, 47 L. R. A. 124.

The defendant's fourth and fifth prayers are defective and were properly rejected, first, because they assume that the goods were returned to Baltimore within a reasonable time after their original shipment to Atlanta instead of submitting that question to the jury; and, secondly, because they are predicated upon the hypothesis that a return of the goods would destroy the right of recovery instead of furnishing ground for mitigation of damages. The modification made by the court of the fifth prayer did not relieve it from the defects to which we have referred.

The defendant's sixth prayer was properly refused because, even if the goods were in the hands of the defendant in the capacity of warehouseman when delivered by it to Pfeiffer & Sons, the delivery of them by it as warehouseman to the wrong person would, under the authorities cited by us, have constituted

a conversion of them. There was no error in granting the defendant's seventh prayer as modified by the court.

The rulings upon evidence forming the basis of the first three exceptions were in our opinion correctly made. The first exception was to the admission in evidence of a series of letters and telegrams which passed between the agents of the Merchants' & Miners' Company and the Seaboard Air Line touching the handling and movement of the goods in question while in the possession of one or the other of those two carriers, who jointly issued the bill of lading. This correspondence, while in a certain sense *res inter alios*, related to the transaction which formed the basis of the suit, and tended to throw light upon its true character, and may fairly be regarded as constituting part of the *res gestæ*. The second and third exceptions were to the refusal to permit the defendant to put in evidence either a copy, or parol testimony, of the contents of a letter alleged to have been written by Phillips to Pfeiffer & Sons tending to show a ratification by the former of the delivery of the goods by the defendant to the latter. There was no evidence tending to show the loss or destruction of the letter itself or any effort by the defendant to secure its production. Without a proper foundation explaining the failure to produce original written instruments of evidence, parol evidence of their contents is not admissible.

For the errors to which we have referred in the rulings on the prayers, the judgment appealed from must be reversed.

Judgment reversed, with costs, and new trial awarded.

(106 Md. 470.)

#### LUMPKIN v. LUMPKIN et al.

(Court of Appeals of Maryland. June 25, 1908.)

#### 1. WILLS—PROCEEDINGS FOR CONSTRUCTION—PARTIES.

The wife of a son of testator is a necessary party to a proceeding for construction of testator's will, her marital rights in the property given her husband by the will, being put in jeopardy by the construction, and their existence being denied by an interpretation that the limitation over to others of the gift to her husband, on his death without issue, applied in case of his death after that of testator.

#### 2. PARTIES—PROCEEDINGS FOR ADDING PARTIES.

The steps taken by plaintiffs in a proceeding for construction of a will to make the wife of a devisee a party, they merely interlining her name on the bill among the plaintiffs, are ineffectual, she being a nonresident, and they neither procuring her to appear by counsel, nor taking any other steps to bring her under the jurisdiction of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 85.]

#### 3. JUDGMENT—RES JUDICATA.

A nonresident married woman interested in a will to the extent of her marital rights in the property thereby given her husband is not bound by proceedings for construction of the

will, because, when on a visit to the state, she heard them discussed by her husband's family.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1184, 1216.]

#### 4. WILLS—PROCEEDINGS FOR CONSTRUCTION—PARTIES.

Executors of a will disposing of personal property are necessary parties to a bill to construe provisions of the will affecting the personal property of the estate, the title thereto being in them till distribution is made,

#### 5. JUDGMENT — NECESSITY OF PASSING ON MATTER COVERED BY PRAYER.

A decree remaining silent as to certain of the subjects covered by the prayer of the bill for construction of a will is erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 355, 356.]

#### 6. WILLS—CONSTRUCTION—LIMITATION OVER.

The will of an aged testator, who left a widow, five children, and several grandchildren, first gave absolutely to his widow his dwelling and its contents, and then gave her four-tenths of his entire estate for her life, with remainder to his children in equal shares; then gave absolutely, without limitation or qualification, to each of his children, by name, one-tenth of his estate, less what might be due him from the child; then gave one twentieth of the estate to a grandchild, and the remaining twentieth to other grandchildren, to be held in trust for them till they come of age; and then provided, "In case of either of my children's death without leaving lawful issue then I will and direct that their portion or inheritance in my estate shall be equally divided between my wife and my surviving children." *Held*, that the limitation over was only in case of a child dying before testator; and applied as well to the children's shares in the remainder in the four-tenths of the estate given to the widow for life as to the gifts to the children directly.

Appeal from Circuit Court No. 2 of Baltimore City; James P. Gorter, Judge.

Petition by Cora Lee Lumpkin to reopen and modify the decree in the case of Hannah S. Lumpkin and others against Harriet V. Lumpkin and others, also a bill of review by her, as executrix of William W. Lumpkin, deceased, for the same purpose as her petition. From adverse decrees she appeals. Reversed and remanded for further proceedings.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

George Moore Brady and William Milnes Maloy, for appellant. W. Burns Trundle, for appellees.

SCHMUCKER, J. This record contains two appeals from decrees of the circuit court No. 2 of Baltimore city, taken by Cora Lee Lumpkin widow of William W. Lumpkin. The first appeal was by her, in her own right, from a decree dismissing her petition to reopen and modify a decree theretofore passed in the case of Hannah S. Lumpkin et al. v. Harriet V. Lumpkin et al. The second appeal was by her, as executrix of her husband's will, from a decree dismissing a bill of review filed by her as executrix for the same purpose as her petition. The cases on the petition and the bill of review were heard together by the court below, and, as both of the proceedings were instituted for the ultimate

purpose of procuring a correct construction of the will of the late Robert G. Lumpkin, the two appeals will be considered by us together.

It appears from the record that Robert G. Lumpkin, of Baltimore city, died on August 10, 1905, seised of a dwelling house and 164 fee-simple ground rents, and possessed of personalty of large value. He left a will, which will be more fully noticed hereafter, naming his widow, Hannah S. Lumpkin, and W. Burns Trundle as executors, and they duly qualified as such. The widow and five children and three grandchildren survived the testator. The children were Edward T., John F., Emma V., Robert G. L., and William W. At the death of the father Edward T. was married and had two infant children; and Emma V. was the wife of James Clark and had one infant child. Robert G. was also married, but had no children; and William W. married the appellant on September 27, 1905, after his father's death.

Robert G. Lumpkin by his will, which was made on January 22, 1900, gave to his widow his dwelling house and its contents absolutely, and also gave her four-tenths of his entire estate for her life, with remainder to his children to be equally divided between them. He then gave, without any expressions of qualification or limitation to each one of his five children one-tenth of his estate less whatever the recipient might owe him at his death. The testator, then, after giving the remaining one-tenth of his estate in trust for his grandchildren, added at the end of the clause creating the trusts the following sentence: "In case of either of my children's death without leaving lawful issue then I will and direct that their portion or inheritance in my estate shall be equally divided between my wife and my surviving children." The true meaning of that sentence is the question of construction lying at the root of the entire litigation of which the present appeals are the latest development. The appellant contends that the death therein referred to of a child without issue means such a death in the lifetime of the testator, while the appellees insist that it means such a death whenever it shall occur. It is conceded by all parties that under article 23, § 325, of the Code of Public General Laws of 1904, the devise over is not void for indefiniteness.

On September 22, 1905, a bill was filed in circuit court No. 2 of Baltimore city by the widow and children of Robert G. Lumpkin against the three infant grandchildren for the twofold purpose of a partition of the ground rents of which he died seised according to the terms of his will, and also a construction of his will in order "to determine what estates the devisees and legatees under said will take in their respective shares thereunder," and for further relief. Under that bill a commission was issued to make a partition in kind of the rents, and the commissioners made their return in the usual

manner making an allotment of 112 of the rents in groups in severalty to the respective children and grandchildren, and allotting the remaining 52 rents to the widow for life, but making no allotment or disposition of the remainder after her death. The case was then submitted for final decree and referred to a master, and, on the coming in of his report providing that each child should hold the rents allotted to him "in fee defeasible upon the happening of the contingency of his dying without leaving lawful issue him surviving at the time of his death," certain of the plaintiffs through special counsel filed exceptions to the report upon the ground that the title of the children to the rents respectively allotted to them should have been made defeasible only upon their death respectively without issue during the life of the testator's widow, Hannah S. Lumpkin. The exceptions to the master's report were submitted by consent July 13, 1906, on briefs to be filed, and on the second day thereafter the final decree was filed overruling the exceptions and confirming the return of the commissioners.

Upon an examination of the final decree it appears that the clause of the will of Robert G. Lumpkin, relative to the death of any of his children without issue, received no full or complete construction nor any construction at all touching its operation upon the interest taken by the children as legatees of the very large personal estate given to them by the will, or upon the interest devised to them in the 52 ground rents allotted to the widow for her life. The only construction of the will made by the decree was the inferential or implied one resulting from the confirmation of the master's report and the direction that each child hold the rents, which had been allotted to it in severalty, "in fee defeasible upon the happening of the contingency of his dying without leaving lawful issue him surviving at the time of his death as expressed in the eighth item of said will."

At the time of the filing of the original bill for partition and the construction of the will of Robert G. Lumpkin neither his executors, nor the wife of his son Robert G., who was then married, were made parties to the case. On October 4, 1905, however, a petition was filed by the plaintiffs then in the case calling the court's attention to the absence from the record of Robert's wife and of the appellant who had, since the filing of the bill, married the son William G., and asking leave to amend the bill of interlineation making the two wives parties plaintiff to the case. Leave having been granted, the plaintiffs interlined the names of the two wives among the names of the plaintiffs in the bill, but so far at least as the appellant is concerned she never authorized any counsel to appear for or represent her in the case nor was she ever summoned or otherwise brought into the case or under the jurisdiction of the court, and it is conceded that she never was a party to the

case until she filed her petition to open the decree.

On November 18, 1907, more than eighteen months after the passage of the final decree and seven months after the filing by the appellant of her petition to reopen the decree and her bill of review, the executors asked for and obtained leave of court to be made parties plaintiff to the case nunc pro tunc by amendment by interlineation on the bill which was accordingly made.

It also appears from the proceedings that on the 17th of February, 1906, the executors of Mr. Lumpkin's estate passed in the orphans' court their first administration account by which they distributed to the appellant's husband for account of his share of the personality stocks and bonds of the appraised value of \$14,792.89, "subject to the provisions of his father's will," and that The Pocahontas Consolidated Company, one of the corporations whose stock was so distributed to him, declined to transfer it to him subject to the provisions of the will, and that such stock is still in the hands of the executors who now claim title to it as executors because of the death of her husband without issue.

On the 15th of April 1907, after the enrollment of the decree already referred to, the appellant filed in the case her petition under affidavit for the vacation of the decree and rehearing of the case upon the construction of the will of Robert G. Lumpkin, particularly in so far as relates to the eighth clause thereof, and that she be made a party defendant to the case. - On the same day she filed in the same court, as executrix and sole devisee and legatee of her husband, who had died without leaving issue, a bill of review also under oath against all of the parties to the original case praying that her bill of review might be consolidated with that case and the final decree which had been passed therein on January 15, 1906, be reviewed and reversed or modified so as to declare that the children of Robert G. Lumpkin, all of whom have survived him, are entitled to hold their devises and bequests under his will in fee simple and by an unconditional title. With the bill of review was filed as an exhibit a certified copy of the will of the appellant's husband making her his executrix and sole devisee and legatee.

In her petition and bill of review the appellant avers that the partition of the rents made in the original case was just and fair, and declares her willingness to abide by and confirm it, except as to the description therein of the character of the title by which the children were to hold the rents allotted to them respectively. She also alleges that no sales or conveyances of any of the rents have been made and that no rights of third parties have intervened or stand in the way of the relief for which she asks, and, further, says that since her discovery of the passage of the final decree and its true nature she has

used all of the diligence which her limited means permitted to assert her rights.

The grounds for relief set up in the petition to vacate the decree and in the bill of review are practically the same, and consist of alleged errors apparent upon the proceedings, such as the insufficiency of parties, appearing by the pleadings and proof to be necessary, and the failure of the decree to fully dispose of the whole subject-matter of the suit. Both the petition and the bill of review allege that the appellant has always been a resident of the state of Virginia, and that she did not have notice at any time during the pendency of the suit upon the original bill that her rights were put in jeopardy or being adjudicated therein or that any attempt had been made to make her a party thereto or that the will of her father-in-law was being construed therein; but the only information she had was that his estate was being administered and his property divided in the ordinary course, and that she never, until the filing of her petition to reopen the case, had authorized any one to appear as counsel or solicitor therein for her. She further averred that under the circumstances in which the decree of January 15, 1906, was passed it was practically but a consent decree obtained by the members of the family residing in Baltimore city, and that neither she nor her husband who at that time resided with her in Virginia, although he was nominally represented in the case, supposed that it was anything other than a proceeding to divide the ground rents. She further averred that the construction put upon the will by the decree was erroneous, and that, if it were permitted to stand, it would result in an unjust and unlawful destruction of her marital rights in her husband's portion of the rents as well as of her title as the executrix and sole devisee of his will to the real and personal estate given to him by his father's will.

The adult appellees answered the petition, and answered and demurred to the bill of review, admitting generally the existence, character, and result of the suit on the original bill but denying the plaintiff's construction thereof, and referring to the proceedings themselves for the full particulars thereof, and also admitting that the appellant Cora Lee Lumpkin had not been made a party to that suit prior to the filing of her petition, and that she had never authorized any solicitor or counsel to appear for her and that none had so appeared. But they deny that the appellant was ignorant that her rights as the wife of Wm. W. Lumpkin were being adjudicated in the case, or that she did not discover that fact until after the passage of the final decree. On the contrary they aver and insist that during a visit made by her to the house of her husband's mother in Baltimore city in December, 1905, the existence and nature of the partition suit were frequently and freely discussed in her presence, and that she at times participated in the dis-

cussions, and that she thus learned and knew the true nature of the case and the issues involved in it, and also insist that she has by her laches disentitled herself to prosecute her petition or her bill of review.

The court below entertained both the petition and bill of review and heard them together on the petition and the bill and the answers thereto and dismissed them by separate decrees, not in either case because they had been filed improperly or without right, but because the learned judge was of the opinion that the will had been correctly construed by the final decree of January 15, 1906, in the original case. The decree of the court dismissing the petition contained also the following provisions: "And it further appearing that by the said original decree in this cause no construction was placed upon the first clause of the will of Robert G. Lumpkin, deceased, it is further ordered, adjudged, and decreed that the clause in said will reading as follows: 'In case of either of my children's death without leaving lawful issue, then I will and direct that their portion or inheritance in my estate shall be equally divided between my wife and my surviving children'—does not apply to the first clause of said will, whereby Robert G. Lumpkin, deceased, after giving to his widow a life estate in four-tenths of his estate, real and personal, including in said four-tenths certain enumerated ground rents, provided as follows: 'At my wife's death these ground rents are to be divided equally between my children or their children, share and share alike to my children.'"

We think the learned judge below was correct in entertaining the appellant's petition and bill of review, but we are unable to agree with him either in the conclusion that the limitation over in the eighth clause of the will upon the death without issue of any of the testator's children did not apply to the remainder in the four-tenths of the ground rents given to his wife for life. Nor are we able to agree with him that the limitation so operated upon the rents given directly to the children as to reduce their estate therein to a fee defeasible by their death whenever it might occur without issue. In our judgment the limitation over was intended to apply with equal force to the entire share or interest of each child in the father's estate, and to operate as an alternative gift to the mother and other children of the share of any child who might die without issue in the father's lifetime. As all the children survived the father the limitation over was never called into operation, and each child took at the father's death an estate in fee in his share of the realty, and an absolute estate in his share of the personality, subject, however, as to the enjoyment of his share of so much of the estate, as was given to the mother for life, to her life estate therein. There are several errors, apparent upon the face of the proceedings in the original case, affording sufficient

ground for reopening it and modifying the decree therein so far as it undertook to construe the will of Mr. Lumpkin. These proceedings were defective both for want of proper parties and because the decree did not finally dispose of the whole subject-matter of the case.

Conceding that the appellant as the wife of one of the sons of the testator was not a necessary party to the case for the purposes of the partition of the rents which did not impair or destroy her dower, but merely transferred it from her husband's undivided share of the rents to those of them which were allotted to him in severalty, she was a necessary party for the purpose of the construction of the will. The partition did not put her dower in the rents in jeopardy but the construction of the will not only put her marital rights in her husband's real and personal estate in peril, but the interpretation of the will adopted by the court, if it were to stand, would in effect deny the existence of those rights. Before that can be done she must have notice and an opportunity to be heard. The plaintiffs elected to make her a party and obtained the court's authority to do so, but the steps they took for that purpose were entirely ineffectual to bring her under the court's jurisdiction. They went so far as to interline her name upon the bill among the plaintiffs but she was a nonresident of the state and they neither procured her to appear by counsel, nor summoned her, nor took any other steps to bring her under the jurisdiction of the court. Nor can we give our assent to their contention that she, a nonresident feme covert, was bound by the proceedings because she heard them discussed by her husband's family on a visit to Baltimore in December, 1906, and was thereby brought within the operation of the principle announced by us in *Albert v. Hamilton*, 76 Md. 304, 25 Atl. 341, *Riley v. First Nat. Bank*, 81 Md. 28, 31 Atl. 585, *Williams v. Snelly*, 92 Md. 21, 48 Atl. 43, *Fetterhoff v. Sheridan*, 94 Md. 454, 51 Atl. 123, and other cases, that persons directly interested in a suit who know of its pendency and have the right to control, direct, or defend it, and fail to appear and assert their rights, are concluded by it. The appellant's marital interest in her husband's property came into existence pendente lite, but it arose by operation of law, and not by assignment from him, and she should therefore, in view of her direct interest in the subject-matter of the suit, have been made a party to it in order to bind her by the construction of the will. *Calvert on parties*, \*91, 92, 97; *Story, Eq. Pl. § 158, 342*; *Miller's Eq. 56, 57*; *Handy v. Waxter*, 75 Md. 521-523, 23 Atl. 1035.

The executors of a will disposing of personal property are always essential parties to a bill to construe provisions of the will affecting the personal estate, as the title is in them until distribution has been made, and the executors of Mr. Lumpkin's will should

have been made parties to the present case before the passage of the decree. The prayer of the original bill for the construction of the will having been a broad one, asking the court to determine what estates both devisees and legatees would take in their respective shares thereunder, the decree should have determined whether the controverted clause of the will was intended to operate upon the personality, and also upon the remainders given to the children in the ground rents devised to the widow for life, and, if so, what its operation was upon those portions of the estate. The decree in remaining silent upon those subjects failed to pass upon the whole subject-matter of the suit or determine the rights of the parties in reference thereto, thus presenting a defect for which we have repeatedly held a decree to be erroneous. *Hurt v. Crane*, 38 Md. 31; *Contee v. Dawson*, 2 Bland, 292; *Evans v. Iglehart*, 6 Gill & J. 171, 204.

The case for the construction of the will, with the appellant thus absent and unrepresented, was submitted for decree without argument upon briefs of two solicitors, one of whom asserted that the controverted clause in the will operated to defeat the estate of any child of the testator upon his or her dying without issue whenever that event occurred, and the other of whom contended that the clause operated to defeat the estate of the child in the event of its dying without issue in the lifetime of the testator's widow. So far as the record shows, the construction of the will favorable to the appellant, which we regard as the correct one, that the controverted clause operated to defeat the estate of such only of the children as might die without issue in the lifetime of the testator, was not urged upon the court by any solicitor. We do not at all mean to intimate that the counsel in managing the case or in presenting their respective views upon their briefs had any plan or purpose to injure the appellant or disregard her rights, but we think that the failure of the appellees, when they had obtained leave of court to make the appellant a party to the suit, to effectually have her made such would, if the decree were to stand, practically result in the destruction of her estate without giving her notice and affording her an opportunity to be heard. In view of these facts, and the further circumstance that the rights of no third parties are shown to have intervened since the passing of the decree, the proceedings in the original case should be reopened, and the decree in so far as it can be taken to be or operate as a construction of the will be modified and corrected so as to declare its true construction.

Turning now to the interpretation of the will before us, and especially to the ascertainment of the purpose of the testator in inserting therein the controverted sentence at the end of the eighth clause, we are reminded, at the outset, of the fact that the construction of wills has been prolific of adjudi-



cations in the history of English and American jurisprudence. The counsel for the appellant have with great skill and industry cited upon their brief, and undertaken to collate and distinguish, no less than 77 Maryland cases, in addition to the other authorities, relied on by them; and the counsel for the appellees has with like diligence and ability fortified his brief with numerous citations. As the law applicable to the issue before us and the cases of the various courts, English and American, bearing upon the subject have been on different occasions carefully considered by the court, we will not again enter upon a review of those cases, or attempt to reconcile the diversity and contradictions which they disclose. It is a matter of prime importance, in ascertaining the intention of a testator, to consider the language in which he himself has given it expression. Directing our attention to the will of Mr. Lumpkin we find that its language is not obscure, and that the application to its provisions of a few fundamental principles of interpretation, which have received repeated recognition from this court, will enable us to determine its true operation upon the estate of which it was intended to dispose. We will first state the principles of interpretation to which we refer, and will then in their light consider the provisions of the will.

A testator may, in making his will, fix the absolute vesting of the different estates created by it at such times as he sees fit within the period allowed by law, and when he has done this with reasonable certainty the courts, in construing his will, will give effect to his wishes. *Larmour v. Rich*, 71 Md. 383, 18 Atl. 702; *Engel v. State*, 65 Md. 544, 5 Atl. 249; *Straus v. Rost*, 67 Md. 465, 10 Atl. 74; *Bailey v. Love*, 67 Md. 608, 11 Atl. 280; *Trust Co. v. Brown*, 71 Md. 166, 17 Atl. 937; *Demill v. Reid*, 71 Md. 175, 17 Atl. 1014; *Slingluff v. Johns*, 87 Md. 276, 39 Atl. 872; *Thom v. Thom*, 101 Md. 456, 61 Atl. 193; *Relly v. Bristow*, 105 Md. 333, 66 Atl. 262. Many of these cases as well as others might be cited in support of the other familiar proposition, also relied on in *Larmour v. Rich*, that "the law it may be conceded favors the early vesting of legacies, and the courts will, as a general rule, where there is more than one period mentioned, adopt the earlier one, if there be no expression or no intent plainly deducible from the terms used that the testator meant to select the later and not the earlier period." The court especially relied on the last-mentioned doctrine in *Meyer v. Eisler*, 29 Md. 28; *Tayloe v. Mosher*, 29 Md. 443; *Fairfax v. Brown*, 60 Md. 50; *Crisp v. Crisp*, 61 Md. 141; *Straus v. Rost*, 67 Md. 477, 10 Atl. 74; *Webb v. Webb*, 92 Md. 111, 48 Atl. 95, 84 Am. St. Rep. 499; *Mercer v. Safe Deposit Co.*, 91 Md. 114, 45 Atl. 865. Neither one of the two foregoing leading principles of interpretation has ever been questioned by this court although, in the application of them to particular cases, results

have been arrived at, owing to the endless variety of provisions found in the wills construed, which until carefully examined may seem to be lacking in harmony.

In our opinion Mr. Lumpkin has indicated in his will with reasonable certainty the time at which he intended the portions of his estate given by it to his children to finally vest, or, in other words, the time prior to which he intended the death of one of his children without issue to occur in order to cause its share to pass over to his wife and other children. The scheme of the will is both natural and simple, and, to our minds, its provisions indicate with reasonable certainty what disposition the testator desired to be made of his whole estate. By the first clause he gives absolutely to his widow his dwelling and its contents, and then gives her four-tenths of his entire estate for her life with remainder to his children in equal shares. He then gives absolutely, without limitation or qualification, to each of his five children one-tenth of his estate less what may be due him from the child. The children are not dealt with as a class, but the gift of one-tenth of the estate is made to each one by name in a separate paragraph of the will, and is complete in itself. One-twentieth of the estate is then given to the testator's grandchild Sue W. Clark with the direction that it be held in trust for her until she reaches the age of 21 years by her mother, who is the testator's daughter. The remaining one-twentieth of the estate is given to the testator's son Edward for the use and benefit of the latter's children, he to hold it in trust for them until the youngest child arrives at 21 years of age. After having thus given the entire estate in general and absolute terms without any qualification, except the temporary trusts as to the two-twentieths given to grandchildren, to parties in esse and capable of taking who constituted his own family, the testator added at the end of the eighth paragraph of his will the provision for any of his children's death without issue, which has furnished the bone of contention in the case.

We think that the testator, having in the earlier part of his will given absolutely to his children in specified portions nine-tenths of his estate, subject to his wife's life interest in four-tenths, intended by the clause in question only to provide alternative beneficiaries for the shares of any of his children who might predecease him without leaving issue to represent them at the distribution of the estate, and did not intend to cut down to life estates or defeasible fees the shares which he had given to his children absolutely. The age of the testator and his wife when he made his will in 1900 does not directly appear from the record, but, from the fact that they had grandchildren who were 17 years old in 1905 when the testimony was taken, and that he purchased some of his real estate as far back as 1875, they must have been well advanced in life. As the tes-



tator's wife was one of the parties to whom the share of any child dying without issue was given, it is unreasonable to suppose that he intended the alternative gift to take effect at the death of the children whenever it might occur, as that would involve an expectation on his part that his wife would survive all of his children. That feature of the limitation over differentiates the present case from most if not all of the cases cited, in which somewhat similar limitations in wills were held by us to refer to a death without issue of the legatee or devisee whenever it might occur. No gift over in favor of the testator's wife, on the death without issue of the first taker, is found in any one of the six cases, cited and mainly relied upon by the learned judge below in his opinion filed in the case on the bill of review, in which the devise over was held to refer to a death without issue, whenever it might occur, of the devisee. The cases so cited were *Gambrill v. Forest*, 66 Md. 17, 5 Atl. 548, 10 Atl. 595, *Devecmon v. Shaw*, 70 Md. 220, 10 Atl. 645, *Lednum v. Cecil*, 76 Md. 150, 24 Atl. 452, *Hutchins v. Pearce*, 80 Md. 434, 31 Atl. 501, *Weybright v. Powell*, 86 Md. 577, 39 Atl. 421, and *Willson v. Bull*, 97 Md. 137, 54 Atl. 629.

The improbability that the testator meant to give to his wife a portion of the shares of the children who might at any time die without issue is strengthened by the fact that in four-tenths of the estate the children's shares were only in the remainder after his wife's death. It is further strengthened by the fact that what is devised over on the death of a child without issue is his or her "portion or inheritance in my estate," which if it means anything, as was said of a similar expression construed in *Fairfax v. Brown*, *supra*, means a portion of his estate while it existed as such, and not many years after its distribution as would necessarily be the case in the not improbable event that one or more of his children should long survive him and then die without issue.

The authorities generally agree that where the limitation over is simply upon the death of the devisee, uncoupled with any contingent event, the will must be construed to mean a death in the lifetime of the testator. *Engel v. State*, *supra*. In *Gerting v. Wells*, 100 Md. 97, 59 Atl. 177, we held that the limitation over in that case which was upon the death of the devisee "without legal heirs or heir" was precisely the same in principle as that in the prior case of *Hammett v. Hammett*, 43 Md. 311, where the expression used in making the limitation over was simply "should one of them die," with no provision as to the failure of issue. A fuller statement of the same principle of construction and the cases supporting it may be found in 17 A. & E. Encyl. of Law, 537, and in *Vanderzee v. Slingerland*, 103 N. Y. 47, 3 N. E. 247, 57 Am. Rep. 701; but we do

not pursue this subject further, as we rely for our conclusion mainly upon the will itself read in the light of the circumstances surrounding the testator when he made it.

The construction of the will adopted by us is strengthened by the proposition, so often reiterated by this court, that where the devise itself is made directly, in unqualified terms adequate to convey a fee, to persons in esse and capable of taking at the death of the testator, it vests in them at his death. *Dulany v. Middleton*, 72 Md. 75, 19 Atl. 146, *Webb v. Webb*, 92 Md. 101, 48 Atl. 95, 84 Am. St. Rep. 499, *Cox v. Handy*, 78 Md. 108, 27 Atl. 227, 501, and *Fairfax v. Brown*, *supra*. Our view receives additional support from the uniform indisposition of this court to hold that an estate given by will in general terms adequate to convey a fee, which includes the *jus disponendi* of the thing devised, may be cut down to a life estate or a defeasible fee by a subsequent clause in the will. *Gerting v. Wells*, *supra*; *Combs v. Combs*, 67 Md. 11, 8 Atl. 757, 1 Am. St. Rep. 359; *Benesch v. Clark*, 49 Md. 504; *Rogers v. Cobb*, 89 Md. 167, 42 Atl. 935; *Nimsen v. Lyon*, 87 Md. 41, 39 Atl. 533.

The limitation over upon the death of a child without issue, occurring as it does in the will before us, must be held to apply also to the children's shares in the remainder in the four-tenths of the estate given to the widow for life, and must receive the same construction in that connection. If the limitation over had in terms applied only to that portion of the estate much authority could have been found in the Maryland cases cited by us for holding that the children's death without issue upon which the limitation was predicated meant a death during the life of the widow, as the children were only to come into possession of the remainder at her death. Indeed it may be conceded that such would have been the weight of authority in that event. But the limitation over is not in terms limited to the devises in remainder nor can its operation by any reasonable construction be restricted to those devises. The will in plain terms attaches the limitation to all of the property real and personal, which the children take under the will, the descriptive words used by the testator, in the limiting clause, being "their portion or inheritance in my estate," unaccompanied by any expressions of exception or restriction. The testator evidently intended the limitation over to affect all of the property of every kind taken by his children under his will. The fact that the limiting clause of the will applied in express terms to the entire share of each child in the father's estate which was largely composed of personality, and that no trust was created or other provision made by the testator for the preservation of the contingent remainders over in the personality to take effect after the death without issue of any of the children, affords further proof that the testator did

not refer to or intend such a death whenever it might occur.

We are aware that in a number of comparatively recent cases this court in construing limitations over in wills upon the death of the first taker without issue has shown an inclination to hold them to refer to such a death whenever it might occur, but in those cases either the context of the will, was silent or indicated the construction adopted in the particular case. We do not mean to weaken or disturb the authority of those cases by the conclusion to which we have come in the present one, for we find in the contents of Mr. Lumpkin's will the several indications, to which we have already referred, that he intended the limitations over, of the portions of his estate given by him to his respective children, to become operative only in the event of their dying in his lifetime.

The decrees appealed from will be reversed, and the cause remanded, to the end that the original case may be reopened and the appellant made a party defendant thereto, and that that case and the one on the bill of review be consolidated and the final decree of January 15, 1906, be so modified as to construe the will of Robert G. Lumpkin in accordance with the views herein expressed, but that the partition thereby made be allowed to stand in so far as the division of the ground rents thereby made is concerned.

Decree reversed, with costs, and case remanded for further proceedings in accordance with this opinion.

(108 Md. 330)

### GOLDBERG v. FELDMAN.

(Court of Appeals of Maryland. June 25, 1908.)

#### 1. CONTRACTS—PERFORMANCE—SUFFICIENCY.

An agreement by which a party is to execute a bond to the adverse party, to his satisfaction, means that if, in the exercise of his judgment, acting on the best information conveniently within his reach, the adverse party in good faith concludes that the bond is not sufficient, the party is bound thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1284-1289.]

#### 2. VENDOR AND PURCHASER—CONTRACTS—PERFORMANCE—COVENANTS OF PURCHASER IN DEED—SATISFACTION OF VENDOR.

A contract for the sale of real estate, stipulating that the deed to be presented to the vendor for execution shall contain covenants that no intoxicating liquors shall be sold on the premises for five years, and that the purchaser, his personal representatives and assigns, shall pay to the vendor and his personal representatives \$50 per day for every day on which the sale of liquor shall be permitted on the premises, and that such covenants shall be satisfactory to the vendor, gives to the vendor, relying on the advice of his attorney, acting honestly and according to his best judgment on such legal knowledge as a practicing attorney ought to possess, the right to insist that the covenants in the deed shall be a part of the consideration for the conveyance, and thereby comply with the rule stated in standard textbooks that only covenants entering into the consideration run with the land, and thereby

strengthen the claim that the covenant for the payment of \$50 per day provides for liquidated damages.

#### 3. SAME—DELIVERY OF POSSESSION.

A purchaser, in a contract of sale which contains no provision as to when possession shall be given, cannot make a demand for the immediate possession, a condition on which he will carry the agreement into effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 314-317.]

Appeal from Circuit Court No. 2 of Baltimore City; Thos. Ireland Elliott, Judge.

Suit by Robert L. Feldman against Solomon Goldberg. From a decree for complainant, defendant appeals. Reversed, and bill dismissed.

Argued before BOYD, C. J., and PEARCE, SOHMECKER, BURKE, and WORTHINGTON, JJ.

Myer Rosenbush, for appellant. Hyland P. Stewart, for appellee.

WORTHINGTON, J. The substantial question in this case is whether Goldberg was justified, on legal grounds, in refusing to execute the deed last presented to him for execution by Feldman, on May 1, 1906. In considering this question, we must bear in mind that it was stipulated in the contract of sale that the deed to be presented to Goldberg for execution, conveying the property to Feldman should contain a certain covenant to the effect that no spirituous or malt liquors should be sold on the premises conveyed for a period of five years from the date of the agreement, and an additional covenant that Feldman, his personal representatives and assigns should pay to Goldberg and his personal representatives the sum of \$50 per day for every day on which the sale of such spirituous or malt liquors should be permitted on the premises; and, also, that it was expressly understood and agreed that such covenants should be satisfactory to Goldberg.

It was shown by the evidence that Goldberg, who was himself a saloon keeper carrying on business on the corner diagonally across the street from the premises in question, desired the covenant precluding the sale of spirituous or malt liquors on these premises to be made explicit in the deed, because a former saloon keeper on the same premises had been the cause of great annoyance to him, so much so, indeed, that he had bought the property in question in order to prevent any other person from obtaining it for saloon purposes. He therefore required it to be inserted in the agreement of sale, that the covenants in the deed should be satisfactory to him. The decision of the case therefore largely depends upon the proper construction of this requirement.

An examination of a number of cases upon the question as to how far the exercise of the option to reject a thing as unsatisfactory is to be controlled by reason and good faith discloses some contrariety of opinion on the subject; the courts, in some cases, holding

that such an option may be exercised arbitrarily and even capriciously, in others, that it must be done bona fide and for good cause. For instance, it has been held that one who has contracted for a satisfactory title cannot be compelled to accept a title not satisfactory to him, even though it appears to be altogether unobjectionable. *Crigler v. Blair*, 4 Ohio Cir. Ct. R. 324; *Silsby Mfg. Co. v. Chico* (C. C.) 24 Fed. 893. In the case of *B. & O. R. R. Co. v. Brydon*, 65 Md. 225, 9 Atl. 127, 57 Am. Rep. 318, in disposing of a motion for reargument, Judge Alvey used the following language: "In cases where it is stipulated that an article to be furnished shall unqualifiedly be satisfactory to the party to whom it is to be supplied, the right to reject the article as not being satisfactory cannot be inquired into; but the party's own determination must be taken as final and conclusive. In such cases it is supposed, and such is the construction, that the party reserved to himself an unqualified option, and is not willing to leave his freedom of choice to any contention, or to be subjected to any investigation whatever." In commenting on this language of Judge Alvey, this court in the case of *Latrobe v. Winans*, 89 Md. 650, 48 Atl. 833, speaking through Judge Pearce says: "An examination of the cases cited by Judge Alvey, above, discloses that they all relate either to the manufacture or furnishing of some article, or the rendering of some service, involving personal taste, feeling, or judgment, such as the painting of a portrait; the execution of a statue or bust; the making of a suit of clothes or lady's dress; the manufacture of a bookcase to harmonize with the other house furnishings; the sale of a riding or driving horse; the use of a reaping machine; or similar instances." "But we have been referred to no case in which these principles have been applied to the title to land, and we do not think it follows from any of the cases cited that they would be so applied."

In *Taylor v. Williams*, 45 Mo. 80, 81, it is held that where a man agreed to buy property if he should be satisfied with the title it meant that he was not bound to take the property so long as his objection to the title was not capricious or unreasonable. In another case it was held that the objection must not be capricious or spring from dishonest design. While the case at bar is not one concerning title, it bears some relation thereto, as it concerns the requirements of a deed of conveyance containing covenants on the part of the grantee that shall be satisfactory to the grantor, and we think that the correct rule, governing a case like this, was laid down in *Harris v. Miller* (C. C.) 11 Fed. 118-122, where the court said: "An agreement by which the plaintiffs were to execute a bond to the defendants, to their satisfaction, meant that if in the exercise of their judgment, acting on the best information conveniently within their reach, the de-

fendants in good faith concluded that the bond was not sufficient, the plaintiffs were bound by their action." Applying this rule to the present case we are to determine whether Goldberg in refusing to execute the deed last presented to him for execution acted in good faith upon such information as was conveniently within his reach, or whether he acted from mere caprice and dishonest motive. As he, very properly, was governed by the advice of his counsel in the matter, the question really is whether his attorney in advising him not to sign the deed acted honestly according to his best judgment, and upon such legal knowledge as a practicing attorney ought to possess, or such as he could conveniently obtain.

Now it cannot be fairly assumed that the subject of covenants in deeds is one wholly free from difficulty. Many learned disquisitions are found in the books in regard to the subject, but it still presents legal niceties, the risks and uncertainties of which no prudent attorney should readily undertake to advise his client to assume. We are therefore not prepared to say that Mr. Rosenbush's demands were wholly unreasonable. There are expressions, indeed, to be found in the books which might seem to warrant Mr. Goldberg's attorney in insisting on the covenants being recited in the deed as part of the consideration for the conveyance. Thus it is said in 2 Sugd. Vend. 468-484: "Only real covenants run with the land, and these only when the covenants have entered into the consideration for which the land, or some interest, therein to which the covenant is annexed, passed between the covenantor and the covenantee. See, also, Bouvier Law Dict. Title "Covenant." In 1 Washburn on Real Property, 330, is found the following statement in regard to covenants: "And so far as a covenant imposing a burden upon land is held to run with the estate or otherwise, the rule as stated by Gould, J., may, perhaps, be still more definite, intelligible, and easy of application, depending upon whether such covenant entered or not into the original consideration upon which the conveyance with which it is connected was made."

Without determining whether the dicta from these standard text-books are applicable to the present case or not, they at least furnish some grounds to a practicing attorney for insisting that the rule of law therein expressed be complied with, when a deed is being prepared for his client to execute, containing covenants intended to protect his client in respect to a matter of great importance to him. Besides this, it is to be observed that there was, by the terms of the agreement, to be a covenant in the deed in addition to the one prohibiting the sale of spirituous and malt liquors on the premises, by which additional covenant the grantee was to bind himself to pay to the grantor \$50 per day for every day that the first or principal covenant was not strictly kept and observed. This lat-

ter covenant was, necessarily, to be in the nature of a bond with conditions, in which the sum named above was no doubt intended as liquidated damages in case of a breach of the first or principal covenant. Now the question of what are liquidated damages and what are not is often a difficult question for an attorney to answer. As was said by this court in the case of *Willson v. Baltimore*, 83 Md. 211, 34 Atl. 775, 55 Am. St. Rep. 339: "Whether a sum named in a contract to be paid by a party in default on its breach is to be considered liquidated damages or merely a penalty is one of the most difficult and perplexing inquiries encountered in the construction of written agreements; the solution of the question depending on the facts and circumstances of each particular case." In this case if the covenants were made a part of the consideration for the conveyance, that fact would certainly strengthen the contention that the sum named should be taken and considered as liquidated damages, and not as a mere penalty; for just compensation for the injury done by the breach of a covenant is what the law aims to accomplish. *Willson v. Baltimore*, supra. Here, then, we think was additional reason why Mr. Goldberg's attorney might reasonably insist on the covenant in the deed being a part of the consideration for the conveyance.

As to the use of the word "heirs," after the name of the covenantor, Feldman, as insisted on by Mr. Goldberg's attorney, inasmuch as the decree must be reversed for the reasons already given, the determination of that question is not necessary to a decision of this case, and we will not consider it.

But there is another ground upon which we think the action of Mr. Goldberg in refusing to execute the deed may be justified. In one of his notes to Mr. Rosenbush, written and delivered to him by Mr. Stewart, on May 1, 1906, that being the last day upon which, under the terms of the agreement, the sale could be consummated, Mr. Stewart said: "We shall insist upon having possession of the property at the time of settlement, etc." Now, the contract of sale contains no provision as to when possession should be given. It appears that a tenant was already in possession of the property, and it might not have been possible for Mr. Goldberg to induce him to vacate forthwith, so as to be able to give the purchaser immediate possession at the time of the settlement. It was in evidence that notice had been given this tenant to vacate, but had he refused to do so, it would have prevented Goldberg from complying with this demand. As the time when possession was to be given was not mentioned in the agreement, Mr. Feldman's attorney could not make a demand for immediate possession, a condition upon which he would carry the agreement into effect.

As we cannot find that Mr. Goldberg's demands, as to the character of the deed to be

executed by him, were prompted by caprice or dishonest design, we think counsel for Feldman erred in not yielding his own judgment to these demands. The fact that Goldberg's attorney framed the covenants which he desired to be incorporated in the deed, and sent a copy of the draft to Mr. Stewart in abundant time to enable him to have a deed prepared in accordance with Goldberg's wishes, indicates a desire on the part of the latter to consummate the transaction in good faith, and we are unable to see how the use of the phraseology of this draft could injure the covenantor, if he meant in good faith to observe the covenants to be entered into by him. The addition of four or five lines to the deed prepared by Mr. Stewart and the abandonment by him of the claim for immediate possession would have been a full compliance with the demands of Mr. Goldberg's attorney, and thereby this litigation would have been avoided.

We do not deem it necessary to pass upon the objections to testimony, as the case turns almost entirely upon the documentary evidence, which was admitted without objection.

It follows from what we have said that the decree of the lower court must be reversed and the bill dismissed, with costs.

Decree reversed and bill dismissed.

(76 N. H. 536)

WHITE RIVER LUMBER CO. v. CLARKE.  
(Supreme Court of New Hampshire. Sullivan.  
June 2, 1908.)

TRUSTS — TRUSTEES — APPOINTMENT — PARTIES  
ENTITLED TO CONTEST APPOINTMENT.

In a bill by one claiming to be the owner of a beneficial interest in a trust estate, for the appointment of a trustee after the death of the original trustee, an adverse claimant to the land has no such interest as entitles him to be heard on the question of the appointment of a trustee.

Transferred from Superior Court.

Bill in equity by the White River Lumber Company against Robert E. Clarke and others for the appointment of a trustee to carry into effect a trust in land created by Franklin Pierce in 1863, brought after the death of the original trustee, in which plaintiff claimed an interest in the beneficial estate. A trustee was appointed, and one Maxfield, claiming an adverse title to the land, excepted. Transferred to Supreme Court. Exception overruled.

Jesse M. Barton and Edwin G. Eastman, for plaintiff. George R. Brown, for Maxfield.

PEASLEE, J. The adverse claimant has no such interest in the trust estate as to entitle him to be heard upon the question of the appointment of a trustee. If, as he claims, he has title to the real estate in question, that fact can be shown when the trustee proceeds against him, or he against the trustee. It is not now in issue.

Exception overruled. All concurred.

(74 N. H. 605)

**HEAD & DOWST CO. v. NEW ENGLAND BREEDERS' CLUB.**

(Supreme Court of New Hampshire. Hillsborough. May 8, 1908.)

**APPEAL AND ERROR—DETERMINATION OF EXCEPTIONS—FAILURE OF EXCEPTING PARTY TO APPEAR.**

Where a trustee in bankruptcy, superseding an assignee in insolvency, had notice of exceptions taken by the bankrupt in an action pending against him in the state court, such exceptions will be overruled, where neither the trustee nor the defendant appears to sustain the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256-4281.]

Exceptions from Superior Court.

Action by the Head & Dowst Company against the New England Breeders' Club to enforce a builder's lien. Transferred from the superior court upon exceptions at the trial. Exceptions overruled.

The New England Breeders' Club did not appear at the trial, but the case was defended by an assignee appointed in proceedings under the state insolvency statute. When the case came on for argument, it appeared that the assignee in insolvency had surrendered the property to a trustee appointed in proceedings in bankruptcy under the federal statute, and had been discharged as assignee. The trustee in bankruptcy had notice of the proceedings. Neither he nor the defendants of record appearing to sustain the exceptions, they were overruled, without consideration.

Burnham, Brown, Jones & Warren, for plaintiffs. Henry F. Hollis, amicus curiæ.

**PER CURIAM.** Exceptions overruled.

PEASLEE, J., did not sit.

(75 N. H. 20)

**WALKER et al. v. CHESSMAN.**

(Supreme Court of New Hampshire. Coos. June 2, 1908.)

**1. MORTGAGES—FORECLOSURE BY ENTRY UNDER PROCESS OF LAW—POSSESSION FOR ONE YEAR—NECESSITY—STATUTORY PROVISIONS.**

Pub. St. 1901, c. 139, § 14, provides that the right of the mortgagor and all persons claiming under him to redeem shall be forever barred and foreclosed by the mortgagee by entry into the mortgaged premises under process of law and continued actual possession thereof for one year. Land in the name of a wife was mortgaged by herself and husband to defendant, and after her death the mortgage was foreclosed by writ of entry against the husband, who was in possession. Writ of possession issued, and defendant went into possession, which he held for over 12 years. The heirs of the wife, some of whom were minors at the time defendant went into possession, sued to redeem. *Held*, that the judgment in the action against the husband did not have the effect of foreclosing the mortgage, which subsisted thereafter as before, and could only be foreclosed by defendant's possession continued for one year.

**2. SAME—GROUNDS FOR POSSESSION—MORTGAGE OR FORECLOSURE JUDGMENT.**

Defendant's possession would be held under and by virtue of the mortgage, and not under

the judgment, for the mortgage vested in him the seisin as well as the title to the premises, and, when he elected to treat the husband in the actual occupancy of the land as a disseisor, as he had a right to do, his subsequent possession was in accordance with the right granted by the mortgagors, and he acquired no new right of possession by the judgment other than if he had taken peaceable possession under the statute.

**3. SAME—NECESSITY OF NOTICE OF PROCESS.**

To recover possession in a writ of entry upon a mortgage against a disseisor, the mortgagor out of actual possession need not be notified by the formal service of process, though he might be permitted to appear and defend against the action; hence the fact that the heirs of a mortgagor were not parties to a writ of entry against the mortgagor's husband does not show that the mortgagee's possession under the execution was wrongful or void as to the heirs for it was what was granted to him by the mortgage deed.

**4. SAME—NOTICE OF POSSESSION—SUFFICIENCY—NECESSITY FOR PERSONAL NOTICE.**

The heirs of the mortgagor were presumed to know that her surviving husband occupied the premises and received the income from the death of his wife, and, where the mortgagee was put in possession under a writ, they had notice of the change, and were put upon inquiry as to the character of his possession, and were not entitled to personal notice thereof.

**5. SAME—POSSESSION UNDER PROCESS IN FORECLOSURE AGAINST ONE IN POSSESSION—EFFECT.**

Where a mortgagee recovers possession of mortgaged land by process in an action upon the mortgage, regularly brought for that purpose alone and not to obtain a judgment of foreclosure, and he remains in peaceable possession for a year, the right in equity to redeem from the mortgage is effectually foreclosed, in the absence of any suggestion of fraud or collusion prejudicial to the rights of heirs of the deceased mortgagor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 982.]

**6. SAME—PRIOR QUITCLAIM DEED BY ONE IN POSSESSION—EFFECT.**

Where a mortgagor's surviving husband in possession of the mortgaged premises gave a quitclaim deed before a writ of entry is brought, it will not affect the right of redemption of the mortgagor's heirs, where the mortgagee has been in peaceable possession under the writ for more than one year.

**7. SAME—MINORITY OF MORTGAGOR'S HEIRS.**

The fact that the heirs of a deceased mortgagor were minors at the time the mortgagee went into possession under process of law will not affect their right to redeem.

Transferred from Superior Court, Coos County; Wallace, Judge.

Bill by Mary E. Walker and others against Roswell C. Chessman to redeem from certain mortgages. Transferred from the superior court on facts found by the court. Case discharged.

The plaintiffs are the children and heirs at law of Annie and Thomas Gorman. April 16, 1890, the defendant conveyed to Annie certain real estate in Northumberland, and on that date she, with her husband, executed a mortgage of the premises to secure the payment of \$300, the whole or a part of the purchase price. On April 12, 1892, they executed a second mortgage to the defendant to secure the payment of a note for \$100. Annie died July

30, 1894. August 2, 1894, Thomas executed a quitclaim deed of all his interest in the premises to the defendant, but remained in possession thereof until January 23, 1895. September 27, 1894, the defendant began a suit to foreclose the mortgages against Thomas, and at the October term, 1894, recovered conditional judgment against him for the premises. Thomas was the sole defendant, and notice of the foreclosure suit was given only to him. A writ of possession was duly issued upon the judgment, and January 23, 1895, the defendant was given seisin and possession of the premises under the same, and has since been in possession, receiving rents and profits. Thomas died November 20, 1906. Some of the plaintiffs were minors during the foreclosure proceedings. The question was reserved whether their right to redeem was barred.

Bernard Jacobs, for plaintiffs. Drew, Jordan, Shurtleff & Morris, for defendant.

WALKER, J. The plaintiffs are entitled to redeem the land from the mortgages, unless it has been foreclosed; and the question presented by the record is whether the defendant's possession of the premises for one year, after he was put in possession under legal process, is binding upon the plaintiffs and foreclosed their right to redeem. As they were not parties to the writ of entry, it is not claimed that they were bound by the judgment issued therein; and whether or not they were so bound is not a material question in this case. The judgment did not have the effect of foreclosing the mortgage. The mortgage subsisted after the judgment as before, and could only be foreclosed by the defendant's possession continued for a year (Pub. St. 1901, c. 139, § 14); and his possession would be held, not under the judgment, but under and by virtue of the mortgages. *Couch v. Stevens*, 37 N. H. 169; *Hall v. Hall*, 46 N. H. 240, 243; *Ray v. Scripture*, 67 N. H. 260, 29 Atl. 454. The mortgages vested in him "the seisin as well as the title of the demanded premises" (*Perkins v. Eaton*, 64 N. H. 359, 360, 10 Atl. 704), and, when he elected, as he had a right to do, to treat Thomas, who was in the actual occupancy of the land, as a disseisor, his subsequent possession was in accordance with the right granted to him by the mortgagors. He acquired no new right of possession by the judgment, any more than he would if he had taken peaceable possession under the statute. *Couch v. Stevens*, supra. For the purpose of recovering the possession in a writ of entry upon a mortgage against a disseisor, it is not necessary that the mortgagor out of the actual possession should be notified by the formal service of process, though he might be permitted to appear and defend against the action. *Hall v. Hall*, 46 N. H. 240. The fact, therefore, that the plaintiffs were not parties to the writ of entry against Thomas, does not show that the

defendant's possession under the execution was wrongful or void as to them. It was what was granted to him by the mortgage deeds.

Nor can it be successfully contended that the defendant's possession and its continuance for a year was without notice to the plaintiffs. They knew, or are presumed to have known, that Thomas, one of the mortgagors, had occupied the premises and received the income from the death of their mother to January 23, 1895, the date when the defendant was put in possession, and that upon that date Thomas was evicted and the defendant entered. In other words, they knew that a radical change in the occupation of the premises had occurred; that the defendant, their mortgagee, was in the exclusive possession; and that Thomas, a part owner of the equity of redemption, had been excluded therefrom. They were put upon inquiry as to the character of the defendant's possession, and it is plain that, upon reasonable investigation, they would have learned from the record of the service of the writ of possession that he was seeking to foreclose the mortgages by holding the possession for the statutory period of one year. If the defendant had elected to foreclose the mortgages by the second method of "peaceable entry" (Pub. St. 1901, c. 139, §§ 14, 16), and not "under process of law," the plaintiffs would have been entitled to no specific personal notice that he was in possession for the purpose of foreclosure. The requirement that he must publish notice of his entry in a newspaper has the same effect in law as a personal service of notice, even when as a matter of fact the mortgagor has no knowledge of the publication. It is "held to be a sufficient notice to all persons interested, that the foreclosure has been commenced." *Howard v. Handy*, 35 N. H. 315, 326; *Thompson v. Ela*, 58 N. H. 490. "They are bound to take notice of it, or abide the consequences." *Kittredge v. Bellows*, 4 N. H. 424, 433; *Gilman v. Hidden*, 5 N. H. 30; *Downer v. Clement*, 11 N. H. 40. They are constructively notified that the mortgagee is proceeding in accordance with the mortgage contract to foreclose their rights, and that, if they desire to protect them, they must satisfy the mortgagee's claim within a year. The publicity of the entry and possession, which the advertisement is designed to afford, when the entry is peaceable, is also afforded by the action at law and the consequent judicial record, when the mortgagee is put in possession under legal process. And there is no reason why actual notice of the mortgagee's entry to the parties entitled to redeem should be required in the one case, and not in the other. In both they are presumed to know that his rightful entry and possession under the mortgage were for the purpose disclosed—in the one case by the advertisement, and in the other by the court record. There is no legislative purpose ex-

pressed that more direct and explicit information should be given to the interested parties, and none can be inferred. As the defendant recovered the possession by process in an action upon the mortgages regularly brought for that purpose alone, and not for the purpose of obtaining a judgment of foreclosure, and as he remained in the peaceable possession for a year, the plaintiffs' right in equity to redeem from the mortgages was effectually foreclosed, in the absence of any suggestion of fraud or collusion prejudicial to the rights of the plaintiffs.

The fact that, before the writ of entry was brought by the defendant against Thomas, the latter had given the defendant a quit-claim deed of the premises, is immaterial, so far as this proceeding is concerned. What the purpose of that deed was is not disclosed; but it appears that Thomas remained in the occupation of the premises after it was given as before. There was no change in his apparent occupation until the defendant's entry under the writ of possession; and not until then were the plaintiffs chargeable with notice that the defendant was in possession for the purpose of foreclosure. As above suggested, in the absence of any fraud practiced upon the plaintiffs by which they were misled or deceived by the giving of the quit-claim deed and the subsequent writ of entry against Thomas, there seems to be no occasion to determine what effect the deed had on Thomas' right to redeem, or whether he might have successfully defended against the writ of entry by disclaiming, or by pleading some other special defense. *Mills v. Peirce*, 2 N. H. 9; *Pierce v. Jaquith*, 48 N. H. 231, 232. The fact that some of the plaintiffs were minors during the time the defendant was proceeding to foreclose the mortgages did not suspend his right to enforce the mortgage contracts, or prevent the foreclosure regularly begun from becoming absolute as against them. *Thompson v. Paris*, 63 N. H. 421. Upon the facts reported, they are not entitled to redeem.

Case discharged. All concurred.

(74 N. H. 517)

#### TOWN OF CANAAN v. ENFIELD VILLAGE FIRE DIST.

(Supreme Court of New Hampshire. Grafton. May 5, 1908.)

#### MUNICIPAL CORPORATIONS—TAXATION—EXEMPTION—PROPERTY OF FIRE DISTRICT.

Under Bill of Rights, art. 28, property cannot be taxed without legislative authority. After a fire district, a public corporation, the territorial boundaries of which were within the town of E., had purchased land and water rights in the town of C., for a water supply, such purchase was ratified by Laws 1903, p. 219, c. 221, § 4, which also provided that "all the property of said fire district used in the construction and operation of its waterworks shall be exempt from taxation." *Held*, that the property of the district in the town of C. was not taxable by such town.

Young, J., dissenting in part.

Hearing on amended case. Judgment for defendant.

For former opinion, see 64 Atl. 725.

George F. Morris, John M. Mitchell, James B. Wallace, and Mitchell & Batchellor, for plaintiffs. Streeter & Hollis, for defendants.

**WALKER, J.** The Enfield Village Fire District is a public corporation created by the Legislature for the promotion of the public welfare. It was organized in 1873 under the general law then in force authorizing its creation (Gen. St. 1867, c. 97), and it thereby became a body politic, and was invested with certain limited governmental powers. Its essential character as a governmental agency, as contradistinguished from a private corporation, is as apparent as though the territory and the inhabitants of which it is composed had been specially designated by the Legislature as a town. While its territorial boundaries are within the town of Enfield, it is, like a school district similarly situated (*Union School District v. District*, 71 N. H. 269, 52 Atl. 850), distinct from the town as a governmental agency. Within the limit of the powers conferred upon it, it may be deemed to be a town. Pub. St. 1901, c. 2, § 5.

In 1903, the Legislature by special act (Laws 1903, p. 217, c. 221) authorized and empowered the defendant to establish waterworks "for the purpose of introducing into and distributing through said fire district an adequate supply of pure water in subterranean pipes, for extinguishing fires and for the use of its citizens and for other purposes." It was also authorized to acquire by purchase or by the power of eminent domain streams and ponds, and to build canals and reservoirs for its waterworks. The act did not specifically define the territory within which this power might be exercised. So far as the acquisition of the property is concerned, it was not expressly limited to the territory of the district, or to that of the town of Enfield. By section 4 of the act it was provided; "The purchase of real estate and water rights already made by said fire district, the authority voted for the issue of notes or bonds for construction of the said waterworks, and the vote of the town of Enfield exempting such notes and bonds from taxation are hereby ratified and confirmed; and all the property of said fire district used in the construction and operation of its waterworks shall be exempt from taxation." Before the passage of this act the defendant purchased certain land and water rights located in the town of Canaan, which it now uses for the supply of water to its water system; and the question, which is presented by an amendment to the original case (74 N. H. 8, 64 Atl. 725), is whether this property is subject to taxation by the town of Canaan. It is apparent the Legislature of 1903 intended to authorize the district to acquire real estate

in Canaan, and in fact ratified and confirmed the acquisition of such property.

In behalf of the plaintiff, it is claimed that the exemption authorized in section 4 only applies to property of the defendant situated in the town of Enfield. It is argued that, though the language used is broad enough to include land situated in other towns owned by the defendant, the intention of the Legislature, found from the competent evidence bearing on the subject, does not warrant so broad a construction. In support of this contention, the case of *Newport v. Unity*, 68 N. H. 587, 44 Atl. 704, 73 Am. St. Rep. 626, is relied upon. In that case it was held that real estate used for waterworks and owned by Newport, but situated in Unity, is not exempt from taxation by Unity, under section 2, c. 55, Pub. St. 1901, which provides that "real estate \* \* \* is liable to be taxed, except houses of public worship, \* \* \* schoolhouses, seminaries of learning, real estate of the United States, state, or town used for public purposes, and almshouses on county farms." The question decided in that case is not precisely the same as the one presented in this case. In that case the element of a special exemption was wanting. Immunity from the tax burden was sought under the general statute of exemptions. But if the theory of the decision is sound, it affords much support to the plaintiff's contention, that the Legislature did not intend to exempt other property of the defendant than that situated in Enfield. One ground upon which that decision was based is that before 1867, when the section above quoted was first enacted, there was no statutory exemption of the real estate of towns from taxation; that at that time towns had no general authority to purchase land beyond their limits; and that "if there were, at the time of the Revision of 1867, no statutes authorizing towns to purchase real estate outside their limits, it seems plain that the statute is not necessarily to be construed as exempting such property from taxation. The Legislature could not have had it in mind. Hence, when they subsequently authorized towns and cities to acquire for public purposes lands in other towns, it cannot be justly presumed that they intended such property to be exempt from taxation." If it is conceded that when the Legislature authorizes a town to acquire land in another town for public purposes, a general statutory exemption of public property is not intended to apply to such extraterritorial property, it may be argued with some degree of plausibility that the Legislature of 1903, by general words of exemption, did not intend to exempt the defendant's property located in Canaan. If the words of the exemption had been "the real estate of the district used for public purposes," in analogy to the general language used in section 2, c. 55, Pub. St. 1901, which the court held in *Newport v. Unity* did not apply to land

located without the town of Newport, the intention to exclude the Canaan property from its operation would not have been more apparent. If the comprehensive language of the general law, exempting the real estate of towns "used for public purposes" from taxation, relates only to real estate located within the territorial boundaries of the town, similar language used in a special act creating a water district might reasonably be restricted to land in the town in which the district is located, in contradistinction to land of the district located in another town. It seems to be important, therefore, to consider whether the reasoning by which the decision in *Newport v. Unity* was reached is logically sound as an authoritative exposition of the legislative intention relative to the exemption from taxation of town property used for waterworks purposes located in another town. The opinion in that case is based to some extent upon the assumption that previous to 1867 the property of towns used for public purposes was taxable, and that the Legislature of that year created the exemption having reference solely to intraterritorial property, for the reason above suggested. If this assumption is sound, it affords weight to the plaintiff's contention that, upon a strict construction, the Legislature of 1903 did not intend to extend the defendant's exemption to property which, though used for public purposes in Enfield, was located in Canaan, and that the express mention of the exception, though unnecessary, was inserted out of abundant caution. If the property in question falls within the taxable class of property, it is taxable unless it is clearly exempted by express legislative language. And the court in *Newport v. Unity*, holding that the public waterworks of Newport located in Unity fell within the general statutory definition of ratable estate, decided that they were taxable, the same as they would be if owned by an individual or a private corporation. If the court had started with the opposite assumption, viz., that being property devoted to a public use by a town the waterworks were not taxable unless specially made so by statute, the conclusion that the Legislature did not intend to exempt them, though located in an adjoining town, would have been less obvious. The evidence of that legislative intent would have been less convincing, and the decision would not be an authority for the proposition that, in the absence of an express legislative exemption, the property of towns used for public purposes is taxable. By applying that doctrine to the case at bar, and adopting the rule of strict construction which is observed when the question relates to the exemption of the property of private corporations or of individuals (*Portsmouth Shoe Co. v. Portsmouth*, 74 N. H. 222, 66 Atl. 1045), it might not be difficult to hold that the Legislature did not intend to exempt the defendant's extraterritorial property, and hence that it



is taxable. But a re-examination of the grounds of that decision, it is believed, will show that they are fallacious.

When the Legislature in 1867 excepted from taxable real estate the "real estate of the United States, state, or town used for public purposes," it did not thereby introduce an innovation, and withdraw from taxation property otherwise subject to that burden. It did not create a new class of non-taxable property. It merely recognized an ancient and uninterrupted rule, which would have been as controlling if it had not been put into legislative language. "It is certainly not true that all lands in the town were ever taxed, or now are. Lands owned by the town are not taxed, and yet are not exempted by any statute; the parsonage, school lot, etc., are of this description. All buildings are to be taxed; but was it ever heard of to tax a meeting house or schoolhouse? Were the public buildings in Exeter, Concord, Hanover, etc., ever taxed? There are and always have been exemptions, where the statute has not expressly made any. They depend upon invariable usage, growing out of the reason and nature of the thing. They are more ancient than our statutes (1770), and are not repealed except by express clauses for the purpose, or by provisions necessarily and manifestly repugnant." Smith, C. J., note to *Kidder v. French*, Smith 155, 157 (1807). In *Grafton County v. Haverhill*, 68 N. H. 120, 121, 40 Atl. 399, 400, it is said: "It is therefore reasonable to consider that, however general may be the enumeration of taxable property, public property held by the state and counties and municipalities for public and governmental uses was intended to be exempted, unless the right or duty to tax it was provided for in the most express and positive terms, or by necessary implication. Cool. Tax. 172; Black, Tax Tit. 410." In recognition of this principle, it was held in that case that county courthouses and jails were exempt from taxation, although county buildings were not included in the statutory exemption of public property. The same principle is clearly stated in *Franklin Street Society v. Manchester*, 60 N. H. 342, where it is held that the Constitution does not exempt church property from taxation. The court say (page 349 of 60 N. H.): "So long as towns, under the act of 1791, exercised parochial functions, and raised taxes for supporting and maintaining houses of public worship, those places of worship were exempt from taxation as public property by the nature of things, and not by the Constitution or by statute. After the act of 1819, when towns were no longer subject to church rates, and the whole management of public worship, including its support, was left to the religious societies authorized and organized for that purpose, the natural reason for exempting this property from taxation ceased." The exemption of such property was neither secured by any constitutional provision, nor granted

by any express legislative enactment; but resulted from the very great improbability that the state, through its Legislature, should intend to include its own property in a general statutory designation of taxable property. Stated otherwise, such an intention could only be found from express and unequivocal language used in the statute authorizing the tax. In the absence of language necessarily leading to that conclusion, the presumption is that the property of towns, which is properly used in promoting the public welfare, is not taxable. And this presumption, entertained and acted upon for so many years, has established a rule of the nontaxability of municipal property, except when specially designated as taxable. It is not an accurate statement to say that the property of the state is exempt from taxation; the fact is it does not belong to the class of property enumerated in a general taxing statute; and it is not exempted from the operation of the statute, for it does not fall within it. Formal exempting language, in a legal view, is as unnecessary as it is harmless. It creates no exemption, and is at most a mere legislative recognition of a class of nontaxable property. The idea is well expressed in *Yale University v. New Haven*, 71 Conn. 316, 331, 332, 42 Atl. 87, 92, 43 L. R. A. 490, with reference to the exemption of college buildings in that state: "When the Legislature in 1822 saw fit to formally declare that property of the United States, of the state, and of municipal governments, and 'the buildings occupied as colleges,' etc., should be exempt from taxation (Pub. Acts 1822, p. 25, c. 23), it did not alter the character of the property, or the reason of its not being taxed. The declaration was not an exemption, in the strict sense of the word, as to buildings occupied as colleges and schools, any more than as to property of the United States. They were untaxed, as they had been for nearly 200 years without any legislative declaration, because they had been placed in that class of property which ought not to be taxed, by virtue of a public policy too clear to be questioned, and which had been followed without any specific legislation by our government from its very beginning." See, also, *Camden v. Village Corp.*, 77 Me. 530, 1 Atl. 689; *Stiles v. Newport*, 76 Vt. 154, 66 Atl. 662; *Milford Water Co. v. Hopkinton*, 192 Mass. 491, 497, 78 N. E. 451; *West Hartford v. Commissioners*, 44 Conn. 360; *People v. Assessors*, 111 N. Y. 505, 509, 19 N. E. 90, 2 L. R. A. 148; *Rochester v. Rush*, 15 Hun, 239; *Id.*, 80 N. Y. 302; *Black v. Sherwood*, 84 Va. 906, 6 S. E. 484; *Van Brocklin v. Tennessee*, 117 U. S. 151, 153, 6 Sup. Ct. 670, 29 L. Ed. 845.

It would seem that, both upon principle and authority, the public property of towns is not taxable unless specifically made so by clear legislative language. The presumption, which has by long and universal acquiescence become a rule of law, is against its

taxability. If the court in *Newport v. Unity* had started with the premise that public property of a town is not ordinarily included in a general taxing statute, and cannot be taxed unless specifically mentioned, it is probable that it would not have held substantially that the waterworks in question were taxable because not specifically exempted from the operation of the general statute. Treating the property as taxable unless specifically exempted authorizes a strict construction against its exemption; while viewing it as nontaxable unless specifically designated as taxable authorizes a strict construction against its taxableness. In the one case the evidence would show that the Legislature did not intend to exempt it from the operation of a general taxing statute; while in the other it would show that the Legislature did not intend to include it in the class of property subject to taxation. And as no property is taxable in the absence of legislative authorization (Bill of Rights, art. 23; Const. art. 5; *Sunapee v. Lempster*, 65 N. H. 655, 23 Atl. 525; *Carpenter, J., in Boody v. Watson*, 64 N. H. 162, 195, 9 Atl. 794; *Nashua Savings Bank v. Nashua*, 46 N. H. 389, 892), and as the rule of the nontaxableness of public town property has been recognized for more than 100 years, it is a reasonable, if not an inevitable, finding that in a general statute enumerating the kinds of property subject to taxation the Legislature did not intend to include the property of towns.

But it is urged that this conclusion is not unlimited, but must be confined to real estate of towns located within their respective boundaries. It is not claimed that there is any special provision of the Constitution imposing such a limitation, or that there is any statute providing in terms for the taxation of extraterritorial property owned by towns. That a town may acquire property in another town for public purposes when authorized to do so by the Legislature is not seriously controverted. In fact, the present proceeding assumes that the defendant has the title to the land in question located in Canaan, and is chargeable with the tax assessed thereon. Moreover, there can be but little, if any, doubt that the Legislature of 1903 ratified and confirmed the defendant's purchase of the land in Canaan. This was equivalent to an express authorization, not to acquire governmental jurisdiction over a part of Canaan, but to become the owner of the land for the purposes specified. *Schneider v. Menasha*, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996. The contention, therefore, is not that the defendant could not become the owner of the land, but that, unlike other land owned by the defendant within its own territory and held for waterworks purposes, this extraterritorial land is not, and cannot be, held for public purposes within the meaning of the rule excluding such property from the list of taxable property

when located within the town or district claiming the immunity; and hence it is inferred that it is taxable. But argument and discussion are unnecessary to prove that the public character of the use made of the property does not depend upon its territorial location. An imaginary line drawn around land used as a reservoir for the supply of pure water to the inhabitants of an adjoining town, and a legislative act annexing the land thus designated to such town, would not affect the character of the use, or make it public, if it was not so before. The admission that such intraterritorial property would be held for public purposes is a concession that when located extraterritorially it serves the public to the same extent, and for all practical purposes its use is the same. *Schneider v. Menasha*, 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996. When, therefore, it is settled or admitted that the public waterworks of a town are not taxable unless specially included in the tax list, it would seem to follow that the tax immunity must extend to its land used in connection therewith located in another town. In the absence of express statutory authority to tax it, legislative authority for its public use by the town indicates an intention that it should be treated as nontaxable, as in the cases of intraterritorial property. In this view of the case, it is not apparent why the location of the property should determine the question of its subjection to the tax laws. The authorities generally recognize no such distinction. See *Stiles v. Newport*, 76 Vt. 154, 56 Atl. 662; *Somerville v. Waltham*, 170 Mass. 160, 48 N. E. 1092; *West Hartford v. Commissioners*, 44 Conn. 360, 369; *People v. Assessors*, 111 N. Y. 505, 507, 19 N. E. 90, 2 L. R. A. 148; *Camden County v. Washington*, 60 N. J. Law, 367, 37 Atl. 623; *Hackettstown v. Mt. Olive*, 63 N. J. Law, 191, 42 Atl. 838. If waterworks like the defendant's are devoted to a public purpose when located within the water district, they serve the same purpose when located outside the district; and since it is conceded that in the former case they partake sufficiently of a public character to be free from the burden of taxation, no sufficient reason is suggested why in the latter case they do not in fact possess the same character. While it may be conceded that the Legislature of 1903 had in mind the decision in *Newport v. Unity*, and that it constitutes some evidence bearing upon the question of its intention in making the special exemption of the defendant's waterworks, it does not outweigh the evidence of the very general understanding for more than 100 years that the public property of towns is not taxable unless specially made so by clear legislative language. The act must be read in the light of that understanding, and the exempting clause be deemed a mere recognition of it.

But it is said that this cannot be deemed a correct statement of the legislative purpose,

because it authorizes one town to withdraw real estate from the taxable property of another town, causing an increased burden of taxation to fall upon the inhabitants of the latter town, without any compensation therefor; that the constitutional provision of equality prohibits such a result; and that therefore it cannot be presumed the Legislature has attempted to authorize it. If this contention were sound, it would afford a cogent evidentiary reason for holding that the exemption granted to the Enfield district, though broad enough to include its land in Canaan, was not intended to have that effect. A construction that makes a statute unconstitutional in its operation is not to be adopted when it is reasonably susceptible of another and constitutional construction. *Leavitt v. Lovering*, 64 N. H. 607, 608, 15 Atl. 414, 1 L. R. A. 58. But it will not be contended that the taxpayers of Canaan, much less the town, have a right to have the taxable real estate in the town remain intact for the purposes of raising a revenue. If the state sees fit to appropriate a part of it for public purposes, the taxpayers' rights are not invaded when it is freed from the tax burden. Otherwise the lands taken by the state for a statehouse, state prison, state library, etc., would be taxable because, aside from their public character, they constitute ratable estate. The same practical hardship as is presented in this case would have arisen if the state had sequestered the land and water rights in Canaan, now owned by the defendant, for a fish hatchery. It would have been withdrawn from the taxable property of Canaan, but no one would contend that the rights of the taxpayers of Canaan would be invaded thereby. Individual and private rights must yield to the public convenience and necessity. *People v. Assessors*, 111 N. Y. 505, 510, 19 N. E. 90, 2 L. R. A. 148. If the inhabitants of Canaan can successfully raise this objection in respect to the defendant's waterworks located in that town, by similar reasoning the inhabitants of Enfield living outside the district could insist that that part of the waterworks system located within the district should be taxed as other property in the town is taxed. If Canaan may tax the property in that town because it is obliged to furnish police protection and highways for its security and convenience, Enfield may claim the same right for the same reason with respect to the defendant's property located therein. The fundamental difficulty with such an argument is that it treats the district or precinct as a private corporation having property and doing business in the town. But the defendant in this case is a public corporation using its property for public purposes. It is as much an agency of the state as the towns of Enfield and Canaan; and so far as it holds its property in that capacity for the public benefit, it is, on principle, no more taxable for it than a county

is for its courthouses and jails. *Grafton County v. Haverhill*, 68 N. H. 120, 40 Atl. 399. Unlike a private corporation, it is not engaged in a gainful occupation. It holds its property in trust for the benefit of the public—not exclusively for the private benefit of its inhabitants. Unlike a strictly private corporation or individual, it cannot charge what it chooses for its water, or refuse to furnish water to those who comply with its reasonable regulations. *Turner v. Water Co.*, 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432. In a legal sense, its property belongs to the state. The next Legislature may abolish it, even against the unanimous protest of all its citizens, and turn the property over to a new district with different territorial boundaries, upon terms deemed to be equitable—a power which has been exercised with reference to school districts. *Laws 1885*, p. 435, c. 43; *Pub. St. 1901*, c. 89, §§ 14-27; *Sargent v. District*, 68 N. H. 528, 2 Atl. 641; *Union School District v. District*, 71 N. H. 269, 52 Atl. 850. "It would seem to follow that the inhabitants of a school district have no rights in the existence or in any of the corporate functions of the district, which can be regarded as vested rights, or which can be set up as beyond legislative control. The authority of the Legislature in the premises being supreme, any such vested rights in the district as a body, or in the inhabitants composing it as individuals, would be inconsistent with that authority in the Legislature, and hence cannot exist." *Farnum's Petition*, 51 N. H. 376, 379; *Wooster v. Plymouth*, 62 N. H. 193, 208. Since the defendant in an agency of the government, receiving all its powers from the Legislature and holding its waterworks located in Canaan for the benefit and convenience of the public, the constitutional doctrine of equal and proportional taxation, as applied to the facts of this case, has no application.

Nor does it follow from this result, that if the Legislature should authorize the defendant to engage in purely commercial pursuits and had the power to do so, property acquired by it in an adjoining town and used by it would escape taxation. A discussion of the supposed analogy would not be useful and is unnecessary. It is sufficient to hold that when an agency of the state, like the defendant, maintains waterworks for the benefit of the public, its property so used is not taxable, though in part located in another town, in the absence of express legislation making it taxable. See *Opinion of the Justices*, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809. It is also a misconception to say that while the use of the waterworks is public as to the inhabitants of the district, it is private as to the inhabitants of Canaan. This argument, as before shown, would also prove that the use is private as to the inhabitants of Enfield not living within the district. But its fallacy consists in treating the taxpayers

or the citizens of the district as though they were stockholders in a private corporation and were benefited by having the exclusive right to use the water. Evidently they have no such right. All the citizens of Canaan, and in fact everybody, may enjoy the advantage and convenience of the defendant's water supply. No one is excluded from the public benefit; and though a resident of Manchester may never go to Enfield to quench his thirst and may never have property interests there, his right to the public benefit is none the less real. His convenience in connection with that of all other people, and not merely and exclusively that of the inhabitants of a part of the town of Enfield, seemed to the Legislature to require or justify the establishment of the works and its maintenance by the defendant. *State v. Griffin*, 69 N. H. 1, 29-31, 39 Atl. 260, 41 L. R. A. 177, 76 Am. St. Rep. 180.

Whether the Legislature may authorize the taxation for state purposes of some municipal waterworks, and exempt others or omit to include them in the designated classes of taxable property, is a question that is not germane to the present inquiry. The sole question presented is whether under chapter 221, p. 217, Laws 1903, the tax assessed upon the property of the water district by Canaan is a legal tax; and that question is answered in the negative by holding that municipal waterworks are not taxable as real estate unless expressly made so by statute, and that the express exemption of such property in the statute in question was merely a recognition of a fundamental principle relating to the taxability of public property that had been recognized and acted upon for a long period of time. So construed, the statute violates no provision of the Constitution. Whether there may be other special statutes or charters relating to the taxation of public waterworks, whose true construction might show that they are violative of the Constitution, it is unnecessary to determine in the present case; for, if it were conceded that there are such statutes, the validity of the statute now under consideration would not be thereby impaired. It is unnecessary to define the extent of the legislative power of imposing taxes upon public corporations in a case like this, where the effect of the statute is not to impose a tax upon the property, but to leave it as untaxable.

In accordance with the provision of the agreed case there must be judgment for the defendant.

BINGHAM, J., concurred. PEASLEE, J., not having been present at the argument, did not sit.

PARSONS, C. J. (concurring). By agreement of parties, the sole question for decision is the validity of the tax sought to be collected in this proceeding. The defendants contend, not only that the tax is not

authorized by law, but that its assessment is expressly forbidden by legislative enactment. They are a fire district—a municipal subdivision of the state—organized under the general law, and embracing a portion of the territory of the town of Enfield. In 1903, they applied to and secured from the Legislature authority to construct and maintain suitable waterworks for the purpose of distributing throughout the district an adequate supply of water for extinguishing fires and for the use of the citizens. Laws 1903, p. 217, c. 221.

The first question raised is the interpretation of the act: Whether it does or does not disclose a legislative intent to exclude the property taxed from the operation of the tax laws of the state. Prior to the passage of the act, the district had purchased the land in the town of Canaan which it has been attempted to subject to the tax in question. Section 4 of the act expressly ratifies and confirms "the purchase of real estate and water rights already made by said fire district"; and, as ratification is equivalent to prior authority, it would seem beyond question that the defendants' ownership of the real estate and water rights in Canaan was within the authority conferred upon them, and was lawful. Section 4 also provides that "all the property of said fire district used in the construction and operation of its waterworks shall be exempt from taxation." Under the statutory definition of the word "town" (Pub. St. 1901, c. 2, § 5), the defendants are exempted by general law from taxation upon their real estate used for public purposes, which would appear to include waterworks. Pub. St. 1901, c. 55, §§ 2, 3. But in *Newport v. Unity*, 68 N. H. 587, 44 Atl. 704, 73 Am. St. Rep. 626, upon consideration of the various provisions of the statutes relating to the taxation of town property held for public purposes, it was determined that the legislative intent, as evidenced by the statutory expressions applicable to that case, was that property owned by one town and held for public waterworks, if situated in another town, should be taxable in the town where it was situated. At the time of that decision Concord had been specially authorized to own real estate and water rights in the towns of Boscawen, Webster, and Hopkinton (Laws 1891, p. 555, c. 261; Laws 1895, p. 531, c. 180), and had been by the enabling act perpetually exempted from taxation on "all property, real and personal, owned and used by said city in the operation of said waterworks outside the limits of said city." Laws 1891, p. 557, c. 261, § 6. The Whitefield Village Fire District was also authorized to hold property for waterworks purposes in the adjoining town of Jefferson, and said waterworks, "with all extensions thereof," were exempted from taxation (Laws 1893, pp. 133, 134, c. 167, §§ 4, 10); while Manchester had been authorized to take or pur-

chase land in Auburn (Laws 1891, p. 319, c. 28, § 2), Exeter, in Stratham (Laws 1893, p. 192, c. 220), Dover, in Rollinsford, Somersworth, and Madbury (Laws 1889, p. 154, c. 170), Somersworth, "outside of said town of Somersworth" (Laws 1891, p. 455, c. 143), and Ashland, in New Hampton (Laws 1895, p. 558, c. 195), without any provisions as to taxation. The force of this decision, therefore, was that, in the absence of express language excluding property of this character from taxation, the Legislature intended it should be taxed. The soundness of the decision in *Newport v. Unity* is now questioned, but no effort has been made to change it by legislative action. There is no evidence that any legislation has been adopted upon the theory that this decision was erroneous. Subsequent legislation must therefore be interpreted as adopted with the understanding that this decision correctly construed the general statute law. Whether the decision is sound or not, is immaterial upon this branch of the case. Since the decision was announced in July, 1896, there have been numerous enactments relating to waterworks construction and operation by towns and cities. In some, express authority is given to hold property beyond the territorial limits of the town or district; in others, such power may be inferred from the general language used, as in *Newport v. Unity*. Some have been expressly confined in their operation to town limits. A few contain express exemptions from taxation. It is unnecessary to refer to these enactments in detail.<sup>1</sup> They establish a legislative judgment, that in some cases property of this character, owned and situated as this is, ought not to be included in the list of taxable property. Taking into consideration this understanding, the language conferring the power to take and hold real estate and water rights identical with that held in *Newport v. Unity* to authorize the holding of real estate in another town (Laws 1895, p. 519, c. 109, § 1), and the fact that the property had been pur-

chased when the act was passed and that all such purchases previously made were ratified and confirmed by the act, it seems clear that the Legislature must have intended by the clause "all the property of said fire district used in the construction and operation of its waterworks shall be exempt from taxation" to remove this property from the list of taxable estate. As the Legislature did not intend this property should be taxed, legislative authority for the imposition of the tax appears to be wanting.

But the plaintiffs contend that nevertheless the property must be taxed, because (1) the town of Canaan has either a constitutional right, or a right prior or superior to the Constitution, in its corporate capacity to tax all property within its territorial limits; (2) because if this property is not taxed, the other Canaan taxpayers will in effect be compelled to contribute the amount it should be taxed toward the maintenance of the Enfield waterworks, and such enforced contribution violates provisions requiring uniformity and equality in taxation; (3) because the act is special as to the Enfield waterworks, and has not general application to all municipal waterworks property similarly situated. None of these considerations will support the tax in question.

First, as to the constitutional or corporate right of Canaan to tax all property within its limits. There is no such right. The case is confused by the fact that the town of Canaan appears as plaintiff. To the eye, at least, the action appears to be a controversy between the two municipalities, and to involve necessarily a right of one against the other. The right claimed is not one of corporate power, governmental or proprietary, but of the exercise of the taxing power—"an incident of the highest sovereignty," which "resides in government as a part of itself." *Phillips Academy v. Exeter*, 58 N. H. 306, 307, 42 Am. Rep. 589; *Cool. Tax*, 479; *Cool. Con. Lim.* 3. "The power of taxation is an attribute of sovereignty belonging to the people; and this power, so far as it has been granted at all, has been delegated under our Constitution to the Legislature.

\* \* \* Towns have no power \* \* \* to change or modify the public law regulating taxation." *Perley, J.*, in *Mack v. Jones*, 21 N. H. 393, 395; *Chase, J.*, in *New London v. Academy*, 69 N. H. 443, 444, 46 Atl. 743. Under the Constitution, the taxing power can be exercised only by force of direct authority from the people, or by the Legislature, or through authority derived therefrom. "No \* \* \* tax \* \* \* shall be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people or their representatives in the Legislature, or authority derived from that body." *Bill of Rights*, art. 28. No tax can be levied by virtue of the action of any subordinate municipal body unless authority for such action has been conferred by the Legislature.

<sup>1</sup>In addition to the acts cited in the text, the following have been examined: Laws 1899, p. 184, c. 205 (Portsmouth), Laws 1901, p. 667, c. 183 (Plymouth Village Fire District), Laws 1901, p. 772, c. 265 (Jaffrey), Laws 1901, p. 808, c. 289 (Durham), Laws 1903, p. 256, c. 255 (Littleton), Laws 1905, p. 574, c. 169 (Wilton), and Laws 1907, p. 241, c. 247 (Lebanon Center Village Fire Precinct). All the foregoing are expressly authorized to go outside town limits. Only Portsmouth and Durham are exempted from taxation. *Bartlett Village Fire Precinct* (Laws 1897, p. 132, c. 139) and *Hillsborough Bridge Village Fire District* (Laws 1897, p. 143, c. 150), while not expressly authorized to extend beyond their territorial limits, are exempted from taxation. *Goffstown Fire Precinct* (Laws 1891, p. 562, c. 269; Laws 1893, p. 128, c. 182) appears to be limited to Goffstown, but is expressly exempted from taxation. *Sunapee* (Laws 1901, p. 680, c. 197) and *Gorham* (Laws 1905, p. 539, c. 188) are confined to the town, as apparently is *Claremont* (Laws 1899, p. 404, c. 180). Other enabling acts are Laws 1897, p. 175, c. 180, §§ 8, 9 (Warner), Laws 1903, p. 230, c. 229 (Hudson), Laws 1903, p. 656, c. 328 (Greenville), and Laws 1905, p. 577, c. 170 (North Conway Water Precinct). Chapter 128, p. 124, Laws 1907, gives general authority to towns and precincts, but confines their powers to the town acting itself, or in which the precinct constructing waterworks is situated.

2 Dill. Mun. Corp. § 538. In this state, the execution of the taxing power immediately affecting the taxpayer is in the hands of officers chosen by the municipal subdivisions of the state—the selectmen or assessors, and collectors. Such officials in the performance of these duties are public officers—not agents of the municipality through whose agency they are chosen.

In *Hibbard v. Clark*, 56 N. H. 155, 22 Am. Rep. 442, it was held that taxes were not a debt or demand due from taxpayers to the town, in such sense that they could be set off by the town summoned as trustee of such taxpayer against an amount due from the town to such person. One reason given was that neither the collector of taxes nor the town could maintain a suit for the collection of the taxes. In *Laws 1881*, p. 455, c. 28, it was provided that "the selectmen of any town \* \* \* may, in a particular case, cause any tax collectible by any town \* \* \* officer to be collected by suit at law or bill in equity." Pub. St. 1902, c. 60, § 17. It is said incidentally in *Dana v. Colby*, 63 N. H. 169, 171, that this statute authorizes a suit in the name of the town. Whether the suit should be in the name of the town or of the officer charged with the collection of the tax may not be very material as to the maintenance of the action, although the latter seems to be the usual course. See cases cited in *Cooley on Taxation*, 300, note 4. But if for some purposes, including its collection by suit, the tax may be regarded as a debt, it is a debt owed not to the town as a corporation, but to the public. *Dana v. Colby*, supra; *Edes v. Boardman*, 58 N. H. 580, 585. If the town of Canaan may properly appear as plaintiff in the suit, such appearance is not by virtue of any private proprietary interest in the tax. So far as this suit is concerned, as plaintiff it represents the state in the exercise of its sovereign taxing power. Its interest and rights are no more than if the suit were in the name of the tax collector, or if the question involved were the validity of a sale of the defendants' property under the collector's warrant. So far as the town is a party to this suit in the execution of the sovereign power of taxation, the town plaintiff is a mere piece of governmental machinery. *Gooch v. Exeter*, 70 N. H. 413, 48 Atl. 1100, 85 Am. St. Rep. 637. It appears in its purely public capacity in this case for the state, and is the state. The reservations of the Bill of Rights for the protection of rights not public but private have no application. *Wooster v. Plymouth*, 62 N. H. 193; *Farnum's Petition*, 51 N. H. 376. The plaintiff as a town in any capacity has no control over the questions involved in this tax. It cannot by town vote direct whether the property in question should be assessed for taxation or not, or determine its value. By similar action it could not authorize this suit. It has no control over it. Payment to

the collector would defeat the suit, and a vote of the town to become nonsuit, or to submit to a verdict for the defendants, could not be pleaded in defense of the action, and would not discharge the tax. Although named as plaintiff, the town of Canaan is in no sense a party to the controversy, which is between the state in the exercise of its taxing power and the taxpayer defending. As a governmental agency, the town of Canaan has no power to assess taxes. Taxes are assessed by governmental officers under legislative direction. Whatever private proprietary right of taxation, if any, the town of Canaan possessed prior to the Constitution, no such right was reserved to it by that instrument; but such right was expressly denied to it by the provision permitting taxation only by the Legislature, or through authority derived therefrom.

But while no rights of the town are infringed by the exemption from taxation of the defendants' property within the plaintiffs' territorial limits, the constitutionality of the exemption, as infringing constitutional rules of uniformity and equality and general legislation as to the individual taxpayers of the town, remains to be considered. It is argued that if this property is not taxed, the burden of the remaining taxpayers is increased; that remitting the defendants' tax of \$11.87 is precisely the same as levying a tax of \$11.87 upon the remaining taxpayers, and presenting the proceeds to the defendants. *Morrison v. Manchester*, 58 N. H. 538, 550; *State v. Express Co.*, 60 N. H. 219, 251, 252.

It is undoubtedly true that all exemptions from taxation are practically equivalent to a direct appropriation. Such is the effect of the exemption of houses of public worship, parsonages in part, and seminaries of learning. *State v. Express Co.*, 60 N. H. 219, 260. Upon the ground that the imposition of a special tax upon the inhabitants of Canaan, to support the waterworks of Enfield not intended to serve any portion of the territory of Canaan, would be beyond the power of the Legislature, it is urged that, since the exemption would be practically equivalent to such a tax, the exemption must be invalid as contrary to general principles of taxation, well understood in this state, and repeatedly elaborated in the decisions of this court. If the question is considered as merely one of equality in taxation, this conclusion seems abundantly sustained by our decisions. Opinion of the Court, 4 N. H. 565; *Smith v. Burley*, 9 N. H. 423, 437; *Morrison v. Manchester*, 58 N. H. 538, 548, 555; *Edes v. Boardman*, 58 N. H. 580; *Carpenter v. Dalton*, 58 N. H. 615; *First Nat. Bank v. Concord*, 59 N. H. 75, 77, 78; *Berry v. Windham*, 59 N. H. 288, 47 Am. Rep. 202; *Robinson v. Dover*, 59 N. H. 521; *Boston, etc., R. R. v. State*, 60 N. H. 87, 94; *Berlin Mills Co. v. Wentworth's Location*, 60 N. H. 156; *State v. Express Co.*, 60 N. H.

219; *Franklin St. Society v. Manchester*, 60 N. H. 342, 347; *Weeks v. Gilmanton*, 60 N. H. 500; *Curry v. Spencer*, 61 N. H. 624, 60 Am. Rep. 337; *Cheshire County Tel. Co. v. State*, 63 N. H. 167, 169; *Boston & Maine R. R. v. State*, 63 N. H. 571, 573, 4 Atl. 571; *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794; *Holt v. Antrim*, 64 N. H. 284, 9 Atl. 389; *Wimkey v. Newton*, 67 N. H. 80, 36 Atl. 610, 35 L. R. A. 756; *Kennard v. Manchester*, 68 N. H. 61, 36 Atl. 553; *New London v. Academy*, 69 N. H. 443, 46 Atl. 743; *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 200, 46 Atl. 470; *Id.*, 70 N. H. 336, 47 Atl. 74.

Though the principle relied on is sound, the application of it as a determinative factor in this case is erroneous. So applied, it proves too much. If it establishes that the exemption is invalid in this case, then all exemptions of every kind and nature are equally invalid; for the exclusion of any property from taxation, to the extent that it is thereby relieved, must, as a mathematical proposition, increase the burden upon property that is taxed. The exemption of the public property of the state or any of its subdivisions must also in the same way increase the local burden upon the community where it is situated—a burden which could not by the taxing power be directly placed on such community for a nonlocal purpose. But the principle involved in the question of legislative power to pass the enabling act is not of taxation, but of exemption. If the Constitution requires all property within the state to be taxed, then the exemption is illegal. If it does not require the taxation of all property, the effect that may be produced by the taxation of less than all would seem to be immaterial. The Constitution is not self-executing in the matter of taxation; the details by which an equal division of the expense of protection shall be made are not prescribed by the instrument. Bill of Rights, art. 12; Const. arts. 2, 5, 6. The framers of the Constitution were practical men—not theorists. To them the document was a practical instrument. While prescribing an equal division of the expense of protection, they left the scheme by which such equal division should be worked out to the Legislature, being careful to provide against the taking of any part of a man's property for such expense without the assent of the Legislature in article 12 of the Bill of Rights, and repeating that declaration with specific reference to taxation in article 28. It would seem from the reading of these provisions that no tax of any particular property or person could be justified except by virtue of an act of legislation imposing it, and that the framers of the Constitution meant by an equal division of the expense of protection such a division as would be "proportional and reasonable," having due regard "for the benefit and welfare of the state," and the special injunctions of article 82 (83). The framers of the Constitu-

tion must also have had in mind the existing practice in levying taxes, for they specially provided for the assessment of the charges of government "on polls and estates in the manner that has heretofore been practiced." Const. art. 6.

But we are not left entirely in the dark to speculate at this late day upon the subject, nor are we at liberty now to draw from the general terms of a practical instrument the inference that the parties to the contract had in mind an impossible and impractical scheme of altruistic equality. The meaning of the instrument as to the power of legislative exemption from taxation is shown by the uninterrupted exercise of the power since its date. The fact of exemption appears from the reported decisions of this court reaching back 100 years and by the statutes of the state going even farther back. "It is a well-settled rule that no tax shall be considered as imposed by law, in the absence of a manifest declaration of the intent of the Legislature to impose it. \* \* \* Taxation not provided, and in fact prohibited, by law is no taxation—is a purely void act." *Sunapee v. Lempster*, 65 N. H. 655, 656, 23 Atl. 525. "By the Constitution (Bill of Rights, arts. 12, 28; part 2, arts. 5, 6) and the uniform practice under it for more than 100 years, no property can be taxed except such as is declared taxable by the Legislature. \* \* \* Much property has been and still is untaxed." *Carpenter, J.*, in *Boody v. Watson*, 64 N. H. 162, 195, 9 Atl. 794, 819. "By our statute, all real estate, with certain specified exemptions, is liable to be taxed. \* \* \* Our statute sets out and describes the different classes of personal property liable to be taxed, and no other personal property than the kinds thus specified and enumerated is liable to be taxed in this state." *Perley, C. J.*, in *Nashua Savings Bank v. Nashua*, 46 N. H. 389, 392. "There are and have been two classes of statutes upon the subject of taxation. The object of one is to establish the rates and enumerate the property to be assessed." *Smith v. Burley*, 9 N. H. 423, 429. "There is no doubt that the Legislature may provide by general laws for the exemption of certain classes of property from taxation, as well as exempt it \* \* \* by omitting it in the description of property required to be taxed." *Brewster v. Hough*, 10 N. H. 138, 142. "To establish the rules by which each individual's just and equal proportion of a tax shall be determined is a task of much difficulty, and a very considerable latitude of discretion must be left to the Legislature on the subject. \* \* \* Within the limits of this discretion, as to the selection of proper subjects of taxation and the proportion of the tax that shall be laid on each subject, the authority of the Legislature is, without question, supreme." *Opinion of the Court*, 4 N. H. 565, 570. "From the time of the adoption of the Constitution to the present day, only such estates and property have been held to be



taxable as the statute in force at the time has declared subject to assessment; and from time to time classes of property, by act of the Legislature, have been added to or struck from the list of taxable estates. We are not aware that the legislative power to do this, under our Constitution, has ever been questioned." Report of Judge Sawyer, Chairman of Tax Commissioners, 1876, p. 8.

Although real estate generally has been taxed, since the Revised Statutes of 1843, certain classes of real estate have been expressly exempted. Rev. St. 1843, c. 39, § 2; Gen. St. 1867, c. 49, § 2; Gen. Laws 1878, c. 53, § 2; Pub. St. 1901, c. 55, § 2. And prior to the Revised Statutes, if not specially excluded, lands owned by the town were not taxed. "There are and always have been exemptions, where the statute has not expressly made any. They depend upon invariable usage, growing out of the reason and nature of the thing. They are more ancient than our statutes (1770), and are not repealed except by express clauses for the purpose, or by provisions necessarily and manifestly repugnant." Smith, C. J., note to *Kidder v. French*, Smith, 155, 157 (1807); *Franklin St. Society v. Manchester*, 60 N. H. 342; *Grafton County v. Haverhill*, 68 N. H. 120, 40 Atl. 399. The universal, contemporaneous, and continuous understanding that no property was taxable except such as was enumerated by the Legislature for that purpose seems to follow logically from the constitutional provision that no tax should be laid except by the Legislature or authority derived therefrom. But the meaning of the instrument is settled by the continuous and uninterrupted interpretation placed upon it for over 120 years. The question is not now an open one. *Pierce v. State*, 13 N. H. 536, 573; *Dublin Case*, 38 N. H. 459, 512; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444, 459; *Copp v. Henniker*, 55 N. H. 179, 209, 20 Am. Rep. 194; *King v. Hopkins*, 57 N. H. 334, 356; *Morrison v. Manchester*, 58 N. H. 538, 551, 552; *State v. Hayes*, 61 N. H. 264, 322; *Boston, etc., R. R. v. State*, 62 N. H. 648, 649; *Keniston v. State*, 63 N. H. 37, 38, 56 Am. Rep. 486. No case is to be found holding a tax invalid because of the exemption of other property by either express provision or failure to enumerate it as taxable. No case is found in which a tax assessed upon property exempted by the Legislature has been held valid. There are many cases in which the extent of a claimed exemption has been discussed and time spent in ascertaining the legislative intent, which was simply wasted if it had been understood that no exemption at all was permissible. In *Warde v. Manchester*, 56 N. H. 508, 22 Am. Rep. 504, a petition for the abatement of taxes assessed upon property made exempt by the statute, the tax was abated upon the ground that the Legislature in exempting the property in question—a seminary of learning—performed a duty prescribed by article 83 of the Constitution; and in opinion of the Court, 4 N. H. 565, 570,

and in *Sunapee v. Lempster*, 65 N. H. 655, 23 Atl. 525, exemptions from poll taxes are expressly approved. In Opinion of the Court, while it is conceded that a tax upon every poll in the state might be proportional, it is said: "No person would suppose such a tax would be just and reasonable." Under the settled construction of the Constitution, the power of the Legislature to exempt from taxation a certain class of property, as for example that used for maintaining public waterworks, by omitting it from the list of taxable estate or by expressly excluding it therefrom, cannot be denied.

But assume that this universal, uninterrupted interpretation of constitutional uniformity and equality in taxation is erroneous, and must be reversed. As has been already said, the Constitution is not self-executing in this respect. It does not authorize any officials or department to assess taxes, except by authority from the Legislature. If the true construction of the Constitution requires the Legislature to impose taxation upon all classes of property in the state, the failure of the Legislature to comply with the constitutional command would be a violation of duty imposed on it by the fundamental law. If we assume the action of the Legislature to have been unconstitutional because of a failure to tax all classes of property, the unconstitutional action of the Legislature in refusing or neglecting to provide for the taxation of certain classes of property would not authorize the court to invade the domain of the Legislature and order the taxation of such property; for the power of taxation is included within the supreme legislative authority vested by article 2 of the Constitution in the Senate and House of Representatives. *Morrison v. Manchester*, 58 N. H. 538, 548, 549. In Minnesota, under a Constitution requiring "all taxes \* \* \* to be as nearly equal as may be" and authorizing a tax upon all inheritances, it was held that a law which did not place the tax upon all inheritances, but exempted some not within the exception of the Constitution, was void. *Drew v. Tift*, 79 Minn. 175, 81 N. W. 839, 47 L. R. A. 525, 79 Am. St. Rep. 446; *State v. Bazille*, 87 Minn. 500, 92 N. W. 415, 94 Am. St. Rep. 718. The court did not undertake to correct what they considered a violation of their Constitution, by extending the law so as to include property which ought to have been, but was not, within its terms. "If the language of the statute is capable of being so construed as to be consistent with the Constitution, the court is bound to give it that construction. If not capable of such construction, all the court can do is to pronounce it void. This is the whole extent of the doctrine. \* \* \*

It does not authorize the addition to the statute of such words, provisions, or modifications not therein expressed or implied, as may be necessary to render it consistent with the Constitution. If it did, an unconstitutional statute would be impossible. By addi-



tion or subtraction its defects would be cured." *State v. Gerry*, 68 N. H. 495, 503, 33 Atl. 272, 276, 38 L. R. A. 228. In *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794, the power of the court to reverse the action of selectmen in exempting certain property which the true construction of the statute showed the Legislature intended should be taxed, and to correct the error by ordering an assessment of the tax, is declared, but there is no suggestion of power in the court to order an assessment in violation of the command of the Legislature. Nor is there in that case or the preceding (*Boody v. Watson*, 63 N. H. 320) question of the validity of the exemption if authorized by the Legislature. Whatever power the court may have to correct unconstitutional action of the Legislature in the exercise of the power of taxation confided to that body by the Constitution, its power would seem to be limited to declaring the invalidity of taxes assessed under an enactment void because of lack of conformity to the Constitution. It cannot make an act taxing some and exempting others valid by extending it so as to include property which the Legislature intended should be taxed, and thereby validating taxes not authorized by the Legislature.

Taking all the legislation as to the taxation of municipal waterworks, recited earlier in this opinion, together, the legislative intent clearly expressed is that some towns owning property for waterworks purposes without their territorial limits should pay taxes on the property in the town in which it is situated, and that others should not. Whether as an exercise of the taxing power such a scheme of taxation is within legislative power, is not material in this suit. So far as it may be claimed that the existing law upon the subject is unequal, if under it Newport and Littleton are required to pay taxes while Concord and Enfield are not, such inequality between different waterworks towns is no concern of the plaintiff or its taxpayers. A constitutional question is not generally considered unless raised by one whose right has been invaded by the alleged breach, nor unless its decision is necessary to the determination of the case. *Copp v. Henniker*, 55 N. H. 179, 203, 20 Am. Rep. 194; *Cool. Con. Lim.* (7th Ed.) 232; 6 Am. & Eng. Enc. Law, 1090. Canaan taxpayers are not injured because Littleton and Newport pay taxes, while Enfield does not. Their share of state and county expense is made less, not more, if affected at all, by the error of which they complain, while each taxpayer's share of local Canaan expense is not affected in any way by the taxation or nontaxation of any particular estate outside the town. Whether as between different waterworks towns similarly situated the law is unequal as imposing different burdens upon each, is a question that may be raised by a town complaining of a burden of taxation imposed upon it and not on others, which perhaps might have been

raised, but apparently was not, in *Newport v. Unity*. If this question is raised, it may be a sufficient answer that towns or fire districts have no constitutional right to construct waterworks or to invade the territory of other towns to obtain their supply, and that they cannot complain if the privilege granted and accepted is accompanied by the burden of taxation. This consideration may or may not be sufficient to determine the question. Other answers may be found. It is not intended to suggest that the fact that municipal subdivisions are mere agencies of the state is not a sufficient answer. Local reasons may require taxation in some cases and not in others, precisely as the privilege of going outside the town has seemed necessary for some towns and not for others, or as some towns have been granted the privilege of taking or purchasing existing local aqueducts while others have been expressly excluded from interfering with any pond, spring, or stream used as the source of supply of an existing aqueduct. See the various enabling acts cited *supra*. No ground is perceived upon which it can be held that all such acts must be identical.

But the question, as has been said, is not one of taxation, but of exemption; of the exercise, not of the taxing, but of the protective power. An act entitled an act of taxation may be valid, although not an exercise of the power of collecting the constitutional shares of expense. The title may be an immaterial misnomer and error of form only, and the act may be an exercise of some of the other powers which provide for the common benefit, protection, and security, and which may be conveniently grouped under the name of the protective power. \* \* \*

The payment of bounties by tax exemptions, and the receipt of compulsory contributions under the protective power, though they affect the revenue, are not to be confounded with the operation of the tax power which collects the constitutional shares of the expense of protection." *State v. Express Co.*, 60 N. H. 219, 257, 259, 260. In the protective power rests the authority for the entire waterworks constructing and maintaining power given the defendants and many other towns and districts. *Russ. Pol. Pow.* 89. That the supply of water for fire protection and the promotion of the health of the citizens is a public service in which the government may engage, and as to which it has power to make various regulations affecting more or less the private property rights of citizens in no way interested in a particular service, may safely be assumed without citation of authority. *Pub. St.* 1901, c. 108, §§ 13, 14; *Laws* 1895, pp. 433, 434, c. 76, §§ 1-5.

All the questions material in this case between these parties were raised in *State v. Griffin*, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177, 76 Am. St. Rep. 139, and after most exhaustive consideration settled adversely to the plaintiffs' contentions here. The case

was a prosecution under section 1, c. 28, p. 310, Laws 1891, prohibiting under a penalty the placing of sawdust by any person in Lake Massabesic in Auburn and Manchester, or in any tributary thereto. The defendant was a riparian proprietor in Auburn, upon a brook flowing into the lake, and operated a saw-mill, the sawdust from which, passing into the brook, was carried away into the lake. For so doing he was found guilty and fined by a magistrate under the statute, and upon his appeal it was claimed that the statute was unconstitutional because he was deprived of his property right as a riparian, of using the brook to carry off the sawdust, without compensation, and that the law was an unequal one because the statute was special instead of general and discriminated in favor of some citizens to the detriment of others. This is precisely the contention here; that through the effect of the exemption the citizens of Canaan are deprived of property through the taxing power without the compensation of protection to which they are entitled, and that the statute is limited in its application to Enfield. In that case the defendant relied on his property rights in Auburn while the waterworks were solely for the benefit of Manchester, as here the plaintiff relies on alleged rights of property owners in Canaan as against a public use confined to Enfield. "The police power of the state extends to the protection of the lives, health, comfort, and quiet of all persons, and the protection of all property, within the state: and persons and property are subjected to such restraints and burdens as are reasonably necessary to secure the general comfort, health, and prosperity." *State v. White*, 64 N. H. 48, 50, 5 Atl. 828, 830. *State v. Express Co.*, 60 N. H. 219, is an elaborate treatise upon the taxing power in this jurisdiction. Not sustainable as an exercise of the taxing power, the act there in question could not be sustained under the protective power, because as was said (page 262 of 60 N. H.): "There is no purpose for which we can presume the statute on which this suit is brought was designed to be a discouraging or encouraging act of the protective power." The contrary appears here. The protection of the property, health, comfort, and lives of the citizens is within governmental power; and the exemption from taxation of enterprises designed for effecting such purpose has a plain tendency to encourage their construction and maintenance. But unless we are prepared to overrule *State v. Griffin*, it is unnecessary to elaborate the question further. The power to enact legislation for the purpose in view, which may to some extent interfere with private property rights without such compensation as must be awarded under the exercise of the power of eminent domain, or such return as is due for property taken under the taxing power, may be sufficiently rested upon the exhaustive discussion to be found in that case. The power to act existing, the wisdom of its exercise is

not a judicial question. *Gooch v. Exeter*, 70 N. H. 413, 415, 48 Atl. 1100, 85 Am. St. Rep. 637.

There may be good reasons why Manchester, acquiring a large tract of Auburn real estate for the protection of its Massabesic water supply, should pay taxes in Auburn, and none at all why Enfield should pay anything to Canaan. The tax sued for is trifling. Subtracting all but the local tax which alone concerns Canaan, it is more trifling still. It has appeared, however, in the course of the argument, that Enfield has expended a considerable amount of money to render the supply available, and that the tax upon the present valuation is a considerable sum. It does not appear that such improvements call for any additional expenditure for highways, schools, or police; so that the practical question about which the parties have been contending with so much earnestness is not whether the Canaan local treasury shall be deprived of an insignificant sum heretofore obtained by taxation of this land, but it is whether the public using this water shall be taxed a large amount for the profit of Canaan taxpayers. These considerations may not bear directly upon the constitutional question, but they tend to show that the exemption is not an unreasonable exercise of the protective power.

The plaintiffs concede the validity of the exemptions of public property of the state, county, and town (*Pub. St.* 1901, c. 55, § 2), and do not attack the exemption of houses of worship, schoolhouses, and seminaries of learning, doubtless sustainable under some branch of the protective power. *Const. art.* 82 (83); *Warde v. Manchester*, 56 N. H. 508, 22 Am. Rep. 504. The defendants contend that this property, owned by a municipal subdivision of the state and held for a public purpose, is within that class of property which the plaintiffs concede may be exempted, and they also claim that such property, in the absence of legislation expressly taxing it, is presumptively exempted from the operation of general tax laws. *Grafton County v. Haverhill*, 68 N. H. 120, 40 Atl. 399; *Franklin St. Society v. Manchester*, 60 N. H. 342, 347; *Kidder v. French, Smith*, 155, 157; *Cool Tax*, 130, 131. The decision in *Newport v. Unity* does not controvert, but concedes, this principle, and implies that but for the statute taxing such property, the waterworks property of Newport held in Unity for the purpose of supplying water in Newport would be exempt from taxation. *Wayland v. Commissioners*, 4 Gray (Mass.) 500; *Somerville v. Waltham*, 170 Mass. 160, 48 N. E. 1092; *West Hartford v. Commissioners*, 44 Conn. 360; *Rochester v. Rush*, 80 N. Y. 302; *People v. Assessors*, 111 N. Y. 505, 19 N. E. 90, 2 L. R. A. 148; *Water Commissioners v. Gaffney*, 34 N. J. Law, 181.

If waterworks property publicly owned is not taxable except by force of express clauses taxing it, the omission to tax it, or the exclusion of it from the tax list, cannot

be a violation of legislative duty. That the furnishing of water to the citizens of Enfield as a protection against fire and for the promotion of the health of the citizens is a public service is conceded, so far as Enfield is concerned. But it is urged that this is not public property so far as Canaan taxpayers are concerned, if it is public as to residents of Enfield Fire District. This contention fails to distinguish between the ownership and the use. The distinction made in many cases as to the liabilities of municipal corporations growing out of the ownership of property has already been alluded to. But it is unnecessary to consider whether the ownership of these works by the Enfield Fire District is or not, as to all other persons, governmental and public. That the use is sufficiently public to authorize the exercise in Canaan of the power of eminent domain granted by the special act is not denied. Whether the use is public must depend upon its character—not upon whether it is viewed from Enfield, Canaan, or Concord. As to the citizen of Enfield Fire District, not only is the use public, but the ownership is public. His property may be lawfully taken by taxation to support the enterprise, and he has a share in its management through his vote. The Canaan taxpayer cannot be taxed for the support of the works, neither has he any voice in the management. It can perhaps be fairly said that as to him the ownership is private; that his relation to it is precisely what it would be if the ownership were vested in a private corporation.

Upon the question whether ownership in this sense private is material upon the question of implied exemption from taxation of property owned in one town and situated in another, the authorities are not in entire accord, although the weight of authority tends to support the defendants' contention. *Sumner County v. Wellington*, 66 Kan. 590, 72 Pac. 216, 60 L. R. A. 850, note 97 Am. St. Rep. 396. In Massachusetts it seems to be the rule that property held for a public purpose for which it could be taken by eminent domain is exempt, in the absence of express provisions taxing it, regardless of the character of its ownership. *Milford Water Co. v. Hopkinton*, 192 Mass. 491, 78 N. E. 451; *Worcester v. Railroad*, 4 Metc. (Mass.) 564. This rule may not be generally admitted. *Cool. Tax*, 60. But whether the Legislature may, for the advancement of a purpose deemed by them beneficial to the state, exempt a class of property from taxation, is a different question. Although the property may not be impliedly exempted because of its ownership, it may nevertheless be expressly exempted by the Legislature to encourage such use for the general advantage of the state. The use being sufficient to justify an express exemption, the ownership of the property is not material unless made so by the exempting statute. Whether the ownership

of the property used in promoting a public purpose is private or public is immaterial. The question is settled by the universal practice under the Constitution. See Judge Sawyer's Report, 13-17; authorities supra; *State v. Griffin*, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177, 76 Am. St. Rep. 139; *Boston, etc., R. R. v. State*, 62 N. H. 648, 649; *State v. Hayes*, 61 N. H. 264, 332; *Morrison v. Manchester*, 58 N. H. 538, 551, 552.

The defendants are engaged in the public service in a certain district. They are bound to serve all who apply for their service on equal terms. Their service is no less public because it does not extend through the whole state. The service of transportation furnished by the Chester & Derry Railroad with its seven or eight miles of track is equally public in principle, if not in extent, with that supplied by the Boston & Maine Railroad operating 1,038 miles. Whether, because the ownership of the property taxed in this case is confined to a particular subdivision of the state, such ownership is public or private as to territory not embraced therein is immaterial. If the ownership were entirely private, such private character would not invalidate a general tax exemption granted by the Legislature under constitutional power to provide for the common benefit, protection, and security.

But the plaintiffs say that if by general law the Legislature might exempt all public waterworks property from taxation, this exemption is invalid because it professed to deal only with the property of the Enfield waterworks and not with waterworks property generally. No clause in the Constitution prohibiting legislation applicable to a particular place or subject is pointed out. Nothing therein contained expressly requires all legislative acts to be general in terms. If such was the requirement, not only would the particular provision be invalid, but the defendants' entire charter would be void, as well as all others of like character. The sole ground upon which this contention can stand, if at all, is that the exempting clause is "inconsistent with the equality of right which the Constitution secures to all." There is no other ground for the contention. *State v. Griffin*, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177, 76 Am. St. Rep. 139. So far as all persons interested in this proceeding who are or may be affected by this exemption are concerned, it is an equal law. It affects all property within its reach alike. All persons may go to Enfield and enjoy the privileges of the waterworks without the burden of the Canaan tax. "The equality of the Constitution is the equality of persons and not of places—the equality of right and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, \* \* \* is an equal law, though no one can enjoy the right, [or] be subjected to the burden, \* \* \* without going to or being in a particular part of the

state." *State v. Griffin*, 69 N. H. 1, 30, 39 Atl. 260, 264, 41 L. R. A. 177, 76 Am. St. Rep. 139; *Gooch v. Exeter*, 70 N. H. 413, 415, 48 Atl. 1100, 85 Am. St. Rep. 637. The plaintiffs' contention on this point also is concluded by *State v. Griffin*. It is impossible to add anything to the discussion in that case. It may, however, be said that to hold that the act is invalid on this ground would invalidate many acts not referred to in *State v. Griffin*. Charters of schools, seminaries of learning, and corporations for various religious, charitable, and educational purposes have been so exempted. It has not occurred to any one to claim that the exemptions were invalid on this ground. See *Alton Bay Ass'n v. Alton*, 69 N. H. 311, 45 Atl. 95; *New London v. Academy*, 69 N. H. 443, 46 Atl. 743; *Young Men's Christian Ass'n v. Keene*, 70 N. H. 223, 46 Atl. 186.

It is too early to overrule *State v. Griffin*; it is too late to hold that no power of apportionment in taxation was granted the Legislature by the Constitution. *Cool. Tax*, 145. As no constitutional right of the town of Canaan or its taxpayers has been invaded by the legislative direction to the assessors of Canaan to omit this property from the invoice of the town, it is not necessary to speculate upon what basis listing it for taxation by them, without legislative authority for such action, can be sustained. I agree that there should be judgment for the defendants.

YOUNG, J. Although I concur in the result reached in this case, and in most of the reasoning of both the CHIEF JUSTICE and Mr. Justice WALKER, I wish to dissent from so much of the reasoning as seems to imply that a municipal corporation has rights which the Legislature is bound to respect, that the defendants' property would not have been taxable even if the enabling act had not contained a clause exempting it from taxation, and that the Legislature could not have taxed the defendants' property in either Enfield or Canaan by special act.

(221 Pa. 41)

WATSON v. McMANUS et al.

(Supreme Court of Pennsylvania. April 27, 1908.)

**INJUNCTION — WHEN GRANTED — PAYMENT PENDING ACCOUNTING.**

Plaintiff filed a bill against a city and a municipal contractor to enjoin payment by the city to the contractor of moneys due under the contract, the contractor having assigned to plaintiff all his interest in moneys, warrants, and payments of any kind on account of any contracts between the contractor and the city. The contract provided that the money should be held by the city for the use of plaintiff, who was constituted attorney to collect the same. The city made no objection to the assignment, of which it had notice. Thereafter plaintiff sued the contractor in equity for an accounting. *Held*, that an injunction restraining the city from making any payments to the contractor until after the accounting was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 96, 97.]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by James V. Watson against Michael McManus and others. Decree for plaintiff, and defendants appeal. Affirmed.

On January 1, 1897, Michael McManus granted, assigned, transferred, and set over unto James V. Watson all his right, title, and interest, claim, and demand in and to all "moneys, bills, warrants, and payments of any kind whatsoever which now are or hereafter to be receivable, payable or due to me from the city of Philadelphia, on account of or by reason of any contract or contracts I now have or may hereafter have with the said city of Philadelphia during the year 1897; the intention of this assignment being that said sums of money and all bills, warrants, and payments as aforesaid due and payable or which may hereafter become due and payable by said city to me on account of said contracts shall be held by said city for the use, benefit and disposal of and as belonging to the said James V. Watson." James V. Watson was irrevocably constituted attorney to collect said moneys. At December term, 1898, No. 547, McManus recovered a judgment against the city of Philadelphia for \$29,842.67, being moneys due under contract dated May 7, 1897. On July 17, 1899, McManus filed a bill against Watson in common pleas No. 4, Philadelphia county, June term, 1899, No. 406, praying for an accounting. Watson filed a cross-bill. The case was proceeded with so far that McManus' bill was dismissed, and the litigation continued under the cross-bill. On February 20, 1904, Watson filed the present bill against McManus praying for an injunction to restrain McManus from collecting and the city of Philadelphia from paying the judgment which McManus had secured against the city, pending the determination of the suit for accounting. During the year 1897, McManus had on hand four contracts with the city—one known as the Queen Lane coping contract, one as the Lincoln avenue grading contract, and one as the schoolhouse contract.

The court found other facts to be as follows:

Finally the schoolhouse was finished, and the city was ready to make the final payment (less percentage reserved under the contract exceeding \$3,300), and the plaintiff upon McManus' request gave him the paper, bearing date June 20, 1898, in which he agreed that "the bills stated to be due for materials furnished and wages due on schoolhouse at Thirteenth and Porter streets are to be paid out of final warrants and reserve for the completion of said schoolhouse and the Queen Lane coping and the Lincoln avenue grading contracts, said warrants to be paid to James V. Watson and he to furnish money from them to Michael McManus sufficient for the above specified purposes." The plaintiff agreed to advance \$6,500 to finish the schoolhouse.

In fact, he advanced \$7,350. He received the warrant for \$20,941.50, and repaid himself the \$7,350. The balance he paid on schoolhouse bills, but there was still about \$10,700 unpaid. When the parties to whom these moneys were owing called on Mr. Watson, he showed them the paper of June, and told them that, when he got the "reserve" on the schoolhouse contract and the balances due on the other contracts, he would settle their bills. In November a warrant was drawn for grading. This was lodged in the controller's office for counter signature. An order for its delivery to McManus was given him by the department of education. This McManus refused to let Watson have, unless he would agree to pay therefrom all the schoolhouse bills. This plaintiff refused to do, but reiterated his intention of carrying out his contract to pay out of the aggregate of moneys to be received by him all the debts on all the contracts. During a part of the grading work he had been paying all the bills, and he wanted reimbursement from the warrant for his outlays for these payments for work done on the grading. Plaintiff finally agreed, in order to induce McManus to give him the order for the warrant, that he would pay half of it to the claims on the schoolhouse. McManus refused to do this, and thereafter neither he nor Mr. Watson got any more warrants on account of grading or the other two contracts. The city controller had the Lincoln avenue warrant, but he likewise had McManus' assignment of all warrants and payments coming due to him to Mr. Watson. The city controller could not pay to McManus and would not pay to plaintiff until the order for the warrant indorsed by McManus was turned into his office.

McManus contends that Watson should have paid every debt due on the schoolhouse when the schoolhouse was finished. Such, however, was not Mr. Watson's agreement. It is plain and cannot be misunderstood that Mr. Watson therein agreed that "the bills stated to be due for materials furnished and wages due on schoolhouse at Thirteenth and Porter streets are to be paid out of final warrants and reserve for the completion of said schoolhouse and the Queen Lane coping and the Lincoln avenue grading contracts, said warrants to be paid to James V. Watson and he to furnish money from them to Michael McManus sufficient for the above specified purposes." Mr. Watson testified that he has always stood ready and willing, and is yet ready and willing, to carry out this agreement. McManus testified that Watson said he would not carry out his agreement. I had the witnesses before me. I heard their testimony. I noted their bearing and I have no hesitancy in stating that, where McManus contradicts Watson, I give entire credence to the latter, and disbelieve the former. I therefore have no hesitation in finding that at the

time McManus refused to let Watson have the warrant due from the city his refusal was unjustified, and Mr. Watson had nothing to indicate an intention not to carry out his agreement. He was entitled to that warrant. His offer to pay \$5,000 therefrom to the creditors of McManus on the schoolhouse contract was more than his agreement required him to do. Had McManus acceded to it, his creditors would have received that \$5,000 and subsequently the \$3,300 "reserve" on the schoolhouse contract. These two sums would have nearly paid all that was owing. McManus' lack of honesty and good faith in the matter is shown in this: That he subsequently collected the reserve on the schoolhouse contract by suit against the city and put it all in his pocket, paying not a cent thereof to his creditors or to his surety, but leaving the trust company to pay all the schoolhouse creditors. Another evidence of his lack of honest intent is the fact that, at the time Mr. Watson agreed to take the warrant then due on the Lincoln avenue contract and pay therefrom \$5,000 to the creditors on the schoolhouse, McManus had a suit pending to collect the balance due on the grading contract from the city, and in that suit, in spite of the fact that the contract expressly limited the total payments to him to \$28,000, he was claiming (and his claim has been sustained by the Supreme Court) a very much larger sum. The fact that the suit was pending, or that he claimed some \$15,000 more than the warrant, he did not mention. There was then, I find, no justification in fact or in law for McManus' refusal to let Mr. Watson have the warrant. The real reason of his refusal is apparent from the testimony in the grading contract suit. Had he turned over the order to Mr. Watson for the warrant, he would have had no standing to claim from the city a sum almost three times the face of the warrant. He could not let go the order for the warrant and pursue the city for this greatly larger sum, and I find that there was an entire lack of good faith in the reasons he had then advanced and now advances for refusing to let Mr. Watson have the warrant.

Nor upon the other point in the case have I any greater difficulty in reaching a conclusion adverse to Mr. McManus' contention. The agreement made after January 1, 1898, did not abrogate the power of attorney and assignment heretofore given by McManus to Watson and lodged with the city controller. We then have this condition: About April 1, 1898, McManus owed Watson about \$20,000. To complete the schoolhouse contract, Watson advanced \$7,350. He got \$20,941.50 in a warrant from the city. He repaid himself the \$7,350 and paid all the rest to the creditors on the schoolhouse, and more than \$300 besides. He took over McManus' quarry as additional collateral security, and advanced money to run the quarry and to complete the three contracts. He did not take the con-

tracts completely out of McManus' hands, and there was not an assignment of the contracts as the contracts exhibit an assignment. McManus' control over them was not ousted, nor anything done by the plaintiff except to finance the jobs and put a man in whom he had confidence, an employé of McManus, in the position of superintendent and paymaster. McManus' direction and control of the grading contract is particularly referred to in the testimony of the superintendent, and it undoubtedly led to a loss by reason of breaking a bargain William M. Watson had made, and insisting upon quarry refuse being hauled from the quarry to Lincoln avenue to "fill" with. Mr. Watson's grandson, the said William M. Watson, who had been heretofore in McManus' employ, continued in his employ after the arrangement was made that Watson should advance money in excess of \$20,000; and, while he became Mr. Watson's representative in seeing that moneys Mr. Watson advanced should be expended upon the three contracts and not otherwise, neither he nor Mr. Watson became McManus' assignee as concerns the three contracts. But as a matter of law I hold that McManus cannot, in the proceeding before me, avail himself of the fact that he assigned to Mr. Watson, if what he did amounted in law to an assignment. The city might take advantage thereof, but McManus cannot. There is no moral right in McManus to have any of the payments due by the city on any of the contracts. He has by suit collected the reserve on the schoolhouse contract and applied it to his own uses. Whether he has collected the balance on the two contracts at Queen Lane reservoir did not appear in evidence. He testified, though, that at the time the suit on the Lincoln avenue contract was pending he had 16 suits against the city, and they may have been included in that number.

Now we have the balance due on the Lincoln avenue grading contract judicially ascertained. Mr. Watson asks that it be paid to him. He shows that the power of attorney and assignment of January 1st assigns to him all McManus' right, title, interest, claim, and demand "in and to all moneys, bills, warrants, and payments of any kind whatsoever, which now are or hereafter shall be receivable, payable or due" to McManus "from the city of Philadelphia on account of or by reason of any contract or contracts" which he, McManus, then had, "or may hereafter have with the city of Philadelphia," and Mr. Watson is constituted McManus' attorney to collect and receive the same.

#### Findings of Law.

McManus met Watson in the law department of this city in 1899. At that time he had the suit pending against the city to recover the amount he claimed to be due him on the Lincoln avenue grading contract. That suit has resulted in his favor. 211 Pa. 394, 60 Atl. 1001. McManus now contends that

Watson cannot have the relief sought by the bill filed in this case, because under *Lockhardt v. City*, he could have brought suit against the city at law to recover the balance due under the contract. The question is somewhat complicated. McManus has recovered upon the contract "reformed." In the Supreme Court opinion Mr. Justice Brown says: "This being so, the plaintiff stands on a written contract with the city, not to be altered, varied, or departed from, but, to put it mildly, to be reformed for a mistake. Though contracts with the city of Philadelphia must be in writing, they are subject to reformation for fraud, accident, or mistake." It is to secure the payment due on this reformed contract that the plaintiff has sought the aid of a court of equity. I cannot see how Watson could have collected by suit at law after McManus had proceeded to have the contract reformed. Surely the city could not have been subjected to McManus' suit wherein he sought to reform the contract and to Watson's suit (McManus to his use) on the contract. Watson never possessed any right to reform the contract. He advanced moneys to do the work, and to secure repayment is entitled to collect any payments due McManus, but he never had any standing in law to collect what has been, by the judgment of the Supreme Court, given to McManus. I therefore find against the defendant on this point.

The second point, that Watson cannot recover because the contract between McManus and the city prevented an assignment of it, I find against the defendant. There was in law no assignment of the contract, and, if there had been, it was a matter of which the city might complain, but not McManus. The city submits itself to the decree of the court, and is willing to pay whoever is determined to be entitled to the sum it owes.

On the third point, that the new agreement made after January 1, 1898, took away Watson's rights under the assignment and power of attorney of January 1, 1898, I find against the defendant. The new agreement did not affect Mr. Watson's rights under the power of attorney.

The plaintiff has been guilty of no laches. As soon as he learned that McManus' suit was pending, he brought his action to prevent the city paying to McManus.

The court entered a decree as follows: "That an injunction issue restraining the defendant, Michael McManus, from collecting, or assigning, the judgment of \$29,215.19, entered in the suit of said Michael McManus v. City of Philadelphia, in the court of common pleas, No. 1, of December term, 1898, No. 547, or taking any further steps in said suit until a final decree be entered upon the cross-bill filed in the suit of James V. Watson v. Michael McManus, in the court of common pleas, No. 4, of June term, 1899, No. 408, and enjoining the city of Philadelphia from paying the amount of said judgment until the fur-

ther order of this court. That upon final determination of the said suit upon the cross-bill of James V. Watson v. Michael McManus, in the court of common pleas, No. 4, of June term, 1899, No. 406, the parties hereto have leave to apply to this court for further order in the premises."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

F. B. Bracken, for appellants. John G. Johnson and George R. Van Dusen, for appellee.

**PER CURIAM.** This is in substance a bill of interpleader to determine the proper party entitled to be paid a sum of money due by the city of Philadelphia on a contract of the city with the appellant and assigned by appellant to plaintiff. The learned judge below found all the facts in favor of the plaintiff, and the only questions in the case are well disposed of in the finding of law by him. Decree affirmed.

(221 Pa. 52)

**GIRARD TRUST CO. v. AVONMORE LAND & IMPROVEMENT CO. et al.**

(Supreme Court of Pennsylvania. April 27, 1908.)

**1. CORPORATIONS—MORTGAGES—FORECLOSURE—BILL IN EQUITY.**

A deed of trust by a domestic corporation authorized the trustee to foreclose on the request of a majority of the bondholders. Held that, on such request, the trustee could file a bill to foreclose, and was not restricted to a scire facias at law.

**2. SAME.**

A court of equity has jurisdiction of a bill by a trustee of a Pennsylvania corporation to foreclose a trust deed at the request of a majority of the bondholders under its general chancery powers, and under Act May 4, 1893 (P. L. 29), giving courts of chancery jurisdiction of litigation between creditors of domestic corporations and such corporations.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by the Girard Trust Company against the Avonmore Land & Improvement Company and the Alcania Company. From a decree for plaintiff, the Alcania Company appeals. Affirmed.

The following is the opinion of Wiltbank, J., of the lower court:

"The questions discussed relate to the jurisdiction of this court of a bill filed by a corporation, in obedience to the demand of creditors for the foreclosure of two mortgages to secure the bonds of another corporation, and for an accounting of the proceeds among bondholders and other creditors, the pledged land to pass free of lien. The equity trial judge admitted to intervene a third corporation having an equitable lien upon the pledged land later in its creation than the first mortgage of the plaintiff, but earlier than the second. It is this third corpora-

tion that raises the question of jurisdiction on demurrer to the bill. The plaintiff, the Girard Trust Company, and the defendant, the Avonmore Land & Improvement Company, are in accord as to the right of the plaintiff as trustee for bondholders to obtain a decree. The required number of bondholders have directed the plaintiff to foreclose. They were expressly empowered to do this by the terms of the mortgages. The intervening corporation, known as the Alcania Company, does not dispute the right of the Girard Trust Company to proceed for failure of performance of the covenants for payment. It admits the failure, but it contends that the remedy is by scire facias at law, and that, as no jurisdiction to foreclose in equity has been created in Pennsylvania, the necessity for an account, which it cannot dispute, is not sufficient to hold the bill. The covenant of the mortgagor that the mortgagee may sell on default is not relied on as a bar to the decree, but its relation to the subject will later be briefly adverted to. The lien of the Alcania Company involves a complication which would bring it into an accounting with the bondholders and the Alcania Company were the property to realize in money beyond a certain limit.

"The first mortgage of the Avonmore Land & Improvement Company was executed and delivered on January 23, 1894. The second mortgage was executed and delivered on June 2, 1900. At a time between these dates, on August 28, 1898, one Hilyard and one Wylie entered into a contract with the Avonmore Land & Improvement Company by which they and their assigns obtained from the company a lease of a part of the tract mortgaged to the plaintiff, comprising 10 acres, for the purpose of erecting a two-mill plant thereon for the manufacture of tin, etc. They secured the right to purchase the tract thus let upon certain terms, and became entitled to the sum of \$41,000 as a bonus or reward for improvements erected aiding the development and availability of the entire tract. Their estate and rights passed from them by due assignment to the Alcania Company, and that company improved the land according to the contract, and thus acquired the title to the bonus stipulated to be paid by the Avonmore Company at certain stages of the development of the property. A part of this bonus has been paid. The lien on the entire tract mortgaged to the Girard Trust Company was created at the time, and still subsists in favor of the Alcania Company, as appears by the contract and deeds between the parties. It was upon a demonstration of these circumstances in its petition to intervene that the trial judge permitted the Alcania Company to appear and argue its demurrer to the jurisdiction. To support their contention, counsel for the Alcania Company cite the case of Ashhurst v. Montour Iron Co., 85 Pa. 30, and with confi-

dence rely upon it as conclusive in their favor. In that case John Ashhurst and Edwin M. Lewis filed a bill for the foreclosure of a mortgage delivered to them by the Montour Iron Company to secure its bonds, averring that there had been a breach of covenant of the mortgagor, a pecuniary default, and consequently a resulting right and duty in the plaintiff to foreclose. I have examined the pleadings and briefs as among the records of the nisi prius. The bill averred that a trust had been created by the defendant in and by an indenture of mortgage which was exhibited, and that the plaintiffs survived Isaac R. Davies, who had been appointed with them, and prayed for a decree of sale in their behalf as mortgagees. The bill appears to have been taken pro confesso. The case was referred to Joel Jones, Esq., as master, and his report ascertained the entire indebtedness on the bonds issued by the company and the interest due up to the date of the filing thereof. A decree was entered approving the report of the master, and further specifically finding what moneys were due for principal and interest in the premises, and ordering a sale of the lands of John Ashhurst and Edwin M. Lewis, surviving trustees, subject to a certain lien or liens therein described, and free, clear, and discharged of all other liens.

"The error assigned in the Supreme Court was the decree in favor of the mortgagee entered without authority in the judge to take cognizance of an obligation created and enforceable at law. It was argued that the nisi prius sitting in equity had not jurisdiction. The Supreme Court adjudged that the nisi prius had not jurisdiction of the cause. The parties were found upon the proofs to be individuals, debtor and creditor, sustaining no fiduciary relation, but, on the contrary, bound by a legal obligation recognized and enforced at law as one of the most familiar and extended subjects of its daily administration. The controlling circumstance was that the defendant owed money on its bonds. True it was that in order to facilitate the raising of the loan and assure repayment, and thus to sustain and perhaps strengthen its credit, it had conveyed to the plaintiff property as security. This property so far as the defendant or mortgagor was concerned was held by the plaintiff or mortgagee in his own right at law to the use of a body of creditors and indirectly to that of the corporation debtor. The terms of the mortgage stipulated for the sale of the pledged property upon the breach of its obligation by the debtor. But the process intended and directed in the instrument was at law under the statutes providing a writ of scire facias. No risk was shown to be apprehended as to the distribution of the fund. The creditors were, therefore, neither plaintiffs nor defendants. Upon default the mortgagee became responsible to them, and we must there-

fore recognize a trust primarily in their behalf; but, so far as any action at law was involved, the mortgagee was the creditor of the mortgagor, and as such had ample remedy. He was the legal plaintiff, and the use plaintiffs were not in view. It is true that had there ensued a failure of the mortgagee to account for the proceeds of the sale he would have stood answerable to the mortgagor, and in this sense would have incurred the responsibility of a trustee in respect of his ultimate liability, provided an action at law, for money had and received or the like, appeared inadequate. But this contingency was remote, and could not be regarded as a feature of any significance at the time the bill was filed.

"It is clear that in *Ashhurst v. Montour Iron Co.* the appellant and appellee appeared in the character of mortgagor and mortgagee last described. There was nothing to show that the mortgagee as trustee for bondholders upon proper case shown desired the aid of the court in the execution of the primary trust. He sued as mortgagee without regard to his liability to account over, and he excluded the cestuis que trustent. The judgment in *Ashhurst v. Montour Iron Co.*, and in the later cases referring thereto, laid stress upon the distinction between an application for equitable relief on the part of a mortgagee against a mortgagor, each merely that and nothing more, and the application of a trustee or of cestuis que trustent specifically in that character to a court of chancery for relief. The statutes and decisions make it evident that we have jurisdiction generally in equity where relief is sought as between parties to a trust, to wit, the trustee and the cestuis que trustent; and, further, that in cases of accounting, where the adjustment of claims and equities must involve a nicer consideration and more intricate process than is usually within the capacity of a jury, a chancellor will proceed without hesitation. The expressions of the Supreme Court indicating the distinction are numerous, and on the subject of accounting they are unvarying. Mortgagor and mortgagee are debtor and creditor at law dealing with a pledge as an incident of a contract of loan on which the remedy at law is ample. 'But,' said the Supreme Court in grouping the statutes conferring jurisdiction, 'control of trustees or trust property and of trustees' accounts is expressly conferred.' *Ashhurst v. Montour Iron Co.*, 35 Pa. 30.

"In the case at bar the Alcania Company attempts to confine the contest to the Girard Trust Company and the Avonmore Land & Improvement Company, without regard to the constituents of the Girard Trust Company; but this is neglecting the controlling circumstances of the litigation, and that which distinguishes it from the case first examined, to wit, the insistence on the part of the bondholders acting through a stipulated



majority that the mortgagee as trustee proceeded to realize upon the property pledged. The use plaintiffs are the actors. Their demand has been formulated and presented under the terms of the mortgage, and has been found just and proper by the mortgagor or debtor. The default is admitted, and a sale of the property is assented to. The object of the trustee in this situation is to perform its duty most efficiently in the interest of all concerned, and to this end to make a sale of the land discharged of incumbrances and free from imperfections of title and also to appropriate the proceeds upon due accounting according to the rights of the creditors and the debtor. It is conceded in behalf of the Alcania Company that we would have had jurisdiction had the bondholders demanded action on the part of the Girard Trust Company and that company had refused. In such case, it was argued, the litigation would have been between the Avonmore Land & Improvement Company and its creditors with a legal title outstanding in the representative of both. It was agreed that jurisdiction would have attached had the Girard Trust Company peremptorily declined to proceed, because then the bondholders would have become entitled to have the trust executed for them, and this right a chancellor would have enforced at their instance. Were we not to regard the bondholders as parties primarily interested here, or, in other words, as the actors, we yet could not pronounce the trustee bound to incur the risk of even a formal breach of its covenants as a meritorious act creating an equity in its own behalf; nor could we look to its assent or dissent as the test of our jurisdiction. The power of sale granted the Girard Trust Company is not a bar to this proceeding. Under the earlier cases in England the conclusion would have been otherwise. It was first held by the chancellor that there was no right to foreclose where there was such power of sale. 2 Spence's Equity Jurisprudence, 676; Sampson v. Pattison, 1 Hare, 533; Down v. Morris, 3 Hare, 394. But it has been decided in this country, as well as in England, that the insertion of a power of sale in a mortgage does not supersede the remedy of a foreclosure bill. Clark v. Jones, 93 Tenn. 639, 27 S. W. 1009, 42 Am. St. Rep. 931. The modification of the law of England was created by the 15 & 16 Vic. c. 86.

"We, therefore, conclude that we have jurisdiction, on the ground that the trustee has been constrained by the action of the cestui que trust to proceed to foreclose the mortgage, and that this constraint may be regarded in one aspect as adverse to the trustee, who, therefore, is entitled to the protection of the chancellor as he enters upon the performance of his duty, and further to this end entitled to secure a decree that the purchasers of the land take a clear title. Indeed, the action of the Alcania Company shows the

expediency of a decree pursuant to the prayer of the bill, because it has brought itself before us as a creditor claiming the right to obstruct the course of collection in behalf of other creditors. It thus gives color to the indication that had the case proceeded beyond the demurrer the Alcania Company would have regarded itself as in position as defendant to interpose obstacles to a sale by way of securing a recognition of its equitable right and some recompense for its later accommodating itself to the course which the bondholders believed to be for their best interest. This discloses a threatened contest between creditors of a corporation. Unless the Girard Trust Company by advertising a sale discharging liens can make title to purchasers without putting them to the risk at some stage of such contest, a notice of the Alcania Company published at a sale might deter buyers and inequitably prejudice the bondholders by a falling off in the bids. Our authority is adequate upon the principles herein cited. But, besides this, we have the warrant of the act of May 4, 1893 (P. L. 29), which provides that the several courts of common pleas having the powers of a court of chancery shall have jurisdiction of all litigations and disputes between stockholders, and parties claiming to be stockholders, and between creditors and stockholders, and creditors and the corporation, of all corporations within the state.

"The exception to the finding of the trial judge is dismissed, and the demurrer of the Alcania Company is overruled. The prayer of the bill is granted."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

David Wallerstein, Francis Fisher Kane, and Arthur O. Fording, for appellant. John Hampton Barnes, for appellee.

PER CURIAM. The decree is affirmed on the opinion of the learned court below.

(220 Pa. 638)

POWELL v. PHILADELPHIA & R. RY. CO.  
(Supreme Court of Pennsylvania. April 20, 1908.)

# 1. CARRIERS — "PASSENGERS" — WHEN RELATION EXISTS.

The relation of passenger and carrier begins when one intending to become a passenger enters on the carrier's premises, and continues until the passenger knows of his arrival at the place of destination, and has a reasonable time to alight and leave the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 984-998.

For other definitions, see Words and Phrases, vol. 6, pp. 5218-5227; vol. 8, p. 7748.]

## 2. SAME.

Where a passenger alights from a train, crosses the track to a station on the other side to meet a friend waiting for her, and in so doing crosses a highway, she does not cease to be

a passenger because she had passed over such highway.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 984-993.]

### 3. SAME—USE OF STATION.

Where a passenger after alighting from a train enters the station to wait for a friend, she is entitled to use the station for a reasonable time.

### 4. SAME.

Where a passenger, after alighting from a train, enters the station to wait for a friend, and, after leaving the station, is compelled to walk along a dark path very close to the track, and is injured by a passing train, she may recover if she used reasonable care to avoid injury.

### Appeal from Court of Common Pleas, Bucks County.

Action by Elizabeth H. Powell against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

On a rule for a new trial, the court filed an opinion in which the facts were stated to be as follows: At about 6:40 o'clock on the evening of November 29, 1905, the plaintiff, Elizabeth H. Powell, accompanied by her friend, Miss Gaunt (now Mrs. Engle), arrived at Langhorne station on a train from Philadelphia. They both alighted in safety on the temporary cinder walk or platform on the south side of the railroad, then operated as a double-track road, running at that point from west to east from Philadelphia to New York City. They were on their way to visit at the house of Edward Palmer, who lived at Langhorne, north of the railroad, and who was to meet them at the station with a carriage. The passenger station house was on the north side of the railroad. It had been located for many years at the foot of Station avenue, a street running in a northerly direction to Langhorne borough. About three weeks prior to this date the station had been moved about 125 feet to the east towards Bellevue avenue, the main street crossing the railroad at about right angles, and running in a northerly direction into Langhorne borough. On the north side of the railroad the Langhorne and Bristol street railway ran from Bellevue avenue in a westerly direction along or near the defendant's land, and parallel with its tracks, for several squares to the west of the passenger station, where it crosses the railroad tracks to the south by an overhead bridge. The street railway stopped its cars at the foot of Station avenue, opposite the railroad station, to let off and take on passengers. The street railway maintained a small platform at this place for the accommodation of its passengers, but no waiting room. Street car passengers intending to take the railroad trains used the railroad's waiting rooms until the departure of their trains, and railroad passengers who desired to reach their destination by means of the street railway likewise used and remained in the defendant company's waiting rooms until the arrival of the next street car. There was no agree-

ment between the defendant company and the street railway as to such use. The waiting rooms were so used by the passengers of both companies for the purposes aforesaid by the permission of the defendant company, at least it does not appear that any objection was made by the defendant company to such use since the street railway was in operation, about 10 years. As said before, Miss Powell and her friend, Miss Gaunt, alighted on the platform in safety. It was a dark, rainy, stormy night. There was no shelter for passengers on the south platform except a small open shed. Miss Powell had been at Langhorne several times before and had used the waiting rooms, but she had not been at Langhorne since the passenger station had been moved. Miss Gaunt had been a frequent visitor at Langhorne, and was well acquainted with the use of the waiting rooms, but had not been there since the station had been removed. They could not reach Mr. Palmer, who lived north of the railroad, without crossing the tracks. They could not cross from the point where they were on the platform to the waiting rooms on the north side because of an iron picket fence between the east and west bound tracks, extending from a point west of the station to the line of Bellevue avenue, a public street crossing; the gates in front of the station being closed. They walked on the cinder walk to Bellevue avenue over the public street crossing to the north side of the railroad, at the end of the cinder walk, which led to the station and waiting rooms, about 190 feet west of Bellevue avenue. At this point they were as near to the street car line as they were at the station waiting rooms. They could have proceeded directly to Mr. Palmer's by the public streets, or they could have gone to the public licensed hotel opposite the street to wait for a car. They, however, did not do so. They took the newly laid cinder walk or platform to the railroad station. They entered the waiting room and at once passed through it to the back door to see whether Mr. Palmer was there with a carriage. It was through the back door that passengers usually took their carriages before the station was moved. They found the door was locked. They looked through the windows, and found Mr. Palmer was not there. They then went to the booth and telephoned to Mr. Palmer to know what to do. He told them to sit down and wait. In a short time Mr. Palmer arrived to take them home in the street car. Their purpose of using the waiting room was to meet Mr. Palmer in the first place, and afterwards to await his arrival to take them home, and to secure shelter from the storm in the meantime. They then waited for the arrival of the next car which was due at 7:40. On the arrival of the street car Mr. Palmer, the plaintiff, and Miss Gaunt, with a number of others, were waiting there for the same purpose. They all

passed down a little bridge from the elevated temporary platform in front of the waiting room to the temporary cinder walk laid along the tracks where the old platform had been taken up the day before. It was while they were passing along this walk to meet the street car that Miss Powell was struck by a passing express train from the east and was injured. During this period the waiting rooms were open for the use of the defendant's passengers. Miss Powell held a return ticket to Philadelphia.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Wm. C. Ryan and Henry D. Paxson, for appellant. Henry A. James and Howard Cooper Johnson, for appellee.

ELKIN, J. After careful consideration, we have concluded that the first assignment of error must be sustained. Whether the plaintiff remained in the waiting room for an unreasonable length of time so as to become a loiterer or mere licensee was, under the circumstances of this case, a question of fact, to be determined by the jury. The learned trial judge in his opinion overruling the motion for a new trial, and for judgment non obstante veredicto states that this was a question for the jury and that it was so submitted, but upon an examination of the charge it is clear that this question was not submitted to the jury with instructions for them to determine this fact. On the other hand, the jury were instructed that, "according to the view which the court takes of that situation, the court will instruct you that her rights as a passenger had not ceased." This had reference to the exact question whether she had remained at the station an unreasonable length of time, and it can only be construed as a binding instruction to the jury. This binding instruction was followed by a general discussion of the facts relating to this particular question, but nowhere does it appear that any direction was given to the jury to determine this exact question. The effect of the charge in this respect can only be considered as binding instructions upon the question of reasonable length of time, and therefore the jury were not left to determine whether, under the circumstances, she had remained an unreasonable time at the station. We do not agree with the contention of the learned counsel for appellant that the relation of carrier and passenger had ceased as soon as plaintiff had been discharged from the train on the south side, and had proceeded from that point to the station house on the north side of the railroad tracks, being the point nearest her destination. This position is predicated on the thought that, in passing from the station house on one side to the station house on the other, the passenger passed over the tracks at a public crossing. If the

railroad company had chosen to make a public crossing a convenience for its passengers in going from the station on one side of its tracks to that on the other, it cannot be excused for an act of negligence on the ground that the relation of carrier and passenger had ceased the moment the passenger placed his foot upon the public highway. The general rule is that the relation of carrier and passenger begins as soon as one intending in good faith to become a passenger enters in a lawful manner upon the carrier's premises to engage passage, and that relation continues to exist until the passenger has been made aware of his arrival at the place of destination, and has had a reasonable time to alight from the car and to leave the premises of the carrier. The duty of the defendant company under this general rule in the present case did not cease the moment plaintiff alighted from the train on the south side of the tracks, nor when she proceeded in the direction ordinarily taken by passengers to reach the station on the north side of the tracks, nor did it cease then until she had a reasonable opportunity to make her arrangements to depart. And right here is the pinch of the case on the question raised by the first assignment of error.

Clearly the plaintiff had the right after alighting from the train to proceed to the station on the opposite side of the tracks to await the arrival of a friend who was to meet her there. She was delayed a considerable length of time, and for the reason stated in the testimony she remained in the waiting room until the friend who she intended to visit called for her. In this connection we quite agree with the suggestion made by the learned counsel for appellant that it was no part of the duty of the railroad company to furnish a waiting room for the intending passengers of a street railway company with which the railroad company had no connection, and, if it clearly appeared that the only purpose of the plaintiff after alighting from the train at the south side of the tracks was to go to the station on the north side for the purpose of awaiting the arrival of a street railway car on which she intended to become a passenger, there could be no recovery because the relation of carrier and passenger would, under these circumstances, have ceased to exist before the injury occurred. But we do not so understand the testimony on this branch of the case. The plaintiff went to the station by the ordinary route, either to meet her friend or await his arrival in order to accompany her to her place of destination. The friend who was to meet her at the station might have walked, or even driven in a carriage, or come as a passenger on the street railway, and the manner of his coming would in no way affect her rights as a passenger of the railroad company. Under these circumstances the plaintiff had a right to make use

of the waiting room of the defendant company for a reasonable length of time, and what was a reasonable length of time was a question of fact, to be determined by the jury. It was the duty of the court to instruct the jury to first determine this question before proceeding to inquire into the alleged negligence of the defendant company, because the right to recover at all depended upon the determination of this question by the jury. If it should be determined that plaintiff had remained at the station an unreasonable length of time before her departure, it would necessarily follow that the relation of carrier and passenger had ceased, and there could be no recovery for an injury subsequently sustained. As we view the testimony, the question of negligence was too broadly submitted to the jury. It was not negligence on the part of the defendant company to run the train which caused the injury on its own tracks and at the usual rate of speed for that train. The question of signals, headlights, and other incidental matters connected with the running of the train, about which some testimony was furnished at the trial, has no connection with this case. The negligence, if any, of the defendant company is in no manner connected with the running of the train which caused the injury. It was the duty of the defendant company to provide safe means of access to and departure from its station for the use of passengers, and the plaintiff in the present case had a right to assume that the means of ingress and egress were reasonably safe. It was the duty of the defendant company to make and maintain the walk in a reasonably safe condition, and if, on the night of the accident, the walk was torn up or covered with obstructions which interfered with its proper use, or which caused the plaintiff to walk too close to the railroad tracks in order to avoid the obstructions, and if this condition of the walk was the proximate cause of the injury, there can be a recovery of damages for the injuries thus sustained. Again, it was the duty of the defendant company to keep the walks and approaches to the station properly lighted at night or when required. This duty was more imperatively demanded of the defendant company in the present case because of the close proximity of the walk to the railroad tracks, which necessarily made it somewhat dangerous. As we view it, there are only two questions of negligence to be submitted to the jury; that is, was the walk reasonably safe for the use intended and was it sufficiently lighted, and, if not, was failure to perform these duties the proximate cause of the accident?

It was the duty of plaintiff to use reasonable care in order to avoid danger. She was charged with notice that the defendant company had a right to run its trains on its own tracks at any time it suited its purpose to do so, and that a train might pass along while she was on the walk, and the duty rest-

ed on her to use reasonable care in order to avoid danger to her person. If she walked too close to the railroad tracks without looking ahead and without exercising such reasonable care as a prudent person should exercise under the circumstances and was injured by reason of her own neglect, clearly there could be no recovery. Under the circumstances, however, we have concluded that this question was also for the jury.

Judgment reversed, and a venire facias de novo awarded.

(321 Pa. 90)

PENNSYLVANIA R. CO. v. CITY OF PITTSBURG et al.

ALLEGHENY VALLEY RY. CO. v. SAME. (Supreme Court of Pennsylvania. May 4, 1908.)

1. TAXATION—RAILROADS—REPEAL OF STATUTES.

Sp. Act Jan. 4, 1859 (P. L. 828) § 3, relating to the taxation of the property of railroad companies in the city of Pittsburgh, is not repealed by Act March 7, 1901 (P. L. 20).

2. SAME—RAILROAD RIGHT OF WAY—"REAL ESTATE."

In view of prior judicial decisions and the construction of Act Jan. 4, 1859 (P. L. 828) § 3, relating to taxation of railroad property in the city of Pittsburgh, as shown by the fact that, for nearly 50 years after its passage, no attempt was made by the city to assess the rights of way of a railroad for taxation, the words "real estate," as used in such act, cannot be considered to include the rights of way.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 5937; vol. 8, pp. 7778-7779.]

Appeal from Court of Common Pleas, Allegheny County.

Bills by the Pennsylvania Railroad Company against the city of Pittsburgh and others, and by the Allegheny Valley Railway Company against the same defendants. From decrees dismissing the bills, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

M. W. Acheson, Jr., and Sterrett & Acheson, for appellant. A. M. Thompson, W. B. Rodgers, and Chas. K. Robinson, for appellees.

POTTER, J. The plaintiffs (appellants) are owners of certain strips of land in the city of Pittsburgh, used now and for many years heretofore, for their main railroad and tracks, and commonly known as rights of way. The city of Pittsburgh, in 1907, assessed and levied a tax upon the said strips, claiming authority to do so under Sp. Act Jan. 4, 1859 (P. L. 828), which provides that "all real estate situated in said city owned or possessed by any railroad company shall be, and is hereby, made subject to taxation for city purposes the same as other real estate in said city."

The first question that is raised is whether these rights of way are real estate taxable

under the act of 1859. That they are, in fact, real estate under the general legal distinctions of property is not disputed, but it is not clear that they are such real estate as comes within the intent of the authority to tax, given by that act. The original conception of a railroad was that of an improved highway, the right to construct, which was a franchise to the company, involving the obligation to furnish motive power, for persons and property, to all who sought it, even in their own vehicles. Of course, experience soon demonstrated that, as vehicles could not pass each other as on ordinary roads, they, as well as the motive power, must be under the control of one authority, but the conception of the railroad as a public highway has never been changed. As such, it is a franchise not included under general words authorizing taxation of property, real or personal. No case has been cited which sustains the view adopted by the learned court below. In *Penna. Railroad Company v. Pittsburgh*, 104 Pa. 522, where the act of 1859 was under consideration, it was held that the real estate of the railroad used for offices, passenger, and freight stations, etc., although necessary conveniences for the enjoyment of the franchise, were taxable under the act. But the distinction is plain. Depots, stations, offices, etc., are necessary, but depots, etc., in any particular place are matters of convenience only, while the right of way is essential to the life of the franchise itself, and, having once been located, is no longer open to the general authority to change. Not only has no case been found to support the view of the court below that the rights of way should be included with other real estate subject to taxation, but the contemporary construction of the statute has been uniformly the other way. The city of Pittsburgh itself made no attempt to assert such a construction for nearly half a century after the passage of the act. The Legislature is presumed to use language in its generally accepted meaning at the time. Contemporary *expositio fortissima est in lege*, and it is perfectly clear that in 1859 the term "real estate," as a subject of taxation, was not understood to include the essential instrumentalities of a franchise, such as the right of way of a railroad.

The second and larger question in the case is whether section 3 of the act of 1859 was repealed by Act March 7, 1901 (P. L. 20). The case of *Harrisburg v. Gas. Co.*, 219 Pa. 76, 67 Atl. 904, is cited as authority for the view that it has been so repealed. There the act of 1889 was held to furnish a complete system for the government of cities of the third class, which was inconsistent with the provisions of the earlier acts, authorizing the city to levy taxes on all real estate of corporations within its limits. If we compare the act of 1889, which was involved in the *Harrisburg Case*, with the provisions of the act of 1901, which is here involved, it

will appear that the property subject to tax is identical (so are the provisions for assessment and collection of taxes), and that both acts provide for the election of assessors—the act of 1901, art. 6 (P. L. 26), by reference to the earlier act of July 9, 1897 (P. L. 219), and also by article 12, § 1, par. 7 (P. L. 33). But in this respect the act of 1901 does not contain a complete system in itself, and differs from the act of 1889, art. 15, § 1 (P. L. 317), which contains such provisions without reference to prior legislation. Then, again, Act 1889, art. 15, §§ 8-10 (P. L. 319), designates the officers to whom taxes should be paid, the manner of enforcing payment, and penalties for failure to pay. Act 1901, art. 19, § 3, par. 2 (P. L. 40), authorizes cities of the second class to provide for the assessment and collection of taxes, but does not designate any officer to collect, nor manner of enforcing payment, nor penalties; but article 7 (P. L. 26) provides that "the city treasurer shall receive the proceeds of all public loans, and shall demand and receive from the proper officers, all moneys payable to the city from whatever source, and pay all warrants duly issued and countersigned; the receipt and collection of funds derived from assessments, taxes, water rents, licenses, permits and rents, from markets, landing, wharves and other public property, excepting delinquent taxes and water rents, shall be attached and subordinate to this department and subject to its supervision, control and direction." It will be seen that the act of 1901 is far short of the act of 1889, in the establishment of a complete system for the assessment and collection of taxes. Then as to delinquent taxes, the act of 1889 provides a complete system. Article 15, § 11 et seq. (P. L. 320). The act of 1901 makes no provision as to collection of delinquent taxes, except by reference to prior acts, as follows (article 5, § 1 [P. L. 25]): "The collector of delinquent taxes shall be the head of the department of delinquent taxes, and all laws and ordinances in force prior to the passage of this act, relative to said office and collection of delinquent taxes, shall be and remain in full force." The act of 1889 contains a complete system as to registry of "the ownership of all real estate liable to municipal taxation or assessment." Article 16 (P. L. 328). The act of 1901 is silent on this subject, and the local act of February 24, 1871 (P. L. 126), is still in force. *Safe Deposit & Trust Co. v. Fricke*, 152 Pa. 231, 25 Atl. 530. Numerous provisions, on other subjects, in the act of 1889, making it a complete system as to cities of the third class, are, in the act of 1901, either omitted altogether or supplied by reference to existing laws.

As set forth by counsel for appellee, the act of 1889 contains four articles providing for incorporation of cities, creation into wards, annexation of territory, and general provisions. The act of 1901 is silent on these sub-

jects. Corporate powers are the same in both. The legislative department is complete in the act of 1889. In that of 1901 the election of councils and ratio of representation are not fixed, but depend on other acts, and there is no reference to the passage of legislative acts. The powers of the executive are much fuller in the act of 1889 than in that of 1901, and there is, in the act of March 7, 1901, no provision for veto, power, nor anything showing that any ordinances were to be submitted to the recorder, except appropriation ordinances; and, even as to them, the proceedings of the recorder's veto are, such as are prescribed by law for the passage of bills over the city recorder's veto, and there is no provision in the act for such passage. The absolute lack of legislation on the most vital matters of city government, namely, the methods of passing ordinances and resolutions, is shown by the subsequent amendment of June 20th, and its very detailed provisions in reference thereto. See Act 1901 (P. L. 591). The act of 1889 provides for the treasurer and controller, and the act of 1901 does the same, but not so fully. The act of 1889 contains an article on board of health. The act of 1901 is silent as to the scope and powers of the board. The act of 1889 contains an article on water and lighting departments, sewerage, exercise of eminent domain, and on these subjects the act of 1901 is silent, except the mere statement in article 4 (P. L. 25) that waterworks, gas and electric plants are under the department of public works. The act of 1889 contains (article 15) over 10 pages on taxation and municipal claims. The act of 1901 contains an article (6) of less than a page on assessors, and preserves the act of 1897, and does not contain a word on the other subjects treated in article 15 of the act of 1889. And so, without going further into the tedious details of comparison, it would seem that these instances amount to a demonstration that the act of 1901 is not a complete system; and therefore the reasoning in *Harrisburg v. Gas Co.*, 219 Pa. 76, 87 Atl. 904, based upon the idea that the act of 1889 was a complete system, cannot apply to nor control this case.

But in any event the act of 1901 includes, within its system, the act of 1859, and saves it in terms. This will appear if we turn to article 6 of the act of 1901 (P. L. 26), under "Department of Assessors," creating a board of revision of taxes, which contains the following proviso: "Nothing herein contained shall be construed to repeal the act of July 9, 1897, providing for the classification of real estate and other property for the purposes of taxation, and for the election of assessors, and prescribing the duties thereof, in cities of the second class, except so far as the same is inconsistent herewith." Now section 2 of the act of July 9, 1897 (P. L. 220), provides as follows as to the board of revision of taxes: "That the present board

of assessors in any such city, or their successors when elected, shall make an assessment of all the subjects of taxation now by law, or which may hereafter be made subject to taxation for city purposes, and they shall take as the basis of such assessment, the last preceding assessment made by the board of assessors for such city, and shall have power to revise, equalize or alter such assessment by increasing or reducing the valuations, and to add to such lists of assessments any subjects of taxation as aforesaid omitted therefrom, and fix the taxable valuation thereof." This is the statute and section under which the assessors proceeded in the present case. They had authority to add to the list of subjects of taxation any real estate of the railroad omitted from the prior lists, subject, "now by law," to taxation under the act of 1859. But this, as we have pointed out, did not, in our judgment, include the real estate comprised in the right of way.

Section 3 (page 220) of the act of 1897 provides: "When the board of assessors shall have altered and amended the lists of all taxable property so as to arrive at its true cash value, they shall then ascertain the aggregate amount of the value of the entire taxable property of said city, which valuation shall remain the lawful valuation for purposes of city taxation, until altered as herein provided." Article 19 of the act of 1901 provides (P. L. 39): "The corporate powers, and the number, character, powers and duties of the officers of cities of the second class, now in existence by virtue of the laws of this commonwealth, shall be and remain as now provided by law, except where otherwise provided by this act." It should also be noted, that the power to levy and collect taxes on all property "taxable according to the laws of the state of Pennsylvania for county purposes," as provided by section 3 (P. L. 40), is in addition to those which are "now provided by law," and not in substitution thereof. The supplemental act of June 20, 1901 (P. L. 586), shows that the purpose of the Legislature was not to repeal any prior acts, except the act of 1887, relating to cities of the second class; sections 1 and 2 of this act being saved also. We are of the opinion that section 3 of the act of January 4, 1859 (P. L. 828), is not repealed, and is in force, but that, in the light of prior judicial decisions, and the contemporaneous construction of the act, as shown by the fact that, for nearly half a century after its passage, no attempt was made by the city of Pittsburgh to assess for taxation the rights of way, it was not the intention of the Legislature to include within the meaning of the words "real estate," as used in the statute, the ground comprised within the rights of way. If it be the policy of the law to make such property subject to local taxation, the Legislature should make it clearly apparent.

Decrees reversed, bills directed to be rein-

stated, and injunction awarded against the collection of taxes upon the rights of way. Costs to be paid by appellees.

(221 Pa. 64)

**MARCH et ux. v. BURGESS, ETC., OF BOROUGH OF PHOENIXVILLE.**

(Supreme Court of Pennsylvania. April 27, 1908.)

**1. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—CONTRIBUTORY NEGLIGENCE.**

Where a traveler knows of a defect in a highway, he is not necessarily guilty of contributory negligence because he uses such highway to reach his destination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1677.]

**2. SAME.**

Where the danger from the defects in a highway is serious, a traveler must, as a matter of law, avoid it at any inconvenience; but, if the danger is trifling, and the inconvenience of taking another way is so great that an ordinarily prudent man would not subject himself to it, it is not negligence not to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1679-1681.]

**3. SAME—QUESTION FOR JURY.**

Where, at the place of an accident, there was a hole in the sidewalk from four to eight inches deep, which had been there several months, and plaintiff, who lived in the vicinity, had only passed the place three times within a year, and did not know of its condition, and fell while using the sidewalk at night, the question of her negligence was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1754-1756.]

Appeal from Court of Common Pleas, Chester County.

Action by Isaiah G. March and Barbara March, his wife, against the burgess and town council of the borough of Phoenixville. Judgment for plaintiffs, and defendants appeal. Affirmed.

Plaintiff, on the night of October 31, 1905, about 10 p. m., was walking on the street, when she fell into a hole in the pavement, variously estimated at from four to eight inches in depth, and was seriously injured. She lived a short distance away, on the same street. The plaintiff testified that she was not in the habit of walking along this pavement, had only been over it three times during the year, and knew nothing of its condition. The hole in the sidewalk had been allowed to continue for a long period of time.

The defendant presented these points:

"(2) The testimony of Barbara March, plaintiff, is that the point, where the accident to her is alleged to have happened, was on the direct route between her residence, where she had lived for over five years, and the business portion of the borough, defendant, that she had passed this point at least three times during the year immediately preceding the accident (the condition of the street was unchanged during that time), and that she and her companion, walking abreast, arm in arm, had passed over this point on their way up that street the evening of the alleged accident. Therefore, if the defect in

the sidewalk at the point in question was so notorious as to be evident to all passers, and, therefore, to constitute constructive notice to the borough thereof the plaintiff, Barbara March, is presumed, under the evidence in this case, above stated, to have known that the pavement was unsafe, and therefore she was required to choose the safe route, which was open to her; and, not having done so, she is guilty of contributory negligence, and cannot recover in this case. Answer. That sounds somewhat argumentative, but still we will pass on it, and refuse that point.

"(3) That it is the duty of one who is walking the streets of a city, either in the daytime or at night, 'to look where he is going,' and this is a look ahead, and the look ahead that discharges the duty is one which includes, in the scope of vision, the ground from the feet forward. Where it clearly appears that a look down, or a look which includes the ground in front of the pedestrian, would have disclosed the hole or irregularity, then the case is one of negligent observation, and the plaintiff cannot recover, and this it is the duty of the trial judge to rule as a matter of law. *Strayline et al. v. Phila.*, 15 Pa. Dist. R. 395. Such being the law, the plaintiff, Barbara March, was guilty, in this case, of negligent observation, and she cannot recover. Answer. That, taken as a whole, some part of it is good law, but, as a whole, it must be refused.

"Under all the evidence the verdict must be for the defendant. Answer. That also is refused, as that is a question for the jury. The facts are somewhat conflicting, although not to any great extent, but sufficient to require us to submit them to you for your consideration."

Argued Before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Gibbons Gray Cornwell and Samuel A. Whitaker, for appellants. Thomas W. Pierce, for appellees.

**PER CURIAM.** There was evidence that the defect in the highway had existed long enough to presume notice to the borough authorities, and the only question in the case, therefore, is the contributory negligence of the plaintiff. The municipality is bound to keep its highways in fairly safe travelable condition, and travelers are entitled to presume that it will do so. Where the traveler has knowledge of a defect in the highway, it does not follow, as a legal consequence, that he must, under all circumstances, avoid the use of it, and reach his destination in some other way. It is a question of the character and imminency of the danger, and the difficulty or inconvenience of avoiding it. If the danger was serious and imminent it might be the traveler's duty, as a matter of law, to avoid it at any inconvenience. If, however, the danger was trifling, and the inconveni-

ence of taking another way was so great that an ordinarily prudent man would not subject himself to it, it would not be negligence not to do so. Between these extremes are the countless gradations of danger and ways of avoiding it, depending on the circumstances. This class of cases must necessarily go to the jury. The present is one of them.

Judgment affirmed.

(221 Pa. 59)

**STEVENSON v. UNITED STATES EXPRESS CO.**

(Supreme Court of Pennsylvania. April 27, 1908.)

**1. MUNICIPAL CORPORATIONS—NEGLIGENCE—UNATTENDED HORSE IN STREET.**

Where the owner of a horse leaves it unhitched and unattended on a city street, it raises the presumption of negligence, putting the burden on such owner of showing circumstances excusing it.

**2. SAME—CONTRIBUTORY NEGLIGENCE.**

An invalid in a rolling chair was left by her attendant in the cartway of a street while she went to deliver a package. An unhitched horse and wagon were about 25 feet behind her and the horse backed upon the chair injuring the occupant. *Held*, that the question of the occupant's negligence was for the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Elizabeth L. Stevenson against the United States Express Company. Verdict for plaintiff, and defendant appeals. Affirmed.

The plaintiff, an invalid, was pushed in her rolling chair by her attendant to a point near the express office of the defendant company. The attendant left the chair with the plaintiff in it standing in the cartway of the street while she went to deliver a package at the express office. About 20 feet in front of the rolling chair stood a horse and wagon belonging to the defendant, the horse being unhitched and unattended. While the two vehicles were in this position the horse suddenly backed upon the chair, overturned it and seriously injured the plaintiff. There was evidence that the cause of the horse backing was the colic. The court submitted plaintiff's negligence and defendant's contributory negligence to the jury.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James F. Campbell, for appellant. A. S. Ashbridge, Jr., for appellee.

**PER CURIAM.** One who leaves a horse unhitched and unattended on a city street takes the risk of what the horse may do. It was held in *Henry v. Klopfer*, 147 Pa. 178, 23 Atl. 387, 388, that such an act raises a presumption of negligence, and puts on the party doing it the burden of showing circumstances which justified or excused it. How strong the presumption will be must depend largely

on the circumstances. If the horse is young, skittish, nervous, or unused to the sights and sounds of a city street, the presumption would be strong, while if he is old, staid, and accustomed to city life, it might be very slight. But even a staid and veteran horse may be liable to sudden fright, or, as in this case, to sudden pain, which may induce dangerous behavior. It is therefore a matter for the jury.

So, on the other hand, was the question of contributory negligence of the plaintiff. The ordinance of February 2, 1897 (Brown's Digest, p. 1848), regulating travel on the public highways of Philadelphia, classes together all persons riding or driving "whether on horseback, in carriages, wagons or other vehicles, or upon bicycles, tricycles, or other mechanical contrivances," as occupants of the cartway, and the next section subjects all persons using "barrows or hand carts" to the regulations prescribed for carriages, wagons, and other vehicles. Wheeled or rolling chairs are not specifically named, but they are clearly within the description of vehicles, and "other mechanical contrivances." Whether in view of their almost exclusive use for small children and invalids they might not reasonably be entitled to take the foot pavement, they certainly are not obliged to do so. It would be a question for the jury on which the customs of the people would be weighty evidence.

Prima facie, therefore, the plaintiff was within her legal rights, if not her legal obligations, in using the street. Whether or not she was negligent in stopping and being left unattended in her condition of impaired capacity for movement, behind an unhitched horse, was clearly a matter for the jury.

Judgment affirmed.

(221 Pa. 7)

**COMMONWEALTH v. DEITRICK.**

(Supreme Court of Pennsylvania. April 20, 1908.)

**1. HOMICIDE—MURDER—EVIDENCE.**

On a trial for murder, the burden rests on the commonwealth to show beyond a reasonable doubt that the killing was intentional and willful; and, where the evidence on both sides raises a reasonable doubt, the jury must acquit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 262-284.]

**2. CRIMINAL LAW — INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.**

On trial for murder, where the defense was accidental killing, an instruction that, if the jury believe from the preponderance of evidence that deceased came to his death through accident, they should acquit defendant, and, if they should conclude from the preponderance of evidence that the accused unlawfully and maliciously killed the deceased, they should convict him, was erroneous, as the case is not one of preponderance of evidence, but one of reasonable doubt.

**3. SAME—INSTRUCTIONS—REVIEW.**

A conviction of murder will be set aside where the court in its charge submitted two conflicting measures of proof to the jury, one of which was erroneous.



**4. SAME—TRIAL.**

On trial for murder, the district attorney need not call every eyewitness, but it is sufficient if he notifies defendant of his determination not to call a particular witness.

**5. WITNESSES — EXAMINATION — LEADING QUESTIONS.**

The court has discretion to allow a party calling a witness to ask leading questions in order to elicit material truth.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 795.]

**6. SAME—IMPEACHING OWN WITNESS.**

On trial for murder, a witness for the commonwealth testified that one shot was fired by the accused and was asked whether at a former trial he had not stated two shots were fired, and, on his denial, the state was permitted to call witnesses to show that he made such statement, and the court charged that the statement out of court that two shots had been fired would only be considered as neutralizing his testimony on the stand that but one shot had been fired, and the jury should give it no other weight. *Held* not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1252-1256.]

**7. CRIMINAL LAW—CONVICTION OF LOWER OFFENSE—SECOND TRIAL.**

Where one indicted for murder on the first trial is convicted of murder in the second degree, it is an acquittal of the higher crime, and on a second trial he cannot be convicted of murder in the first degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 366, 387, 389, 394.]

**8. SAME—DEGREE OF CRIME—INSTRUCTIONS.**

Though it is for the jury to determine the degree of murder where the facts admit of either finding, where on a first trial defendant has been convicted of murder in the second degree, the court on a second trial should instruct that he cannot be convicted of murder in the first degree.

Mitchell, C. J., dissenting.

Appeal from Court of Oyer and Terminer, Montour County.

Peter Deltrick was convicted of murder in the second degree, and appeals. Reversed.

For opinion on former conviction, see 218 Pa. 36, 68 Atl. 1007.

At the trial the defense was an accidental shooting of the deceased while the prisoner was handling a revolver. John Woll, a witness for the commonwealth, who had testified at the first trial that only one shot had been fired, repeated the same testimony at the second trial. He was asked whether he had not made statements in the interval between the two trials in the presence of two persons to the effect that two shots had been fired. The question was allowed. Woll denied that he had made such statement. The court then admitted under objection and exception the testimony of the two persons to whom Woll was alleged to have made the statement as to the two shots.

The court charged in part as follows: "In this case the commonwealth presses for a verdict of murder in the second degree. The commonwealth does not press for a verdict of murder in the first degree, and you, therefore, cannot convict the defendant of murder in the first degree. Whether or not

the killing of the deceased was accidental, therefore, becomes an important question for you to determine from all the credible—from the preponderance of the evidence in the case. If you should reach the conclusion from the evidence, from the preponderance of the evidence, that Jones, the deceased, came to his death through the accidental discharge of the pistol, then it would be your duty to acquit the defendant. If, on the other hand, however, you should reach the conclusion, from the preponderance of the credible evidence in the cause, that the prisoner unlawfully and maliciously shot and killed Jones, the deceased, then we will say to you it would be your duty to convict him. The witness, James Woll, one of the eyewitnesses of this shooting affair, and whom it was the duty of the commonwealth to call, it was claimed by the commonwealth, took the commonwealth by surprise by testifying upon the stand that but one shot was fired, when, since the last trial and prior to his testimony now, he had stated to two of the commonwealth's witnesses that two shots were fired. The commonwealth alleges that she had reason to believe that Woll would testify from the stand according to his statements made to these witnesses. We permitted, under the circumstances, the commonwealth's counsel to inquire of the witness Woll whether he had not, on a certain occasion and at a designated place, to persons named, stated that two shots had been fired, and upon his denying it we permitted the persons to be called to testify to the statements made by him previously, viz., that two shots were fired. We did this, and we call your particular attention to this, not for the purpose of adducing substantive evidence of itself to prove that two shots were fired, but we permitted it only to neutralize the evidence given by the witness Woll, and we say to you that you must treat it only in that way and in no other way. That is, that you must not take these statements of Woll's made to these witnesses about two shots being fired as proof that two shots were fired, but that you may take them as neutralizing the statement made by the witness Woll on the stand that only one shot was fired."

Argued before MITCHELL, C. J., and FELL, BROWN, ELKIN, and STEWART, JJ.

Grant Herring, S. P. Wolverton, S. P. Wolverton, Jr., and Thomas Welsh, for appellant. H. M. Hinckley and C. P. Gearhart, Dist. Atty., for appellee.

STEWART, J. The appellant, charged with the felonious killing of James A. Jones, has had two trials, each resulting in a verdict of guilty of murder in the second degree. On appeal from the first conviction, we were constrained to reverse and direct a new venire because of manifest error in the charge of the court, too prejudicial to the defend-

ant to be overlooked. The defense set up was that the killing was accidental; that the pistol was discharged in sport, with no purpose to inflict injury upon any one. The instruction to the jury in unmistakable terms imposed on the defendant the burden of proving his defense beyond reasonable doubt. We held, in strict accord with settled principles, and in line with all our own adjudications, that, where a felonious killing is charged, the burden rests throughout on the commonwealth to show beyond a reasonable doubt that the killing was intentional and willful, and that where the evidence taken as a whole—that is to say, the evidence produced on both sides—raises a reasonable doubt in the minds of the jury as to whether the killing was accidental or intentional, they must acquit the accused, for the reason that the commonwealth has failed to meet the requirements as to proof. The opinion filed in that appeal (218 Pa. 36, 86 Atl. 1007) makes it unnecessary to say anything here in support of the rule. Quite as serious a mistake was made on the last trial, and in the same connection. On the second trial, as on the first, the defense rested wholly and exclusively on an accidental killing, and with respect to this defense the jury were charged as follows: "Whether or not the killing of the deceased was accidental, therefore, becomes an important question for us to determine from all the credible—from the preponderance of the evidence in the case. If you should reach the conclusion from the evidence, from the preponderance of the evidence, that Jones, the deceased, came to his death through the accidental discharge of the pistol, then it would be your duty to acquit the defendant. If on the other hand, however, you should reach the conclusion, from the preponderance of the credible evidence in the case, that the prisoner unlawfully and maliciously shot and killed Jones, the deceased, then we will say to you it would be your duty to convict him." The error here is too patent to require discussion. It applies to the defense of accidental killing, the rule of evidence which governs in cases where the defense is insanity. Because sanity is the normal condition of men, and insanity a defense set up to an act which otherwise would be a crime, we have held that the burden rests upon the defendant of proving his abnormal condition, and that by a preponderance of evidence. *Meyers v. Commonwealth*, 83 Pa. 131. Where the defense is an accidental killing, no exception to any general rule is asserted; and, instead of admitting the intentional act charged in the indictment, the defense directly challenges and controverts it. When this is the case, it is not a question of preponderance of evidence with respect to the matter of defense, but whether the effect is to leave a reasonable doubt in the minds of the jury as to whether the killing was intentional. If such doubt remains, it must operate to acquit.

The error here complained of is not technical, but fundamental, since it was a virtual denial to the defendant of a right he has with all others, when charged with the commission of crime, to a fair trial according to the law of the land. Uniformity of rule in the administration of justice can only be disregarded at the expense of that equal and exact justice to all, which it is the great object of our government to secure. True it is, that in other parts of the charge the trial judge directed the jury that, in order to convict the defendant, the testimony on behalf of the commonwealth must satisfy their minds of his guilt beyond a reasonable doubt; and it is insisted that such unqualified instructions correct the misdirection referred to. Taking the charge as a whole, it is impossible to tell which of the conflicting directions was observed by the jury. Certain it is that the misdirection of which complaint is made was not withdrawn; nor does it appear from the charge that the subsequent instruction was intended by way of correction. The jury had submitted to them two conflicting measures of proof. Which they adopted no one can tell. In *Commonwealth v. Gerade*, 145 Pa. 289, 22 Atl. 464, 27 Am. St. Rep. 689, the charge of the court was open to the same criticism, and the case was reversed; the same error being assigned. We there said: "But with two measures of proof before them one substantially correct, and the other erroneous, how is it possible for us to determine which the jury adopted? There should be nothing left to conjecture, especially in a capital case. It is enough to know that the jury may have been misled by erroneous instructions on a point vital to the defense." The fifth assignment of error is sustained.

Since the case must go back for another trial, an expression of view with respect to the questions raised by other assignments seems to be required. There were but two eyewitnesses to the occurrence. On the first trial, as on the last, both these witnesses testified that the defendant had fired but one shot. The contention of the commonwealth was, notwithstanding this testimony, that he had fired two shots. Whether one or two was a most material fact in the case; for, if two, the defense of an accidental killing would have absolutely nothing to support it. The commonwealth relied upon the circumstances that the revolver with which the shooting was done showed two empty shells, and the additional fact that the defendant declared that he had shot into the ceiling, which testimony could only be explained on the theory that two shots had been fired. Both eyewitnesses were called as witnesses for the commonwealth. The second to be called was Woll. Having testified that but one shot was fired, counsel for the prosecution were permitted to inquire of the witness, by way of laying ground for contradiction, whether he did not since the former trial state that two

shots were fired. Upon his denial that he had so said, counsel were permitted to call witnesses to testify to such declarations made by him. This is assigned for error. Manifestly in calling Woll as a witness the prosecuting officer had regard to a supposed rule in criminal procedure requiring the commonwealth to call all eyewitnesses to the occurrence. The impression that there is such a rule very widely obtains, but it is without judicial sanction. The disregard of it, if it ever existed, never of itself resulted in a reversal. In all such cases very much must be left to the discretion of the district attorney under the general direction of the trial judge. There may be, often are, justifying, if not compelling, reasons why a prosecuting officer should not be required to call each and every eyewitness. For instance, if he is satisfied from contradictory statements that any witness has made that the witness is wholly unreliable, it is asking too much that he accredit him by calling him to the stand. He does his whole duty in such case, if he gives notice to the defendant of his determination not to call the witness, so that he may be afforded the opportunity to call him if he desires. It is, of course, the duty of a district attorney to present all the testimony on the material facts, whether adverse to the defendant or favorable to him. We said as much in *Commonwealth v. Keller*, 191 Pa. 122, 43 Atl. 198; but by this nothing more is to be understood than that there must not be a withholding of testimony by the prosecuting officer for no other reason than it would be favorable to the defendant. In the very recent case of *Commonwealth v. Danz*, 211 Pa. 507, 60 Atl. 1070, it was assigned for error that the prosecuting officer had failed to call as a witness the physician who made the examination of the exhumed body of the party killed. We there said: "Under the circumstances, there was no duty on the part of the district attorney to call McFarland as a witness for the prosecution, quasi judicial officer though he be, as much concerned to see that no innocent person suffer as to see that no guilty man escapes. His full duty to the prisoner was discharged when he notified her that he would not call him, coupled with the notice that she must do so if she thought the testimony would help her." In *Donaldson v. Commonwealth*, 95 Pa. 21, we said, with reference to the failure of the district attorney to call a certain witness, that the calling of the witness was demanded equally by the cause of humanity on the one hand or of justice on the other; and yet, notwithstanding the conclusion there was: "We do not reverse for this reason, and do not sustain the fifth assignment of error which raises the question, but merely express our opinion as to what should have been done under the peculiar circumstances of this case." The rule with respect to hostile and adverse witnesses might well apply here if

Woll was called under a supposed legal requirement; but it is not necessary to invoke such rule, nor is it necessary that surprise on the part of counsel at the attitude of the witness should have been asserted. However much it was insisted upon formerly that a party could not be allowed to impeach by contradiction witnesses called by himself, the rule which prevented it has not only been much relaxed, but, as Mr. Wigmore in his treatise on Evidence shows, has been in most jurisdictions wholly abrogated. In England, where it had its origin, some features of it, preserved by statute, yet remain, but the very marked tendency in this country is to escape from it entirely. Our own state furnishes no exception. In *Gantt v. Cox & Sons Co.*, 199 Pa. 208, 48 Atl. 992, speaking by the present chief justice, we said: "The rule that a party calling a witness is not permitted to ask leading questions and is bound by his testimony is liberally construed in modern practice, with a large measure of discretion in the court to permit parties to elicit any material truth without regard to the technical consideration of who called the witness. It is a discretion not susceptible of exactly defined limits before hand, but to be exercised in the interests of justice and a fair trial under circumstances as they arise." It is complained that the effect of allowing such an examination, and admitting in evidence the contradictions, was to bring into the case Woll's declarations that two shots were fired, as substantive evidence in support of the commonwealth's theory; but any such result was so carefully guarded against by the trial judge as to make it impossible. In express terms he told the jury that Woll's statements out of court, to the effect that two shots had been fired, were not substantive evidence that two shots had been fired; that, at most, they could only be considered as neutralizing his testimony on the stand to the effect that but one shot had been fired, and that the jury should give them no other or different weight. Exception is taken to the use of the word "neutralizing" by the court in this connection; but it was entirely appropriate as will be seen from the following quotation which we take from Wigmore on Evidence, § 1018: "The prior self-contradiction is not used assertively; i. e., we are not asked to believe his prior statement as testimony, and we do not have to choose between the two (as we do choose in the case of ordinary contradictions of other witnesses.) We simply set the two against each other, perceive that both cannot be correct, and immediately conclude that he has erred in one or the other—but without determining which one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement. Thus we do not in any sense accept his former statement as replacing his present one. The one simply neutra-

lizes the other as a trustworthy one." There was no error in admitting the evidence; and the court sufficiently guarded its effect.

The other assignment of error relates to the instruction of the jury that, under the circumstances of the case, there could be no conviction of murder in the first degree. Of course, it is always for the jury, and never for the court, to determine the degree of murder, where the case upon its facts admits of either finding; but, where there is that in the case which, by operation of law, eliminates the higher degree, it is as much the duty of the judge to instruct with respect to this as it is to instruct with respect to the law generally. Such instruction cannot be considered as a determination of the degree by the trial judge. It is a determination by the law. There does exist a contrariety of view as to the effect to be allowed on a second trial—obtained at the instance of the defendant—of a conviction on the first of a lower grade of offense than the highest charged in the indictment. The great weight of authority in other states is that such conviction operates as an acquittal of the higher grade, and that on a second trial there can be no conviction of an offense of higher grade than that of which defendant was convicted. This view we regard as the better one, more consistent with reason and principle, and, what is more to the purpose than any individual opinion, it is the one adopted in our state. In *Hollister v. Commonwealth*, 60 Pa. 103, we have a clear recognition of this view of the law. We quote from the opinion of Chief Justice Thompson: "There is one matter on the face of this record which we cannot forbear noticing, namely, that this defendant was tried before this trial on the same indictment, and was acquitted of the burglary and larceny laid in the first count, but found guilty in the second, viz., for inciting Harris to commit the crime laid in the first count. On application by the prisoner for a new trial the court granted it, but on the second trial held him to answer as before the whole indictment. Was this right? We think not. It is laid down in 8 Wharton's Criminal Law (last Ed.) § 3250, that 'where there has been an acquittal on one count, and a conviction on another, a new trial can be granted only on the count on which there has been a conviction; and it is error on a second trial to put the defendant on trial for the former.'" *Commonwealth v. Gabor*, 209 Pa. 201, 58 Atl. 278, is an authority no less explicit. It is there said: "In the present case the indictment was for murder, but the verdict was guilty of manslaughter. Under the decisions in this state the verdict of manslaughter was so far an acquittal of murder that the appellant cannot now be found guilty on that indictment of any higher grade than manslaughter." Nowhere can be found a more satisfactory vindication of the rule here asserted than in the opinion

of Chief Justice Folgar in the case of *People v. Dowling*, 84 N. Y. 478. He there says: "The matter at the bottom is the constitutional provision that no person shall be expected to be twice put in jeopardy for the same offense; and yet new trials are granted in criminal cases on the motion of the accused, and, if he gets a new trial, he is thus subject to be put twice in jeopardy. This is done on the ground that, by asking for a correction of error made on the first trial, he does waive his constitutional protection and does himself ask for a new trial, though it bring him twice in jeopardy. The waiver of constitutional protection, unless it be expressly of the benefit of a verdict of acquittal, goes no further than the accused himself extends. His application for a correction of the verdict is not to be taken as more extensive than his needs. He asks a correction of so much of the judgment as convicted him of guilt. He is not supposed to ask for correction or reversal of so much of it as acquits him of offense. He therefore waives his privilege as to one, and keeps it as to the other. The waiver is construed to extend to the precise thing as to which relief is sought." Any different rule than that here indicated would, as we view it, be a serious impairment of a defendant's right to immunity from a second trial for the same offense, when a jury of his peers in a proper judicial proceeding has once found him not guilty. And this was the effect of the first verdict in this case with respect to the charge of first degree murder.

We find no merit in any of the assignments of error except the fifth. The error there complained of requires a reversal of the judgment.

Judgment reversed and venire de novo awarded.

MITCHELL, C. J. (dissenting). That the commonwealth is bound to prove every element of the crime charged by evidence which leaves no reasonable doubt, and that the jury should be clearly and positively so instructed, is not to be questioned. But I do not understand it to be the law that the judge is bound to repeat and reiterate this caution at every point in his charge where he takes up a different aspect of the case or a different line of the evidence. On this point, as on every other, the charge should be regarded as a whole and its correctness estimated by its general effect on the jury. "A charge must be considered and interpreted as a whole. If, so interpreted, it is a correct exposition of the law, and an adequate and impartial presentation of the case, it will be sustained, although portions of it, torn from their proper connection, may suggest error." *Commonwealth v. Johnson*, 183 Pa. 293, 19 Atl. 402 (305). In the present case the killing was not denied; the only defense being that the discharge of the pistol was accidental. On the previous trial the

jury had unfortunately been instructed that the defense must be established beyond a reasonable doubt. This was held to have put an undue burden on the prisoner. *Commonwealth v. Deitrick*, 218 Pa. 36, 66 Atl. 1007. At the present trial the learned judge, clearly having in mind this undue burden, charged the jury: "Whether or not the killing of the deceased was accidental, therefore, becomes an important question for you to determine from all the credible—from the preponderance of the evidence in the case. If you should reach the conclusion from the evidence, from the preponderance of the evidence, that Jones, the deceased, came to his death through the accidental discharge of the pistol, then it would be your duty to acquit the defendant. If, on the other hand, however, you should reach the conclusion from the preponderance of the credible evidence in the cause that the prisoner unlawfully and maliciously shot and killed Jones, the deceased, then we will say to you it would be your duty to convict him." I am of opinion that this was a correct statement of the law. The prisoner had been flourishing an empty revolver and boasting of his skill as a marksman. On being taunted by the deceased as to his marksmanship, he went into another room, got a loaded revolver, and almost immediately leveled it at the deceased and fired. The legal presumption that a man intends the natural and usual consequences of his act raises a clear inference that this was murder, and, if no evidence to the contrary had been given, the jury would have been bound to so find it. But the prisoner undertook to show that it was an accident, and was bound to satisfy the jury of that fact by a preponderance of the evidence. It has been so held in regard to self-defense (*Alexander v. Com.*, 105 Pa. 1 [10], and the same principle should apply to reduce what is presumptively a murder to an accidental killing. It is true that, when this case was here before (218 Pa. 36, 66 Atl. 1007), some authorities were referred to which hold that accident is not an affirmative defense which puts the burden of proof on the prisoner like self-defense; and, while I must concede that the tendency of the language used is to credit those authorities, yet the decision was put upon another and entirely sound ground. The rule contended for is illogical, wrong in principle and in true policy, and ought not to be considered adopted in Pennsylvania without more direct and cogent reasons than have yet been presented.

But, if I am wrong in this, and conceding for the present that the part of the charge quoted was erroneous, yet it was abundantly cured by the context. After defining murder and the statutory distinction of degrees, the judge charged that "all murder not of the first, is necessarily of the second, degree. Murder in the second degree includes all unlawful and malicious killing, evincing depravity of heart, but where no intention to kill

has been established by the evidence to the satisfaction of the jury, and beyond a reasonable doubt." He then considered manslaughter and the bearing of intoxication, etc., using this emphatic language: "In every criminal trial there are two rights which belong to the accused and which attach to him at every stage of it, and in every view of it. These are the presumption of innocence, and the benefit of the reasonable doubt. The presumption of innocence must be overcome by proof, and by proof which will leave in the minds of the jury no reasonable doubt of guilt. In trials for murder, as in all others of a criminal nature, the defendant is entitled to the benefit of what is known as a reasonable doubt; that is, the feeling of uncertainty as to the guilt of the accused which remains in the mind of an honest man after a full, fair, and conscientious consideration of all the evidence."

And, finally, after reviewing the evidence and defining specifically the different verdicts which the jury might find, he closed his charge by repeating the caution: "As before intimated, before you convict the prisoner, you should be satisfied of his guilt beyond a reasonable doubt. If there is a reasonable doubt in your minds of his guilt, then he should be acquitted." The jury retired for deliberation with these words in their ears, and it does not appear to me possible that the dullest mind could have failed to appreciate the prisoner's rights on this subject. I agree that in the choice of evils incident to the imperfection of human tribunals it is better that a guilty man should escape than that an innocent one should be convicted; but I do not believe in magnifying trivial breaches of technical rules, which could not possibly have had any effect on the real merits of the case, into errors which call for a reversal of the judgment. By the first jury's want of nerve to do its duty a murderer whom any honest and courageous jury would have convicted in the first degree without leaving the box has escaped the gallows certainly, and now is to be given a third chance to go free altogether. I do not believe that the law requires any such failure of justice.

(221 Pa. 38)

#### In re PAXSON'S ESTATE.

(Supreme Court of Pennsylvania. May 4, 1903.)

#### WILLS—CHARITABLE BEQUESTS—"ATTESTING WITNESSES."

Under Act April 26, 1855 (P. L. 328), providing that no property shall be bequeathed to any person in trust for religious or charitable uses except by deed or will, attested by two credible witnesses, at least one calendar month before the decease of the testator, an attesting witness must be a subscribing witness.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 1, p. 630.]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Edward M.

Paxson. From a decree dismissing exceptions to adjudication, the commonwealth, on the relation of the National Farm School, and others appeal. Affirmed.

Penrose, J., filed the adjudication, which was, in part, as follows:

"The decedent, Hon. Edward M. Paxson, died without issue, October 12, 1905. By his will, admitted to probate November 8, 1905, upon proof, by two witnesses, of handwriting of signature, he gave \$100,000 and certain real estate to his wife, Mary M. B. Paxson, absolutely, and certain other personal property there set forth; the residue of his estate, after various gifts, more fully set forth in the petition for distribution hereto annexed, being given to her for life. The will contains charitable gifts as follows: 'All my remaining farms in Bucks county, including the Walker farm adjoining "Nonesuch" and subject as to Bycot Farm to my wife's life estate, I give to my said wife and to my friends, L. Webster Fox, M. D., William S. Erdman, M. D., Harmon Yerkes and T. Howard Atkinson and their heirs, in trust, nevertheless, to establish and found at "Nonesuch" the farm I recently purchased, \* \* \* a home for poor boys, where they shall be properly educated as farmers, gardeners, etc. I leave the trustees to fix the age at which they may be received and merely suggest from six to sixteen, and to remain until they arrive at twenty-one years, and that after a trial term, they be regularly indentured as apprentices, and in all cases the control of parents over them to be absolutely released. They should be well instructed in the dairy and all branches of farming, as well as in truck gardening; and when their term has expired, I want each boy who has a satisfactory record, to have a good outfit of clothing and one hundred dollars in gold, to commence the world with; also a certificate that he has graduated with credit. I am induced to found this institution from the fact that so many of our young men are abandoning the farming business, which I consider a great mistake. I leave the trustees to name the institution, and merely suggest that of "Buckingham Agricultural Institute." I presume the trustees will procure a charter; the vacancies in the board to be filled from time to time by the appropriate court of Bucks county. I do not desire to encumber this will with minute directions, nor do I wish to tie the hands of the trustees. I may leave some thought as to the management for the consideration of the trustees, which, however, will be no part of my will, and not binding upon the trustees. And that the institution may not lack support, I give the said trustees the sum of one hundred thousand dollars, which sum shall be largely increased on the death of my wife; in trust for the purposes above mentioned. \* \* \* And from and after her death, I give and devise all my real estate in the borough of

Newton, Bucks county, to the "Friends' Boarding Home" of Bucks quarterly meeting, its successors and assigns, to be used and enjoyed, however, only so long as the said "Home" shall be kept for such purposes as at the present. In case it shall not be kept as such home for the period of one year, then the subject of this devise as well as the home itself, shall revert to my residuary estate. And from and after the death of my said wife, I give, bequeath and devise all my estate remaining at that time to the trustees of the home for boys, hereinbefore named, or their successors, in trust for carrying on the aforesaid provisions for said home. \* \* \* I suppose my executors will be obliged to pay the collateral inheritance tax on the gift to the home for poor boys, but I think they should not tax such a charity, and I therefore request my executors and trustees of the home to apply to the Legislature for an appropriation for an equal amount.'

"The will was signed by the testator January 23, 1905, nearly nine months before his death. It was written by Horace Yardley, secretary of the Jayne estate, from a draft which appears to have been made by the testator himself. It is free from the slightest ambiguity, and the charity which it seeks to create and provide for is of the most deserving and beneficent character; but, while all its other provisions are effective, the charitable gifts must fail, for the reason the testator has failed to comply with the requirements of the act of April 26, 1855, regulating testamentary dispositions of real and personal estate for such purposes. That act declares, in language which is explicit and peremptory, that 'No estate shall be bequeathed, devised or conveyed to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and, at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, next of kin or heirs, according to law.' The will itself shows that it was the intention of the testator that it should be attested by at least two witnesses. It has, at the end, the usual attestation clause, 'Sealed and signed in the presence of us,' but the intended witnesses are wanting.

"The testimony shows that the will, having been engrossed by Mr. Yardley, was brought by him to the Jayne building, on the north side of Chestnut street, in the morning of January 23, 1905, and taken to the rooms of the Jayne estate, of which Judge Paxson was one of the trustees, in the second story. Patrick Keefe, the janitor and messenger of the estate, was there at the time, or came in soon afterwards, and was told by Mr. Yardley that the paper which he then had was a will, which Judge Paxson intended to execute. It does not appear, however, that

Patrick examined the paper, or that he had any knowledge of its character or its contents than what he was thus told by Mr. Yardley. Judge Paxson came in at a later hour. He seated himself at the table, in the main room of the Jayne office, and while Mr. Yardley, who stood by his side, read the original draft, he had before him the engrossed copy, and saw that it was correct. He then signed the latter, not only at the end, but at the foot of each page, Mr. Yardley turning over the pages for him as he did so. Patrick Keefe, while this was going on, was in the adjoining room, at a distance of perhaps 50 feet, reading a newspaper. The rooms were communicating, with a wide, high opening between, so that, from where he sat, the table, the testator, and Mr. Yardley were in full view. He might therefore have seen the act of signing, but he was unable to say that he did; and, even if he had, he could not, except from what he had been told by Mr. Yardley, in the absence of the testator, have known that what was signed was a will. See upon this subject, *Hock v. Hock*, 6 Serg. & R. 47. It is true that Patrick testified that he saw a paper on the table in Mr. Yardley's room at the time, which, when the will was brought before the auditing judge from the office of the register of wills, he identified as the same paper, though he only saw the outside of it, declaring that its appearance, when on that table, was precisely that of the paper from the register. The absolute unreliability of such evidence is shown by the fact that the latter paper had on it the buff colored back put on in the register's office, which it certainly had not when it was signed by the testator. After the will was signed, Mr. Yardley asked the testator who were to be the witnesses, to which the reply was that he (Yardley) and Patrick would do; but, when his attention was called to the fact that the will gave a small legacy to each, and that they might, perhaps, on that account, be disqualified, he agreed that this might be so, and said that 'Mr. Oellers and Mr. Harrington are coming to see me on business, and when they come I will ask them to witness it.' This, however, was never done. Some months afterwards, in conversation with various friends, who were examined before the auditing judge as witnesses, he spoke of having executed a will and of the charities which it provided for, referring especially to the home for poor boys and the plan for educating young farmers, in which he expressed great interest; but the will by which this was done was not exhibited to the witnesses, nor was there anything by which they could identify it.

"The ordinary method by which a will is attested is by having it witnessed by persons who, at the request of the testator, sign their names for that purpose; but subscription is not, perhaps, the only method of attestation, though, obviously, mere proof of the genuineness of the signature of a testa-

tor is not 'attestation.' The act of 1833 requires that a will shall be 'proved' by two witnesses; and any written instrument, in the absence of statutory requirements, is proved, if there are no subscribing witnesses, by proof of the signature. When, therefore, the act of 1855 declared that, in order to create a valid charity the will must be 'attested,' something different from the 'proof,' which was sufficient in the case of an ordinary will, was manifestly intended. The act was a remedial one, and its purpose was apparent. It was to protect testators against their own weakness, and from the importunities and undue influence of designing persons, often exercised at the expense of those to whom the testator was under moral obligation to make provision for. The law, to use the language of Judge Mitchell, in *Hoffner's Estate*, 161 Pa. 331, 343, 20 Atl. 35, 'recognizes such bequests as valid, but requires them to be made when the judgment is clear, and the obligation is not sharpened or exaggerated by the terrors of impending death.' It is to be so construed as to prevent the mischief which it was designed to correct, and this would be done very ineffectually, if at all, if 'attestation' is to be regarded simply as the equivalent or synonym of 'proof.' Nothing would be easier than to antedate the will and dispense with witnesses and then, the presumption being that the date was the actual one, the statutory provision that it must be at least one calendar month before the death of the testator would, in many, if not the majority of cases, be a nullity. To attest a will the witnesses must be able to identify the instrument as the act of the testator, not simply from the appearance and nature of the paper itself, but from the declaration of the testator and its identification by him at the time. Whether he must not also request the persons to bear witness that the instrument is his will need not be considered.

"Undoubtedly many instances have occurred, and will occur, of which the present is a striking example, where most deserving charities have been defeated by the failure of testators to comply with the requirements of the act; but the responsibility is upon the testator who does this, and not upon the court, whose duty it is to decide an abstract question. The act is plain, and its terms peremptory, and judges cannot disregard it, or allow themselves to be influenced by the hardship of any particular case. Cases of hardship frequently occur as the result of statutory enactments, as, for example, the act requiring a promise to pay the debt of another to be in writing (see *Schafer v. Bank*, 59 Pa. 144, 98 Am. Dec. 323), or the act requiring a will to be signed 'at the end thereof,' which, as held in *Wine-land's Appeal*, 118 Pa. 37, 12 Atl. 301, 4 Am. St. Rep. 571, in an opinion by Judge Paxson himself, must be literally complied with, even if the words following the signature do not

affect or change the dispositions made by the instrument. In the present case, the testator was perfectly familiar with the law. He knew that the will, so far as concerned the charitable gifts, was incomplete until duly attested; and he declared that he would, at a later time, see that this was done, but, whether from forgetfulness, inattention, or because of some contemplated change, it never was done. The act has been on the statute book for more than 50 years, and very many cases have occurred, frequently in our own court, in which gifts of this character have been declared inoperative because the will was not attested by two witnesses, though it had been admitted to probate upon proof of the handwriting of the testator. The correctness of this, so far as appears, has never hitherto been questioned. So long ago as 1862 a very distinguished judge (Thompson, P. J., of the court of common pleas of Philadelphia) thus decided in *Hupfeld's Estate*, 5 Phila. 219, and a no less distinguished judge, of the orphans' court of Allegheny county, decided (in 1891) in the same way in *Gray's Estate*, 147 Pa. 67, 69, 23 Atl. 205; the decree being affirmed by the Supreme Court. The contemporaneous and continued construction of a statute, where its meaning is in doubt, will not be departed from. *Contemporanea expositio est optima et fortissima in lege, et optimus legis interpres consuetudo*. But the meaning of the act of 1855 is not, in the opinion of the auditing judge, doubtful. No other argument is required than the act itself, its words are free from ambiguity, and interpretation is unnecessary. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*.

"The auditing judge is compelled, therefore, notwithstanding the exceptionally able argument of counsel representing the charity and the commonwealth, to decide, though with great regret, that the charitable gifts have failed, by reason of the omission of the testator to execute the will in accordance with the requirements of the act of 1855, regulating such dispositions; and as the ultimate gift was residuary, the result is to this extent: An intestacy, one half of the personal estate passing to the widow of the testator, and the other half to his next of kin, his nephews and niece and grandnephews and nieces, whose names are set forth in the petition hereto annexed, *per stirpes*."

Exceptions to the adjudication were dismissed by the court in the following opinions:

"Ashman, P. J. We adopt the adjudication of Judge Penrose as the opinion of the court. It was attempted to prove the gifts to charity by two witnesses, one of whom, seated at a distance of 50 feet or more from the testator, could identify the paper, upon which the testator wrote, as the will, only because the draftsman, the other witness, had told him that it was the testator's will, evi-

dence which was purely hearsay. His testimony was defective in this: That it required to be supplemented by that of another, whereas, under repeated decisions, each witness to a charitable gift must, from his evidence, based on independent knowledge and information as an eyewitness, meet all the requirements of the statute. *Hock v. Hock*, 6 Serg. & R. 47; *Mitchell v. Low*, 213 Pa. 526, 63 Atl. 246. To make good his deficiencies by cumulative testimony furnished by another eyewitness, or by after-declarations of the testator to others that he had executed a will bequeathing to charities, which he described in terms corresponding with those named in his will, is not permissible. A chain is no stronger than its weakest link, and this is true in law as in physics. *Derr v. Greenawalt*, 76 Pa. 239. Neither witness had signed; and, if either had died before the hearing, the gifts must have fallen. The act of 1855, in our opinion, carefully guards against such a mischance. It provides that no estate shall be conveyed or willed to a charity, 'except the same be done by deed or will, attested by two credible and at the time disinterested witnesses, at least one calendar month before the decease of the testator or alienor.' The orderly arrangement of these provisions seems to indicate that the attestation should be made at least one calendar month before the death. *Gray's Estate*, 147 Pa. 67, 23 Atl. 205. If the witness attest the will by signing, and we know no case where an instrument has been held to be attested except by the signatures of the witnesses, and one or both should die, proof of their signature will carry with it the legal presumption that the will was executed in conformity with all legal requirements. It is incredible that the Legislature could have meant to subject a will giving, as in this instance, a million to charities to the hazard of the continuance in life of a single witness. The testator, who had but recently resigned from the highest judicial office of the commonwealth, evidently entertained this view. He acquiesced in the suggestion by the draftsman, whom he requested to sign, that he and Keefe, being legatees, were perhaps interested witnesses within the meaning of the act, and were therefore ineligible; and he declared that he would have two other witnesses sign the instrument. He, therefore, manifestly regarded the will as at that time incomplete. It is useless to speculate upon this after-inaction. He may have intended, on further reflection, to add other provisions to the instrument. But he did nothing, and his will remains as he saw fit to leave it.

"For the reasons given by the auditing judge, we concur in his decision that the collateral inheritance tax, imposed by the Mexican government on inheritances and legacies, was due and payable by the estate of the testator, out of the proceeds of the mortgage held by him upon the property of the Amparo Mining Company, the mortgagor.



"The claim of John R. Williams to certain shares of stock of the Amparo Mining Company, to the rejection of which exceptions were filed, is referred back to the auditing judge, with his own consent, for further consideration.

"The remaining exceptions are dismissed.

"Penrose, J. (concurring). It must always be a source of great regret that a charity, which might have been productive of so much benefit to the community, should fail, or that a fortune so large should go to those whom the testator, apparently, did not wish to have it; but the act of Assembly which—wisely, as has heretofore been supposed—regulates the methods by which such benevolences (often the result of importunities, at a time when the donor is not in a state of mind to resist them, and when perhaps his own fear or selfish desire for post mortem admiration causes him to overlook those for whom he ought to provide) are to be created, declares that: 'No estate \* \* \* shall \* \* \* be bequeathed, devised or conveyed to any body politic or to any person in trust for religious, charitable, literary or scientific uses except the same be done by deed or will, attested by two credible and at the time disinterested witnesses, at least one calendar month before the decease of the testator \* \* \* and all dispositions of property contrary hereto shall go to the residuary legatee or devisee, next of kin or heirs, according to law.' The question, therefore, unaffected by the merits of the gift or the amount given, is a very simple one: What is the method by which, alone, under the mandates of the act, a valid charitable disposition of an estate can be made by will? and in the consideration of this question it is manifest that the eminence of the testator, or the profundity of his legal attainments, can have no weight whatever; for, to use the language of Professor Gray (Rule against Perpetuities, preface page, v): 'If the answer to a problem does not square with the multiplication table, one may call it wrong, although it be the work of Sir Isaac Newton.' The act is a remedial one, aimed at an obvious mischief. It has been on the statute books for more than 50 years, during all of which time its meaning has been supposed, by bench and bar, to be clear and free from doubt. It has been acted upon, under this general understanding, in innumerable instances; and, so far as its plain expression called for interpretations, the rule that remedial statutes are to be so construed as to suppress the mischief and advance the remedy—'suppressing all subtle inventions to creep out of the statute'—has never been lost sight of.

"The act, as already stated, declares that no such testamentary disposition shall be made, except by 'deed or will attested by two credible and at the time disinterested witnesses, at least one calendar month before the decease of the testator.' It must not

only be by a will executed at least one calendar month before such death, but that will must be not simply 'proved,' as in the case of an ordinary will, but 'attested' by two witnesses. Obviously some kind of proof differing from the ordinary proof, is there made requisite. When a statute uses a different term from that used in another statute relating to the same general subject, the rule is elementary that a different meaning is intended; and the difference in the meaning of the words 'proved,' as used in the act relating to ordinary wills, and 'attested,' as used in the act with regard to wills creating charities, has been shown by eminent jurists, in language substantially the same in very many cases, beginning with what was said by Judge Oswald Thompson, in 1861, in *Hupfeld's Estate*, 5 Phila. 219; *Irvine's Estate*, 206 Pa. 1, 55 Atl. 795, being the last utterances of the Supreme Court on the subject. See, also, *Gray's Estate*, 147 Pa. 67, 23 Atl. 205, etc. There must be two witnesses, and each must 'attest'—whatever that may be—the 'will' which contains the charitable gift. An 'attesting' witness in the sense used by the statute, can be no other than one who, of his own knowledge, can identify the instrument as that executed by the testator 'not less than one calendar month before' his death. The witnesses who 'attest' must be credible, and 'at the time' disinterested. At what time? At the time of attestation. And what is it that they attest? That the will, which they must each be able to identify (see *Simrell's Estate*, 154 Pa. 604, 26 Atl. 599, 35 Am. St. Rep. 864), was executed at least one calendar month before the death of the testator; and here there is but one person who can testify as to the execution of the will, the other, who was called for the purpose, not only having no knowledge of his own that the instrument was the testator's will, but being unable to say that he saw it 'signed at the end thereof' or at all. That declarations of the testator, not having the will in the presence of the person to whom they are made, that he has disposed of his estate in a designated way are not the equivalent of a witness required to prove a will was expressly decided in *Derr v. Greenawalt*, 76 Pa. 239, in an opinion by Judge Sharswood, citing *Clark v. Morton*, 5 Rawle, 235, 28 Am. Dec. 667, where the same thing was decided in the case of Judge Morton's will. Very eminent counsel (Mr. Meredith and Mr. Williams) contended for a different ruling in *Clark v. Morton*, but the law was too obviously against them, and the question cannot now be regarded as an open one. It is not affected by *Scott's Estate*, 147 Pa. 89, 23 Atl. 212, 30 Am. St. Rep. 713, an exceptional case which was explained in the very recent case of *Willing's Estate*, 212 Pa. 136, 61 Atl. 812, where the court below was reversed for following what was erroneously supposed

to be the doctrine newly established by Scott's Estate.

"In the present case Judge Paxson had intended to comply with the act. The will, which he signed, was copied from a draft which he himself had made. It contained the usual attestation clause, to be subscribed by two witnesses; but, it having been suggested to him that the two persons whom he had intended to call might not be 'disinterested,' within the meaning of the act, he concurred in the suggestion, declaring that he would have two others, whom he named, whom he expected to see later in the day; but, whether from forgetfulness on his part, or inattention, or from an unexpressed idea of subsequent changes in the will, he failed to do so. The consequence is most unfortunate, but it is not in the power of the court to avoid this. The mandate of the act is positive, and, as said in *Gorgas v. Saxman*, 216 Pa. 237, 65 Atl. 619, 'a ruling made to cover the exigencies of a particular case makes bad law generally.'"

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Abraham Israel, Russell Duane, Alfred N. Kelm, and John E. Fox, for appellants. John G. Johnson, for appellees Stopp and others. Samuel Dickson, Henry S. Drinker, Jr., and Henry D. Paxson, for appellees Paxson and others.

MITCHELL, C. J. Appellants have presented a learned argument on the etymology and primary meaning of the word "attest," but unfortunately it has little bearing on the question in this case. The word has several variations of meaning, subordinate to the general sense, among which the latest authority, the new Oxford dictionary, gives "(a) to bear witness to, to testify, to certify, (b) formally by signature." The exact question here is the sense in which the Legislature used the word in Act April 26, 1855 (P. L. 328). By the general wills act of April 8, 1833 (P. L. 249), wills "in all cases shall be proved by the oaths or affirmations of two or more competent witnesses." No subscribing witnesses are necessary, proof of the testator's signature by witnesses acquainted with his handwriting being sufficient, and the witnesses being only required to be "competent"—i. e., disinterested—at the time of making proof. In the act of 1855, however, the Legislature set an entirely different standard of proof. By that act "no estate, real or personal, shall hereafter be bequeathed, devised, or conveyed to any body politic, or to any person in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and, at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor." The purpose of this act is plain. It was to make reasonably

sure that testamentary gifts to religion or charity were the result of deliberate intent of the testator, and were not coerced from him while in weakened physical condition, under the influence of the doubts and terrors of impending death. The main feature of this precaution was, of course, the requirement that the gift must be by deed or will, one calendar month before the decease of the donor or testator, and this fact must be attested by two credible and, at the time, disinterested witnesses. Nothing is easier than to antedate a writing, whether deed or will, and the statute guarded against that danger by the requirement that it should be not merely proved, but "attested" by two witnesses, and those two must be at "the time disinterested." At what time? Certainly not merely at the time of probate, for that was the general rule under the act of 1833, and did not need any re-enactment. Those whose memory goes further back than the evidence act of 1887 will recall the amount of time and argument spent over questions of the interest of witnesses, and whether the interest had been or could be released. The act closed all controversy on this point, by the requirement that the witnesses should be disinterested "at the time." At what time? Clearly at the time the instrument was executed, in the manner required by the statute. In *Ervine's Estate*, 206 Pa. 1, 55 Atl. 795, it was said by our Brother Mestrezat that this language "presupposes the existence of a writing, signed by the testator at the time of the attestation," and that, necessarily, is the time the qualification of the witnesses must be referred to.

Having regard, therefore, to the change in the language of the two statutes from "proved," in the act of 1833, to "attested," in the act of 1855, to the requirement of the latter that the two witnesses shall be "at the time" disinterested, and the absence of any other reasonable intendment as to that time than the date of compliance with the requirements of the statute, to wit, the execution of the will not less than a calendar month before testator's death, and its attestation by two "at the time" disinterested witnesses, the conclusion is not to be avoided that the attestation must be by witnesses, who then and there make compliance with the statute certain by subscribing their names. An attesting witness under this statute means a subscribing witness.

The learned court below called attention to the danger, from the death of one or both witnesses, that the gift might fall if the witnesses had not signed. It is a strong argument, ab inconvenienti, and adds to the force of the conclusion. But we put our decision on the manifestly intentional variation in the language of the two statutes and the nature of the additional requirements in the act of 1855.

Decree affirmed.

(221 Pa. 68)

**SLOTTER v. PATTERSON.**

(Supreme Court of Pennsylvania. April 27, 1908.)

**1. GROUND RENTS—SALES—ACTION FOR PRICE—SPECIFIC PERFORMANCE.**

An action to recover the price for which plaintiff sold to defendant a yearly ground rent will be treated as a bill for specific performance of a contract for the sale of real estate where the defendant refused to accept a deed because of incumbrances on the land, and the rights of the parties must be determined in accordance with the law in such cases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Ground Rents, § 3.]

**2. SAME—DEFENSES—PRIOR LIENS.**

Defendant agreed in writing to purchase a yearly ground rent clear of all incumbrances which affect the principal of the ground rent. At the date of the agreement and when plaintiff tendered the deed, there were certain municipal liens against the real estate which were first liens. *Held*, that the purchaser was relieved from all liability.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Aaron H. Slotter against Joseph G. Patterson, Jr. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Henry W. Scarborough, for appellant.  
Homer G. White, for appellee.

**MESTREZAT, J.** This is an action of assumpsit brought by the plaintiff to recover the purchase money due on a written agreement by which the plaintiff sold to the defendant a "certain yearly ground rent for the sum of one hundred and twenty dollars, payable half yearly \* \* \* out of and for all that certain lot or piece of ground with the buildings and improvements there erected situate on the west side of Forty-Ninth street" in the city of Philadelphia. The action, therefore, must be treated as a bill for the specific performance of a contract for the sale of real estate, and the rights of the parties must be determined in accordance with equitable principles applicable in such cases.

The plaintiff agreed to convey a title "clear of all incumbrances which affect the principal of the ground rent." On investigation the defendant ascertained that at the date of the agreement, and when the plaintiff tendered a deed, there were certain municipal liens against the property amounting in the aggregate to more than \$1,000. He, therefore, refused to pay the purchase price and accept a title to the ground rent, alleging as a reason therefor that the plaintiff could not convey a title, as required by his agreement, "clear of all incumbrances which affect the principal of the ground rent." This is the only question in the case, and, on a rule for judgment for want of a sufficient affidavit

of defense, the court below sustained the contention of the defendant and refused judgment.

We need not enter into a discussion to show that the trial court properly disposed of the case. The question involved is clearly and conclusively settled by the decision of this court in *Mitchell v. Steinmetz*, 97 Pa. 251. That was an action of assumpsit for the recovery of damages alleged to have resulted to the plaintiff, the owner of a ground rent, by reason of the refusal of the defendant, who had purchased it, to take title. The parties submitted a case stated, and it was agreed that the court should "exercise as full equitable powers as if a bill in equity had been filed for specific performance of a contract of sale." The defendant purchased at auction a ground rent of \$100 per annum owned by the plaintiff, paying therefor \$1,600. The defendant refused to accept a deed on the ground that there existed at the time of the sale, and, when the deed was tendered, certain taxes and municipal claims against the lot out of which the rent issued, amounting in the aggregate to \$1,684.79. The defendant contended that the title to the ground rent sold was not, by reason of the liens, marketable at the time of the sale. It was admitted that the title to the ground rent itself was good and marketable in all other respects, and that the deed tendered was in proper form. The questions of law presented to the court for determination were: (a) Is the defendant relieved from his contract to purchase the ground rent by reason of the existence of the incumbrances upon the real estate out of which the ground rent purchased issued? and (b) are the plaintiffs entitled to recover from the defendant the loss sustained by reason of the nonfulfillment by the defendant of his agreement to purchase the ground rent? The first question was answered in the affirmative and the second question in the negative by the trial court which entered judgment for the defendant; and on appeal the judgment was affirmed by this court.

It will be observed that the facts of the case at bar are similar to those in the *Mitchell Case*, and the reasoning in the latter case applies with full force to the case under consideration. Paxson, J., delivering the opinion, said, *inter alia* (page 255 of 97 Pa.): "What are the facts here? The land is heavily incumbered by municipal claims and taxes, which \* \* \* are made prior to all other liens and incumbrances. A judicial sale for the arrears of ground rent, or upon any other incumbrance, will not discharge the lien of the taxes unless the property brings enough to pay them. It is manifest, therefore, that this ground rent is worthless, or its value greatly impaired by reason of the liens upon the land out of which it issues. These liens affect the title to the land, and whatever impairs the title to the land

necessarily impairs the title to a rent issuing out of the land. If the title to the land fails, the title to the rent fails with it. I presume it will be conceded that, if this ground rent had been subject to prior mortgage on the land equal to the value of the latter, the title to the rent would have been worthless. In what respect does such case differ from the one in hand? In either event, the rent is subject to a paramount lien upon the thing out of which it issues, and it necessarily sweeps away the title to both." So far as appears in this record, the municipal claims which are a first lien against the lot out of which the ground rent issues may be equal or almost equal to the value of the lot itself. It is impossible, therefore, to say that these liens will not affect the principal of the ground rent. In fact, if the claims amount to the full value of the property, they would wipe out entirely the ground rent. This is distinctly ruled in the Mitchell Case. It is conceded that a sale made upon the municipal liens would discharge the arrears of ground rent at the time of the sale, and that the proceeds would be applicable to the liens. This would necessarily affect the defendant's investment. By the agreement of the parties the defendant purchased the "certain yearly ground rent for the sum of one hundred and twenty dollars" issuing out of the lot, and to deprive him of any part of that sum deprives him pro tanto of his investment, which is "the principal of the ground rent."

We think the defendant set up sufficient facts in his affidavit of defense to justify the ruling of the court below, and therefore the judgment is affirmed.

(221 Pa. 72)

### HOLLIS v. WIDENER.

(Supreme Court of Pennsylvania. April 27, 1908.)

#### 1. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES—NOTICE.

In an action for injuries to an employé while oiling an ice machine, where plaintiff alleges that the place he was required to work on was unsafe, he may show that the platform which he used was not that in ordinary use, and that it was not protected by guard rails, which defect was brought to the attention of the defendant, who promised to remove the danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 207.]

#### 2. SAME—ASSUMPTION OF RISK.

An employé does not assume the risk where he shows that he notified the employer of the dangerous condition of the appliances, and was told that the danger would be removed, and he remained at work by reason of this assurance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 638-647.]

#### 3. SAME.

Where an employé slips on the unguarded platform of an ice machine, on which he is obliged to go and oil the machine, and is injured, he was engaged in his duty as oiler of the machine when injured.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Edward G. Hollis against Peter A. B. Widener. From an order refusing to take off a nonsuit plaintiff appeals. Reversed.

At the trial it appeared that plaintiff was injured on July 23, 1902, while serving as an oiler on defendant's steam yacht at a time when the yacht was cruising in the English Channel. When the plaintiff was on the stand he was asked these questions: "Q. What have been the appliances on platforms and fixtures you have seen around engines—how have they been arranged? (Objected to.) Q. Did you ever see platforms for oilers? A. Yes, sir. Q. What is the usual arrangement of them? (Objected to. Objection sustained. Exception for plaintiff.) Q. Did you ever see in your experience any driving wheels or fly wheels of engines which were unprotected or unguarded outside of this one? (Objected to. Objection sustained. Exception for plaintiff.) Q. Did you ever see, in your experience of 8 or 10 years, any platforms three feet off the ground, outside of this one on the Josephine, without steps? (Objected to. Objection sustained. Exception for plaintiff.)"

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

S. M. Waln, for appellant. J. F. Lewis, for appellee.

MESTREZAT, J. This is a very close case, and the meager facts disclosed on the trial do not take it out of the realm of doubt. There was but one witness produced and examined at the trial, and his examination, on either side, was quite unsatisfactory in developing the material facts upon which the case should turn. The reason of the learned trial judge for directing a nonsuit was stated by him as follows: "The mere happening of an accident to one working about machinery does not prove negligence on the part of the employer, or that the appliance was defective; nor does a promise of the employer or person representing him that alterations or changes will be made to render a dangerous machine safer bind the employer, unless the machine was less safe than those in ordinary use." The thought in the mind of the learned judge seems to have been that the machine about which the plaintiff was engaged was that in ordinary use, and hence was not defective; and that the promise made to alter or change it imposed no liability upon the employer for not making the alterations or changes. The position of the learned trial judge may be conceded to be correct, but that was not the case he had before him. As we understand the plaintiff's case, he alleges that the place he was assigned to perform the work for which he was employed was unsafe, by reason of the failure of the plaintiff to guard and protect him from the machinery, which it was his duty to oil, and the necessity for guarding the machinery was brought to

the attention of the employer, or a person representing him, who promised to remove the danger by providing the guards necessary to protect the plaintiff while he was engaged at his work. It is not claimed, as we understand, that the ice machine about which the plaintiff was employed was dangerous or unsafe, except in so far as the plaintiff might come in contact with it, by reason of the absence of guards along the platform on which he was required to stand while he was performing his duties. There is no contention that the machinery was not fit for the purpose for which it was intended, nor that it was not the machinery ordinarily used for such purpose. The claim is that the defendant erected a platform on which the plaintiff had to enter and oil the ice machine, and that, in the construction of that platform, the defendant neglected to take the proper and obviously necessary precautions to protect an employé while engaged in oiling the ice machine, the work of the plaintiff. The negligence, therefore, alleged by the plaintiff to have resulted in his injuries, is not that the machine about which he was employed was not the one in ordinary use, but that the place in which he was required to perform his duties in oiling the machine was made unsafe by the character of the platform he had to enter in order to perform his duties.

The offers of evidence, the refusal of which is the subject of the third, fourth, and fifth assignments of error, do not disclose clearly their purpose, but we assume that the purpose of the offers was to show that the platform in question was not constructed as those used for a similar purpose under like circumstances, and that the usual arrangement of the platform on which the oiler is expected to perform his duties has guards or other protection over the wheel of the machinery which caused the plaintiff's injuries. We presume the offers were rejected because they were not sufficiently explicit. It was certainly competent to show that the platform constructed by the defendant was not that in ordinary use for such purpose, and that its defective construction was the proximate cause of the plaintiff's injuries. *Madara v. Pottsville Iron & Steel Company*, 160 Pa. 109, 28 Atl. 639. If the platform prepared by the defendant for the use of the plaintiff in the performance of his work was that ordinarily constructed and furnished for the purpose under like circumstances and conditions, it would certainly go far towards exculpating the defendant from any negligence on the ground of a defective or insufficient platform. If, on the contrary, it was not in ordinary use, but one which the testimony tended to show was dangerous, it might impose liability upon the defendant. The evidence on the question, if embodied in a proper offer, was therefore competent, as tending to show failure on the part of the defendant to furnish a reasonably safe place for the plaintiff to per-

form the duties for which he was employed.

The plaintiff had been engaged at this work long enough to know the dangers, if any, arising from a defective or negligently constructed platform, and it may be that he assumed the risk of those dangers. But he contends that he rebutted the presumption that he assumed such risk by showing that he notified his employer of the dangerous condition of the platform, and was assured that the danger would be removed, and that he remained at his work solely by reason of this assurance. He claims that the danger to which he was subjected was not so imminent and immediate as to require him to refuse to continue his work, and therefore that the promise of his employer to remove the danger justified him in not at once quitting work. If the evidence was sufficient to establish the facts as claimed by the plaintiff, his case was brought within the doctrine of *Reese v. Clark*, 198 Pa. 312, 47 Atl. 994; *Webster v. Coal & Coke Company*, 201 Pa. 278, 50 Atl. 964, and *Foster v. National Steel Company*, 216 Pa. 279, 65 Atl. 618.

The plaintiff was injured when he was attempting to step on the platform, on which he was about to enter for the purpose of oiling the ice machine. His right foot, which he had placed on the platform, slipped, and the foot and the leg were taken into the wheel of the ice machine, and the foot was so badly injured that it had to be amputated. He must therefore be regarded as having been engaged at his work at the time he was injured. It was the duty of the defendant, not only to use reasonable care in protecting the plaintiff while he was at work on the platform, but also while he was stepping on it in order to perform his work. In *Foster v. National Steel Company*, 216 Pa. 279, 65 Atl. 618, the plaintiff, who was engaged in unloading cars on an elevator track, fell between the projecting ties, on which he had to walk from one car to the other to reach the car which he was to unload. The defendant was held to be negligent in not furnishing a safe passageway or platform for the plaintiff, who was injured while he was walking from one car to the other, and not while he was engaged in the act of unloading the car.

The question involved in the case is whether the defendant furnished a reasonably safe place for the plaintiff to perform the work for which he was employed. Of course, in determining this question there are several others which will incidentally arise, but we need not now suggest or consider them in the absence of the evidence which will be given on the trial. It may be well, however, to suggest that the facts should be more fully developed than in the former trial, so that the merits of the case may be intelligently passed upon, not only by the jury, but by the court.

The first assignment of error is sustained, and the judgment is reversed, with a *procedendo*.

(75 N. H. 10)

**ST. PIERRE v. A. J. FOSTER & CO.**

(Supreme Court of New Hampshire. Hillsborough. June 2, 1908.)

**1. NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE.**

The rule that a showing that plaintiff has without fault lost the right to try a material issue, and that, if tried, the issue may, on the evidence presented, be decided in his favor, authorizes a finding that justice requires a further trial, is the rule not only in petitions for a new trial after verdict and judgment, as authorized by Pub. St. 1901, c. 230, § 1, but is applicable in analogous cases where a right to trial on appeal from a decision of the probate court has been lost without fault, as provided by chapter 200, §§ 7, 9, or where a right to the trial of a highway traveler's claim against a town has been lost by failure to give necessary notice, as provided by chapter 76, §§ 8, 9, and it is sufficient for petitioner on an application for relief to show that he possesses a right to a trial of a particular sort, and that he has lost the right without fault, together with the existence of evidence on which the tribunal, the right to whose decision he has lost, may properly find in his favor.

**2. SAME.**

Where plaintiff, not in fault for not trying an issue material to a recovery, satisfies the court, on an application for a new trial, after the Supreme Court has ordered judgment for defendant, by evidence he produces, that the jury will probably find in his favor, a new trial must be granted, as authorized by Pub. St. 1901, c. 230, § 1, providing that a new trial may be granted when through mistake justice has not been done, etc.

**3. APPEAL AND ERROR—QUESTIONS OF FACT—MOTION FOR NEW TRIAL.**

The question what justice requires on an application for a new trial on the ground that plaintiff, not in fault, has lost the right to try an issue material to a recovery, is one of fact to be determined on competent evidence and where there is competent evidence, or, where the evidence is not reported, an exception to the finding presents no question for the Supreme Court, but, where it appears that there was no competent evidence to sustain it, the finding fails.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

**4. NEW TRIAL—GROUNDS.**

Where the judge who presided at the trial of an action found on an application for a new trial, after the direction by the Supreme Court of a verdict for defendant, that plaintiff had lost, without fault, the right to try an issue essential to a recovery, and that on the evidence presented the jury could find a sustainable verdict for plaintiff, a new trial must be granted, though the judge is of the opinion that the jury ought, on the whole case, to find a verdict for defendant.

**5. SAME.**

The fact that the opinion of the court as to the weight of the evidence on the merits differs from that of the jury rendering a verdict for plaintiff is not a finding that plaintiff's claim to a new trial to try an issue essential to a recovery is iniquitous, or that an order for judgment for defendant notwithstanding the verdict is so clearly just that it will be inequitable to open the case.

Transferred from Superior Court, Hillsborough County; Peaslee, Judge.

Petition by Albert St. Pierre against A. J. Foster & Co. for a new trial. Transferred on exception to the denial of the petition. Exceptions sustained and petition granted.

See 74 N. H. 4, 64 Atl. 723.

. 70 A.—19

The plaintiff was not in fault for the non-production of the evidence, the want of which vitiated the former verdict in his favor. This evidence can be supplied, and in such case it is likely a jury will find a verdict for the plaintiff sustainable upon the law. It appeared to the court that the jury ought to find a verdict for the defendants; and, because of this view of the weight of the evidence, it was found that justice does not require a further hearing, and the petition was denied. If this view is erroneous, the motion should have been granted.

Hamblett & Spring and Branch & Branch, for plaintiff. Burnham, Brown, Jones & Warren, for defendants.

PARSONS, C. J. The verdict which the plaintiff obtained against the defendants was set aside, and a verdict and judgment were ordered for the defendants upon the ground that no evidence was offered upon an issue necessary for the plaintiff to prove to establish the defendants' liability. *St. Pierre v. Foster*, 74 N. H. 4, 64 Atl. 723. The plaintiff now asks for an opportunity to try this issue. It is found that the plaintiff was not in fault for not presenting evidence upon this issue at the former trial, and that, if a trial is permitted, the jury will probably find for the plaintiff a verdict sustainable upon the law. The facts that the plaintiff has, without fault, lost the right to try a material issue, and that, if tried, the issue may be decided in his favor, authorize a finding that justice requires a further trial. Such is the rule, not only in petitions for a new trial after verdict and judgment (Pub. St. 1901, c. 230, § 1), but in the analogous cases where a right to a trial upon appeal from the decision of the probate court has been lost without fault (Pub. St. 1901, c. 200, §§ 7, 9), or where the right to the trial of a highway traveler's claim against a town has been lost in like manner by failure to give the necessary notice (Pub. St. 1901, c. 76, §§ 8, 9).

The grounds upon which applications of this kind should be granted or denied are set forth in the numerous cases cited in *Bolles v. Dalton*, 59 N. H. 479, 480. None of the statutes have been construed as requiring two trials upon the merits. It has been considered sufficient, upon an application for relief, for the petitioner to show that he possessed a right to a trial of a particular sort, that he has lost the right without fault, and the existence of evidence upon which the tribunal, the right to whose decision he has lost, might properly find in his favor. As said of the application for leave to appeal from a probate decision: "The construction given this provision of the statute is that if there are important questions at issue which the petitioner in good faith desires and intends to try, and some evidence is offered to sustain the reason for the appeal, the leave to appeal will be granted without

deciding the merits of the controversy." *Holton v. Olcott*, 58 N. H. 598, 599. As to the highway statute, under which the right to a trial is given upon similar grounds, it is said: "Evidence sufficient to authorize the submission of the plaintiff's case to the jury will sustain the requisite finding of 'manifest injustice.' The questions of law and fact which the plaintiff desires to litigate are not ordinarily determined upon the preliminary petition. It is sufficient if it appears that there are important questions which, through accident, mistake, or misfortune, the plaintiff will be unable to try unless the petition is granted." *Owen v. Derry*, 71 N. H. 405, 406, 52 Atl. 928, 927. "The general rule is that, when it appears that a trial has not been had by reason of accident and misfortune, the court will give the party an opportunity for a trial without inquiring into the merits of the controversy. That matter is to be investigated before another tribunal." *N. E. Mutual Fire Ins. Co. v. Company*, 22 N. H. 170, 172; *Woodworth v. Wilson*, 50 N. H. 220, 223, 224. In the present case the materiality of the issue the plaintiff seeks an opportunity to try is established by the fact that because it was not tried and found for the plaintiff judgment has been ordered for the defendants. The plaintiff was not in fault for not trying it, and has satisfied the superior court by the evidence now produced, not only that the jury may, but that they probably will, find the issue in his favor. These facts authorize, and as matter of practice require, the granting of the petition. It is found that a new trial should be had, unless the fact that the judge hearing the application is of the opinion that upon the whole case the jury ought to find for the defendants authorizes the denial of the petition. The essential point—what justice requires—is a question of fact, to be determined, however, like all questions of fact, upon competent evidence. If there is competent evidence, or if the evidence is not reported, an exception to the finding presents no question for this court. *Jaques v. Chandler*, 73 N. H. 376, 381, 382, 62 Atl. 713. But, if it appears that there was no competent evidence to sustain it, the finding fails. *Ela v. Ela*, 72 N. H. 216, 219, 55 Atl. 358; *Cox v. Leviston*, 68 N. H. 167, 20 Atl. 246. It is not understood that, upon this petition or motion, there was a trial of the whole case upon the merits; but, the same being heard by the judge who presided at the former trial, his opinion of what the jury ought to do appears to be based upon the evidence then presented and now offered. As it is found that upon the evidence the jury could find a sustainable verdict for the plaintiff, it follows that reasonable men might so find. If in the face of this finding the view of the court as to the weight of the evidence is sustainable, it must be that reasonable men might on the whole evidence also find for the defendants. It is not probable

the findings were understood to be in conflict. They must, therefore, have been intended to mean that upon the evidence reasonable men might come to different conclusions. From this fact it cannot be inferred that it would be inequitable to permit the plaintiff to try an important question which he desires and intends in good faith to try, and which he has without his fault been prevented from trying. If it were, a petition for a new trial could only be granted where the evidence was such that a verdict against the petitioner would be set aside as against the weight of the evidence. No such rule has ever been advanced. What the plaintiff asks for, and what the statute authorizes to be given him, is a trial, an opportunity to litigate some matter in dispute, not a decision of the controversy. As the court in this proceeding cannot settle the dispute, there is no logic in requiring the petitioner to establish by proof a matter the court has no power to adjudicate.

Upon the facts found, the petition should be granted. Whether under similar facts a petition for a new trial should or could be granted to enable the plaintiff to maintain an iniquitous claim, or the defendants to set up an unconscionable defense, or when substantial justice has already been done, are questions not presented. The fact that the opinion of the court as to the weight of the evidence on the merits differs from that of the jury is not a finding that the plaintiff's claim is iniquitous, or that the order of judgment for the defendants, is so clearly just that it would be inequitable to reopen the case.

Exception sustained. Petition granted.

PEASLEE, J., did not sit. The others concurred.

(75 N. H. 3)

WRIGHT v. PEMIGEWASSET POWER CO.  
(Supreme Court of New Hampshire. Belknap.  
June 2, 1908.)

1. ACTION—NATURE AND FORM—ASSESSMENT OF DAMAGES FOR TAKING LAND OR TRESPASS.

Defendants overflowed plaintiff's land by constructing a dam in a river, and she sued for damages. Later, by agreement of the parties, a petition for an assessment of her damages was filed as an amendment to the original action; it being agreed that the dam was a public benefit, and defendants joined plaintiff in requesting the court to ascertain the value of the easement they desire to acquire. *Held*, that the action is one to ascertain the value of the flowage rights defendants seek to acquire in plaintiff's land, and not an action for damages caused by defendant's illegal acts.

2. EMINENT DOMAIN—REMEDIES OF OWNER—RECOVERY OF DAMAGES.

A petition for an assessment of damages under the flowage act will be dismissed where a millowner files a disclaimer; the landowner being remitted to an action at law to recover his damages caused by the millowner flowing the land.

**3. SAME—INTEREST—RIGHT TO.**

If, in constructing a dam in a river, defendants knew or should have known that it would overflow plaintiff's land above and intended to acquire flowage rights by condemnation proceedings, they were bound, when the land was overflowed, to pay plaintiff for such rights, and for their failure to do so interest was properly added from that date on a petition for an assessment of her damages.

**4. SAME.**

If a dam constructed by defendants in a river was a public benefit, and they intended to condemn land overflowed by it, they acquired the right to take the land under the statute.

**5. SAME.**

Defendants having failed to settle with plaintiff for overflowing her land by the construction of a dam in a river, when the land was overflowed or within 30 days thereafter, or to take necessary steps to have the land condemned, plaintiff could sue at law to recover her damages or maintain a proceeding under the flowage act on defendants joining her in asking the court to ascertain the value of the rights they seek to acquire.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 719-736.]

**6. SAME—EVIDENCE.**

By joining plaintiff in a proceeding, under the flowage act, for an assessment of plaintiff's damages caused by defendants overflowing her land by constructing a dam in a river, and requesting the court to ascertain the value of rights they seek to acquire, defendants acknowledged their intention to acquire flowage rights by condemnation proceeding, and furnished evidence warranting a finding that they entertained such intention when the flowing was begun.

**7. SAME—PROVISION NOT REPEALED.**

Pub. St. 1901, c. 142, § 17, authorizes the addition of 50 per cent. to the value of an easement acquired by a millowner in overflowing land under that chapter. Laws 1893, p. 41, c. 507, § 1, provides that, in estimating damages, damage done other land of the person flowed, as well as the damage to the land actually occupied, shall be considered, and that the court shall render judgment upon the sum returned as the verdict. Section 2 repeals so much of chapter 142 as is inconsistent with the act. *Held*, that section 2 does not repeal section 17; it repealing only so much of chapter 142 as is inconsistent with the purpose to allow the landowner all damages sustained, both direct and indirect.

**8. SAME—EVIDENCE.**

The measure of plaintiff's damages for the overflowing of her farm by defendants constructing a dam in a river being the difference between the value of the farm when defendants flowed it and what it would have been worth then if the dam had not been built, the jury in a proceeding to assess the damages under the flowage act could consider all the consequences which would probably result from flowing the farm, if defendants used ordinary care to do no unnecessary damage, tending to reduce the farm's value, and one of the probable consequences being that the vegetable matter in the soil would decay and produce disagreeable odors on the water receding, and, the overflowed land being near plaintiff's residence, the jury could consider such odors in ascertaining the value of the flowage rights defendants desired to acquire.

Walker and Bingham, JJ., dissenting in part.

Transferred from Superior Court, Belknap County; Stone, Judge.

Petition by Ambrosia R. Wright against the Pemigewasset Power Company for assessment of damages under the flowage act. Transferred from superior court on defend-

ant's exceptions; verdict having been for plaintiff. Exceptions overruled.

The plaintiff owns a farm bordering on the Pemigewasset river, which the defendants overflowed by means of a dam built in 1902 and 1903 on their land further down the stream. They made no settlement with the plaintiff, and in March, 1905, she brought an action at law for damages. In August, 1907, this petition was filed by agreement of parties as an amendment to the original action. It was then agreed that the defendants' dam was a public benefit, and they joined with her in requesting the court to ascertain the value of the easement they wished to acquire. It was also agreed that the court should adjust the question of interest. The plaintiff was permitted to show that the flowing of her land caused disagreeable odors whenever the water receded. The jury having returned a verdict for the plaintiff, the court added 50 per cent. thereto and interest from February 7, 1903. The defendants excepted (1) to the addition of interest; (2) to the addition of 50 per cent. to the verdict; and (3) to the admission of evidence as to disagreeable odors.

Streeter & Hollis, for plaintiff. Sargent & Niles, for defendant.

YOUNG, J. The question raised by the defendants' first exception is whether it was permissible in any view of the facts to compute interest on the verdict from February 7, 1903; that being the date upon which the defendants flowed the plaintiff's land. In answering this question, it will be necessary to consider the nature of this proceeding. Two views have been presented: One that it is an action to assess the damages the plaintiff has sustained because of the defendants' illegal acts; and the other that it is to ascertain the value of the flowage rights the defendants wish to acquire in the plaintiff's land. It is manifest that the latter view is the correct one; for otherwise it would not be an answer for the defendants to disclaim an intention of acquiring any rights in the land. It is well settled that a petition of this nature will be dismissed where a millowner files a disclaimer, and that the landowner will thereupon be remitted to an action at law to recover the damages he has sustained by reason of the millowner's acts in flowing his land. *Gordon v. Paper Co.*, 72 N. H. 346, 56 Atl. 757; *Jones v. Whittemore*, 70 N. H. 284, 47 Atl. 259; *Mitchell v. Electric Co.*, 70 N. H. 569, 572, 49 Atl. 94; *Chapman v. Company*, 67 N. H. 180, 38 Atl. 16; *Hovey v. Perkins*, 63 N. H. 516, 526, 3 Atl. 923; *Town v. Faulkner*, 56 N. H. 255; *Pollard v. Moore*, 51 N. H. 188. Inasmuch as the purpose of the proceeding is to ascertain the value of the flowage rights the defendants wish to acquire, and not to assess the damages the plaintiff has sustained by reason of the defendants' illegal acts, it would seem that the



question whether the court erred in computing interest on the verdict from the time the land was in fact flowed would be solved by ascertaining whether on that date (February 7, 1903) the defendants knew or should have known that their dam would overflow the plaintiff's land, and intended to acquire flowage rights by condemnation proceedings. If they did, it was their duty to then pay her for the rights they wished to acquire. For their failure to do so interest should be added from that date; for interest is given as damages for the unlawful detention of money. *Chauncy v. Yeaton*, 1 N. H. 151, 158; *Felton v. Fuller*, 35 N. H. 226, 229; *Adams v. Blodgett*, 47 N. H. 219, 90 Am. Dec. 569; *Thompson v. Railroad*, 58 N. H. 524; *Snow v. Perkins*, 60 N. H. 493, 49 Am. Rep. 333. The plaintiff's land is on the Pemigewasset river above the defendants' dam, and is flowed thereby. The defendants knew, or ought to have known, that, as a direct consequence of their acts, her land would be flowed to the extent that it was below the level of the water as raised by the dam. If the dam was a public benefit, and the defendants intended to condemn the land when the dam was built and the land was flowed, they acquired the right to take it under the statute. *Lebanon v. Olcott*, 1 N. H. 339; *Ash v. Cummings*, 50 N. H. 591, 622. The right attached when the dam was built with such an intention (Pub. St. 1901, c. 142, § 19), and their duty to compensate the plaintiff arose when their desired rights were determined or located by actually flowing the land (Pub. St. 1901, c. 142, § 13). As the defendants did not settle with the plaintiff at that time or within 30 days thereafter, or take the necessary steps to have her land condemned, she could have brought an action at law against them to recover the damages she sustained (*Roberts v. Company*, 73 N. H. 121, 59 Atl. 619), or have maintained a proceeding under the flowage act in case the defendants joined with her in asking the court to ascertain the value of the rights they wished to acquire. By joining with her in the proceeding and making such a request, they acknowledged their intention to acquire rights of flowage by condemnation proceedings, and furnished evidence from which it could be found that they entertained such an intention at the time the flowing was begun. Under these circumstances, the court was justified in computing interest on the verdict from the time the plaintiff's land was flowed.

2. The question whether section 2, c. 50, p. 41, Laws 1893, repeals the provisions of chapter 142, Pub. St. 1901, relative to adding 50 per cent. to the value of the easement which a millowner acquires when land is flowed under the provisions of the latter chapter, was considered in *Concord, etc., Co. v. Clough*, 69 N. H. 609, 45 Atl. 565, and the following opinion by Wallace, J., was announced: "••• • Pub. St. 1901, c. 142, §§ 14-17, provide that, upon a petition for

the assessment of damages under the flowage law, the damages will be assessed by the jury if either party so elect, otherwise by a committee of three disinterested persons, and that judgment will be rendered upon the report of the committee or verdict of the jury, with 50 per cent. added. Section 1, p. 41, c. 50, Laws 1893, provides that the committee or the jury in estimating the damage done under the flowage law 'shall take into consideration any damage done to other land of the party flowed, as well as the damage occasioned to the land actually occupied, and the court shall render judgment upon the sum returned as the verdict of the jury.' Section 2 repeals so much of chapter 142 of the Public Statutes as is inconsistent with this act. The purpose of the act of 1893 was to make it certain that indirect damage occasioned to other land of the party flowed, not actually covered by water, as well as damage occasioned to land actually occupied, should be included in the assessment of damages for flowage under chapter 142 of the Public Statutes. There is no evidence of any intention on the part of the Legislature to repeal the provision of the law for adding 50 per cent. to the damages assessed. If there had been any such intention, it would have been expressed. There is nothing inconsistent with the purpose of the amendment to provide for the assessment of indirect damages, nor with the language employed to express that purpose, and the provisions of chapter 142, Pub. St., that the damages when assessed should be increased 50 per cent." The *Clough Case* was finally disposed of on another ground, and there is nothing in the record to show why this part of the opinion was not reported. But, whatever the reason may have been, it is clear, when the purpose of chapter 50, Laws 1893, is considered, that the Legislature did not intend by section 2 of that act to repeal section 17, c. 142, Pub. St. 1901, adding 50 per cent. to the verdict. The manifest purpose of section 1 of the act of 1893 is to make it certain that the landowner shall recover all the damages he sustains, both direct and indirect; and all that section 2 repeals is so much of chapter 142, Pub. St., as is inconsistent with this purpose. It cannot be found, therefore, that the provision of chapter 142 adding 50 per cent. to the verdict is repealed by section 2 of the act of 1893, unless it is inconsistent with an intent to enable landowners whose land is overflowed to recover all the damages they sustain by reason thereof. It is clear that the 50 per cent. provision of chapter 142, Pub. St. 1901, instead of being in conflict with section 1, c. 50, Laws 1893, tends to promote the purpose of that chapter, and that the intent of both is to make it certain that those whose lands are taken under the provisions of the flowage act shall recover all the damages they sustain because of such taking. The act of 1893 repeals those provisions of the

earlier statute, and those only, which are inconsistent with the legislative intent that parties whose lands are taken under the flowage act shall receive full compensation for all the loss they sustain, whether the flowing is the direct or the indirect cause of the damage.

3. The measure of the plaintiff's damages is the difference between the value of her farm when the defendants had flowed it and what it would have been worth on that date if their dam had not been built. It was competent, therefore, for the jury to consider all the consequences which would probably result from flowing the plaintiff's land, if the defendants used ordinary care to do no unnecessary damage which would have any tendency to reduce the value of the farm. One of the probable consequences of flowing the land was that the vegetable matter in the soil would decay, and produce disagreeable odors whenever the water receded. The land was near the plaintiff's dwelling house, and it is common knowledge that such odors would make the house less desirable for human habitation, and consequently less valuable. The odor, therefore, was something the jury should consider in ascertaining the value of the flowage rights the defendants wished to acquire.

Exceptions overruled.

WALKER and BINGHAM, JJ., dissented on the second question. The others concurred.

(104 Me. 27)

#### HUTCHINS v. LEWIS.

(Supreme Judicial Court of Maine. Feb. 26, 1908.)

##### 1. CONTRACTS—CONSTRUCTION.

All written contracts are to be read in the light of surrounding circumstances. The relations of the parties and the subject-matter are always to be taken into consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 752.]

##### 2. BROKERS—SALE OF REALTY—RECOVERY OF COMMISSIONS.

In the case at bar the defendant placed real estate in the plaintiff's hands in July, 1905, for sale under a written contract, in which he agreed to pay the plaintiff, who was a real estate broker, "a commission of one hundred dollars in case of sale." Held, that this did not limit the broker to a commission only in case of actual sale by himself, that it was not necessary that he should complete the entire negotiations, but, if he had placed a purchaser in communication with the owner and subsequent negotiations resulted in a sale by the owner, then the broker was entitled to recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 85-89.]

(Official.)

Exceptions from Supreme Judicial Court, Androscoggin County.

Assumpsit by plaintiff, a real estate broker doing business as C. L. Hutchins Real Estate Company, against Andrew Lewis, to recover a commission of \$100 for sale of defendant's real estate under a written contract. Ver-

dict for plaintiff for \$103.27. The defendant excepted to certain rulings made by the presiding justice during the trial. Exceptions overruled.

Argued before EMERY, C. J., and WHITEHOUSE, STROUT, CORNISH, and KING, JJ.

Newell & Skelton, for plaintiff. Oakes, Pulsifer & Ludden and John Merriman, for defendant.

CORNISH, J. The single question is the construction of a contract, of which the following is the important part:

"C. L. Hutchins, Real Estate Co.

"Gentlemen:

"I hereby place the property, of which the above is a description, in your hands for sale, and agree to pay you a commission of one hundred dollars in case of sale.

his  
"Andrew X Lewis."  
mark.

The defendant's interpretation of this contract is that it compelled payment of commission only in case of sale by the broker himself. The exceptions show that the property was placed in the plaintiff's hands in July, 1905, the price to be \$1,000; that it was never withdrawn; that the plaintiff endeavored to sell the property to the International Paper Company for that sum, but received an offer of only \$600, which he communicated to the defendant, who refused it; that a few months later the same company, through its own attorney, closed the trade with the defendant personally for \$900, and paid him that sum; and the plaintiff took no part in the final transaction.

If the defendant's interpretation is correct, this action fails. But the presiding justice construed the contract to have the ordinary meaning of such agreements between real estate owners and brokers, and instructed the jury that it was not necessary for the plaintiff to complete the entire negotiations himself, but, if he had placed a purchaser in communication with the owner and subsequent negotiations resulted in a sale by the owner at any price, then he would be entitled to recover in the same manner as if he had himself participated in all the negotiations.

We think the construction put upon the contract by the court was correct. All written contracts are to be read in the light of surrounding circumstances. *Snow v. Pressey*, 85 Me. 408, 27 Atl. 272. The relations of the parties and the subject-matter are always to be taken into consideration. So read, this contract does not admit of the narrow construction claimed by the defendant. The defendant agreed to pay a commission of \$100 "in case of sale"—not necessarily a sale completed personally by the plaintiff, but a sale negotiated by the plaintiff as a broker or brought about by such services on his part as a broker would be expected to render under like circumstances. This is the reason-

able and natural interpretation of the contract, and such as must have been in the contemplation of both parties when it was made. In fact, the defendant seems to have retained the same idea at the time of the final sale because he then asked the attorney of the purchaser as to his liability to the plaintiff for commissions.

The instructions to the jury as to the grounds of the plaintiff's recovery were in accordance with the settled law of this state. *Garcelon v. Tibbetts*, 84 Me. 148, 24 Atl. 797; *Hartford v. McGillicuddy*, 103 Me. 224, 68 Atl. 860.

Exceptions overruled.

(221 Pa. 62)

### In re TAUSSIG'S APPEAL.

(Supreme Court of Pennsylvania. April 27, 1908.)

#### PRINCIPAL AND SURETY—RELATION INTER SE—EVIDENCE.

A mother and son, one having a life interest and the other a remainder interest in an estate, executed a judgment note, assigning their interests in the estate as security. The mother was the principal and the son was surety in the transaction as shown by the papers. *Held* that, after the death of the mother, it could be shown between the son and the mother's estate that the son was in fact the principal and the mother the surety.

Appeal from Court of Common Pleas, Philadelphia County.

In the matter of the estate of Sarah B. Ball, deceased. From a decree dismissing exceptions to auditor's report, L. Meredith Taussig and May W. Ball, executrices, appeal. Reversed.

On June 27, 1878, George B. W. Ball and wife executed a voluntary deed of trust to the Pennsylvania Company for Insurance on Lives and Granting Annuities. Under this deed the grantors reserved to themselves life estates in the principal with remainder over to their children. After the death of Mr. Ball, Mrs. Ball and her son, Louis Irving Ball, signed the papers constituting the transaction described in the opinion of the Supreme Court. Before the auditor one William Bryans, an assignee of Louis Irving Ball, claimed the share of Louis's estate assigned to him as against the claim of Mrs. Ball's estate. The auditor allowed Bryans' claim.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William Trautwine, Jr., Joshua Matlack, and E. Spencer Miller, for appellants. J. Howard Morrison, for appellee.

**PER CURIAM.** The relations of borrowers to the lender are not conclusive of their relations to each other. In this case the borrowers were mother and son, and it may be conceded that, on the face of the papers, the former was the principal and the latter only a surety. But the facts as shown by the

evidence are all the other way. Both mother and son had interests in a trust estate; the former's being present and the latter's future and contingent. The son wanted to borrow money, and, on applying for a loan, was informed that his security was not sufficient, but that, if his mother would pledge her name and interest in the trust estate, the loan would be made. The mother consented and the loan was made, both parties signing a judgment note, and each separately executing an assignment of his and her interest in the trust estate with power of attorney to collect from the trustee, etc. On the note both parties were joint obligors, but, conceding for present purposes that on the face of the papers the mother became the principal debtor, the situation was open to explanation and the evidence makes it clear beyond all doubt. The son, not the mother, wanted to borrow the money. The lender refused to make the loan to him, but as the mother had an interest in the trust estate which made him willing to lend on her credit, he put her in the position of primary debtor and made the loan. As between him and the borrowers, the relation was thus made conclusive, and it may be conceded that *prima facie* that was the relation of the borrowers between themselves. But the evidence is overwhelming that the real relations were entirely different. As already said the son wanted the loan. He applied for it himself, and failed to get it. Then his mother pledged herself for it, the loan was made, and the son got the money. As between themselves he was the principal debtor, and the mother only a surety in the whole matter. The learned auditor below gave too much weight to the mere form of the transaction in disregard of the convincing evidence of its actual character.

Decree reversed and record remitted, with directions to allow the claim of appellants.

(221 Pa. 67)

### HESS et ux. v. AMERICAN PIPE MFG. CO.

(Supreme Court of Pennsylvania. April 27, 1908.)

#### 1. EXPLOSIVES—BLASTING—INJURIES.

In an action by a woman for injuries by an explosion, wherein she testifies that, in addition to fright, she was thrown on a chair and injured in her face by glass from the shattered window, a verdict in her favor will be sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Explosives, § 9.]

#### 2. DAMAGES—FRIGHT.

Mere fright, unaccompanied by physical injuries, is insufficient to sustain an action for negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 100.]

Appeal from Court of Common Pleas, Chester County.

Action by William Hess and Ada Hess, his wife, against the American Pipe Manufacturing Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and

BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Thomas W. Pierce, for appellant. Wilmer W. MacElree and Joseph H. Baldwin, for appellees.

**PER CURIAM.** It is settled that mere fright, unaccompanied by physical injury, is not sufficient to sustain an action for negligence. *Huston v. Freemansburg Boro.*, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49; *Ewing v. Ry. Co.*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 668, 30 Am. St. Rep. 709; *Linn v. Duquesne Borough*, 204 Pa. 551, 54 Atl. 341, 93 Am. St. Rep. 800. The jury, in the present case, was explicitly instructed to this effect, and there is no complaint of the charge in that respect. While it may be a little doubtful, even on the plaintiff's own testimony, whether she really received any direct physical injuries from the blast, apart from the fright, yet she testified positively that she was thrown on a chair by the force of the concussion, and this testimony gets some support from the fact that several window panes were broken, and some particles of the glass struck her in the face. It was claimed by defendant that her previous testimony was not in accord with this, but the question of credibility was for the jury.

Judgment affirmed.

(74 N. J. B. 624)

**EINSTEIN v. RARITAN WOOLEN MILLS.**  
(Court of Chancery of New Jersey. May 22, 1908.)

**1. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — BETWEEN CORPORATION AND STOCKHOLDER — INCREASE OF CAPITAL.**

Where a special charter provides that the capital stock may be increased from time to time to any sum, not exceeding a sum named, this limitation on the power of the company is a part of the contract existing between the stockholders themselves and between stockholders and the corporation, and its abrogation against the objection of a stockholder violates the federal Constitution, which prohibits the impairment of the obligation of contracts.

**2. COURTS — DECISIONS CONTROLLING — FEDERAL QUESTIONS.**

The decisions of the Supreme Court of the United States are the final authority on questions arising under the Constitution prohibiting the impairment of the obligation of contracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 331.]

**3. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — BETWEEN CORPORATION AND STOCKHOLDER — CREATION OF PREFERRED STOCK.**

The creation of preferred stock by a corporation not authorized by the special act incorporating it, nor under general laws existing at that time, and against the objection of a shareholder, violates the obligation of the contract between the corporation and shareholder.

**4. CORPORATIONS — STOCK — CREATION OF PREFERRED STOCK — STATUTES.**

Act March 22, 1860 (P. L. p. 608), providing that manufacturing corporations might create two kinds of stock, viz., general stock and special stock, the latter subject to redemption with a fixed half yearly sum or dividend, not

exceeding 4 per cent. before any dividends should be set apart or paid on the general stock, was repealed on April 7, 1875 (Rev. St. 1874-75, p. 10, § 25), without any reservation of any rights acquired under it, and, even if such act were a part of the charter of a company organized under a special act, it would not authorize the creation of preferred and common stock under a plan contemplating dividends at the rate of 7 per cent.

**5. SAME.**

Act April 6, 1908 (P. L. p. 127), authorizing the creation of new stock by corporations, merely gives the consent of the state that the stockholders may do so if they all agree, but, if all do not agree, such act cannot be held to be a portion of the charter of a corporation organized under a special act, or as an amendment thereto.

Action by William Einstein against the Raritan Woolen Mills to restrain the increase of capital stock and the issuance of preferred stock. Injunction granted.

R. V. Lindabury, for complainant. Nelson Y. Dungan and Edward Lauterbach, for defendant.

**HOWELL, V. C.** The Raritan Woolen Mills was incorporated by a special act of the Legislature of New Jersey, entitled "An act to incorporate the Raritan Woolen Mills," which act was approved March 23, 1869, and is found in the laws of that year at page 536. The charter provides that the capital stock shall be \$100,000, "with the privilege of increasing the same from time to time to any sum not exceeding \$250,000." Capital stock to the amount of \$150,000 has been issued and is outstanding. The directors have passed a resolution providing for the amendment of the company's charter by increasing the total capital stock of the company to \$525,000, \$150,000 of which shall be first preferred cumulative 7 per cent. stock and the remainder common stock. The resolution further provides that the present outstanding common stock of the corporation shall be converted into the first preferred cumulative 7 per cent. stock which the resolution provides for; so that, when the change shall have been effected, the capital stock of the corporation shall consist of \$150,000 of preferred stock and \$375,000 of common stock. The directors have called a meeting of the stockholders to vote upon the adoption by them of the resolution, and the complainant, who is one of the stockholders of the corporation, now files his bill to enjoin the corporation, its officers and directors, from increasing the capital stock or issuing any preferred stock, or converting the present outstanding issue of \$150,000 of common stock into a like amount of preferred stock, and restraining the stockholder from voting at the stockholders' meeting in favor of the directors' resolution.

Two questions are raised: One, the power of the corporation without the universal consent of its shareholders to increase the amount of its capital stock; second, the

right of the corporation to issue preferred stock, and compel its substitution for the present outstanding common stock without the consent of all the shareholders. The charter of the corporation confers upon it the general powers, and subjects it to the general restrictions contained in the corporation act of 1846 (P. L. p. 16), and it may be sufficient, without further reference to the statute, to say that it contains no specific authority to a corporation organized under it to do any of the things that are attempted to be done in this case. The charter provides in so many words that the capital stock may be increased from time to time to any sum not exceeding \$250,000.

This I take it is a limitation upon the power of the company which is part of the contract existing between the stockholders among themselves and between the stockholders and the corporation itself, and that it cannot be abrogated or avoided by the corporation or by its directors, or by any majority, however large, of its stockholders against the objection of the holder of a single share. This is on the ground that such action would violate that provision of the federal Constitution which prohibits the states from passing any laws which impair the obligation of contracts. The decisions of the Supreme Court of the United States are the final authority on questions arising under this provision of the Constitution, because they are necessarily federal questions. In *Chicago City Railway v. Allerton* (1874) 18 Wall. (U. S.) 233, 21 L. Ed. 902, the question which is now before the court arose for final decision in the Supreme Court of the United States. The appellant was a street railway company having a capital of \$1,250,000, which it proposed to increase to \$1,500,000. The appellee, Allerton, objected, and filed his bill to prevent the increase. The charter of the corporation provided the capital stock should be \$100,000, and that this might be increased from time to time at the pleasure of the corporation, and that all corporate powers of the corporation should be vested in and exercised by the board of directors and such officers and agents as the board should appoint. The board of directors attempted to make the increase by a mere resolution of that body. Mr. Justice Bradley, without attempting to decide questions which arose under the Constitution and laws of the state of Illinois, affirmed the decree in favor of the complainant below upon the broad ground that a change so organic and fundamental as that of increasing the capital stock of the corporation beyond the limit fixed by the charter could not be made by the directors alone, unless expressly authorized thereto. He says: "Authority to increase capital stock of a corporation may undoubtedly be conferred by a law passed subsequent to the charter, but such a law should regularly be accepted by the stockholders. Changes in the

purpose and object of an association or in the extent of its constituency or membership involving the amount of its capital stock are necessarily fundamental in their character, and cannot on general principles be made without the express or implied consent of the members." This case has been followed, and its authority has never been questioned. Its doctrine followed in *Scoville v. Thayer*, 105 U. S. 143; *Bank v. Railroad Co.*, 13 N. Y. 599; *Railroad Company v. Schuyler*, 34 N. Y. 30; *Kent v. Quicksilver Mining Company*, 78 N. Y. 182. I quote from the opinion of Judge Folger in that case: "There is a power in this charter to alter, amend, add to, or repeal, at pleasure, by-laws before made. It is argued from this that it was in the power of the corporate body, in due form and manner, to alter the by-laws which had fixed the amount of the capital stock and the number and relative value of the shares thereof. The power to make by-laws is to make such as are not inconsistent with the Constitution and the law, and the power to alter has the same limit, so that no alteration could be made which would infringe a right already given and secured by the contract of the corporation. Nor was the power to alter to the extent of affecting the contracted relative value of a share, reserved when the share was sold to the stockholder, so as to enter into and form a part of the contract. An alteration is a pro tanto repeal; but no private corporation can repeal a by-law so as to impair rights which have been given and become vested by virtue of the by-law afterwards repealed." The reasoning of these cases goes to the question of the violation of the contract as alleged by the complainant, and it applies to the other matters mentioned in the resolution, namely, the creation of preferred stock and the compelling of the present shareholders to surrender their common stock and accept preferred stock in lieu thereof. It is true that at the time of the creation of this corporation there was an act in force (P. L. p. 603) providing that manufacturing corporations might create two kinds of stock, viz., general stock and special stock, the latter at no time to exceed half the capital paid in, and subject to redemption with a fixed half yearly sum or dividend, not exceeding 4 per cent, before any dividend should be set apart or paid on the general stock. This act was repealed on April 7, 1875 (Rev. St. 1874-75, p. 10, § 25), without any reservation of any rights acquired under it, and, at any rate, if it were a part of the company's charter, it would not authorize the present action, for the reason that the rate of dividend provided for is 4 per cent, while the present plan contemplates dividends at the rate of 7 per cent.

All the other provisions of our statutes relating to the creation of preferred stock have been passed since the *Raritan Woolen Mills* was organized as a corporation, and, it not

appearing in the case that these subsequent provisions have been accepted by the shareholders as amendments to the charter, I feel obliged to hold that there is no authority for the creation of preferred stock without the consent of every shareholder. The same line of argument applies to the attempt of the directors to convert the present common stock into preferred stock. It is said on behalf of the company and its directors that the complainant cannot be compelled to convert his own stock into preferred stock, and that he, therefore, need not do it, that he may continue to hold it as common stock, and that, inasmuch as one share of stock is like another, it can make no difference to him whether he holds his shares which have been heretofore authorized, or whether he holds shares which shall be authorized by virtue of the resolution in question. The reasoning of Mr. Justice Bradley in the *Al-lerton* Case above cited seems conclusive on this point. He says: "Second, as it respects the constituency or capital and membership. This is the next most important fundamental point in the constitution of a body corporate. To change it without the consent of the stockholders would be to make them members of an association in which they never consented to become such. It would change the relative influence, control, and profit of each member. Even when the additional stock is distributed to each stockholder pro rata, it would often work injustice, because some of the stockholders might be unable to take their respective shares, and might thus lose their relative interest and influence in the corporate concerns," I take it that, when Mr. Justice Bradley speaks of the consent of the shareholders, he means the consent of every shareholder, and that a mere majority, however large, would not have the power to interfere with the rights and property of the minority.

My attention is called by the defendant to an act of April 6, 1908 (P. L. p. 127), which on its face and by its terms permits to be done the very thing that is sought to be accomplished in this case. But I am unwilling to accede to this. I must hold that this act is merely the consent of the state that the stockholders may, if they all agree, do the things which are provided for in that act; but, if all the stockholders do not agree, the act cannot be held to be a portion of the charter of the corporation or an amendment thereto. This is specifically held in *Kean v. Johnson*, 9 N. J. Eq. 417; *Zabriskie v. Hackensack Railroad Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617; *Black v. United Railroad & Canal Companies*, 24 N. E. Eq. 455; *Mills v. N. J. Central Railroad Co.*, 41 N. J. Eq. 1, 2 Atl. 453, and many other cases which have ingrafted this doctrine into our law so deeply as to be beyond disturbance.

The motion for the injunction should therefore prevail.

McMANUS-KELLY CO. v. POPE MFG. CO.  
(Court of Chancery of New Jersey. June 25, 1908.)

CORPORATIONS—INSOLVENCY—EQUITABLE SET-OFF.

As against the claim of an insolvent corporation, for which a receiver has been appointed, thereby vesting in him, under Act 1896 (P. L. p. 299) § 68, all its effects, the debtor cannot set off notes of the insolvent, not yet due, at least in the absence of some equitable ground therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2287.]

Suit by the McManus-Kelly Company against the Pope Manufacturing Company. Heard on motion to set off claims. Set-off denied.

The bill of complaint in this case was filed August 14, 1907, for the administration of the affairs of the defendant corporation as an insolvent corporation. Upon the filing of the bill, and on the same day, receivers were appointed to wind up its affairs. They qualified at once, and entered upon the execution of the trust. On that day the corporation had to its credit with the International Trust Company, a banking institution of the city of Boston, the sum of \$9,407.49, and at the same time the trust company held three notes of the insolvent corporation for \$25,000 each, due, respectively, October 15, 1907, November 8, 1907, and February 18, 1908. The notes were signed by the insolvent defendant, and were made payable to the order of the trust company. The trust company held no security for their payment. On September 19, 1907, prior to the maturity of any of the notes, the receivers of the defendant corporation made demand upon the trust company for the payment of the deposit. The trust company refused to pay the same, and claimed the right to hold it as a set-off to the unmatured liabilities of the defendant held by it. The receivers now make application for an order directing them to pay a 25 per cent. dividend on all the claims proved and admitted by them, including the claim of \$75,000 held by the trust company. The trust company was notified that incidentally to the payment of the dividend the receivers would claim to deduct the amount of the deposit from the dividend declared on the \$75,000 indebtedness, thus utilizing the deposit for the payment of the trust company's dividend pro tanto. On the hearing the dividend was ordered paid, but, as to the trust company, the deposit was directed to be deducted from its dividend, and the set-off claimed by it was disallowed.

Sherrerd Depue, for receivers. William M. Richardson, for the International Trust Company.

HOWELL, V. C. (after stating the facts as above). The right of set-off in this state may be either legal or equitable. At law

the right depends upon the statute of March 27, 1874 (Rev. St. 1874-75, p. 794, §§ 1-4), first passed in 1722 (1 Nev. Laws, p. 98), which provided that, if two or more persons be indebted to each other, such debts or demands not being for unliquidated damages may be set off against each other, and that in an action between such debtors the defendant may set off against the plaintiff the debts or demands which may be due or owing to him. There are at least two requirements which the defendant must meet: One is that his claim must be for liquidated damages and that unliquidated damages cannot be set off (*Slaytor-Jennings Co. v. Specialty Paper Box Company*, 69 N. J. Law, 214, 54 Atl. 247), and the other is that the demand so attempted to be set off must be due and payable, and must have belonged to the defendant at the time of the beginning of the action (*Johnson v. Kaiser*, 40 N. J. Law, 286; *Russ v. Sadler*, 197 Pa. 51, 46 Atl. 903). It is quite apparent, therefore, that in an action at law brought by the receivers against the trust company that company would not have been allowed at law to set off the unmatured obligations which it held. This rule of law must be followed by this court, and in this case, unless the trust company shall have presented to the court some matter of equitable consideration which takes the case out of the legal rule.

In the case of *Camden National Bank v. Green*, 45 N. J. Eq. 546, 17 Atl. 689, affirmed 46 N. J. Eq. 607, 22 Atl. 56, an equitable set-off was allowed upon the presentation to the court of special circumstances which were thought to be sufficient to raise an equity in favor of the bank, and thus allow the set-off. These circumstances were (1) that the deposit was part of the proceeds of the discounted note, and was part and parcel of the same fund and arose out of one transaction which the parties had engaged in; and (2) that, in addition thereto, the estate of the maker of the note was insolvent, and that the fund on deposit was still actually in the custody and possession of the holder of the obligation. There are no special circumstances shown to the court touching the transaction in hand. It does not appear that the deposit is part of the proceeds of the notes which were discounted or that there was any mutuality in the cross-claims; nor are any facts adduced which raise an equity in favor of the trust company to refuse compliance with the legal demand made upon it by the receivers for the amount of the deposit. It is true that the defendant corporation was insolvent, but I do not see how mere insolvency, without other circumstances, can justify a claim for equitable set-off. There should be other facts and circumstances. Insolvency merely furnishes the occasion for taking advantage of the other facts to raise an equity for the protection of the bank. *Hannon v. Williams* (Court of Errors) 34 N. J. Eq. 255, 38 Am. Rep. 378;

2 Story, Eq. Jur. § 1435ff. In *Rawson v. Samuel*, Cr. & Ph. 161, Lord Cottenham in deciding against an attempt at equitable set-off, says: "We speak familiarly of equitable set-off as distinguished from the set-off at law, but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross-demands is not sufficient. *Whyte v. O'Brien*, 1 S. & S. 551. \* \* \* What equity have the plaintiffs in the suit for an account to be protected against the damages awarded against them. If they have no such equity, there can be no good ground for the injunction." This opinion is cited with approval by our Court of Appeals in the case of *Trotter v. Heckscher*, 40 N. J. Eq. 612-658, 4 Atl. 83. Its doctrine had been previously announced by Vice Chancellor Van Fleet in the case of *Jackson v. Bell*, 31 N. J. Eq. 554. He there says: "The remedy by set-off as enforced in equity is undoubtedly somewhat broader and more liberal than that given by statute, but it has its limits. The mere existence of a cross-demand is not enough to establish a right to it, nor will the existence of an unsettled account out of which a cross-demand may arise be sufficient. \* \* \* And, even where the cross-demands are debts of fixed and certain amount, but had their origin in distinct and independent transactions, equity will not set off one against the other, unless such course is made necessary by some peculiar equitable consideration, as, for example, where there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presumption arises that the one is understood by the parties to go in liquidation or set-off of the other."

The appointment of a receiver for the defendant corporation under our statute creates additional reasons why the trust company may not have its set-off. In the first place, the creditors by operation of law have fastened their claims upon all the property of the corporation as of the date of the receiver's appointment. *Receiver of Graham Button Company v. Spielmann*, 50 N. J. Eq. 120, 24 Atl. 571, affirmed 50 N. J. Eq. 796, 27 Atl. 1033. By the statute (P. L. 1896, p. 299, § 68), all the property of the defendant corporation wheresoever situated, and all its franchises, rights, privileges, and effects upon the appointment of a receiver forthwith vested in him, and the corporation was divested of title thereto. The receivers thereupon became entitled to the possession of the fund, and after the demand which they made, if there is any intendment in the case at all, it is in favor of giving to the receiver the legal title to the deposit, or, at the very least, an equity superior to any equity which the trust company might have for a set-off. The statutory transfer of the title to the deposit is a complete severance of the depos-

It from the unmaturing obligations, if it could be said that there ever had been a relationship between them. The two debts are not substantially the same. They are not in the same right. They are not mutual. They do not arise out of the same transaction. The title has shifted to a trustee who holds under the trust fund doctrine for creditors. *Williams v. Traphagen*, 38 N. J. Eq. 57, a case presenting the converse of the one now before the court. The cases in Massachusetts seem to be adverse to the trust company's claim on all grounds. In *Spaulding v. Backus*, 122 Mass. 553, 23 Am. Rep. 391, it was held that a note given by A. to B. and not yet due could not in equity be set off against a note given by B. to A. upon which A. had brought an action for the benefit of C., to whom he had assigned it, notwithstanding A.'s insolvency and C.'s knowledge of it. The court said: "We are clearly of opinion that a party whose debt is not due has no equitable claim whatever to set-off against a debt of his own already due in the hands of a party who is insolvent." In *Wiley v. Bunker Hill National Bank*, 183 Mass. 495, 67 N. E. 655, the same ruling was made on the authority of *Spaulding v. Backus*. Counsel have furnished a large collection of cases which seem to affirm the rule touching equitable set-off which is here announced, showing that it is a rule of very wide if not universal application. Among the cases are *Bradley v. Angel*, 3 N. Y. 475; *Myers v. Davis*, 22 N. Y. 489; *Mechanics' Bank v. Stone*, 115 Mich. 648, 74 N. W. 204; *Chipman v. National Bank*, 120 Pa. 86, 13 Atl. 707. And they call attention to the distinction between the line of cases above cited and another class in which the debt owed by the insolvent is due but the debt owed to the insolvent is not due, of which class the following is an example: *Richards v. La Tourette*, 119 N. Y. 54, 23 N. E. 531. In this latter class the courts have held that the debtor may waive the time of credit to which he is entitled and pay the debt in money or by way of set-off.

It is therefore quite manifest that the trust company had no authority to appropriate to its own use by way of set-off the deposit which lay in its bank to the credit of the defendant corporation, and that the amount thereof must be deducted from the dividend which is payable to the trust company on its \$75,000 claim.

I have therefore advised a decree in accordance with these conclusions.

(74 N. J. E. 367)

ROGERS v. COLEBAUGH et al.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

MORTGAGES — FORECLOSURE — DEFENSES — EVIDENCE.

C. conveyed property to R. in 1896, at the same time giving C. the right to repurchase within 10 years, on paying a certain sum, fixed payments to be made at specified times. In 1900 R. reconveyed the property to C., subject

to a mortgage held by W., payment of which C. assumed. In 1901 W. foreclosed the mortgage, R. buying at the sale, and thereafter deeding the property to C., receiving as part payment a mortgage on the premises. Held, in an action to foreclose the latter mortgage, that evidence that after 1896 C. made large payments to R. on account of the purchase price was immaterial on the defense of fraud, and that R. was not entitled to the full amount of the mortgage, in the absence of evidence that the moneys so paid were not due as part of the purchase price for the reconveyance in 1900; and likewise proof that R. neglected to pay W. interest on W.'s mortgage as it accrued was immaterial, in the absence of evidence of obligation to pay it.

Appeal from Court of Chancery.

Suit by George M. Rogers against Jennie Colebaugh and others. From an adverse decree, defendants Annie Comly and Annie Comly, Jr., appeal. Affirmed.

Spencer Simpson, for appellants. Ephraim Tomlinson and George Reynolds, for respondent.

GUMMERE, C. J. The bill in this case is filed to foreclose a mortgage given by the defendant Jennie Colebaugh to the complainant on the 8th day of December, 1902, to secure the payment of \$2,365. Annie Comly and Annie Comly, Jr., were made parties defendant because they were in possession of the mortgaged premises, or some part thereof, and claimed to have some lien upon, or interest in them. They filed an answer attacking the validity of the mortgage and a cross-bill, in which they alleged that one Charles H. Comly was the owner of the mortgaged premises in 1896; that on the 14th day of March of that year the complainant induced him, by fraud and misrepresentation, to deed said premises to him for a stated consideration of \$2,686, which was never, in fact, paid; that the complainant, in furtherance of his scheme to defraud Comly, at the same time entered into an agreement with him for the reconveyance to him of the mortgaged premises; that the complainant subsequently failed to pay the interest upon a certain mortgage which covered the premises, by reason whereof the mortgage was foreclosed, and the premises sold; that the complainant was the purchaser at this foreclosure sale; that Comly paid to him at various times, on account of the mortgaged premises, sums of money amounting to more than \$1,200; that Comly died in 1905, leaving the defendants his only heirs at law; and that they are now vested with all his interest in the mortgaged premises, and entitled to assert against the complainant all rights which he (Comly) could have asserted had he lived. On these facts they asked such relief as the court should consider them entitled to. The complainant filed a replication denying the allegations of the answer and of the cross-bill. At the hearing before the Vice Chancellor the following case was made by the complainant: On April 7, 1887, the property was owned by the complainant. On that day he and his wife conveyed it to Charles H. Comly for



\$3,365. The purchase money was paid, in part, by a bond and mortgage for \$2,365 made by Comly to Rogers, and payable in five years from date. On the 9th of March, 1889, Rogers assigned this bond and mortgage to Peter L. Voorhees, and on October 29, 1896, Voorhees' executrix assigned the bond and mortgage to one Annie Wilson. Comly held the property from April 7, 1887, to March 14, 1896, and on the latter day reconveyed it to the plaintiff for an expressed consideration of \$2,686. At the time of this reconveyance the complainant made an agreement with Comly in writing, by the terms of which Comly was given the right to repurchase the premises within 10 years, provided he should pay the sum of \$2,686 as follows: \$100 in six months from date, \$100 in one year from date, and \$150 at the end of every six months thereafter, with interest. On the 31st of May, 1900, the complainant and his wife reconveyed the property to Comly, subject to the lien of the \$2,365 mortgage held by Annie Wilson, the payment of which was assumed by Comly. In July, 1901, Annie Wilson filed in the Court of Chancery a bill to foreclose her mortgage, and made Charles H. Comly, Annie Comly, and Annie Comly, Jr., parties defendant thereto; the two females being made parties because they claimed some undisclosed interest in the premises. A decree pro confesso was taken against all of the defendants, and afterward a final decree went against them foreclosing all their rights in the premises. Upon sale made by the sheriff under the foreclosure proceedings, the complainant purchased the premises. Subsequently, and on the 8th day of December, 1902, he sold them to the defendant Jennie Colebaugh, and received from her, as part payment of the consideration money, the mortgage which is the subject of the present foreclosure suit. That mortgage is due, and is entirely unpaid.

At the close of the complainant's case the defendants Annie Comly and Annie Comly, Jr., offered to prove that "Charles H. Comly, prior to and subsequent to the agreement of March 14, 1896, made large payments to Rogers on account of the purchase price of the premises in question; that he died in 1905; that they since April, 1887, have been, by verbal arrangement with the late Charles Comly, in possession of a part of the premises in question; and that Rogers, in order to get the property back in his own name, by fraud, neglected to pay the interest due to Mrs. Wilson on the mortgage assigned to her, and thereby obtained repossession of the property at a small figure." The learned Vice Chancellor overruled the offer to make this proof by the defendants on the ground that their failure, as well as the failure of their ancestor Charles H. Comly, to answer in the suit brought by Annie Wilson for the foreclosure of her mortgage, operated as a bar to the claim made by them in the present litigation, and advised a decree in favor of

the complainant for the principal and interest due on his mortgage. We do not consider it necessary, for the determination of this appeal, either to concur in, or dissent from, the view which led the learned Vice Chancellor to advise the decree now under review. It may be doubted whether the failure of the appellants and of their ancestor to set up in the Wilson foreclosure suit the matters now brought forward by them is a bar to any relief in the present suit, for Mrs. Wilson had no concern with the matters now presented. Her mortgage was a valid lien upon the premises, and she was entitled to a decree foreclosing the interest of all of the defendants, without regard to the alleged rights or liabilities which it is now claimed existed between them and the present complainant. Being matters in which she was in no way interested, they constituted no defense to her suit; and, this being so, it is not easy for us to see upon what theory the failure of the appellants to litigate in the earlier suit the matters specified in their cross-bill (even if it was permissible for them to do so) bars them from setting them up in the present suit as a ground of relief against the complainant. The decree pro confesso merely extinguished the rights which the defendant had in the mortgaged premises as against Annie Wilson.

But we think that the decree was manifestly justified on the facts of the case. The proof offered by the appellants failed entirely to sustain the allegations of their cross-bill. Proof that prior to and subsequent to the date of the agreement of 1896 Charles H. Comly made large payments to the complainants on account of the purchase price of the mortgaged premises was immaterial, unless it was also shown that the moneys so paid were not due as a part of the purchase price for the reconveyance of the property by the complainant to Charles H. Comly on May 31, 1900. So, too, proof that Rogers neglected to pay to Mrs. Wilson the interest on her mortgage as it accrued was entirely immaterial, in the absence of evidence tending to show that the obligation to do so rested upon him, and no such evidence was offered to be submitted. The facts offered to be proved afforded no ground of support for the contention of fraud on the part of the complainant, or for the conclusion that he was not entitled to the full amount of the mortgage made to him by Miss Colebaugh.

The decree appealed from will be affirmed.

(74 N. J. E. 721)

STATE MUT. BLDG. & LOAN ASS'N OF  
NEW JERSEY v. MILLVILLE IMP. CO.

(Court of Chancery of New Jersey. July 7, 1908.)

#### 1. MORTGAGES—MODIFICATION—SECURITY.

A mortgage originally given to secure a simple money bond may, by agreement of the mortgagor, be made security for the payment

of a loan from, and for interest, dues, premiums, and fines due to, a loan association.

## 2. SAME—PARTIAL PAYMENT.

When money is paid to a mortgagee, in consideration of the release from the lien of the mortgage of a part of the mortgaged premises to a purchaser of the fee of the released portion, in the absence of agreement by the parties to the contrary, the law applies the payment in reduction of the mortgage debt pro tanto.

## 3. MORTGAGES—SALE OF EQUITY—RIGHTS OF PURCHASER.

Where premises are purchased subject to incumbrances, among which is a sum due for taxes, the purchaser cannot set up an outstanding tax title acquired before the purchase of the mortgagor's title, whether the tax title be a lien only or a fee simple; and especially so when the purchaser had previously acquired the tax title with a view to becoming the purchaser of the mortgagor's title.

(Syllabus by the Court.)

Bill by the State Mutual Building & Loan Association of New Jersey against the Millville Improvement Company. Exceptions to master's report. Overruled.

S. Stanger Iszard and French & Richards, for complainant. Norman Grey, for defendant.

**WALKER, V. C.** The mortgage being foreclosed in this case was made on August 31, 1895, by the South Jersey Land & Transportation Company to Richard H. Rushton conditioned for the payment of \$26,000 January 1, 1900, with interest at 6 per cent. per annum. There are no special covenants or agreements in the mortgage. It simply pledges certain lands and premises in the counties of Atlantic and Cumberland, in this state, for the payment of the mortgage debt. On August 19, 1896, the mortgage was assigned by Mr. Rushton to the complainant, the State Mutual Building & Loan Association of New Jersey. The assignment is without any covenants against the assignor. Contemporaneously with the making of the assignment a declaration of no set-off was given by the mortgagor, the South Jersey Land Transportation Company, who had become a stockholder in the complainant association, to the assignee, the State Mutual Building Loan Association of New Jersey who is now foreclosing that mortgage. This document recites that the South Jersey Land Transportation Company, the stockholder, has applied to the State Mutual Building & Loan Association of New Jersey, the complainant, for the loan and advance of \$20,000, based on 200 shares of stock in the association according to its constitution, by-laws, and regulations, and proposes to secure the same by the assignment of the bond made by the South Jersey Land & Transportation Company to Mr. Rushton conditioned to pay \$26,000 January 1, 1900, with interest, and the indenture of mortgage made and given to secure the same, which security the association is willing to take provided the South Jersey Land & Transportation Company will agree that the full sum of \$20,000 is due and owing on the bond and

mortgage, and that those securities shall fall due and become payable forthwith in case of any default in the payment of dues, interest, premium, or fines, by the company to the association. The document then proceeds, in consideration of the premises, etc., to covenant that \$20,000 of principal is due and owing on the bond and mortgage, and that the company has no plea, set-off, or defense against the same in law or equity, and that in case of any default in the payment of any monthly installment of dues, interest, premium, or fines on the loan, or any portion thereof, in accordance with said constitution, by-laws, and regulations, then and in such case the bond and mortgage shall at the option of the association, its successors and assigns, forthwith become due and collectible, and said association, its successors and assigns, may forthwith proceed to collect and recover the principal and interest thereof and use the proceeds to pay and discharge the loan and advance and the dues, interest, premium, and fines accrued thereon, in the same manner as if the bond and mortgage had been made and given in the first instance to secure the same.

The defendant, the Millville Improvement Company, filed an answer which did not set up any defense or present any question except such as might be properly referred to a master, and the cause was, on December 31, 1906, referred to Judge Starr, a master in chancery, to ascertain and report the amount due to the complainant on the mortgage and on the bond, and also whether the complainant is entitled to charge against or collect from the land described in the complainant's mortgage dues, interest, premiums, or fines, laid or imposed by the complainant, and for what amount a decree should be made in favor of the complainant on the mortgage, and what lands the mortgage is a lien upon, and what lien, if any, the defendant, Millville Improvement Company, has in any part of the lands by virtue of the purchase by it of a tax title from the township of Landis, and if a lien, the amount due thereon, and to whom, and the priority of the same with respect to the complainant's mortgage. The master took considerable testimony and filed an elaborate report on May 31, 1907. To this report four exceptions were filed, and the matter has been heard upon these exceptions. They will be considered together, and together they raise three questions: (1) Was the complainant entitled to charge against the South Jersey Land & Transportation Company dues, interest, premiums, and fines? (2) Should the complainant have credited on the mortgage the amount paid to it for releases of parts of the mortgaged premises, instead of crediting those payments on account of the loan and advance? (3) Is the defendant the owner of the land located in the township of Landis in fee simple absolute, free from the lien of the complainant's mortgage, by reason of its acquisition of title

under a sale for taxes of part of the mortgaged premises made by that township?

As to the first question: My judgment is that the complainant was entitled to charge against the South Jersey Land & Transportation Company dues, premiums, and fines, as ascertained and set forth by the master in his report, and the amount of which as found by the master is the amount due and owing from the defendant to the complainant on the loan and advance referred to, and I hold that the complainant can recover against the defendant on the foreclosure of this mortgage the amount for which the mortgage stands as security, which is the principal of the loan, with interest, dues, premiums, and fines. In my opinion the mortgage given by the South Jersey Land & Transportation Company to Mr. Rushton, and by him assigned to the complainant, was, in the hands of the complainant, in virtue of the declaration of no set-off, which, as before stated, is also a contract between the parties, the same as though the mortgage were originally made between the same parties as security for the loan made by the complainant to the defendant. As is well known, there are regular forms of bonds and mortgages given to building and loan associations to secure the payment for shares of capital stock and for interest, dues, premiums, and fines. Although the mortgage in question was not one of them, as originally drawn, nevertheless, in effect, it became such, in equity, by virtue of the declaration of no set-off. In *Jones on Mortgages* (6th Ed.) § 357, it is laid down: "As against the mortgagor, his agreement that the mortgage shall stand as security to the mortgagee for further advances, although it be oral only, is valid, and, after the advances have been made upon the faith of it, a court of equity will not allow the mortgagor to redeem without performing it." This question has been settled by the Court of Errors and Appeals of this state in *Atwater v. Underhill*, 22 N. J. Eq. 599. Mr. Justice Depue in the opinion in the case, at page 603, said: "A mortgage which has been satisfied may be given a new vitality by a redelivery by the mortgagor to the mortgagee or a third person, upon a new consideration, or for a purpose different from that for which it was made. *Robinson v. Urquhart*, 12 N. J. Eq. 515; *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687. But to give such effect to the mortgage the repledging must be made by the authority of the person whose estate is sought to be held for the performance of the new obligation. Mrs. Atwater was the owner of the mortgaged premises, and the mortgage, when once extinct, could only be revived by an authority which emanated from her." The same doctrine is exploited in *Whitney v. Franklin*, 28 N. J. Eq. 126, 130; *Campbell v. Perth Amboy Shipbuilding Co.*, 70 N. J. Eq. 40, 59, 62 Atl. 319. Thus it appears that not only may a subsisting mortgage be made security

for a further or other debt than that for which it was originally given, but that after it has become extinct it can be revived and repledged. It will be remembered that the South Jersey Land & Transportation Company was the mortgagor, and that it itself made the agreement directly with the complainant whereby its mortgage, after assignment by Mr. Rushton, the mortgagee, was pledged as security for the loan and advance made to it by the complainant. In this posture of the affair it was as though the mortgage had never been given to secure Mr. Rushton, but to secure the performance by the mortgagor of his contract of membership with his fellow stockholders in the complainant association. *Clarksville B. & L. Ass'n v. Stephens*, 26 N. J. Eq. 351, 355; *State W. B. & L. Ass'n v. Hornbaker*, 41 N. J. Law, 519, 522; *Bowen v. Lincoln B. & L. Ass'n*, 51 N. J. Eq. 272, 28 Atl. 67. In the last case (*Bowen v. Lincoln B. & L. Ass'n*) the bond provided only for the payment of dues and interest, but not for fines, and the Court of Errors and Appeals (at page 280 of 51 N. J. Eq., and page 67 of 28 Atl.) intimated that, if the constitution and by-laws had declared that fines should be collected out of the proceeds of the sale of property pledged to secure a loan made to a member, that might justify the decree under review, which visited the payment of fines upon the defendant, and which was reversed because the court found nothing in the contract under which the payment of fines could be enforced in that suit. In *New Jersey B. & L. Co. v. Bachelor*, 54 N. J. Eq. 607, 35 Atl. 745, the amount held to be due upon the mortgage was that actually paid upon it, together with premium and monthly payments required to be made by the terms of the bond and mortgage.

Secondly. The master finds upon the evidence that there was no application made by the defendant of the various sums received for releases of parts of the mortgaged premises to the payment of the mortgage debt. In this I think he has erred, but the error is harmless, as will be seen. On August 20, 1896, the president of the complainant association wrote a letter to the president of the South Jersey Land & Transportation Company, in which he said: "Regarding the matter of your loan from this association of \$20,000, we understand you desire releases from time to time on a portion of the mortgaged premises, paying us a satisfactory sum therefor which shall be agreed upon from time to time, reducing the loan to that extent. We have no objection to doing this at all," etc. And counsel for the defendant, Millville Improvement Company, contends that this amounts to a valid direction to have the money applied on the mortgage, but cites no authority to sustain his position. He evidently treats the mortgage debt as a thing apart from the loan and advance which the mortgage was assigned to secure. My view is

contrary to the contention of counsel on this head. As I read the communication it is a direction to apply the moneys on the loan and advance, which is, as between the parties to this suit, the mortgage debt, as has already been seen, and for the payment of which the mortgage was assigned. I take it that, where money is paid to a mortgagee in consideration of his release of a part of the mortgaged premises from the lien of his mortgage to a purchaser of the fee in the released portion, the law applies the payment in reduction of the mortgage debt pro tanto, and that application of the payment to some other debt between the parties can only be made by their mutual agreement. In *Jones on Mortgages* (6th Ed.) § 907, it is laid down: "If a mortgagee release a portion of the mortgaged premises to one who has purchased the equity of redemption of that portion, the money paid him for such release is deemed a payment upon the mortgage debt, and he cannot apply it in discharge of other debts due him from the mortgagor." In *Hicks v. Bingham*, 11 Mass. 300, it was held: "Where a mortgagee of two parcels of land released one of them to an assignee of the mortgagor, she was held to apply the money paid in consideration of such a release in discharge of so much of the sum due on the mortgage, although the mortgagor was still indebted to her on other accounts." And *Putnam, J.*, on page 302, remarked: "And we are all of opinion that the respondent is bound to apply the consideration, which she received for a release of a part of the mortgaged premises, towards payment of the mortgage. It was received by her in consequence of the mortgage, and the price of the land mortgaged, as well as the rent of it, received by the mortgagee, ought to be applied towards the extinguishment of the debt secured by the mortgage." But, after all, in this case, in my opinion, an appropriation by the complainant of moneys received for releases of portions of the mortgaged premises, to the payment of the loan and advance, is an application of payment upon the mortgage, because that mortgage, although originally not so written, nevertheless, by virtue of the declaration of no set-off and agreement between the parties, at the time the releases were given and payments made, stood as security for the loan and advance made by the complainant to the South Jersey Land & Transportation Company, the defendant's predecessor in title, as effectually as though it were originally written to secure that very debt. Although counsel for defendant contends that the money received for the releases should have been applied to the mortgage debt, instead of the loan and advance, his position in this regard is founded in a misconception, for, by virtue of the agreement mentioned, the loan and advance became the mortgage debt.

As to the question of tax title: In the year 1902 the South Jersey Land & Transportation Company was decreed to be insolvent in

a suit in this court wherein Edward R. Wood was complainant and that concern was defendant. In that proceeding application was made to sell the mortgaged premises free from the lien of the mortgage which is now being foreclosed, which application was refused, and an order was made for the sale of the premises subject to the mortgage. The sale took place in August, 1904, and the property was purchased by the defendant, the Millville Improvement Company, whose deed for the land was executed and delivered in September, 1904. In April, 1904, that part of the mortgaged premises which is situate in the township of Landis was sold for unpaid taxes, and the township became the purchaser. In May, 1904, the township sold the property to the defendant, Millville Improvement Company, who thereafter acquired the title of the South Jersey Land & Transportation Company in the mortgaged premises, as above stated. The title acquired by Landis township and by it transmitted to the Millville Improvement Company is said to be a title in fee simple absolute, free and discharged from any estate in or lien upon the same in favor of the complainant as mortgagee, unless in equity and upon principle it should be held, as the master reported, that as against the complainant the defendant has only a lien for the money expended in acquiring the tax title or deed, and that the complainant is therefore entitled to redeem. Counsel for the complainant asserts that the South Jersey Land & Transportation Company was really Mr. Wood, and that the Millville Improvement Company is the same; that is, as he was the president and the dominant factor of both corporations, they are bound by his acts in reference to the subject under consideration, as much as though he himself were the defendant in relation to those acts. The case of *Burgin v. Rutherford*, 56 N. J. Eq. 686, 38 Atl. 854, is cited by complainant's counsel as authority for the proposition that the Millville Improvement Company, as the holder of the tax title in this case, has only a lien upon the property for the amount paid for it, and that the complainant has the right to redeem the land from the tax sale. That case (*Burgin v. Rutherford*) was affirmed in the Court of Errors and Appeals for the reasons given in the Court of Chancery (*Kaighn v. Burgin*, 56 N. J. Eq. 852, 42 Atl. 1117); but is not an authority in this case to the full extent claimed by counsel. In that case (*Burgin v. Rutherford*) the defendant, Kaighn, a third party, had not acquired a fee-simple, absolute title by virtue of a tax deed, but held only a certificate of sale, and by virtue thereof had only a lien upon the mortgaged premises (*Id.*, 56 N. J. Eq. 669, 38 Atl. 854), which, of course, could be redeemed.

Whether the Millville Improvement Company purchased the equity of redemption in such a way as to be liable to pay the taxes, or whether the sale to it was one in fee simple by which the interest of the mortgagee

was divested, it is not necessary to decide. Although the tax title was acquired by the Millville Improvement Company before it took title to the mortgaged premises by sale from the receiver of the South Jersey Land & Transportation Company, nevertheless, it took its title from him subject to incumbrances, including the tax lien in whatever form it existed, as will presently be shown. The acquisition of the tax title was only a step in the purchase ultimately of the entire premises of the South Jersey Land & Transportation Company by the Millville Improvement Company, as contemplated by it. This, I think, abundantly appears from the evidence. Those two companies were distinct and separate entities, it is true, but, nevertheless, Mr. Wood was their agent with plenary powers, and his knowledge was their knowledge, and his acts bound them, at least so far as corporations may be bound in law by the acts of their agents.

Mr. Wood made an affidavit in the insolvency proceedings against the South Jersey Land & Transportation Company on August 3, 1904, in which he stated that there was due to the State Mutual Building & Loan Association of New Jersey, the complainant in this cause, on the mortgage being foreclosed, and a certain other mortgage, the sum of \$36,281.11, besides unpaid taxes in the township of Buena Vista, in the county of Atlantic. This sum admittedly included the amount of the Landis township taxes and for which that township sold a portion of the mortgaged premises to the Millville Improvement Company. About the time of the sale by the receiver to the Millville Improvement Company, negotiations were entered into between the complainant and defendant and the American Land Improvement & Silk Culture Association concerning the lands in question, which recited the debt due from the South Jersey Land & Transportation Company to the complainant to be the sum of \$36,281.11, and this agreement was actually executed by the Millville Improvement Company, though for want of execution by the American Land Improvement & Silk Culture Association it did not become operative. Mr. Wood in his testimony before the master on April 17, 1907, after stating that the purchase by the Millville Improvement Company of the tax title from Landis township was for its own account and with the expectation of making a profit out of the transaction, was confronted with his affidavit made in the insolvency proceedings, and then admitted that the amount due as stated in that affidavit and in the agreement executed by the Millville Improvement Company included the Landis township taxes for which the property was sold. If anything were wanting to show the knowledge of the Millville Improvement Company of the situation with reference to the Landis township tax title and the power of Mr. Wood to act for and bind the company, it is, in my judgment, supplied by Mr. Wood's affi-

davit and the tripartite agreement executed by it, to say nothing of the evidence before the master, including the testimony of Mr. Wood.

A corporation is bound by the acts of its president within the apparent scope of his authority which it authorizes, acquiesces in, or accepts the benefit of. *Bennett v. Millville Improvement Company*, 87 N. J. Law, 320, 51 Atl. 706. It is perfectly apparent that Mr. Wood was authorized to act for the Millville Improvement Company with reference to the acquisition of title from the receiver of the South Jersey Land & Transportation Company subject to the lien for taxes of Landis township, and that it acquiesced in all that he did in its behalf, and it would have accepted the benefits of his negotiations in the form in which they were cast in the tripartite agreement, had that agreement become efficacious by execution on the part of all the parties to it. In the insolvency proceedings of Wood against the South Jersey Land & Transportation Company, to the petition filed by the receiver for leave to sell the lands free from incumbrances, Mr. Wood appended an affidavit in which, among other things, he said that Landis township was offering for sale all of the lands of the South Jersey Land & Transportation Company situate within its boundaries, claiming title thereto by virtue of proceedings under the Martin act, meaning the tax title in question. Leave to sell free of incumbrances being denied, another petition was preferred by the receiver praying the court to order a sale subject to incumbrances. Such an order was made, and the Millville Improvement Company offered the receiver \$250 for the property "subject to incumbrances," and the receiver reported that the offer was equivalent to a bid of about \$40,000. This sum included the Landis township taxes. Upon becoming the purchaser of the lands upon these conditions, the defendant, the Millville Improvement Company, became obligated to extinguish its tax title as against the complainant's mortgage. It thereupon owed a duty to do so, for, as remarked by Vice Chancellor Van Fleet in *Foley v. Kirk*, 33 N. J. Eq. 170: "It is a universal principle that a purchase, at a tax sale by one whose duty it was to pay the taxes, shall operate only as an extinguishment of the tax. One man can acquire no rights against another by a neglect of a duty which he owes to the other."

It is unnecessary to hold that, when the Millville Improvement Company acquired the tax title through the operations of Mr. Wood, the purchase was really made for the benefit of the mortgagor, the South Jersey Land & Transportation Company, in which case it would inure to the benefit of the mortgagee complainant. If by its contract of purchase the Millville Improvement Company agreed, as part of the consideration, to take title subject to incumbrances, among which were the Landis township taxes, then it just as

effectually became its duty to refrain from setting up an adverse tax title against the complainant's incumbrance as though it were obligated to pay the taxes in the first instance.

The master correctly found that the claim of the defendant under its tax title could not be sustained, but that it was entitled to be subrogated to the rights of the township by way of tax lien, and to be reimbursed out of the sale of the mortgaged premises the sum paid for taxes, by way of lien paramount and prior to that of the complainant's mortgage. This is, in effect, providing for redemption.

The exceptions will be overruled, and the master's report will be in all things ratified and confirmed, with costs.

(74 N. J. E. 417)

### KRAUSS v. KRAUSS.

(Court of Errors and Appeals of New Jersey.  
June 22, 1908.)

#### APPEAL AND ERROR—ESTOPPEL TO QUESTION JUDGMENT—ACCEPTANCE OF BENEFITS.

Where one has applied for and secured an order from the Court of Chancery purging him of contempt and discharging him from an attachment, said order being made upon certain conditions to be performed by the party discharged, such party cannot, after accepting the benefit of the order, attack by appeal one or more of the conditions imposed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3611-3616.]

(Syllabus by the Court.)

#### Appeal from Court of Chancery.

Bill by Emma Krauss against Gustav A. Krauss. From an order of the Court of Chancery, by which Gustav A. Krauss on certain conditions was relieved from contempt and discharged from imprisonment under an attachment issued against him for disobeying the decree ordering him to pay alimony to his wife, he appeals. Dismissed.

Hudspeth & Carey and Gilbert Collins, for appellant. James C. Gordon, for respondent.

REED, J. The situation when the order appealed from was made was as follows: The wife of the appellant had filed a bill in the Court of Chancery to compel her husband to pay her alimony. In the suit so begun, a decree was made that Krauss should pay the costs of the suit, a counsel fee to his wife's solicitor, and should pay his wife \$100 per month. Krauss paid nothing, but left this state, wandering through the South and Southwest, until he reached South Dakota, where he brought a suit to divorce his wife and obtained a decree therein. He then married another woman and took up his residence in the city of New York. He was indicted in Hudson county for malpractice, while previously practicing there as a physician. He was extradited, and while imprisoned in the Hudson county jail a civil action was brought against him for the same malpractice. This action was begun by a writ of *capias ad re-*

*spondendum*. While still in jail an alias writ of attachment was issued out of the Court of Chancery, based upon his disobedience of the order to pay costs, counsel fee, and alimony. He was acquitted upon the trial of the indictment, and secured a nonsuit upon the trial of the civil action; but he was still held under the attachment issued for his contempt of the chancery decree. He applied to the Court of Chancery for his discharge, and his application was denied. Later, he again applied for his discharge, and upon this application the order under review was made.

The court first adjudged the defendant to be in contempt for his failure to pay the alimony awarded to the complainant in the case. It then ordered that the defendant appellant should be relieved and purged of his contempt and be discharged from further imprisonment upon several conditions: First, that he pay \$500 on account of costs incurred, and the counsel fee allowed in the decree in the original cause. Second, that he pay the costs in the contempt proceedings. Third, that he make his promissory note to one Ackerman, trustee for Emma Krauss, the complainant, for all the alimony owing up to the date of the order, and the remainder of the costs. Fourth, that he should execute an agreement that he would not use the decree of divorce alleged to have been procured by him in South Dakota as a defense or bar to any claim, demand, or proceeding thereafter taken by Emma Krauss or in her behalf to make, secure or collect the alimony due or thereafter to accrue to her under the final decree providing for the payment of such alimony, or in any civil suit brought by her or in her behalf founded on the original marriage relations between the complainant and the defendant; and, further, that Gustav Krauss should join with her in the execution of deeds or mortgages upon her separate property. Further, that Gustav Krauss should keep books of accounts of his receipts and expenditures and certify a transcript thereof upon the complainant every six months. The appellant paid the \$500 and the taxed costs in the contempt proceedings. He also gave his promissory note for the amount of alimony due and for the payment of costs. He also executed an agreement in conformity with the conditions imposed. Upon the performance of all these conditions, he was, under the order, entitled to and obtained his discharge. Thereafter he filed his petition of appeal from the order of the Court of Chancery granting his discharge upon the conditions named. In his petition of appeal, he complains of each of the conditions imposed upon him.

The right of the court, in the instance of one who has contemned its decree, to order him to perform certain acts deemed requisite to annul his contemptuous conduct and essential to procuring the operation of the decree, as a condition upon which the contem-

ner shall purchase his relief from contempt and discharge from punishment, seems to be entirely clear. 9 Cyc. p. 61; 10 Cent. Digest "Contempt," § 283; In re Davies, 21 Q. B. D. 236; Roberts v. Donahan, 16 Ont. Pr. 436; Thornton v. Davis, 4 Cranch, C. C. (U. S.) 500, Fed. Cas. No. 13,998; In re Steinert, 29 Hun (N. Y.) 301; Newton v. Askew, 6 Hare, 319-325; Scully v. Skekane, Sau. & Sc. 710. The principal attack upon the conditions imposed is leveled at the one which required the execution of an agreement that the appellant would not use the Dakota divorce decree as a bar to any claim for alimony. The effect of this condition, it is argued, is practically to annul the force of the foreign decree, and that this cannot be done upon a summary proceeding and without the orderly processes of a regular suit of equity.

Before passing upon the propriety of this condition, however, the prefatory question confronts us. This question is whether it is now permissible to the appellant to challenge the validity of that condition upon appeal? It is settled by a line of cases that the Court of Chancery possesses the ability to annul a foreign decree of divorce if fraudulently obtained. Doughty v. Doughty, 28 N. J. Eq. 581; Magowan v. Magowan, 57 N. J. Eq. 322, 42 Atl. 330, 73 Am. St. Rep. 645; Streitwolf v. Streitwolf, 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683, 78 Am. St. Rep. 630. That the pretended Dakota divorce was obtained by imposition upon the foreign tribunal respecting the domicile of the appellant is transparent from the testimony taken in this cause. The only ground for complaint by the appellant is that he was not offered the privilege of answering and contesting in a regular suit, the charge of fraud in obtaining the Dakota decree. It is to be observed, however, that the order of the Court of Chancery in itself had not the slightest annulling influence upon the Dakota decree. The order did not even strip the appellant of the power to use the decree in the modified form prescribed in the conditions. Whether it would have this effect depended entirely upon the volition of the appellant. He had the right to refuse to accept the purgation of his contempt and his discharge from the attachment upon the conditions imposed. The conditions only became forceful by his acceptance of the same, and by the execution of the required agreement. By his acceptance he waived pro tanto his right to a regular trial of the validity of the decree, and by this waiver secured his discharge from the restraint of the attachment.

The query now is whether, after having secured by acceptance the benefit of the order by which he was set at liberty, and having returned, presumably, to his New York domicile, he can retain that benefit and at the same time challenge the validity of the condition upon which he obtained it. It is a settled rule that, where a party recovers a judgment or decree and accepts the bene-

fits thereof voluntarily and knowing the facts, he is estopped to afterwards reverse the judgment or decree on error. The acceptance operates as, and may be pleaded as, a release of error. 2 Cy. Pl. & Pr. 174, 175; 2 Cyc. 651; Elliott on Appellate Proceedings, § 162. The language of the text in these books of authority is sustained by a great array of cases. From this rule springs the difference between the position of a party who pays a judgment against him and a party who accepts the payment of a sum awarded to him by the judgment. The former has his right of appeal because he receives no benefit from the judgment, while he who accepts the fruits of the judgment is estopped from appealing. Elliott, App. Pro. § 152. From this rule, that when he accepts the benefit awarded to him by the judgment or decree, flows the corollary that where the award of a benefit is coupled with the imposition of conditions to be performed by the person benefited, and he accepts the benefits, he is precluded from afterward challenging the validity of the conditions by an appeal. The rule is stated in the text of 2 Cyc. 645, in this language: "If a trial court imposes terms as a condition upon which a continuance or amendment will be allowed or upon which an order will be granted, or other thing will be done or not done, and the party upon which the terms are imposed accepts them, he will be deemed to have acquiesced in the ruling, and cannot afterward question its validity in the appellate courts." A party cannot avail himself of that portion of the decree which is favorable to him and secure its fruits, while prosecuting an appeal to reverse such portion as mitigates against him. Moore v. Williams, 29 Ill. App. 597.

In Mahone v. Williams, 39 Ala. 202, the plaintiff was permitted to amend a pleading upon a certain condition, and the plaintiff proceeded to accept the conditions and amend. Upon appeal the appellate court refused to consider that part of the judicial order imposing the conditions.

In Tupper, Adm'r, v. Kilduff, 26 Mich. 394, after one trial of the cause, the defendant asked permission to amend his plea and add an additional affidavit. This was granted upon condition that the defendant should stipulate that the amendment should have no other effect than to prevent the recovery of interest between two dates, unless the jury should find that the defendant had notice of certain forgeries, etc. The defendant entered into the stipulation and made his amendment and filed his affidavit. It was held that the administrator of the defendant—he having died—would not be heard on error to complain of the terms imposed in granting the order permitting the amendment and the filing of the affidavit.

In Flanders v. Town of Merrimac, 44 Wis. 621, an order to change a venue was granted upon condition that the plaintiff, who asked

for the order, should pay certain costs. He paid the costs, and took the benefit of the order changing the place for trial. He then took an appeal from so much of the order as required him to pay the costs. The appellate court observed that: "If it were necessary in the decision of the appeal, they would be inclined to hold that the appellant was entitled to his order without the payment of the costs; but in the view the court took of the case it was unnecessary to decide that question. It was held unnecessary to decide it because the appellant was precluded from questioning the validity of the conditions imposed. To permit him to do so, the court said would be contrary to the maxim: 'Qui sentit commodum sentire debet et onus.' The appellant having accepted at the hands of the court the order applied for by him, he must take it with the burden imposed. If not satisfied with the burden, he should refuse the benefits."

The appellant in this case, having accepted the benefit of the order purging him of contempt and discharging him from the attachment, cannot attack the conditions imposed by an appeal to this court.

The appeal must be dismissed.

(74 N. J. E. 658)

#### CLARK v. MOREHOUS et al.

(Court of Chancery of New Jersey. July 1, 1908.)

#### 1. WILLS—CONSTRUCTION—DESIGNATION OF DEVISEES—CLASSES—"GIFT TO A CLASS."

A gift to a class is a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions, the share of each being dependent for its amount upon the actual number.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1114, 1115.]

#### 2. SAME—TIME OF ASCERTAINMENT OF CLASS.

Where a particular estate is created, with remainder to the children of a designated person, the gift by way of remainder will go not only to the objects living at the death of testator, but to all who may subsequently come into existence before the period of distribution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1512, 1513.]

#### 3. SAME—CONSTRUCTION—VESTED OR CONTINGENT INTERESTS—CONSTRUCTION IN FAVOR OF VESTING.

Courts will make every intendment in favor of a vested, rather than a contingent, estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1461, 1462.]

#### 4. SAME—NATURE OF INTEREST CREATED—VESTED REMAINDER—GIFT TO CLASS.

Testator created a life estate in favor of his daughter in bonds, mortgages, and bank stock, "and at her decease I devise the same to her children same manner as if she died seised of it in her own right, to share and share alike." *Held*, that the gift was to a class, consisting of the life tenant's children, which class would remain open until the period of distribution, at the life tenant's death, to admit new members, and a child of the life tenant living at testator's death took a vested estate in remainder which could be subjected to the payment of his debts.

#### 5. JUDGMENT—FOREIGN JUDGMENT—EFFECT OF JUDGMENT IN COURT OF ANOTHER STATE.

Where a creditor seeks to establish a lien against the interest of his debtor, deceased, vested under a will, and assigned by the debtor to him as security, no relief can be given him by reason of a judgment recovered by him against the personal representative of the debtor in another state, the only effect of such judgment being to prove conclusively the existence of a debt, which was unpaid.

Bill by Theodore Clark against Harry Morehous and others to establish a lien upon the interest of said Morehous in certain bonds and mortgages and bank stock. Final hearing on bill, answer, replication and proofs. Decree for complainant.

Evi A. Martin died in the latter part of 1889. He left a will which was executed on July 9, 1889, and was admitted to probate on November 12, 1889. By the third paragraph of his will he created in favor of his daughter Ann E. Morehous a life estate in several bonds and mortgages and in some bank stock, "to have and collect the annual interest and dividends on all the bonds and mortgages and bank stock bequeathed in paragraph three during her natural life, and at her decease I devise the same to her children same manner as if she died seised of it in her own right, to share and share alike, and I do order and direct that the said Ann E. Morehous shall collect and receive the interest and dividends on the bonds and mortgages and bank stock in this paragraph described for her own use and benefit and give receipt and quittance for the same." Ann Morehous, the life tenant, is still living. She became the mother of four children—Martin L. Morehous, Annie Price, Ella Drew, and Clara Demarest—all of whom were living at the date of execution of Evi A. Martin's will, and also at the time of his death. Martin L. Morehous died on August 20, 1901, leaving three children, Floyd S., Harry W., and Helen G., all minors, and all now living. On September 15, 1897, Martin L. Morehous made an assignment to the complainant Theodore Clark of all his right, title, and interest in the bonds and mortgages and bank stock mentioned in the third paragraph of his grandfather's will, and in which his mother has a life estate, to secure the payment of a promissory note given by him to the complainant. The complainant recovered a judgment in the Supreme Court of New York on this note on June 5, 1907, against the personal representative of Martin L. Morehous. The bill is filed for the purpose of establishing a lien in favor of the complainant, the prayer being in the following words: "That the said assignment made, executed, and delivered by the said Martin L. Morehous to your orator, and all the right, title, and interest of the said Martin L. Morehous and of his legal representatives and next of kin in and to the said bonds and mortgages, and in and to the said bank stock assigned to your orator, may be de-



creed to be absolute in your orator and in his legal representatives, and the amounts due thereon so far as the interest of the said Martin L. Morehous extended and so far as the interest of his legal representatives and next of kin extend in and to said bonds and mortgages and in and to said bank stock may be decreed to be paid to your orator upon the death of the said Ann E. Morehous and may be applied to the payment and satisfaction of the principal and interest of said judgment so as aforesaid recovered by your orator against the estate of the said Martin L. Morehous, deceased." No objection has been made to the form or substance of this prayer, and I shall treat the case as one instituted for the purpose of having this court declare that the complainant has a specific lien upon the interest of the said Martin L. Morehous in the bonds and mortgages and bank stock mentioned, for the purpose of securing the payment of the said indebtedness.

Henry C. Hunt, for complainant. George M. Shipman, for defendants.

HOWELL, V. C. (after stating the facts as above). Whether the complainant can have a lien on the property which Martin L. Morehous transferred or attempted to transfer to him, or not, depends upon the construction of that portion of the will of Evl A. Martin which deals with the property in question. The gift upon the death of Ann Morehous is to a class—"her children"; and the devolution of the title depends upon the peculiar rules of law relating to class gifts. These relate principally to the vesting of the title in a class and the opening of the class from time to time to admit new members. Judge O'Brien, in *Re Russell*, 108 N. Y. 169, 81 N. E. 103, says: "A gift to a class has been defined by a recent decision of this court to be a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions, the share of each being dependent for its amount upon the actual number"—citing *In re Kimberly's Estate*, 150 N. Y. 90, 44 N. E. 945. See, also, *In re Brown*, 154 N. Y. 313, 48 N. E. 537. The definition is Mr. Jarman's (*Jar. on Wills*, 534). Where a testator devises property to persons who are designated individually as by name or description, or where he devises property in severalty to a number of persons, the courts do not treat such devises as devises to a class, but hold that the devisees take distributively. The difficulty in this case lies in determining precisely at what time the members of the class shall be ascertained, and in further determining with accuracy who constitute the class. Ordinarily speaking, the members of the class are determined at the time the instrument of gift takes effect, and this is ordinarily at the date of the death of the testator, yet

there may be provisions in the will which will fix the membership of the class, as of the date of the execution of the will or upon the happening of some event in the future.

In the case now before the court the solution of the question is embarrassed by the use after the devise of the words "same manner as if she died seised of it in her own right," it being claimed on the part of the complainant that the membership of the class was fixed at the date of the death of the testator, and by the defendants that the words just quoted indicate that it was the intention of the testator that the membership of the class should not be determined until the death of Ann Morehous. It is very clear that the period of distribution must await the demise of Ann Morehous. There is a life estate interposed between the persons who shall eventually be found to be members of the class and the property, and this life estate must fall in before the property can be distributed to any one. Mr. Jarman has formulated the rule applicable to the particular class of cases to which this class belongs, as follows: "Where a particular estate or interest is carved out with a gift over to the children of the person taking that interest, or the children of any other persons, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution." 2 *Jar. on Wills*, 704, § 156.

The rule is stated by Mr. Williams as follows: "It may be material in this place to observe that upon an ordinary limitation by way of remainder to children, etc., in a class all who are in esse at the time of the death of the testator take vested, and, consequently, transmissible interests immediately upon the testator's death; and all who come in esse before the particular estate ends and the limitation takes effect in possession, are to be let in, and take a vested interest as soon as they come in esse, and they and their representatives will take as if they had been in esse at the testator's death." 2 *Will. on Ex'rs*, 351. Mr. Theobald states the rule as follows: "In the case of a gift in remainder or after a trust to accumulate, all children born at the death of the testator, and coming into esse before the death of the tenant for life, or the end of the period of accumulation take a share to the exclusion of those born afterwards." *Theo. on Wills*, 255.

There is another class of cases frequently met with which are dealt with analogously, and that is the class where the period of distribution is postponed until the attainment of a given age by the children. In that class of cases the gift will vest in those who are living at the death of the testator and who come into existence before the first child attains that age, i. e., the period when the fund becomes distributable in respect of any one object or member of the class. 2 *Jar. on Wills*, 712. These rules so clearly expressed

by the text-writers are borne out by the cases. In *Middleton v. Messenger* (1799) 5 Ves. Jr. 137, the testator gave his wife a life estate with remainder to the children of his brothers and sisters. The Master of the Rolls held that all the children living at the death of the testator and those born afterwards before the death of the wife had vested interests. All the early cases on the subject are collected by Mr. Sanders in a note to *Heathe v. Heathe*, 2 Atk. 121. The same course was taken by the House of Lords in *Odell v. Crone* (1815) 3 Dow. 61. See *Holland v. Wood*, 11 Eq. 91. The rule was followed in *Shattuck v. Steadman*, 2 Pick. (Mass.) 468, where Richardson, the testator, gave to his niece the interest of \$1,000 during her life, and at her death directed that the principal sum should be equally divided among her children, and be payable to them when they respectively arrived at the age of 21 years. The niece had 8 children, all of whom were living at the testator's decease. She had a son John who died before the life tenant, but after he had arrived at the age of 21 years. It was held that John took a vested legacy.

In the matter of *Evans' Estate*, 155 Pa. 646, 26 Atl. 739, the rule is stated as above quoted from Jarman on Wills. There the testator bequeathed a sum in trust with directions to pay the income to his nephew during his lifetime and at his death to pay the remainder to the heirs at law of the nephew. Under the authority of the rule which is there quoted at length it was held that the gift over vested immediately on the testator's death, subject to open and let in others coming into existence before the period of distribution. In *Doe v. Provost*, 4 Johns. (N. Y.) 61, 4 Am. Dec. 249, the facts were that the testator devised lands to his daughter C. "during the term of her life, and immediately after her death unto and among all and every such child and children as the said C. shall have lawfully begotten at the time of her death, in fee simple, equally to be divided between them share and share alike. It was held that the four children of the daughter C. who were living at the death of the testator took a vested remainder in fee, and that in case there had been any children born afterwards the class would have opened for their benefit, and that the children of a daughter of C. who died in the lifetime of her mother were therefore entitled to the share of C. who was living at the death of the testator.

In *Tucker v. Bishop*, 16 N. Y. 402, the rule is laid down by Paige, J., as follows: "Where a bequest is to a class of individuals in general terms as 'to the children of A.,' and no period is fixed for the distribution of the legacy, the time for distribution will be the death of the testator, and hence only children born or begotten prior to and in esse at that time will be entitled to share in the distribution, but where the distribution is

by the terms of the will to be made at some time subsequent to the death of the testator the gift will embrace not only all children living at the death of the testator, but also all those who shall subsequently come into existence before the period of distribution, and if the bequest is a present bequest the beneficiaries who are in esse at the death of the testator will take vested interests in the fund, but subject to open and let in after-born children who shall come into being and belong to the class at the time appointed for the distribution." *Thomas v. Thomas*, 149 Mo. 426, 51 S. W. 111, 73 Am. St. Rep. 405.

The following cases in New Jersey touch the question: *Den v. Manners* (1843) 20 N. J. Law, 142. There a testator devised the profits of land to his son, but if the son died in the lifetime of his wife then the devise was to the son's children and their heirs and assigns. The son died leaving a wife and eight children. His son Abraham died in his lifetime leaving two children. It was held that Abraham had a vested estate in the lands which descended to his children and that they took their father's share. *Van Gieson v. Howard* (1849) 7 N. J. Eq. 402. There the testator devised real estate to his widow for life, and ordered it to be sold after her death and the proceeds to be equally divided among the children of his brothers and sisters. He had three brothers and one sister. One of the nieces died after the testator's death and in the lifetime of the widow. It was held that a portion of the estate was vested in her and that she had a devisable interest. In *Felt's Ex'rs v. Vanatta* (1870) 21 N. J. Eq. 84, Mary Felt bequeathed to her executors \$700 in trust to pay the interest annually to her daughter Ann for life, and after her decease to the children of Ann, share and share alike. At the date of the will Ann had one child, Mary, who afterwards married and had children. She died in the lifetime of her mother, leaving children surviving her. The mother died in 1866 leaving no descendants other than the children of Mary. The will provided that if no children of Ann should be living then the devised property was to fall into the residue of the estate of the testatrix which she directed should be equally divided among her children. The chancellor states the rule as follows: "A gift of the interest of the residue of Ann for life and the principal to her children at her death gave a vested interest to such child of Ann as was living at the date of the will and the death of the testatrix." This was held by the Court of Errors in a will where the children were named (*Howell v. Green*, 31 N. J. Law, 570); and he then quotes the paragraph from Williams on Executors which is herein above copied. But while he stated the rule recording the authorities, he held that the facts were not within the rule.

In *Ward v. Tompkins* (1878) 30 N. J. Eq. 3, the testator gave to the children of his son

Daniel a part of his residuary estate, to be equally divided between them as they should respectively come to the age of 21 years. At the time of making the will and of the testator's death Daniel had two children, but before the elder came of age another child was born, and all three were living, and the eldest had attained his majority. It was held that each of the three children were entitled to an equal share, thus supporting the general result of the rule.

*Perrine v. Newell* (1891) 49 N. J. Eq. 57, 23 Atl. 492, is here mentioned for the reason that it is an example of a gift to children who are named, and although they compose a class, to wit, the children of a son of the testator, they do not take under the rule which I have above cited, but distributively as persons who are specifically named. The devise there was to trustees in trust to pay C. the rents and profits during his lifetime, and at the death of the life tenant he gave these lands to C.'s three children, B., N., and T., naming them. It was held that they took a vested remainder after the trust estate, and could mortgage their interest in the lands. See, also, *Adams v. Woolman* (1892) 50 N. J. Eq. 516, 26 Atl. 451.

The defendants urge the application of the case of *Van Tilburgh v. Hollinshead*, 14 N. J. Eq. 82, but in my opinion the case does not apply. There the devise was to "such children of the devisee as shall survive him"; and the chancellor carefully distinguishes (page 35 of 14 N. J. Eq.) between that gift and a gift to a class. The same may be said about the case of *Slack v. Bird*, 23 N. J. Eq. 238, and *Dutton v. Pugh*, 45 N. J. Eq. 426, 18 Atl. 207, in neither of which cases was the gift strictly to a class. *Teets v. Weise*, 47 N. J. Law, 154, is likewise distinguishable for the reason that the devise there was to A. for life, and at her death to her children "who may be living at the time of her decease."

I cannot regard the recent New York cases as authority, for the reason that they seem to be more or less affected by legislation. The case of *Gilliam v. Guaranty Trust Company*, 186 N. Y. 127, 78 N. E. 697, 116 Am. St. Rep. 536, cited for the defendants, has for its authority the case of *Paget v. Melcher*, 156 N. Y. 399, 51 N. E. 24, which seems to have been decided upon its own peculiar set of circumstances. The former rule in New York was undoubtedly as it is given by the text-writers above mentioned. *Collin v. Collin*, 1 Barb. Ch. (N. Y.) 630, 45 Am. Dec. 420; *Jenkins v. Freyer*, 4 Paige, Ch. (N. Y.) 47. The rule was likewise declared by the court of appeals so late as 1857. See *Tucker v. Bishop*, 16 N. Y. 402, cited herein. Neither do I think that *Price v. Hall*, 5 Eq. 398, 37 L. J. N. S. Ch. 191, is an authority which applies to the facts in the present case, because there the remainder was manifestly contingent. It depended upon the fact whether William Hall left any children at his death, and so the

whole gift was contingent. The cases of *Richardson v. Wheatland*, 7 Metc. (Mass.) 169, and *Moore v. Weaver*, 16 Gray (Mass.) 307, also cited on behalf of defendants, appear to rest upon a construction of the provisions of the Massachusetts Revised Statutes.

The next question is whether there is anything in the context of this will which takes the case out of the rule of law above mentioned. It is claimed on behalf of the answering defendants that the words "same manner as if she died seised of it in her own right" have the effect of creating a contingent remainder in such children of Ann Morehous as may be living at the date of her death, and that therefore there was no vesting of the estate of the death of the testator, and that therefore Martin L. Morehous took no interest in the property in question. It is a well-known rule that courts will make every Intendment in favor of vesting the estate. Omitting these words, there would be no doubt but that the devise would have vested at the death of the testator. The will would then read "and at her decease I devise the same to her children \* \* \* to share and share alike." And there would be no doubt about the fixed right of Martin Morehous in the property at and from the death of the testator. What is the effect of the omitted words? They do not seem to me to have been inserted by the testator for the purpose of denoting or ascertaining the persons who should take upon the death of Ann Morehous; that he had already done by a designation of the class of persons who should succeed to the estate; but rather for the purpose of denoting the quality of the estate which the class, to wit, "her children" should take; that is to say, what the testator had in mind was that all the children of Ann Morehous who were living at his death and who might come into being before her death should share equally in the estate mentioned in that paragraph of her will, and that instead of taking a life estate, as the mother had, or some less, or qualified interest, they should take an absolute and indefeasible estate by way of succession from her. It thus appears that the gift in the will of Evi A. Martin to the children of Ann Morehous is a gift to a class, and that by the settled rules governing such gifts Martin L. Morehous at the death of the testator took a vested estate in remainder in the property in question; that there can be no distribution of the property until the death of Ann Morehous, the life tenant; and that therefore the class of legatees must remain open until that time to admit new members, if any there may be; and that at the time of the distribution the class will include all children of Ann Morehous who were alive at the death of the testator and who subsequently became members of the class before the death of the life tenant. No relief can be accorded to the complainant by reason of the judgment which

he recovered against the personal representative of Morehous. It was recovered in a foreign state, and is no lien upon any property which has its situs here. Its sole effect is to prove conclusively that a debt existed from Martin L. Morehous to the complainant which has never been paid. That portion of the prayer of the complainant's bill which seeks relief with respect to the judgment must be disregarded.

I therefore conclude that Martin L. Morehous at the time of his death was seised of a vested interest in the property mentioned in the third paragraph of the will of Elvi A. Martin, and that so far as the bill seeks to charge the property with a lien in favor of the complainant by virtue of the assignment of September 15, 1897, the prayer should be granted.

(76 N. J. L. 547)

#### STATE v. DELANEY.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

##### 1. RECOGNIZANCES—SCIRE FACIAS.

A writ of scire facias on a recognizance is considered as process and declaration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Recognizances, § 42.]

##### 2. SAME—PLEADING.

When a defendant pleads to a writ of scire facias, he thereby waives any right to have a declaration.

##### 3. SAME—NON EST FACTUM.

Non est factum is not a good plea to a scire facias on a recognizance under acts 1900 (P. L. p. 309).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Recognizances, § 49.]

##### 4. SAME—FORFEITURE.

Where a recognizance is conditioned for appearance in the court of quarter sessions and a writ of scire facias issues out of the circuit court, under P. L. 1900, p. 309, it is not required that a writ should show a forfeiture of the recognizance and a certification thereof to the circuit court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Recognizances, §§ 47, 48.]

##### 5. SAME—EVIDENCE.

A recognizance, being a debt of record, is to be proved by the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Recognizances, §§ 57, 58.]

(Syllabus by the Court.)

Error to Circuit Court, Atlantic County.

Action by the state against Robert E. Delaney. Judgment for the state, and defendant brings error. Affirmed.

Bourgeois & Sooy, for plaintiff in error.  
Theo. Backes & Nelson and B. Gaskill, Asst. Atty. Gen., for the State.

VOORHEES, J. The defendant, Robert E. Delaney, entered into a recognizance before a justice of the peace of the county of Atlantic in the sum of \$8,000 for the appearance of Charles Barbour and Arthur Allen before the court of oyer and terminer and quarter sessions of the county of Atlantic on the second Tuesday of May then next ensu-

ing, and not to depart the said court without leave. Subsequently, on the 8th day of August, 1906, there issued out of the circuit court of said county a writ of scire facias returnable on the 24th day of August, 1906. After setting forth the said recognizance, the writ recited that at a court of quarter sessions of said county on the 6th day of June, 1906, the said Barbour and Allen, although thrice solemnly called, did not appear according to the condition of the recognizance, but made default, and the said Robert E. Delaney, being also called to appear and produce the said Barbour and Allen, likewise made default, whereby the recognizance remains against them in full force, and that, on motion of the prosecutor of the pleas of said county, a writ of scire facias was awarded commanding the said Barbour, Allen, and Delaney that they appear before the circuit court of said county on the 24th day of August to show cause why judgment should not be entered and execution awarded against them for the sum named in the recognizance according to the statute. This writ having been served upon the defendant Delaney, he appeared by his attorneys, and pleaded non est factum. A notice was appended to the plea that, upon the trial of said issue, he would prove that at the time of the signing and delivering of the bond of recognizance sued upon the said Delaney was in a state of intoxication, because of which said condition he was unable to understand the nature of the act of signing and delivering the said alleged bond, and was at that time unable to understand or undertake to become surety thereon. Issue having been thus joined, the cause was brought on for trial before the circuit court and a jury. A verdict having been rendered by the jury for the state, judgment was accordingly entered thereon for the sum mentioned in the recognizance, together with costs. A writ of error sued out by the defendant removes the judgment so entered into this court.

The first error assigned is that no declaration was filed in the cause. A scire facias whether considered as an original or judicial writ is an action, and such as the defendant may plead to. It is considered both as process and declaration. It is in the nature of a declaration, and the proper course to take advantage of informalities is by demurrer. Bac. Abr. 624; 2 Tidd's Prac. 1090. The defendant, by appearing and voluntarily pleading to the writ and tendering an issue, has waived his right to insist upon a declaration. 1 Tidd's Prac. 514.

It is also assigned for error that there was no proof that the recognizance had been forfeited and had been certified into the circuit court. By our statute (P. L. 1900, p. 309), it is enacted: "If such recognizor shall appear at the return of such writ and not show or allege any matter sufficient to discharge him from his recognizance, \* \* \* judgment shall be given against the said recognizor."

Recognizances are considered as judgments being obligations solemnly acknowledged and entered of record, and the scire facias on those is the judicial writ and proper remedy, "which the conusee hath \* \* \* to revive the judgment and put in execution, if the conusor cannot stop it by pleading such matter as the law judges sufficient to that end, such as a release," etc. Jacob's Law Dict. tit. "Scire Facias." The plea failed to show any matter sufficient to discharge him from his recognizance. The submission to the jury, therefore, of the issue tendered by the plea, was an act of leniency on the part of the court, of which the defendant cannot complain. The above statute also provides that, "if such person shall not appear agreeably to the condition of the recognizance, the court in which such recognizor may be bound to appear may forfeit the same, and the said court or the Supreme or the circuit court \* \* \* upon such forfeited recognizance being certified into such court shall be empowered and directed \* \* \* to award a writ of scire facias." It is not thereby required that the writ should show a forfeiture and a certification to the circuit court. The presumption is that these preliminary matters appeared to the circuit court, before it awarded the writ of scire facias. Inasmuch as the defendant has failed to allege these matters in his plea, he ought not now to be heard. Under a plea of non est factum, this defendant cannot take advantage of the objection that the action is brought in the wrong court. 1 Chitty, Pl. 484.

Error is also assigned because there was no proof of damages or debt before the jury, and no amount of debt or damages was found by the jury. The jury found "for the plaintiff and against the defendant," without mentioning any specific amount. A recognizance, being a debt of record, must be proved by the record. 2 Bl. 314; 3 Id. 331. The defendant is required to show cause why the conusee should not have advantage of the record. The record was therefore plenary evidence of the amount of the debt. At common law judgment for the plaintiff was that plaintiff have execution, and the jury were not required to find any specific amount. The debt being certain, judgment which under the statute is required to be given "as in case of debt" has been properly entered on the finding for the sum mentioned in the recognizance.

The judgment will be affirmed.

(74 N. J. E. 448)

#### JOHNSTON v. O'REILLY.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

#### JUDGMENT — CONCLUSIVENESS — EQUITY — JOINT TORT-FEASORS.

Though generally a supplemental bill or an original bill in the nature of a supplemental bill is demurrable if it appears on its face to have been filed after a decree for causes known to

complainant before the decree, a decree against one of the several defendants to a bill to recover surplus proceeds of a foreclosure sale of complainant's land on the theory defendants conspired to defraud her does not preclude subsequent bill by her executor against one not a party to the first bill, but who was found on the hearing under such bill to have been a co-conspirator and joint tort-feasor in the fraudulent transaction, it appearing that the executor has been unable to enforce the decree under the first bill, though complainant to such bill could have had it amended or have filed a supplemental bill so as to charge those shown to have been joint tort-feasors.

#### Appeal from Court of Chancery.

Bill by Aaron E. Johnston, Mary E. Throckmorton's executor, against Hugh E. O'Reilly. From an order overruling a demurrer to the bill of complaint, defendant appeals. Affirmed.

The following is the opinion of Magie, Ch., of the court below:

"The bill demurred to recites the filing of a bill in this court by Mary E. Throckmorton on January 16, 1903, against Patrick J. Reilly, Hugh O'Reilly, and Patrick Skelly, the purpose of which bill was to obtain a decree requiring the defendants, or some of them, to pay to Mary E. Throckmorton the sum of \$7,919.55, which complainant charged had been obtained out of the surplus money arising from the sale of lands belonging to her, sold under foreclosure proceedings in which a large surplus had resulted. The theory of the bill was that Patrick J. Reilly, who was the purchaser at the foreclosure sale, and Hugh O'Reilly and Patrick Skelly, who were the complainants in the foreclosure bill, had fraudulently conspired to obtain, and had obtained, the surplus which belonged to her in equity. The present bill recites that the cause went to hearing and a decree therein was made against Patrick J. Reilly, and not against the other defendants. The opinion of Vice Chancellor Pitney, who heard the case, reported in 68 N. J. Eq. 130, 59 Atl. 1044, indicates that Hugh O'Reilly and Patrick Skelly were not shown to have been concerned in the fraudulent transaction, but that there had been a fraud committed of which Patrick J. Reilly was, at least, constructively guilty, although he did not personally receive the proceeds of the fraudulent transaction. The Vice Chancellor further found that the present demurrant, Hugh E. O'Reilly, and one Thomas P. McKenna, Jr., had, in fact, been permitted by Patrick J. Reilly to receive the proceeds of the fraudulent transaction, and had acquired and retained the same. The present bill frankly admits that in the course of the examination of witnesses in the previous cause a tortious connection of the present demurrant and of McKenna with the transaction was plainly shown. If thereupon the complainant, or rather Aaron E. Johnston, her executor, who because of her death pendente lite had been admitted as complainant, had immediately applied to the Vice Chancellor for an amendment of his

bill so as to charge those who were really shown to be two of the tort-feasors liable to answer for their misconduct, or had immediately filed a bill in the nature of a supplemental bill, I think there is no doubt that the amendment would have been permitted, or the supplemental proceeding would have been brought to hearing before a decree was made. Complainant, however, did not take either of these obviously appropriate steps. On the contrary, he proceeded to a decree against Patrick J. Reilly alone. The present bill goes on to say that complainant has been unable to enforce his decree against Patrick J. Reilly, and that the estate of which complainant is the representative remains unsatisfied for the fraudulent abstraction of the money in equity belonging to the deceased. He has thereupon filed the present bill, and brought in the demurrant and McKenna as the parties who received and retain a portion of the money obtained by the fraud which, under the previous bill, the Vice Chancellor found had been perpetrated upon Mrs. Throckmorton.

"In support of the demurrer, it is insisted that the demurrant is wholly exonerated from the pursuit of the complainant, because the complainant, having knowledge of the facts which his demurrer admits, proceeded to take a decree against one of the joint tort-feasors. The argument is that this is a supplemental bill, or an original bill in the nature of a supplemental bill, and that the general equity rule is that such a bill will be demurrable if it appears on its face to be filed after a decree for causes which became known to the complainant before decree made. Such seems the general rule of equity pleading. *Story Eq. Pldg.* No. 338; *Barriclo v. Trenton Mut. Life & Fire Ins. Co.*, 13 N. J. Eq. 155; *Commercial Assurance Co. v. N. J. Rubber Co.*, 61 N. J. Eq. 446, 49 Atl. 155. But I am unwilling to conclude that the present case falls within that rule. I think this bill may be treated as an original bill against two of three original tort-feasors and the two who have obtained, and are retaining from the complainant, or from the estate of which he is the executor, money which ought to be paid to him, and which they fraudulently obtained and still retain. Mr. Pollock, in his treatise on the Law of Torts, declares the English rule with respect to tort-feasors to be that where the injured party has recovered a judgment against some, or one, of the joint authors of a wrong, he cannot sue the other or others for the same matter, even if the judgment in the first action remains unsatisfied. By a note to the text, it appears that he deemed this rule had been finally settled in the English courts by the decision in *Exchequer Chamber*, in the case of *Brismead v. Harrison*, L. R. 7 C. P. 547. By the examination of the English cases before that case, it is clear that whether judgment against one without satisfaction was a bar to an action against other joint tort-feasors was left un-

certain. *Pollock on Torts* (Am. Ed.) No. 170. The reasons given in the English leading case for treating the judgment against one joint tort-feasor as a bar to actions against others jointly liable seem not to have impressed the American courts. Judge Cooley, in his work on Torts, sums up the cases in this country thus: 'When the suit is against several joint wrongdoers, the judgment must be for a single sum against all the parties found responsible. As it may happen that this judgment may not be against all the parties liable, either because the plaintiff was not at first aware of the full extent of the combination which has injured him, or because he was unable, when first suing, to obtain service on all the parties connected with it, it becomes a question of importance whether, after thus proceeding against a part, he may afterwards sue others. And the question is the same if having voluntarily elected to pursue a part only, he finds, after obtaining judgment, that the pecuniary responsibility is not what he had supposed. Whatever may have been the reason for the proceeding at first against less than the whole, it is conceded on all sides that a previous suit against one or more is no bar to a new suit against the others, even though the first suit be pending, or have proceeded to judgment when the second is brought. The second, or even a subsequent, suit may proceed until a stage has been reached in some one of them at which the plaintiff is deemed in law to have either received satisfaction, or to have elected to rely upon one proceeding for his remedy, to the abandonment of the others.' *Cooley on Torts*, p. 157. An early case involving the principle was decided by C. J. Kent in *Livingston v. Bishop*, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330. The American doctrine was declared by the Supreme Court of the United States to be that a judgment against one joint trespasser is no bar to a suit against others for the same trespass, and that nothing short of full satisfaction can make such judgment a bar. *Lovejoy v. Murray*, 3 Wall. (U. S.) 1, 18 L. Ed. 129. The reason which has impelled the courts of law in this country to permit an injured party to pursue his relief for a tort against one and then against another of the tort-feasors responsible until he obtains a satisfaction appeals as strongly, if not more strongly, to a court of equity.

"In my judgment the taking of the decree in the previous cause is no bar to the maintenance of a bill against co-conspirators and joint tort-feasors not included in the decree, if it be made to appear that no satisfaction has been obtained from the person charged by the decree.

"The demurrer must therefore be overruled."

Charles J. Roe, for appellant. Aaron E. Johnston, for respondent.

PER CURIAM. The order under review herein should be affirmed for the reasons expressed in the opinion of Chancellor Magie

(75 N. J. L. 748)

**TOMLINSON v. ARMOUR & CO.**(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)**1. APPEAL AND ERROR—DECISIONS REVIEWABLE—JUDGMENT ON DEMURRER.**

A judgment in favor of either party, upon demurrer to a declaration, is a final judgment, reviewable on error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 465-468.]

**2. SAME—RECORD—QUESTIONS PRESENTED FOR REVIEW—JUDGMENT.**

The record returned to a writ of error, besides reciting the plaintiff's declaration and the demurrer thereto, set forth simply that the court below, having heard argument upon the demurrer and duly considered the same, did order that the demurrer be sustained with costs; there being no more formal entry of judgment nor any award of a specific sum for costs. After joinder in error and argument of the cause upon the merits, *held*, that for purposes of review, the judgment as returned was sufficient in substance, and would be treated as if amended in the court of review with respect to matters of form.

**3. SAME—COMMON JOINDER IN ERROR—EFFECT.**

The common joinder in error amounts to an admission by defendant in error that what is returned as the record of the judgment below is, in truth, the record thereof; so that, after joinder in error, neither party can of right allege diminution or have a certiorari.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3065-3072.]

**4. SAME.**

*Thompson v. Bowne*, 39 N. J. Law, 2, and *Cooper v. Vanderveer*, 47 N. J. Law, 178, criticised; *Stein v. Goodenough*, 69 N. J. Law, 635, 56 Atl. 701, distinguished.

**5. SAME.**

The technical phrase "ideo consideratum est" is not necessary to constitute such a judgment as will support a writ of error. The want of this technical phrase, being a defect of form merely, may be amended, if necessary, in the court of review.

**6. FOOD—LIABILITIES FOR INJURIES—MANUFACTURER—SCIENTER.**

A declaration setting forth that defendant was engaged in the business of putting up in tin cans or vessels, and vending, meats for food and domestic use, and did put up a certain can of ham for food and domestic use, which was sold by the defendant to a retail dealer, to be sold to customers and patrons; that plaintiff purchased said can of ham from said retailer for food and domestic use; that the defendant negligently put up in said can of ham diseased, unfit, and unwholesome ham, which was deleterious and poisonous to the human body and health; and that the plaintiff, without fault or negligence on her part ate a piece of ham taken from said can, and in consequence thereof became poisoned and sick with ptomaine poison—*held* to set forth a good cause of action, notwithstanding the absence of scienter.

**7. SAME.**

Irrespective of the presence, or absence, of contractual obligations arising out of the dealings between manufacturer and retailer, and between retailer and consumer, the manufacturer of canned goods is under a duty to him who, in the ordinary course of trade, becomes the ultimate consumer, to exercise care that the goods, which he puts into cans and sells to retail dealers, to the end that such dealers may sell the same to customers and patrons as food, are wholesome and fit for food, and not tainted with poison.

(Syllabus by the Court.)

**Error to Supreme Court.**

Action by Sara V. Tomlinson against Armour & Co. From a judgment of the Supreme Court sustaining defendant's demurrer to the declaration (65 Atl. 883), plaintiff brings error. Reversed, and record remitted.

Carrow & Kraft, for plaintiff in error.  
Gaskill & Gaskill, for defendant in error.

**PITNEY, Ch.** This writ of error is brought to review a decision of the Supreme Court sustaining defendant's demurrer to plaintiff's declaration. The record returned by that court to the writ of error, besides reciting the declaration and the demurrer thereto, sets forth simply that the court, having heard the argument of counsel upon the demurrer, and having duly considered the same, did order that the demurrer be sustained, with costs. There is no more formal entry of judgment, nor any award of a specific sum for costs. Upon this record the plaintiff in error assigns error, in that the Supreme Court ordered that the demurrer be sustained, with costs, and decided that judgment should be given for the defendant, whereas judgment should have been given for the plaintiff. The defendant in error filed the common joinder in error, averring "that there is no error, either in the record and proceedings aforesaid or in giving the judgment aforesaid"; and praying "that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed," etc. The case has been submitted upon arguments addressed to the merits, without suggestion of a motion to quash, or other objection, based upon the want of a proper judgment returned. The question suggests itself, however, whether the record manifests a definitive adjudication against the plaintiff in error, which ought to be reviewed here.

The general rule is laid down in 2 Tidd's Prac. (3d Am. from 9th London Ed.) 1141, as follows: "No writ of error can be brought but on a judgment, or an award in the nature of a judgment; for the words of the writ are 'si iudicium redditum sit,' etc. And hence it was formerly holden that a writ of error could not be brought before judgment given; and, if tested before, it was no super-seas. But it seems to be now agreed that a writ of error, bearing teste before judgment, is good, so as the judgment be given before the return of it; and this is the usual course for preventing execution, and the allowance of it may be served before the return of the writ of inquiry and final judgment. Still, however, if the writ of error be returnable before judgment, it may be quashed." And at page 1162 it is said: "If the writ of error be returnable before judgment is given, it may be quashed on motion. But where the writ of error, on a judgment in the common pleas, was returnable in Easter Term, and the costs were not taxed and final judgment signed until Trinity Term, after

which the defendants, in Michaelmas Term, served the plaintiff with a rule to assign errors, and, the plaintiff having assigned them, the defendants, in the same term, joined in error, and, the case being afterwards argued, the judgment of the court of common pleas was reversed. The Court of King's Bench, under these circumstances, refused to quash the writ of error, on the ground that it was returnable before costs were taxed in the court below, and consequently before any judgment was given in that court; as the defendants ought to have applied to quash it, in an earlier stage of the proceedings"—citing *Den v. Roake*, 5 Barn. & Cres. 735, note.

In *Thompson v. Bowne*, 39 N. J. Law, 2, our Supreme Court, upon an examination of the record returned with a writ of error, concluded that no judgment had, as yet, been actually entered, and therefore dismissed the writ, as having been improvidently issued and returned; and this, although manifest error appeared in the proceedings. So harsh a practice ought not to be followed (especially after joinder in error and consideration of the merits), unless the state of the return clearly requires it; else a mere mistake in form, for which the plaintiff in error is not responsible, may delay the reversal of an erroneous judgment, or the affirmation of one that is free from error. And why should an erroneous judgment stand any the longer, because it adds informality to error? To so hold is simply to encourage loose practice in the entry of judgments.

In *Cooper v. Vanderveer*, 47 N. J. Law, 178, it clearly appeared that the action in which the alleged error had been committed had not proceeded to its termination, and the Supreme Court properly dismissed the writ of error. Chief Justice Beasley, however, in delivering the opinion, employed the phrase: "A writ of error will not run until the conclusion of the course of law in the court of first instance."

But in *Stein v. Goodenough*, 69 N. J. Law, 635, 56 Atl. 701, it was pointed out by this court that by the later English practice the writ of error was permitted to be tested before judgment entered, in order that it might operate as a supersedeas in cases where execution was forthwith sued out; that even under this practice the writ was good only provided judgment was given before its return, and if it was returnable before judgment was entered, it was quashed upon motion; and that this practice is prevalent in this state, and is recognized by that section of our practice act (P. L. 1903, p. 582, § 170) which provides that whenever any writ or other proceeding shall require the removal of the record of any judgment to any other court, the clerk shall record the judgment and the proceeding in the action in full. In *Stein v. Goodenough*, we retained the cause, in order that the actual entry of judgment final might be procured, and the record then

brought up by certiorari. But in that case the return showed that, although rules entitling the defendant in error to judgment had been entered in the minutes, no judgment had been actually entered.

The present case differs, for here the return discloses, not a mere minute or memorandum of the judgment that is to be entered, but the very entry of the judgment itself. The order sustaining the defendant's demurrer is certified to us, by the Supreme Court, as the record of the judgment called for by our writ of error. It may be presumed to have been entered in that form in the judgment book. Of course such an entry is informal. The technical and proper form of a judgment, sustaining defendant's demurrer to plaintiff's declaration, after reciting that it appears to the court that the declaration and the matters and things therein contained are not sufficient in law for the plaintiff to have and maintain his action thereof against the defendant, proceeds in substance as follows: "Therefore it is considered that the plaintiff take nothing by his said writ, and that the defendant go thereof without day," etc. And there follows a judgment for costs in the following form: "And it is further considered that the defendant do recover against the plaintiff [mentioning the sum], for his costs and charges by him about his defense, in this behalf laid out and expended, by the court here adjudged to the defendant with his assent, according to the form of the statute in such case made and provided; and that the defendant have execution, thereof," etc. Archbold's Append. 299.

But the technical phrase "ideo considerationem est" is not necessary to constitute such a judgment as will support a writ of error. *Doe ex dem. Rutherford v. Fen*, 21 N. J. Law, 700, 702. Such a defect, being one of form merely, may be amended (if necessary) in this court. *Apgar's Adm'r's v. Hiler*, 24 N. J. Law, 806; *Del. & Western R. R. Co. v. Toffey*, 38 N. J. Law, 525, 526, citing *Hooper v. Lane*, 6 H. of L. Cas. 443, 476, 489, 501, 555.

The common joinder in error—"in nullo est erratum"—amounts to an admission, by defendant in error, that what is returned as the record of the judgment under review is, in truth, the record thereof; so that after joinder in error neither party can of right allege diminution or have a certiorari. 2 Tidd, Prac. 1174; *Gilliland v. Rappleyea*, 15 N. J. Law, 138, 145. Indeed the common joinder ordinarily concludes with a prayer "that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed." And such is the prayer of the defendant in this case. It involves a clear inconsistency to admit the defendant in error afterwards to move to quash the writ of error, on the ground that no judgment has been returned.

It is true that, notwithstanding the parties may thus be bound by their admissions, the court of review is not restrained from look-



ing into the record, and may of its own motion award a certiorari to supply any defects in the body of the record or in its outbranches. Such was the course pursued by us in the case of *Stein v. Goodenough*, above cited. But in the present case the judgment record, in the form of which it has been made up in the Supreme Court, and by that court returned to us, sufficiently imports a determination of the merits raised by the demurrer, and lacks only a precise ascertainment of the amount of costs. Of this imperfection defendant in error makes no complaint. If the judgment is to be affirmed, only defendant in error will be harmed by the omission of costs. If the judgment is to be reversed, because erroneous on the merits, the judgment for costs will, of course, fall with it. A judgment in favor of either party upon demurrer to a declaration is a final judgment, reviewable on error. *Hale v. Lawrence*, 22 N. J. Law, 72, 80. Upon the whole, therefore, we see nothing in the exigencies of the present case to require that decision be delayed in order to enable the Supreme Court to perfect its judgment record, and return the perfected record to us pursuant to a certiorari. For the purposes of review we consider the judgment, as returned, sufficient in substance, and will treat it as if amended in this court with respect to the mere matter of form.

We proceed, therefore, to consider the case upon its merits. The plaintiff's declaration sets forth that the defendant was engaged in the business of putting up in tin cans or vessels, and vending, meats or ham for food and domestic use, and did put up a certain can of ham for food and domestic use which was sold by the defendant to a retail dealer, to be sold to customers and patrons; that plaintiff purchased said can of ham from said retailer for food and domestic use; that the defendant "so carelessly, negligently, recklessly, and improperly put up, in said can of ham, diseased, unfit, and unwholesome pork or ham, which was deleterious and poisonous to the human body and health; that the plaintiff after purchasing said can of ham, and without fault or negligence on her part, ate a piece of ham taken from said can, and in consequence thereof became poisoned and sick with ptomaine poison." Defendant's demurrer raised certain formal objections that under the old practice could have been raised only by special demurrer, and are now available only on motion to strike out. *Van Horn v. Central R. R. Co.*, 88 N. J. Law, 133, 139; *Race v. Easton & Amboy R. R. Co.*, 41 N. J. Law, 536, 539, 41 Atl. 710; *Minnuci v. Phila. & Reading R. R. Co.*, 68 N. J. Law, 432, 53 Atl. 229; *Jackson v. Penna. R. R. Co.*, 69 N. J. Law, 79, 54 Atl. 532; *Karnuff v. Kelch*, 69 N. J. Law, 409, 55 Atl. 163. These objections the Supreme Court properly disregarded.

The only question properly raised by the demurrer, is whether, upon the facts stated in the declaration, and in the absence of scienter, there is a liability on the part of the

defendant. The Supreme Court held there was none; and this, upon the ground that at common law, upon a sale of food or provisions by a manufacturer to a dealer, there is no implied warranty of wholesomeness, and that, assuming a different rule exists in the case of a sale by such dealer to a consumer, yet the consumer, in the absence of a statute, cannot hold the manufacturer or original vendor to a higher degree of duty than that cast upon him by common law with respect to his own vendee. In our opinion the Supreme Court erred in making the question of defendant's liability turn upon the existence or nonexistence of a warranty. Whether a warranty be express or implied, it is a matter of contract, rendering the maker liable in case of breach, notwithstanding he used all care to prevent a breach, but rendering him liable in ordinary circumstances only to the party with whom he contracted, or to others for whose benefit the contract was made. Assuming (without deciding) that there is no implied warranty, on the part of the manufacturer of canned food, that the goods shall be wholesome and fit to be eaten, it by no means follows from this that there is no duty resting upon the manufacturer to exercise care that the contents of the cans, which it puts upon the market to be sold for food and domestic use, are, in fact, food, rather than poison.

In this state we have repeatedly held that where a duty arises solely out of a contract, no one can bring an action for its breach unless he be a party to the contract, or one for whose benefit it is made. *Marvin Safe Co. v. Ward*, 46 N. J. Law, 19; *Styles v. Long Co.*, 67 N. J. Law, 413, 417, 51 Atl. 710; same case at a later stage, 70 N. J. Law, 301, 57 Atl. 448; *Conklin v. Staats*, 70 N. J. Law, 778, 59 Atl. 144. But in these cases liability was denied upon the ground that, aside from the contract, there was no duty incumbent upon the defendant. In the case in 46 N. J. Law, 19, *Ward* was subject to a contractual obligation to build a bridge in accordance with his contract, and was under no other duty. The contract was subject to modification and waiver as between the parties. In the *Styles* Case, as reported in 67 N. J. Law, 413, 417, 51 Atl. 710, it appeared that the trial judge had submitted to the jury the contractual obligation to light the footbridge, arising out of defendant's agreement with the board of freeholders as forming in and of itself a sufficient basis for imposing upon the defendant the duty of exercising care towards the public, for breach of which duty the plaintiff, as one of the public, could maintain an action of tort; and that the stipulations of the contract were adopted as the sole criterion for determining what precautions were necessary to be taken by the defendant in order to fulfill the duty in question. It was held by the Supreme Court that this was error. In the case, in 70 N. J. Law, 301, 57 Atl. 448, it was held by this court

that the contractual obligation created no liability toward the traveling public, and that the Long Company was not liable under the doctrine of invitation, because it was the county authorities who had invited the public to use the bridge, and not the bridge builder. In *Conklin v. Staats* the scow that was damaged was berthed by the defendant at a place where there was a submerged pile, upon which the plaintiff's scow was impaled when the tide fell. There was no notice to the defendant of the existence of the submerged pile, but because defendant had contracted with a third party to remove all old piles, it was contended that it thereby came under a general duty to the public, including the plaintiff. This court held that the plaintiff, not being a party to that contract, could not maintain an action of tort in respect to the breach of a duty that arose solely from its provisions.

In *Styles v. Long Co.*, 70 N. J. Law, 302, 57 Atl. 448, Mr. Justice Swayze, speaking for this court, cited some distinguishable cases, where the existence of the contract creates a situation that subjects the parties to duties that are independent of the obligation to perform the contract, instancing the duty of carriers of passengers (*Marshall v. York, etc., Ry. Co.*, 11 C. B. 655), the duty of a vender of drugs (*Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 453), the duty of the vender of a gun to a person for whom it was bought (*Langridge v. Levy*, 2 M. & W. 519, 4 M. & W. 337), the duty of a person who participates in the management of a highly dangerous agency (*Van Winkle v. American Steam Boiler Co.*, 52 N. J. Law, 240, 19 Atl. 472), the duty of a county clerk under the statute in cancelling a mortgage (*Appleby v. State*, 45 N. J. Law, 161), as cases where the duty was held to be a positive duty, independent of the contract although arising out of a state of facts created by the contract.

Coming, then, to consider the facts of the present case as averred in the declaration, and dealing with them, irrespective of the presence or absence of contractual obligations arising out of the dealings between manufacturer and retailer and between retailer and consumer, the question is whether the manufacturer is under a duty to him who, in the ordinary course of trade, becomes the ultimate consumer to exercise care that the goods, which he puts into cans and sells to retail dealers, to the end that such dealers may sell the same to customers and patrons as food, are wholesome and fit for food, and not tainted with poison. Canned goods are, at the present day, in such common use that we may judicially recognize that the contents are sealed up, not open to the inspection or test, either of the retailer, or of the customer, until they are opened for use; and not then susceptible to practical test, except the test of eating. When the manufacturer puts the goods upon the market in this form for sale and consumption, he, in

effect, represents to each purchaser that the contents of the can are suited to the purpose for which it is sold, the same as if an express representation to that effect were imprinted upon a label. Under these circumstances the fundamental condition upon which the common-law doctrine of caveat emptor is based—that the buyer should “look out for himself”—is conspicuously absent; for he has no opportunity to look out for himself. And when he thus buys and eats the contents of the package, relying upon the assurance of the manufacturer that they are fit to be eaten, it seems to us to result from general and fundamental principles that he has a right to insist that the manufacturer shall at least exercise care that they are so fit, and are not unwholesome and poisonous.

Among the most fundamental of personal rights, without which man could not live in a state of society, is the right of personal security, including the “preservation of a man's health from such practices as may prejudice or annoy it” (1 Black. Com. 129, 134)—a right recognized, needless to say, in almost the first words of our written Constitution (Const. art. 1, par. 1). To assert, therefore, that one living in a state of society, organized, as ours is, according to the principles of the common law, need not be careful that his acts do not endanger the life or impair the health of his neighbor seems to offend against the fundamentals. Upon what other fundamental principle does the rule rest, that one who uses a highway must be careful not to collide with his neighbor? Upon what other fundamental principle does the law of libel and slander rest? Or the rule, recently laid down by this court in *Brennan v. United Hatters*, 73 N. J. Law, 729, 744, 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, that any act is wrongful which, in the ordinary course, will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right?

In *Langridge v. Levy*, 2 M. & W. 519, 4 M. & W. 337, plaintiff's father bargained with defendant to buy of him a gun, for the use of himself and sons, and the defendant, by falsely and fraudulently warranting the gun to have been made by N., and to be a good, safe, and secure gun, sold the gun to plaintiff's father, and the plaintiff, knowing and confiding in the warranty, used the gun, which in his hands, by reason of its weak, dangerous, and insufficient construction and materials, burst, whereby plaintiff was injured. Held, by the Courts of Exchequer and of Exchequer Chamber, that the action was maintainable, on the ground “that, as there is fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.” This case of itself is, of course, not an authority closely in point

with the case before us, for here there is no averment of fraud, but only of negligence. But in *George v. Skivington*, L. R. 5 Exch. 1, where the declaration alleged that the defendant carried on the business of a chemist, and in the course of his business professed to sell a chemical compound, made of ingredients known only to him, and by him represented to be fit to be used for a hair wash, and the plaintiff J. G. thereupon bought of the defendant a bottle of this hair wash, to be used by his wife, the plaintiff E. G., as the defendant then knew, and averred that the defendant had negligently and unskillfully prepared the hair wash, so that by reason thereof it was unfit to be used for washing the hair, whereby the female plaintiff, who used it for that purpose, was injured, it was held by the Court of Exchequer on demurrer that a good cause of action was disclosed. This decision was based upon the authority of *Langridge v. Levy*, it being held that the duty was of a similar character; one of the barons saying: "Substitute the word 'negligence' for 'fraud,' and the analogy between *Langridge v. Levy* and this case is complete." *Longmield v. Holliday*, 6 Exch. 761, was distinguished, but upon grounds that are not very satisfactory. In the latter case it was held that a tradesman, who contracts with an individual for the sale to him of an article to be used (in this instance a lamp) for a particular purpose by a third party, is not, in the absence of fraud, liable for injury caused to such person by some defect in the construction of the article. In this case the declaration averred that there was a fraudulent representation that the lamp was safe; but of this there was no proof at the trial. There was no averment, in the declaration, of negligence on the part of the defendant in the manufacture of the lamp. The decision may perhaps be sustained upon this ground.

The leading American case is *Thomas v. Winchester* (1852) 6 N. Y. 397, 57 Am. Dec. 455. This is a well-considered case, and holds that a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label; that such liability arises, not out of any contract or privity between the dealer and the person injured, but out of the duty which the law imposes upon the former to avoid acts in their nature dangerous to the lives of others. This decision has been cited with approval by our Supreme Court as a typical instance of the duty imposed, on public grounds, upon any person who undertakes the performance of an act which, if not done with care and skill, will be dangerous to the persons or lives of others; the duty being to exercise such care and skill. *Van Winkle v. American Steam Boiler Company*, 52 N. J. Law, 240, 247, 19 Atl. 472.

And this court has already approved *Thomas v. Winchester* to the extent that it held the chain of causation was not broken by the innocent acts of the intervening parties who, in reliance upon the label, bought and sold the poison until it came to her who finally used it as a machine. *Del., Lack. & Western R. R. Co. v. Salmon*, 39 N. J. Law, 299, 310, 23 Am. Rep. 214. The doctrine of *Thomas v. Winchester* has been recognized and approved in Massachusetts. See *Norton v. Sewall*, 106 Mass. 143, 144, 8 Am. Rep. 298. And in *Bishop v. Weber* (1885) 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715, an action of tort was sustained against a caterer for improperly and negligently furnishing unwholesome and poisonous food. *Allen, J.*, said: "This liability does not rest so much upon an implied contract as upon a violated or neglected duty voluntarily assumed. Indeed, where the guests are entertained without pay, it would be hard to establish an implied contract with each individual. The duty, however, arises from the relation of the caterer to the guests. The latter have a right to assume that he will furnish for their consumption provisions which are not unwholesome and injurious through any neglect on his part. The furnishing of provisions which endanger human life or health stands upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties."

In *Blood Balm Co. v. Cooper* (1889) 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324, it was held, upon the authority of *Thomas v. Winchester*, that the proprietor of a patent medicine, who puts upon the bottle containing it a prescription that it is to be taken in certain quantities, and sells it to a druggist for resale to any who may wish it, is liable for any injury sustained, on account of its poisonous effect, by one who buys it of the druggist, and uses it according to the prescription. The court said: "The liability of the plaintiff in error to the person injured arises, not by contract, but for a wrong committed by the proprietor in the prescription and direction as to the dose that should be taken." We can see no difference, whether the medicine was directly sold to the defendant in error by the proprietor, or by an intermediate party, to whom the proprietor had sold it in the first instance for the purpose of being sold again. It was put upon the market by the proprietor, not alone for the use of druggists to whom they might sell it, but to be used by the public in general, who might need the same for the cure of certain diseases, for which the proprietor set forth in his label the same was adapted. This was the same thing as if the proprietor himself had sold this medicine to the defendant in error, with his instructions and directions as to how the same should be taken."

A recent Minnesota case, *Schubert v. J. R.*

Clark Co. (1892) 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559, perhaps extends the doctrine of *Thomas v. Winchester* further than we need to go in the present case. There one Phelps had ordered a new stepladder from a retail merchant, for the use of the plaintiff, who was a house painter in the employ of Phelps. The merchant, not having such a ladder in his stock, ordered the defendant corporation to deliver such a ladder to the plaintiff for his use. Pursuant to this order defendant delivered a ladder to the plaintiff, which was made of poor, cross-grained, and decayed lumber, but was so painted that neither the plaintiff nor his employer nor the merchant could discover the defects. Plaintiff, supposing the ladder to have been made of good material, proceeded to use it in the performance of his work, when it broke under his weight, and he was thereby injured. The liability was sustained.

*Craft v. Parker Webb & Co.* (1893) 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139, is a case more closely in point, and is, we deem, a reliable authority.

In *Huset v. J. I. Case Threshing Mach. Co.* (1903) 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303, the precise question was this: "Is a manufacturer or vender of an article or machine which he knows, when he sells it, to be imminently dangerous, by reason of a concealed defect therein, to the life and limbs of any one who shall use it for the purpose for which it was made and intended, liable to a stranger to the contract of sale, for an injury which he sustains from the concealed defect while he is lawfully applying the article or machine to its intended use?" Sanborne, J., in the course of a somewhat elaborate opinion, approves arguing the doctrine of *Thomas v. Winchester*, *Bishop v. Weber*, and other cases of that character.

In *Salmon v. Libby* (1905) 219 Ill. 421, 76 N. E. 573, the declaration alleged, in substance, that the defendant prepared, put up in a package, and sold to the trade, certain mince-meat, which, in the due course of business, passed through the hands of a wholesale dealer, a retail dealer, and finally was made into a pie, of which plaintiff's testator ate; that the defendant negligently and improperly prepared and manufactured the mince-meat in question; that as a result the same became unfit for food, and poisonous and destructive to human life when used as food; and that plaintiff's testator, lawfully partaking of the same, was poisoned, and lost his life in consequence thereof. There was no averment of a scienter, the declaration counting upon the negligence alone. The Supreme Court of Illinois held that this set forth a good cause of action, under a statute permitting a recovery for the death of a person caused by the wrongful act or omission of another.

Upon both reason and authority we are clearly of the opinion that the declaration before us sets up a good cause of action. The

fact that the defendant was the manufacturer, presumably having knowledge, or opportunity for knowledge, of the contents of the cans and of the process of manufacture; that it put the goods upon the market for sale by dealers to consumers, under circumstances such that neither dealer nor consumer had opportunity for knowledge of the contents; the fact that the goods were thus manufactured and marketed under circumstances that imported a representation to intending purchasers that they were fit for food and beneficial to the human body; that in the ordinary course of business there was a probability (it being, indeed, the very purpose of the defendant) that the goods should be purchased, and used by parties purchasing, in reliance upon the representation; and that the defendant negligently prepared the food so that it was unwholesome and unfit to be eaten, and poisonous to the human body, whereby the plaintiff was injured—make a case that renders the defendant liable for the damages sustained by the plaintiff thereby.

Let the judgment be reversed, and the record be remitted to the Supreme Court, to the end that the defendant may apply there for leave to withdraw its demurrer and plead to the merits. See *Hale v. Lawrence*, 22 N. J. Law, 72, 82.

(74 N. J. E. 423)

#### BUTLER v. COMMONWEALTH TOBACCO CO.

(Court of Errors and Appeals of New Jersey.  
June 16, 1908.)

##### 1. CORPORATIONS—INSOLVENCY AND RECEIVERS—PRESENTATION AND ALLOWANCE OF CLAIMS.

In the case of the *State Bank v. Receivers of Bank of New Brunswick*, 3 N. J. Eq. 268, decided in 1835, it was held that the "act to prevent frauds by incorporated companies" (P. L. 1829, p. 58) was essentially a bankrupt act; and it was further held that a creditor holding collateral security of an insolvent corporation must apply his securities to the payment of his debt, and prove only for the balance. The essential bankrupt features of this act and its re-enacted provisions have since been repeatedly recognized by our Court of Chancery, and once by our Supreme Court. The practice in distributing the assets of an insolvent corporation under this act has been in conformity with the rule in bankruptcy, including the rule respecting the rights of creditors holding collaterals of the insolvent corporation.

##### 2. SAME.

*Held*, that the rule thus adopted seems quite as, if not more, equitable than the rule which permits a creditor to prove for his whole debt and retain his collaterals; but without considering and deciding upon the relative merits of the two systems.

##### 3. SAME.

*Held*, that because this rule in bankruptcy has prevailed, with judicial recognition, for over 70 years, it should be retained.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Proceedings for the winding up of the affairs of the Commonwealth Tobacco Company, an insolvent corporation. A receiver

was appointed, and from a decree of the Court of Chancery, advised by the Vice Chancellor, respecting the claim of the Consolidated National Bank of New York, an appeal was taken. Reversed.

Otto T. Hess and Robert H. McCarter, for appellant Jerome Taylor. M. T. Rosenberg and Royall Victor, for appellee Consolidated National Bank.

REED, J. The Commonwealth Tobacco Company was decreed to be insolvent and a receiver appointed by the Court of Chancery on October 17, 1904. Among the claims presented to the receiver was that of the Consolidated National Bank of New York. This bank claimed for the full amount of its indebtedness, amounting to \$54,440, as such indebtedness appeared at the date of the insolvency of the tobacco company. It appeared in the case that the bank held as collateral security for the payment of this debt warehouse receipts for tobacco in storage. Those receipts were pledged to the bank by the debtor, the tobacco company. The learned Vice Chancellor held that, in view of the rule in the federal courts, and in view of the weight of authority in the state courts, and for the purpose of establishing, as he thought, a harmonious doctrine in the administration of the assets of an insolvent in the state and federal courts, a rule should be adopted which permitted the creditor to prove for his entire debt as it existed when insolvency was declared, and that the creditor should receive dividends thereon without regard to the amount of collaterals held by him to secure such debt. The doctrine thus adopted was styled in the opinion, and in the arguments of counsel, the equity rule, as distinguishing it from the opposite rule, which was styled the bankruptcy rule. It may be conceded that, in instances other than strict bankruptcy proceedings, the equity rule for the administration of the assets of an insolvent is supported by the weight of authority in the state courts. It may also be conceded that the same rule has received the recognition of the federal Supreme Court in the case of *Merrill v. National Bank of Jacksonville*, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640. This case holds that the bankruptcy doctrine which requires the holder of collateral securities to exhaust them and credit the proceeds upon his claim, or else requires him to surrender them before he can prove for his entire claim, is not in terms recognized by the United States statute respecting insolvent national banks, nor in the provision in that statute for a ratable dividend on the claims proved and adjusted. A majority of the court—a majority of one—concluded that the language of the national banking act did not require the application of the rule in bankruptcy proceedings, and adopted the opposite rule as the more equitable. The comparative merits of the two rules and the trend of authorities are exhaustively discussed in the

opinion of Mr. Chief Justice Fuller writing for the majority, and in the opinions of Mr. Justice White and Mr. Justice Gray writing for the minority. A careful perusal of these opinions leaves upon the mind the impression that the argument is with the four dissenting judges, and the impression that equality in the distribution is better preserved by the bankruptcy rule than by the so-called chancery method. One illustration of Mr. Justice White forcibly presents a result which may spring from the application of the chancery rule: "A. loans to a bank \$5,000 without taking security: B. loans to the bank the same amount without taking security: B. makes a further loan of \$5,000, and takes \$5,000 worth of collaterals as security. The bank becomes insolvent and pays 50 per cent. dividend. A. gets \$2,500 for his \$5,000, while B. gets \$5,000 in dividends upon the \$10,000 and \$5,000 from his collaterals. B. gets his whole debt, although, like A. he had no security for \$5,000 of it." But, whatever may be thought of the comparative merits of the two doctrines, it is quite clear that it cannot be said that the rule adopted in bankruptcy proceedings is clearly and conspicuously inequitable. It is the rule which has always obtained in the winding up of insolvent estates by purely bankrupt proceedings. It was a feature of the proceedings in the bankrupt acts of Great Britain as well as the bankrupt acts of the United States. It controls in the distribution of assets under Bankr. Act July 1, 1898, c. 541, §§ 57e, 57h, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443). In the case of an insolvent corporation in this state where the assets are distributed in the United States District Court, the creditor holding collaterals has to deliver up his security as a condition precedent to proving his whole claim, or else he must apply the value of his security to his claim, and prove for the balance. If the chancery rule is adopted in this case, it will follow that, if the same corporation should be wound up in the Court of Chancery, the same creditor could prove for his whole claim, and retain his securities or enough of them to make him whole. So far as the notion of promoting uniformity of rule should be allowed to control, its influence would be in favor of the preservation of the rule in bankruptcy. But, with a nice balancing of the merits of the two doctrines, there appears one consideration which is controlling in this case. That consideration is that for nearly three-quarters of a century the act under which this insolvent corporation was being wound up has been regarded by the courts of this state as essentially a bankrupt statute, and a bankrupt rule of administration has been applied in the distribution of the assets of such corporations.

In 1835 in the case of *State Bank v. Receivers of Bank of New Brunswick*, 3 N. J. Eq. 266, a receiver of an insolvent corporation was appointed under "an act to prevent

frauds by incorporated companies," passed in 1829 (P. L. p. 53), the act which by re-enactment is the same as that under which the present proceedings were taken. The insolvent corporation had a claim against the State Bank, and the latter held an independent claim against the insolvent corporation. The State Bank also held a \$1,000 draft as collateral security for its claim against the insolvent bank. Chancellor Vroom was called upon to deal with two questions: First, whether there existed a right to set off the independent claims; and, second, whether the State Bank of New Brunswick was bound to apply to its debt the value of its collaterals and prove only for the balance, or was entitled to prove for the whole amount of its claim regardless of its collateral security. The Chancellor, Vroom, held that, while the independent debts could not be set off under our statute to enable mutual dealers to discount, yet they could be set off under the act of 1829, because that act partook largely of the character of a bankrupt act, and, under the bankrupt system, the set-off was permissible. The Chancellor also held that the draft should be appropriated to the payment of so much of the debt due to the State Bank of New Brunswick as it would liquidate, and dividends should be paid on the balance.

In 1852 the question of a set-off arose in the case of *Receivers v. Paterson Gaslight Co.*, 23 N. J. Law, 283. This was an action by a receiver against the gaslight company, a debtor of an insolvent corporation, but a debtor which held a claim against the insolvent corporation. The question was whether in that action at law the defendant could set off its claim against that of the receiver; and it was held that it could. Chief Justice Green in delivering the opinion of the Supreme Court remarked: "The act to prevent frauds by incorporated companies, so far as it relates to the estate of insolvent corporation, is in all its essential elements a bankrupt law. It leaves the creditor, indeed, the naked remedy of proceeding to judgment against the corporation stripped at once of its property and the right of exercising its franchises; and thus avoids the constitutional objection of interfering with the obligation of contracts. But, like a bankrupt law, it vests the whole property of the corporation by operation at law in the hands of assignees to be distributed among the creditors upon principles of justice and equity." In 1854 in the case of *Van Wagenen et al., Receivers for the People's Savings Bank of Paterson, v. Paterson Savings Bank et al.*, 10 N. J. Eq. 13, a question was presented to Chancellor Williamson respecting the effect of certain preferences made by the officers of the insolvent bank just before it closed its doors for business. In distinguishing between those preferences acquired by diligent creditors and those preferences voluntarily proffered by the officers of the bank, the

Chancellor said: "The object of the act to prevent frauds by incorporated companies is to secure all the creditors of such institutions an equal distribution of its assets. This is the primary object of the statute. Any act done with the view, and for the purpose of defeating this object, is a fraud upon the act, and illegal. The primary object of this act being the same as that of the bankrupt laws, in giving a construction to it, we may properly examine those general principles which have been established by the courts in reference to transactions under those laws. And I may remark here that our courts have always recognized the object and provisions of the act in question and of the bankrupt laws to be essentially the same." The Chancellor then proceeded to apply the doctrines of the bankrupt courts in the solution of the question then before him. In *Spader v. Mural Decorating Mfg. Co.*, 47 N. J. Eq. 18, 20 Atl. 378, Chancellor McGill said: "The receiver is not at liberty to recognize any liability or to make any payment which is not approved by the statute. Such is the view taken out of proceedings under the national bankrupt act, and it can hardly be questioned that the proceedings now considered partake of the same character." In *Frost v. Barnert*, 56 N. J. Eq. 290, Vice Chancellor Stevens, in passing upon the validity of a mortgage given by the corporation after it became insolvent, said that "the act of 1829 which had become by re-enactment section 63 et seq. of the corporation act had received a settled construction—that it had been repeatedly held to be in its essential element a bankrupt act."

So it appears that in the decisions of questions arising in the administration of the assets of insolvent corporations the courts of this state, since the earliest case, have uniformly regarded our statute as essentially a bankrupt act, and applied the doctrines which have controlled in bankruptcy proceedings. The practice of applying collateral securities to the liquidation of a debt against an insolvent corporation, and of proving only for the balance, has been uniform for over 70 years, and hundreds of insolvent corporations have been wound up and their assets distributed in conformity with this rule. Indeed, the influence of the doctrine laid down by Chancellor Vroom in 1835 has been much broader, for it seems to have controlled in the administration of insolvent estates in every form. Chief Justice Green, in writing the opinion of this court in the case of *Bell v. Fleming*, 12 N. J. 490-491, which case involved the rights of a creditor of a person who had made a general assignment, expressed the broad view that it was well settled that such a creditor was entitled to have a mortgage due first satisfied out of the proceeds of the sale of the mortgaged premises, and, if that proved insufficient, he was entitled to go in as general creditor for a dividend upon the balance. Other cases

recognizing the same general rule are cited in *Whittaker v. Amwell National Bank*, 7 Dick. 400-418, 29 Atl. 203. It is unnecessary, however, in this case, to consider the general application of the bankrupt rule to all cases of insolvency. It is sufficient to say that the bankrupt character of our statute concerning insolvent corporations recognized so long vindicates the rule adopted in the earliest case and followed ever since. Even if it should be conceded that the rule adopted in the court below is possibly a more equitable rule than that which has formerly obtained, nevertheless, more injury would result to the jurisprudence of the state by unsettling a practice which has prevailed for nearly three-quarters of a century practically unchallenged than by adhering to the rule which has hitherto been regarded as satisfactory and equitable.

We are constrained to the conclusion that the order of the Court of Chancery should be reversed.

(76 N. J. L. 354)

#### ATLANTIC CITY v. HEMSLEY.

(Supreme Court of New Jersey. July 14, 1908.)  
INNKEEPERS—LICENSE TAX.

Under subdivision 27, § 14. of the city charter of Atlantic City (P. L. 1902, p. 293), the city council of the city has no power to pass an ordinance imposing a sleeping room license tax upon a hotel that is licensed by the city council of the city as an inn and tavern and to sell intoxicating liquors and is so conducted.

Garrison, J., dissenting.

(Syllabus by the Court.)

Certiorari to Recorder of Atlantic City.

Frederick Hemsley was convicted of violating an ordinance of the city of Atlantic City, and brings certiorari. Conviction set aside.

Argued February term, 1908, before GARRISON, SWAYZE, and TRENCHARD, JJ.

John B. Slack and Gilbert Collins, for prosecutor. Harry Wootton, for defendant.

TRENCHARD, J. The prosecutor of this writ of certiorari was convicted before the recorder of the city of Atlantic City of "conducting the business of boarding house and hotel" without a license therefor, in violation of an ordinance of the city of Atlantic City entitled "An ordinance governing, regulating and fixing fees of mercantile licenses in Atlantic City, N. J., and regulating the business licensed," approved May 11, 1904.

It is contended that the business conducted by the prosecutor was not forbidden by an ordinance lawfully enacted. The ordinance in question provides as follows: "Section 1. Be it ordained by the city council of Atlantic City, that on and after June 1, 1904, the fees to be paid annually to Atlantic City for a license to conduct the different kinds of business herein mentioned within the limits of Atlantic City shall be as follows: Boarding houses, cottages and hotels, for each sleeping room, \$50." The ordinance further provides

that it shall be unlawful to conduct any business required to be licensed without a license therefor, and a penalty for its violation. A city, when authorized by its charter or by the general incorporation laws of the state, may impose licenses and business taxes upon natural persons or corporations. This power, however, is not inherent in municipal corporations, and it will never be held to exist unless conferred in express terms or by necessary implication. 21 Amer. & Eng. Enc. of L. (2d Ed.) pp. 782, 783. The act adopted by the city as its charter, under which the ordinance in question was passed, is found in P. L. 1902, p. 284. Subdivision 27, § 14, thereof, provides as follows: "The city council of such city shall have power to make \* \* \* ordinances for the following purposes: \* \* \* To license and regulate cartmen, porters, hacks, street cars, omnibuses, automobiles, stages, and all other carriages and vehicles used for the transportation of passengers, baggage, merchandise and goods and chattels of any kind; and the owners and drivers of vehicles and means of transportation; also auctioneers, common criers, hawkers, peddlers, pawnbrokers, junk-shop keepers, keepers of bath houses, boarding-houses and news-stands, sweeps, scavengers, travelling and all other shows, circuses, theatrical performances, plays, billiard tables, pool tables, organ grinders, exhibitions, concerts, public places of amusement for gain, skating rinks, itinerant venders of merchandise, medicines and remedies, lumber and coal yards, stores for the sale of groceries, dry goods and merchandise and goods and chattels of any kind, and all other kinds of business conducted in such city; the place or places or premises in which or at which the different kinds of business or occupations are to be carried on or conducted, and to fix the amount of fees to be paid for such licenses and to prohibit all persons and places and all vehicles unlicensed from acting, using or being used in said capacities or for such uses and purposes; and that the fees for such licenses may be imposed for revenue."

The power of city council under that section to impose a license fee upon boarding houses is not challenged. But the place complained of is a hotel, known as the "Hotel Brighton," and it is insisted that under the act in question the city has no power to pass an ordinance imposing a sleeping room license fee or tax upon the hotel. If the above recited section of the city charter stood alone, the power of the city to impose such a room license fee or tax upon hotels might exist in view of the general language "all other kinds of business," notwithstanding hotels are not specifically mentioned. 21 Amer. & Eng. Enc. of L. (2d Ed.) p. 786. But however that may be, we think the power did not exist for the reasons we will now state. By the charter (P. L. 1902, p. 298, § 20), the city has the power to license the sale of intoxicating liquors, and by section 115 thereof the power to license



Inns and taverns conferred by its charter of 1854 (P. L. 1854, p. 278) was expressly reserved. *Conover v. Atlantic City*, 73 N. J. Law, 590, 64 Atl. 146. In pursuance of such power, the city granted the prosecutor a license to keep an inn and tavern and to sell intoxicating liquors at the Hotel Brighton for a term covering the time referred to in the complaint in this case. Not only was the place in question licensed as an inn or hotel, but it is so conducted. It advertises as a hotel and receives all unobjectionable travelers who are willing to pay an adequate price. It supplies liquors to its guests, has spare bedrooms and stables, keeps a public register, runs a coach to the railroad stations, and has all of the essentials which distinguish an inn or hotel from a boarding house. *Martin v. State Ins. Co.*, 44 N. J. Law, 485, 43 Am. Rep. 397. Generally speaking, the distinction between an inn and a boarding house is that into the former all travelers have a right to enter and demand accommodation, but the keeper of a boarding house has a right to select his guests. *Beall v. Beck*, 3 Cranch, C. C. (U. S.) 666, Fed. Cas. No. 1,161; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *Commonwealth v. Cuncannon*, 3 Brewst. (Pa.) 344. Whether or not a particular place is an inn or a boarding house is a question of fact depending on the intention of the proprietor. The right of the traveling public therein depends on that intention as evinced by the character of the business there conducted. That the Hotel Brighton is an inn or hotel—not a boarding house—is conclusively established by the proprietor having taken out a license therefor, and by the character of the business there conducted. It cannot be successfully contended that one may keep an inn and tavern in a boarding house. The license *ipso facto* characterizes the place. It was essential to the grant of the license to the inn or hotel that it should have at least two spare beds and be well provided with house room for the accommodation of guests. *Amerman v. Hill*, 52 N. J. Law, 326, 19 Atl. 789. The number of these bedrooms is not limited, nor can it be, but must vary in accordance with the number of guests coming to the inn to be entertained, so, consequently, the granting of the license by the city to the prosecutor to keep an inn and tavern at the Hotel Brighton of necessity requires and allows him to keep bedrooms for the accommodation of his guests, and the city, having granted him such license, cannot tax him again for something which he already has a license to do. The rule is that a person who has taken out a license for or paid a tax on a certain business cannot be compelled to take out another license or pay another tax for anything which constitutes an essential part of such business. 21 Amer. & Eng. Enc. of L. (2d Ed.) p. 814.

In view of the fact that the premises in question were licensed as an inn or hotel by the city under the powers conferred by its charter, and that it was essential to such

grant, and to the maintenance of such inn or hotel, that it should have spare rooms for the accommodation of its guests, and of the further fact that the section of the city charter, under which the ordinance in question was passed, does not specifically empower the city council to pass ordinances imposing a sleeping room tax upon inns or hotels, or to otherwise license or regulate the same, we think that the power to enact the ordinance in question, so far as it applies to hotels, is at least doubtful. Statutes delegating such power are to be construed strictly, and, if there is any doubt as to the existence of the power, it must be resolved in favor of the public and against the city. 21 Amer. & Eng. Enc. of L. (2d Ed.) p. 783. Accordingly, we hold that the city council was without power to impose the room tax upon the hotel in question by the ordinance under review.

The conviction is therefore set aside, with costs.

GARRISON, J., dissents.

(73 N. J. B. 746)

#### TAYLOR v. TAYLOR.

(Court of Errors and Appeals of New Jersey.  
June 15, 1903.)

#### 1. HUSBAND AND WIFE—ACTION FOR ALIMONY—GROUNDS.

To entitle a wife to alimony on the ground of desertion by the husband, the desertion must have been without justifiable cause, and the husband must have refused and neglected to maintain and provide for the wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1063.]

#### 2. SAME.

When a wife separates herself from her husband and claims alimony, she must justify the separation by proof of extreme cruelty on the part of the husband to the same extent as though she were suing for divorce a mensa et thoro on the ground of extreme cruelty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 1063, 1064.]

#### 3. SAME.

A wife who has separated herself from her husband on account of his extreme cruelty may be entitled to alimony, though he used no physical violence toward her, but she must prove that his conduct was such as to place her life or health in danger, or to render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife, or that the conduct of the husband was such as to bring about these conditions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 1063, 1064.]

#### 4. SAME—EVIDENCE.

Evidence considered, and held insufficient to show that the husband was guilty of such extreme cruelty toward his wife as to justify her in separating herself from him and to maintain a suit for alimony.

#### 5. DIVORCE—GROUNDS—DESERTION.

The failure of a husband to attempt to induce his wife to return to him removes from her desertion the element of obstinacy, and such desertion is not a ground for divorce under a statute providing that to render a desertion ground for divorce the desertion must have been willful, continued, and obstinate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 114.]



### Appeal from Court of Chancery.

Suit for alimony by Jennie L. Taylor against Joseph N. Taylor, in which defendant files a cross-bill for divorce. From a decree dismissing the bill and cross-bill, complainant appeals. Affirmed.

On appeal from a decree of the Court of Chancery, advised by Vice Chancellor Leaming, who delivered the following opinion:

"This is a bill filed by the complainant, under the statute, for a decree for the payment of alimony. The husband denies the material allegations of the bill, and files a cross-bill in which he seeks a divorce from his wife on the ground of desertion. The law is well settled—in fact, it is statutory—that, to entitle a wife to alimony, two elements must concur: First, the husband must, in the language of the statute, without any justifiable cause abandon his wife, or separate himself from her; and, second, he must refuse or neglect to maintain and provide for her.

"It is well settled that a husband's conduct toward his wife may be such as to justify the wife in separating herself from him. In such case the separation, having been occasioned by the husband, will be treated as his separating himself from her. The conditions, other than adultery, which will justify the wife in separating herself from her husband, are those which our statute has provided as sufficient cause to entitle the court to grant to the wife a divorce from bed and board, namely, extreme cruelty on the part of the husband. This is necessarily so; for a wife cannot be justified in assuming the right to live separate from her husband for causes which will not justify this court in granting to her the right to live separate from her husband. It follows, therefore, that when the wife, as in this case, separates herself from her husband and claims alimony, she must justify that separation by proof of extreme cruelty upon the part of her husband to the same extent as she would be compelled to prove if she were suing for a divorce from bed and board on the ground of extreme cruelty.

"Now, what constituted extreme cruelty on the part of the husband sufficient to justify a decree *a mensa et thoro*, or to justify the wife in a suit for alimony after separating herself from him; has been defined by our courts so frequently and with such accuracy that it should not be a question for dispute. I have before me a list of all, or nearly all, of the cases upon that subject, and it may be useful to briefly review the principal authorities, and summarize what I think may be said to be the settled condition of the law upon the subject at this time. The early cases were loath to hold that anything short of physical violence could amount to extreme cruelty within the intention of the statute, but I think it fair to say that that idea has entirely disappeared from the view of the judges who are called upon to administer this

branch of the law. One of the earlier cases upon the subject, and the first utterance, I believe, of the Court of Errors and Appeals, was the case of *Close v. Close*, 25 N. J. Eq. 526. Justice Van Syckel, in delivering the opinion of the court in that case on page 529, uses this language:

"Without attempting to give a definition of legal cruelty applicable to all cases, I think it may safely be said that where the husband has been guilty, or there is reasonable ground to apprehend that he will be guilty, of any actual violence, which will endanger the safety or health of the wife, or where he had inflicted upon her any physical injury accompanied by such persistent exhibition of ill feeling and opprobrious epithets as will endanger her health, or render life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife, the decree of separation should be pronounced. Whether, in a case of extreme hardship, in the absence of any actual or apprehended physical injury, she will be remitted for the redress of her grievances to the domestic forum, must be left for adjudication when the case presents itself."

"In the case of *English v. English*, 27 N. J. Eq. 579, Justice Scudder, in delivering the opinion in the court as found on page 585, uses this language:

"The court must be satisfied that the wife is in danger of bodily harm if she goes back to him, or, to use the language in *Close v. Close*, 25 N. J. Eq. 529, that he has done and will continue to do such acts as will endanger her health or render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife. It is not the question whether she will live more comfortably at her father's house with a liberal allowance of alimony, but whether she is released from her duty as a wife by the extreme cruelty of her husband, and the reasonable apprehension that it will continue. The principle which must decide this case does not affect these parties alone. It is of the utmost importance to all that these bonds should not be lightly severed."

"The other case which I desire to quote on the point now under discussion is *Black v. Black*, as reported in 30 N. J. Eq. 215. In this case the Vice Chancellor (Van Fleet) on page 221 uses the following language:

"The question, then, presented by this branch of the case, is this: Was the complainant justified in separating herself from her husband? The justification she offers is cruelty. She must show a case of extreme cruelty such as would entitle her to a decree of separation. The courts can know no middle ground. A wife must live with her husband, make his home hers, and give him her society and services, unless she can show reasons valid in law relieving her from her duty to him. To justify a decree *a mensa et thoro*, actual physical violence need not be

proved, but such conduct by the husband must be shown as will justify the court in believing that if he is allowed to retain his power over his wife, and she is compelled to remain subject to him, her life or health will be endangered, or that he will render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife.

"This view adopted by Vice Chancellor Van Fleet has been since incorporated in other cases, and is substantially, I believe, the accepted view to-day. In *Weigand v. Weigand*, reported in 41 N. J. Eq. 202, 3 Atl. 699, the same Vice Chancellor gives expression to the same views, namely, that personal violence is not the only form of extreme cruelty which will entitle a wife to separate herself from her husband. In *Fred v. Fred*, 67 N. J. Eq. 495, 58 Atl. 611, Vice Chancellor Bergen expresses the same views. Other cases in point will be found collected in the opinion in *McVickar v. McVickar*, reported in 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422. The rule in this state may be considered settled as follows: That to justify a wife in separating herself from her husband physical violence need not be proved, but such conduct of the husband must be shown as will reasonably convince the court that her life or health was in danger, or her life rendered one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife, or that the conduct of the husband, if continued, would have brought about these conditions.

"The first question, therefore, that it becomes the duty of this court at this time to determine, is whether or not the separation of the complainant from her husband was justified according to the standard of the decisions to which I have just referred; whether the treatment of her husband was the cause of that separation; and, if so, whether that treatment amounted to extreme cruelty within the meaning that has been attributed to it by the cases to which I have referred.

"The testimony upon the part of the complainant, if accepted in its fullness, might justify an affirmative conclusion. If all that is claimed in her behalf be accepted, it is probable that her treatment at her home may have been of such nature as to justify her, in the preservation of her health, to take the radical step which she took in leaving her home; but that testimony and that claim, in practically all of its essential features, is without corroboration. The witnesses called to corroborate her in those matters have failed entirely to disclose any such condition of affairs at her home as would entitle a court to make an affirmative finding to the effect of extreme cruelty as claimed by complainant; and, in view of the contrary and opposing testimony that exists in this case, it is entirely manifest that no such finding can properly be made.

"Mrs. Nellie Howard testified that the husband used profane language to his wife. She nowhere claimed that she saw any physical violence or radical mistreatment. She saw marks on Mrs. Taylor's forehead, but does not know what occasioned them other than what Mrs. Taylor told her. Her testimony touching the incident when the wife stepped on her husband's corn is not sufficient to add any weight to the general claim upon the part of the complainant of a course of mistreatment by her husband. The only other misconduct on the part of the husband testified to by Nellie Howard was when Mrs. Taylor had taken money from the pocket of her husband while he was asleep; the husband having exhibited extreme anger on ascertaining the fact. Mrs. Myers, called to corroborate the claim of cruelty, characterized the husband's attitude as indifferent. The only profanity which she was able to testify to was some rather vigorous language used by the husband in the absence of the wife, because of her absence. Mrs. Ray W. Cox testified to nothing of the nature of cruel treatment or conduct upon the part of the husband of that nature, but the force to be given to her testimony will be found in her statement that she had heard the husband say that he had made a mistake in his marriage, and would like to get rid of his wife. She never heard him use any profane language to his wife. So far as the testimony of the witnesses goes, therefore, that embodies about all there is in the nature of corroboration. I do not find in the circumstances which have been developed in the progress of the investigation any features, corroborative in their nature, to justify an affirmative conclusion of cruelty on the part of the husband.

"On the other hand, opposed to this claim, there is the testimony of a large number of witnesses who were in positions to know, as nearly as can be known by any person other than the husband and wife, what the treatment of Mr. Taylor was toward his wife. These witnesses have shown and were in a position as a rule to show with a great deal of fullness that Mr. Taylor's conduct toward his wife was not, to say the very least, of the nature claimed by Mrs. Taylor. The conviction brought to my mind is not that Mr. Taylor was a model husband. I think the proofs justify a conclusion very much to the contrary. I cannot help believing, under all the evidence, that Mr. Taylor fell very far short of the standard which the good of society demands of a husband in his treatment of a wife. But it would be a misjudgment upon all the testimony in this case for this court to treat as proven the averments of the bill that Mr. Taylor was cruel, in the sense of the statute, toward his wife.

"If that be true—and that is my conclusion—then Mrs. Taylor was not justified in separating herself from her husband; and

that fact will bar her from the relief which she seeks. The actual separation occurred under peculiar circumstances and conditions. It is perfectly plain that Mrs. Taylor may have shrunk from the disagreeable anticipations of meeting her husband when he came from the hospital. I can conceive that after he was taken to the hospital as the result of what was, to say the least, a grave indiscretion on her part, she might well have dreaded meeting him when he was well enough to resume his place at his home; but it cannot be overlooked that the conduct of Mrs. Taylor in repeating what her husband had said to her, or what she claimed her husband had said to her, in the nature of a slander, to the very people that it is claimed the husband slandered, was a grave wrong on the part of the wife to the husband. I can find no justification for it. You may call it an indiscretion; but I think that term will not properly define it. I cannot conceive of a wife to whom a husband has communicated a slander about another going to the person slandered and there repeating it, unless she lacks either ordinary intelligence or has no interest in her husband or affection for him or care for his welfare. No sensible person could have expected, in repeating the slander to those against whom it was directed, anything but trouble. Perhaps Mrs. Taylor could not and did not anticipate that the sons of the supposed slandered person to whom she repeated the story, would resort to the extremity that they did, or would do the very thing that they did, but she must have known, if she had any sense, that trouble would follow what she was doing. The fault was therefore hers, and it is a fault that it is difficult to excuse; and I say it was natural, very natural, that she should shrink from meeting her husband on his return from the hospital where he had been as the consequence of her wrongdoing, but that fact necessarily does not excuse her from leaving her home and deserting her husband.

"The second element necessary in the procurement of alimony is the disposition upon the part of the wife, if the husband's conduct is such as to permit her to live with the husband, to resume the relations of husband and wife. I do not find that Mrs. Taylor has ever exhibited any desire to resume marital relations with her husband. I am not prepared to say that, if the husband had shown any disposition upon his part toward a reconciliation, Mrs. Taylor would not have met him half way, but the letter from Judge Wescott, or the letter dictated by Judge Wescott, cannot be treated or regarded as a letter giving accurate expression to the true feelings of Mrs. Taylor at the time that letter was penned. The subsequent letters written by Mrs. Taylor, as well as her subsequent conduct, show that that letter was not a true embodiment of her true feelings at the time it was written.

"My conclusion, therefore, is that Mrs. Taylor was not justified in separating herself from her husband, and has not since that time shown any proper desire upon her part to resume her relations with him as a wife; and her claim for alimony must be denied. I have no doubt at all but that her physical condition was probably all that is claimed. She might have been a very weak woman physically, and I have no doubt the attentions she received from her husband were much less than a wife in her condition would crave and should receive, but I cannot conclude that her husband's conduct was such as would justify her in this breach against her matrimonial vows and against society itself.

"Now, the second branch of this case is entirely independent, and is practically the same as though it were an independent suit, in that the husband claims a divorce against his wife by reason of this desertion. The law touching the desertion which entitled the husband to a decree of divorce against his wife is defined quite as accurately as the law touching alimony. The subject has been before the courts as frequently, or more frequently, than almost any other breach of the law, and I have before me at this time an outline of all, or nearly all, of the leading cases upon the subject, and I will refer to them briefly in order to define what I consider to be the settled law of this state that the facts in this case may be applied to the law. The statute provides that the desertion must be willful, continued, and obstinate. In the case of *Taylor v. Taylor*, 28 N. J. Eq. 207, Vice Chancellor Van Fleet lays down the rule that, under this statute, three elements must concur to constitute a desertion willful, continued, and obstinate: First, cessation of cohabitation; second, an intent in the mind of the defendant to desert; and, third, that the separation was against the will of the complainant. In that case Vice Chancellor Van Fleet reviews four earlier decisions which fully sustain the view taken by the learned Vice Chancellor, and among others the case of *Bowlby v. Bowlby*, 25 N. J. Eq. 400, which was a decision rendered by Vice Chancellor Dodd, and afterwards affirmed by the Court of Errors and Appeals. Since the decision of Vice Chancellor Van Fleet in *Taylor v. Taylor*, the view there so tersely defined has been followed by our courts in a great many cases, and the view always laid down and which will be found to underlie and form the groundwork of all cases is that, to entitle the husband to a divorce upon the ground of desertion, the separation must be against his will, and that a failure upon his part to attempt to induce his wife to return makes the desertion of the wife willful and continued, but destroys the element of obstinacy; and I think the views expressed by the courts in the various cases may be said to entirely concur in that feature which requires, on the part of the husband, some effort to induce

the wife to return, else the obstinacy required by the statute does not exist.

"I am not prepared to say that no case can be conceived where the husband could not procure a divorce upon the ground of desertion without having made some effort to procure the return of his wife, but I am prepared to say that such a case must be an extreme one, if it can in fact exist, and that this is not that kind of a case. It is undoubtedly true that, where it is perfectly clear that any attempt upon the part of the husband to induce his wife to return would be unavailing, he would be excused from that duty, provided his heart was right, but, if the going away of the wife was to any degree caused, or provoked by him, if he can in any sense be said to be chargeable with misconduct, even though not in such degree as to justify her conduct, then there is upon him the most powerful duty to use his utmost effort to get her to return, and upon that the authorities are entirely at rest.

"The views which I have expressed are what I consider the settled law of this state, and will be found embodied in the following cases: *Rittenhouse v. Rittenhouse*, 29 N. J. Eq. 274; *Trall v. Trall*, 32 N. J. Eq. 231; *Hankinson v. Hankinson*, 33 N. J. Eq. 66; *Loux v. Loux*, 57 N. J. Eq. 561, 41 Atl. 358; *Van Wart v. Van Wart*, 57 N. J. Eq. 598, 41 Atl. 965; *Hall v. Hall*, 60 N. J. Eq. 469, 46 Atl. 866, which is a decision of the Court of Errors and Appeals; *Edwards v. Edwards*, 69 N. J. Eq. 522, 61 Atl. 531, a decision by our present Chancellor; *Ojserkis v. Ojserkis*, 62 Atl. 113, a decision rendered in this court by the late Vice Chancellor Grey; and *Meier v. Meier*, a decision by this present Chancellor, reported in 68 N. J. Eq. 9, 59 Atl. 234. In *Van Wart v. Van Wart*, Vice Chancellor Stevens gives what to my mind is a fair statement of the summary of the authorities in the following language:

"It seems plain to me that the desertion in this case, though it may have been willful, was not 'obstinate.' It was not persisted in against the effort or influence of the husband to bring it to an end. Obstinate persistence on the part of the wife was wanting, because the advances or concessions which the husband, as a just man, ought to have made to terminate it, were also wanting. Such advances and concessions were the prerequisite of any obstinate persistence against them."

"Again he says:

"In considering what effort or concession must be made in any given case, the conduct of the parties toward each other must be considered. It is obvious that more effort and concession will be required of one whose conduct actually produces or contributes to produce the desertion than of one who is blameless. If the party deserted is not in fault, and effort to induce the deserting party to return would probably prove unavailing, it need not be shown. In general it may be said that that desertion to be adjudged obstinate,

which has resisted such effort or concession, as the party alleging such desertion ought, under the particular circumstances of the case, to have made to bring it to an end."

"The effort upon the part of the cross-complainant in this case to bring the desertion of his wife to an end does not appear to have been made at all. I cannot believe that his conduct has been so blameless or so praiseworthy as to exonerate him from any attempt whatever, or even from a desire for his wife to return to him, and he has testified that he has no such desire. While I have already stated that the letter written at the instance of Judge Wescott does not to my mind give a true expression of the feelings or sentiments of the wife, and while I think the husband was justified in regarding that letter as a letter with a purpose other than the purpose expressed on its face, yet the duty was there upon the part of the husband to take no chance that his refusal to meet any proffer upon the part of his wife to terminate the desertion should be the thing that stood in the way of reconciliation, and I am obliged to conclude that under the law, as I understand it, and as I have undertaken to define it, I am unable to advise a decree in favor of the cross-complainant.

"The relations between these parties are indeed unfortunate, and it might perhaps be better for both if they were separated, but that is a question which I am not permitted to deal with. I am obliged to apply the law as I conscientiously believe it exists, and under the law as it exists I do not feel justified in awarding alimony or in awarding to the defendant a decree of divorce on the ground of desertion.

"A decree will be prepared accordingly. There will be no costs taxed, but I will allow a counsel fee to the complainant of \$50."

Spencer Simpson, for appellant. Frederick A. Rex, for respondent.

PER CURIAM. Complainant filed a bill against her husband under the statute for a decree requiring him to pay alimony. He filed a cross-bill praying for divorce on the ground of desertion. By the final decree both bills were dismissed. From so much of the decree as dismisses the complainant's bill she appeals. Defendant has not appealed.

We concur in the views expressed by Vice Chancellor Leaming so far as they relate to the dismissal of complainant's bill, and the decree in that respect will therefore be affirmed.

(76 N. J. L. 561)

#### MIKA v. PASSAIC PRINT WORKS.

(Court of Errors and Appeals of New Jersey.  
July 14, 1908.)

#### 1. MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURIES—ASSUMPTION OF RISK—OBVIOUS DANGERS.

A servant's hand was caught between two cylinders of a calender machine while he was

trying to straighten out the cloth and prevent a double edge from going through. It appeared that the cylinder revolved with great rapidity, and that the servant had never worked on the calender machine until three days before, though he had been in the factory for some time. He claimed that he told the second boss he did not know how to work on a calender when he was directed to work on the machine, and that the reply was that, if he did not want to do that kind of work, he could go home. *Held* that, if the master was negligent in failing to instruct the servant in the operation of the machine, the injury was not due to such neglect, and it was not error to direct a verdict for defendant, for both servant and master had equal means of forming a correct judgment of the danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 610-624.]

**2. SAME—FAILURE TO GUARD MACHINERY—EFFECT ON ASSUMPTION OF RISK—STATUTORY PROVISIONS.**

Laws 1904 (P. L. p. 156), section 18 of which provides that whenever practicable all machinery of every description shall be properly guarded, does not abolish the common-law principle of assumption of risk, for the statute merely provides a penalty for its violation; and there is no provision that assumption of risk shall not be presented as the defense, nor is there any reference to civil liabilities.

Error to Circuit Court, Passaic County.

Action by Joseph Mika against the Passaic Print Works. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Francis Scott, for plaintiff in error. John B. Humphreys, for defendant in error.

**VROOM, J.** The action was for injuries received by the plaintiff while employed in the factory of the defendant at Passaic, N. J. He was working at a machine called a calender machine, and which is used to stretch, press, and finish cloth. A model of the machine and photographs of the same were offered in evidence, and showed that the machine consisted of three cylinders, placed one above the other, and a stretcher, which is another cylinder placed in front of the other three. The cylinder known as the "stretcher" has staves upon it designed to stretch the width of the cloth as it passes over the stretcher. The staves of the stretcher are made of metal and are corrugated. They slide backward and forward along the horizontal length of the stretcher as the stretcher revolves. The cloth is caught by this backward and forward motion of the staves as it revolves about the stretcher, and its width is stretched in that way. After leaving the stretcher, the cloth passes between the two lower cylinders in the rear, and revolves round the rear of the middle cylinder and then around the top cylinder, from which it is wound onto a roll in the rear of the machine. The duties of the plaintiff were simply to attend to the cloth as it ran through the machine. It was shown that the cloth was delivered to the machine in rolls, the plaintiff was to adjust the roll in place, and, when its contents had run through the calender, to adjust another. It was also his duty to watch the cloth as it passed through the

machine. As the plaintiff himself said: "I was to watch that this cloth should go in there straight; that it should not turn." On the day of the accident the plaintiff further says that he was straightening out the cloth because he saw a double edge coming, and that he "was trying to rectify the double edge from the bottom underneath the cloth." His hand was caught between the cylinder with the staves, called the "stretcher," and the next cylinder. It appeared that the cylinders revolved with great rapidity; one witness saying they were liable to go round 25 times a minute. The plaintiff claimed that he had been put to work on this calender machine without any instruction, and that he had never worked a calender machine before, although he had been for some time employed about the factory. When told to work on the machine by the second boss, plaintiff says he told him that he did not know how to work on a calender, and the reply was that, if he did not want to do that kind of work, he could go home. The accident occurred on the third day he was working on the calender machine. At the close of the plaintiff's case a motion for nonsuit was made and granted; the learned trial judge saying, in part: "I do not see how any person can successfully contend that the injury which this man suffered was not the result of an obvious risk. If he had been feeding this cloth on two rollers, it required no one to tell him that, if he let his fingers come in contact with those rollers, he would get hurt. Now, he was not exactly feeding the cloth on the rolls, but he was undertaking to smooth the edges of a rapidly moving cloth drawn at a great tension over this stretcher. He began with his hands within 14 or 15 inches certainly of the place of contact where the danger was apparent. His hand could be drawn there in a second of time. It was a dangerous occupation, of course. He saw the speed at which the cylinder was revolving. It may be said that he was told to do this work or leave. That is no excuse. He had the right to exercise the option to leave or to stay on. \* \* \* I think it was an obvious risk, and the motion on that ground should be granted."

The only assignment of error seriously relied upon by the plaintiff in error and requiring consideration here is to the granting of a nonsuit at the close of plaintiff's case. The evidence discloses that at the trial no attempt was made to establish any of the charges made in the declaration, excepting (1) that the plaintiff was inexperienced and was put to work upon the machine without any instructions or warning; and (2) that the presses and rollers were unguarded, contrary to the statute in such case made and provided. The case presented here is not in my opinion one where the injury to the plaintiff can be imputed to any neglect of the master in not instructing him as to the operation of this machine. Even should it be assumed that the master failed in the performance of his duty in not instructing him as to its op-

eration, I do not see that the injury was due to any such neglect. As was said in *Foley v. Jersey City Electric Co.*, 54 N. J. Law, 414, 24 Atl. 488: "The servant and the master had equal means of forming a correct judgment. Therefore whatever want of prudence is chargeable to the one must be imputed to the other." The danger here which was to be apprehended, that of having the hand caught between the rolls, was a perfectly obvious one, and as readily discernible by the servant as by the master. It is unnecessary further to enlarge upon or discuss the rule laid down in this court in *Coyle v. Griffing Iron Co.*, 63 N. J. Law, 612, 44 Atl. 666, 47 L. R. A. 147, that "the servant assumes all the risks and perils usually incident to the employment, and included in such risks and perils are those which it is a part of his duty to take knowledge of by observation." *Chandler v. Coast Electric Ry. Co.*, 66 N. J. Law, 380, 39 Atl. 674; *Johnson v. Devoe Snuff Co.*, 62 N. J. Law, 417, 41 Atl. 936; *Tompkins v. Engine Co.*, 70 N. J. Law, 335, 58 Atl. 393.

The case on the brief of defendant (*Rooney v. Sewall, etc., Cordage Co.*, 161 Mass. 153, 36 N. E. 789) is instructive and decisive as to this point. Knowlton, J., there said: "When the plaintiff entered the defendant's service, he impliedly agreed to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used. It is not material whether he examined the machinery before making the contract or not. He could look at it if he chose, or he could say: 'I do not care to examine it. I will agree to work in this mill, and I am willing to take my risk in regard to that.' In either case he would be held to contract in reference to the arrangement and kind of machinery then in use by his employer, so far as these things were open and obvious, so that they could readily be ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage." As was insisted upon the argument, there is a very marked distinction between the danger which is incident to the operation of a machine in its normal condition and a danger which is incidental to it by reason of some defect in the machine. In the case before us, the evidence clearly indicates that the danger of catching hold of the cloth as it was taken hold of by the plaintiff was a danger incident to the machine in its ordinary and normal operation, and was such an obvious danger that there can be no escape from the conclusion that it was one of the ordinary risks which had been assumed by the plaintiff.

The remaining question in the case was that raised by the averment in the declaration that the presses and rollers were unguarded and unprotected, contrary to the statute in such case made and provided. The reference was to Acts 1904, p. 156, entitled

"An act regulating the age, employment, safety, health and work hours of persons, employees and operatives in factories," etc. Section 13 of this act provides: "Whenever practicable, all machinery shall be provided with loose pulleys, all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws, drums and machinery of every description, shall be properly guarded." Only one witness testified that it was practicable to have the machines guarded, and pointed out where it could be done. It nowhere appears, however, in the case that machines of this character ever had been guarded, or that there existed any necessity therefor beyond the statement of this one witness. But, admitting that by reason of the practicability of guarding these machines there was created, under the statute, a duty in the master to perform this specific duty for the safety of his servants, this does not in my opinion abolish the common-law principle of the assumption of risk. Nothing contained in the statute provides that assumed risk on the part of the servant shall not be presented as a defense where one violating the statute is sued by this servant by reason of such violation. The statute provides a penalty alone for its violation, and nothing is contained in the act referring to or concerning civil liabilities. While this question of the availability of the defense of assumption of risk by one who has not complied with a statute requiring the placing of safeguards over machines has not been before our courts, it has received much attention in many of the courts of other states, and those of the United States. In 4 A. & E. Annotated Cases, p. 587, is printed the report of a case decided in the state of Washington. *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915. This case expresses a pronounced view in favor of the nonavailability on the part of the master of the defense of assumption of risk who has not complied with the statute requiring the guarding of machinery. An examination of the case shows that it was decided by a divided court and a vigorous dissenting opinion filed. The report of the case in the volume cited has been most fully and thoroughly annotated, and the decisions favoring and rejecting the above doctrine collated.

After an examination of the leading cases, I feel confident that the weight of authority is adverse to the decision in the case of *Hall v. West & Slade Mill Co.*, supra, and that the true rule is laid down in the adjudications of the courts of the United States and of the states of Maine, Rhode Island, Minnesota, Ohio, Wisconsin, and New York. In the latter state the leading case is *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367. The opinion was by Judge E. F. Bartlett, and I feel warranted in quoting it in part as expressive of the true principles governing this question: "In order to sustain the judgment in favor of the plaintiff, it is necessary to

hold that when the statute imposes a duty upon the employer, the performance of which will afford greater protection to the employé, it is not possible for the latter to waive the protection of the statute under the common-law doctrine of obvious risks. We regard this as a new and startling doctrine calculated to establish a measure of liability unknown to the common law, and which is contrary to the decisions of Massachusetts and England under similar statutes. \* \* \* We think this proposition is essentially unsound, and proceeds upon theories that cannot be maintained. It is difficult to perceive any difference in the quality and character of a cause of action whether it has its origin in the ancient principles of the common law, in the formulated order of modern decisions, or in the declared will of the Legislature. Public policy in each case requires its rigid enforcement, and it was never urged in the common-law action of negligence that the rule requiring the employé to assume the obvious risks of the business was in contravention of that policy. \* \* \* We are of opinion that there is no reason in principle or authority why an employé should not be allowed to assume the obvious risks of the business as well under the factory act as otherwise. There is no rule of public policy which prevents an employé from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rules of obvious risks. The statute indeed does contemplate the protection of a certain class of laborers, but it does not deprive them of their free agency and the right to manage their own affairs." I would also refer to *Langlois v. Dunn Worsted Mills*, 25 R. I. 645, 57 Atl. 910; 2 Labatt, M. & S., §§ 649, 650; and cases cited in 4 A. & E. Annotated Cases, on page 23, under the title "Plea of Assumption of Risk Available."

The other assignments were directed to exceptions taken to the admission or rejection of evidence. I found no errors in the ruling of the court.

The judgment below should be affirmed.

(76 N. J. L. 367)

**HARRIS v. CONGRESS HALL HOTEL CO.**  
(Supreme Court of New Jersey. July 14, 1908.)  
CORPORATIONS—OFFICERS—AUTHORITY.

The law does not ordinarily imply in the secretary of a business corporation the power ex officio to bind the company by his act, though, of course, the corporation may become subsequently bound by ratification. He cannot, in the absence of a special authorization, accept a surrender of a lease given by the corporation to its tenant and bind the corporation to pay the wages of the employés of the lessee. He may, of course, have larger powers by special appointment from the directors, and evidence of such powers may be found in the circumstances of the particular case.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1613.)

(Syllabus by the Court.)

**Certiorari to Court of Common Pleas, Cape May County.**

Action by Edward Harris against the Congress Hall Hotel Company. Judgment for defendant, and plaintiff brings certiorari. Affirmed.

Argued February term, 1908, before GARRISON, SWAYZE, and TRENCHARD, JJ.

Matthew Jefferson and John W. Wescott, for prosecutor. Carrow & Kraft, for defendant.

**TRENCHARD, J.** This writ of certiorari brings up for review a judgment in favor of the defendant entered upon the verdict of a jury ordered by the judge of the Cape May common pleas court on the trial of an appeal from a small-cause court. At the time the verdict against the plaintiff was directed, the testimony would have justified the jury in finding the facts as follows: That the plaintiff took employment in the summer of 1897 as a servant in the Congress Hall Hotel at Cape May, being employed by one Edward H. Cake, who was conducting the hotel under a written lease from the Congress Hall Hotel Company that confessedly imposed no liability upon that company, the defendant, for payment of the plaintiff's wages; that, by its terms, the lease expired March 1, 1899; that about the middle of August, 1897, Cake became financially embarrassed, and a Mr. Moore, the secretary of the defendant company, and who transacted the season's business with Cake for the company, came to the hotel and agreed with Cake that the company would pay the servants in the hotel, of whom the plaintiff was one, all that was due them at that time, and all that might become due in the future if they would continue work; that in consideration of this agreement, and at the same time, Moore accepted from Cake a surrender of the lease, and authorized Cake to run the hotel for the company for the remaining two or three weeks, and until it was closed for the season; that, as a part of the arrangement between Cake and Moore, the latter instructed Cake to give to each of the servants an order showing the amount that was due to them, saying that they could present these for payment at the Girard House in Philadelphia; that up to August 30, 1897, when the hotel closed, there was due to the plaintiff for wages the sum of \$125, but what part of it was for services rendered before the making of the agreement, and what part for services rendered thereafter, does not appear.

The question requiring consideration is whether there was any evidence from which the jury might have legitimately inferred that Moore, the secretary of the defendant company, was authorized to accept a surrender of its lease and make a new contract, or whether his act was otherwise binding upon the company. The law does not ordinarily imply, in the secretary of a business corporation, the power ex officio to bind the company

by his act, though of course the corporation may become subsequently bound by ratification. He cannot, in the absence of special authorization, accept a surrender of a lease given by the corporation to its tenant and bind the corporation to pay the wages of the employes of the lessee. He may, of course, have larger powers by special appointment from the directors, and evidence of such powers may be found in the circumstances of the particular cases. Thompson on Corporations, § 4697. In the present case there is no evidence of special authority of the secretary to accept a surrender of the lease, and to contract for the company to pay the wages of the plaintiff. It appeared from the testimony that neither the secretary nor the company was apprised in advance of the visit of the secretary to Cape May that any such proposition was to be made. Nor is there anything in the circumstances of the case from which larger than the ordinary powers of the secretary might have been inferred. The fact that the secretary had transacted the season's business with Cake on behalf of the company did not justify an inference of power to accept surrender of the lease and to make a new contract. So far as the case shows, his dealings had not extended beyond the transaction of such routine business as arose under the lease, and could not justify the inference of special authorization of power to bind the corporation by the acts in question.

Nor was there, in the present case, any circumstances disclosed by testimony from which ratification might have been inferred. The evidence is that the alleged contract was repudiated by the directors of the company as soon as it was brought to their attention, and there is no evidence that the defendant received any benefits of the contract.

Under these circumstances, a judgment for the defendant was properly directed.

Accordingly the judgment of the common pleas court is affirmed, with costs.

(108 Md. 357)

# MODERN WOODMEN OF AMERICA v. CECIL.

(Court of Appeals of Maryland. June 24, 1908.)

## 1. TRIAL—OFFER OF EVIDENCE.

Among the papers proposed to be offered in evidence by defendant in an action on an accident policy being a printed clipping presumably from a newspaper, giving an account of the death of insured, and stating that he had committed suicide because of lack of funds and employment, the offer is properly rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 120.]

## 2. SAME.

Defendant in an action on an accident policy having admitted that the proofs of death had been furnished as required by defendant's laws, its offer of the proofs of death, covering many pages, is properly rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 89.]

## 3. SAME.

Though an affidavit of plaintiff in an action on an accident policy, that insured had committed suicide, was admissible as a declaration against interest, yet defendant having offered to introduce it with other papers, which were inadmissible as proofs of death, the offer, made as an entirety, without calling attention to the affidavit, was properly rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 120.]

## 4. APPEAL AND ERROR — REVIEW — MATTERS NOT RULED ON BELOW.

The trial court not having ruled on special exceptions to prayers for instructions, the legal propositions in which granted prayers are conceded to be correct, the questions intended to be raised by the exceptions are not open to consideration on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1647.]

## 5. SAME—BILLS OF EXCEPTIONS.

The questions presented by a prayer for instructions, the propriety of which depends on the evidence, cannot be considered on appeal; the bill of exceptions, containing the prayers, not containing the evidence, and not being connected by express reference to a bill of exceptions which, though containing the evidence, brings up another question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2933–2935.]

Appeal from Circuit Court, Frederick County; James B. Henderson, Judge.

Action by Julia M. Cecil against the Modern Woodmen of America, a body corporate of the state of Illinois. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

H. Dorsey Etchison, for appellant. George A. Pearce, Jr., and William P. Maulsby, Jr., for appellee.

BURKE, J. On the 31st day of August, 1905, the Modern Woodmen of America, a beneficial society, incorporated under the laws of the state of Illinois, issued a benefit certificate to Harry Cecil, a member of Pools-ville Camp No. 1159, located in Montgomery county, for the sum of \$1,000, payable upon his death to Julia M. Cecil, his mother. On April 23, 1906, Harry Cecil was found dead in the room of his boarding house in Washington, D. C., and the proof shows that his death was caused by his drinking carbollic acid. The society refused to pay the insurance to Mrs. Cecil, the mother, and she brought suit upon the certificate in the circuit court for Frederick county, and from a judgment entered in her favor the defendant has appealed.

At the trial the plaintiff offered in evidence the certificate issued by the defendant, and its counsel admitted the death of the insured, and further admitted that the defendant had due notice of his death, and that the death proofs had been submitted to it in proper form as required by the laws of the order, and also admitted that Harry Cecil was a member of the order and in good standing. Thereupon the plaintiff closed her case. There



is a provision in the certificate which declares that the same shall be null and void and of no effect, and that all moneys which may have been paid and all rights and benefits which may have accrued on account of the certificate shall be absolutely forfeited, if the insured shall within three years after becoming a beneficial member of the society die by his own hand, whether sane or insane, except by accident. The single controverted question at the trial was: Did Harry Cecil designedly take his own life? To show that he did the defendant offered in evidence the testimony of Philip Laddon, a druggist residing in the District of Columbia, Dr. J. Ramsey Nevitt, the coroner, and William Shamberger, the morgue keeper of the district, and Ira D. Phillips, a friend and roommate of the deceased. After the testimony of these witnesses had been taken, the defendant's counsel, holding in his hand and exhibiting to the court a large bundle of papers fastened together, said: "I now offer in evidence the final death proofs in this case." To this offer, as made, the plaintiff objected, and the court then inquired of the defendant's attorney for what purpose he offered the proofs of death, and to this inquiry counsel replied: "The death proofs are always admissible, and I now offer the same in evidence for the general purposes of the case, and for what they are worth." The court sustained the objection, and excluded the proffered testimony. This ruling is the one complained of in the first exception. There was no error in this ruling. Among the papers proposed to be offered in evidence was a printed clipping, presumably from some newspaper, giving an account of the death of Harry Cecil, and stating that he had committed suicide because of lack of funds and employment. Upon no principle of evidence could this have been given to the jury. The proofs of death were not admissible, because the defendant had admitted that the proofs of death had been furnished as required by the laws of the order, and to have permitted these proofs, which cover thirteen pages of the printed record, to have been introduced in evidence, would have been a useless consumption of the time of the court. The affidavit of Mrs. Cecil, in which she stated that the insured had committed suicide, was properly admissible, and would no doubt have been admitted in evidence had the attention of the court been called to it; but offered generally in connection with all the other papers it was rightfully excluded. This was the only paper, among the many which the defendant proposed to offer, that was admissible in view of the admissions which had been made, and, if the counsel desired to offer that paper in evidence, he should have called the court's attention to it, and the court would have admitted it, not as a part of the proof of loss, but as a declaration by the plaintiff against her own interest. *Mutual Life Insurance v. Stibbe*, 46 Md. 312; *Travellers' Insurance Co.*

*v. Nicklas*, 88 Md. 474, 41 Atl. 906; *Fidelity Mutual Life Ins. Co. v. Ficklin*, 74 Md. 183, 21 Atl. 680, 23 Atl. 197.

After the court had excluded the proofs of death as offered, the defendant introduced and read to the jury the by-laws of the order, which provided that the certificate shall be null and void if the insured within three years after becoming a member die by his own hand, except by accident. The defendant then rested its case, and the plaintiff called four witnesses in rebuttal. At the conclusion of the whole case, the plaintiff offered four prayers for instructions to the jury, and the defendant submitted two. The court granted the plaintiff's prayers, and granted the defendant's second prayer and refused its first. The ruling of the court upon the prayers constitutes the second bill of exceptions. The defendant filed special exceptions to the plaintiff's third and fourth prayers; but the court did not rule upon these exceptions, and therefore the questions they were intended to raise are not before us, as this court can only pass upon such questions as were raised and decided in the lower court. The legal propositions announced in the plaintiff's granted prayers were conceded to be correct, and they are fully supported by the cases of the *Travellers' Insurance Company v. Nicklas*, 88 Md. 470, 41 Atl. 906, and *Royal Arcanum v. Brashears*, 89 Md. 624, 43 Atl. 866, and were properly granted. The defendant's first prayer, which was refused, asked the court to direct a verdict for the defendant, because there was no legally sufficient evidence in the case under which the plaintiff could recover. It was an application to the court to decide, as matter of law, that the insured had designedly taken his own life. It was conceded at the hearing that the plaintiff had made out a prima facie case; but it was contended that the evidence offered by the defendant, which is embraced in the first exception, shows conclusively that the insured intentionally committed suicide. There is nothing in the evidence contained in the second bill of exceptions, which was taken to the ruling on the prayers, to show that Harry Cecil willfully committed suicide, and, as the exceptions are entirely separate and disconnected, the question raised by this prayer must be determined upon the evidence embraced in that exception alone; and, as it contains no evidence to rebut the legal presumption that the deceased did not take his own life, the court could not, no matter what it might find the fact to be, reverse the judgment. This court said in *Cooke v. Cooke, Executor*, 29 Md. 552, that: "It is, no doubt, well settled that, unless bills of exception are connected by express reference to each other, or by the use of words which fairly import such connection, they will be considered as separate and distinct, and the court will look to and consider only the evidence set out in each exception." In 2 *Poa, Pl. & Prac.* § 820, it is stated: "Where a bill of exceptions brings

up only the prayers offered by the exceptant and refused, without a statement of the evidence upon which they are based, the court will be unable to consider them properly, unless the evidence is found in another exception previously taken, to which reference may legitimately be made." In this case there is no connection whatever between the two exceptions. After the first exception had been taken, the record shows as follows: "Defendant's Second Bill of Exceptions. To further maintain its issues, the defendant offered in evidence the sixty-fifth section of the by-laws of the order, which was read to the jury." In the view we have taken of the case, it becomes unnecessary to discuss the evidence. We have, however, carefully considered it, and are of the opinion that the court would not have been justified in withdrawing the case from the jury.

Judgment affirmed, with costs above and below.

(108 Md. 446)

#### STEWART & CO. v. HARMAN.

(Court of Appeals of Maryland. June 25, 1908.)

#### 1. MASTER AND SERVANT—ACTIONS FOR INJURIES TO SERVANT—EVIDENCE—ADMISSIBILITY.

In an action for injury to a servant due to the glass falling from a window and cutting him, evidence that the glazier a few days after the accident put new strips around the window did not prove any defect in the window at the time of the accident, as the old strips might possibly have been injured in removing the fragments of glass that adhered to the sides of the sash after the accident, or have been broken while being removed preparatory to putting in a new glass.

#### 2. SAME—EVIDENCE OF SUBSEQUENT REPAIRS.

In an action for injury to an employé due to the glass falling from a window, evidence that a few days after the accident the glazier put new strips around the window, and that, when witnesses examined the window some time after the accident, they found the strips had been changed since the original construction, should have been excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 918.]

#### 3. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in the admission of evidence for plaintiff was harmless, where the defendant on cross-examination, elicited evidence to the same effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

#### 4. MASTER AND SERVANT—LIABILITY FOR INJURY TO SERVANT.

A master's liability for injury to a servant, if liability attaches at all, depends on a breach by him of some imposed duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 135.]

#### 5. SAME—DUTY TO FURNISH SAFE MATERIALS AND APPLIANCES.

A master is required to exercise due care to provide and maintain safe materials and appliances with which the servant may perform his work, but he is not an insurer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 172, 173.]

#### 6. SAME—ASSUMPTION OF RISK.

Where a servant engages to perform services for compensation, it is implied as a part

of the contract that, as between himself and his employer, he assumes all the risks incident to the service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 538-543, 550.]

#### 7. SAME—DUTY OF SERVANT TO EXERCISE DUE CARE.

Where an employer had not established any rule or custom of independent inspection of the windows in its building, and the window from which the glass fell and cut an employé was of simple design, and the employé had ample opportunity to examine its condition from day to day for several months before the accident happened, and was about 50 years old and of ordinary intelligence and capacity, it was incumbent on him to observe its condition for his protection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706-722.]

#### 8. NEGLIGENCE—RES IPSA LOQUITUR.

The doctrine of *res ipsa loquitur* is inapplicable to establish a defect in the construction of a window or a failure to maintain the same in good repair from the mere fact that the glass fell therefrom, where it cannot be fairly and reasonably inferred from the circumstances themselves that negligence in constructing or in maintaining the window caused the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 218.]

Appeal from Baltimore City Court; George M. Sharp, Judge.

Action by John W. Harman against Stewart & Co. Judgment for plaintiff, and defendant appeals. Reversed, without new trial.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

Jesse Slingluff and William L. Marbury, for appellant. Thomas C. Weeks, for appellee.

WORTHINGTON, J. This is a suit by an employé against his employer to recover damages for an injury which the former sustained while engaged in the performance of his duties. The defendant is a mercantile corporation carrying on business in the building at the northwest corner of Howard and Lexington streets, in Baltimore city. Plaintiff was at the time of the accident complained of employed by the defendant to make himself generally useful on the fourth floor of its place of business. Some of his duties were to clean furniture, to help carry out furniture, and, more to the point so far as this suit is concerned, to open in the morning and to close in the evening the windows of that floor. The plaintiff testified that he had performed this duty every day during the five or six months of his employment there. These windows were large, their dimensions being six by eight feet, each containing a single pane of heavy plate glass from about three-eighths to one-half an inch in thickness. The windows were opened and closed by means of fixed pivots, one at the top and one at the bottom of the window frame. There was also attached to the bottom of each window frame a device for controlling the window and holding

it open or shut, or at any angle desired. It is not deemed necessary for the purposes of this case to minutely describe this device, as there is no contention that it was not in good condition. On the afternoon of June 4, 1906, the plaintiff had just closed one of these windows, when in an instant a great many fragments of broken glass from the pane in that window fell upon the backs of his hands, cutting and injuring him severely. The manner in which the accident happened is briefly described by the plaintiff as follows: "Q. Will you describe to the jury how you closed that window? A. It works on a pivot in the middle, and you had to push. The window closed very readily. I had the window closed, and my left hand was resting on the sill, and I was in the act of pulling down the blinds with the right hand, and, like a flash, I should judge about 1,000 pieces came out and struck me here [indicating the backs of his hands]. Q. Did the glass fall outward or inward? A. Some fell outward and some fell inward." This was all the evidence offered by the plaintiff as to the manner in which the accident happened, and as he was, at the time of the accident, hidden from view by some furniture in the room, no one but himself saw how it happened, though another employé of the defendant, a Mr. Gregg, a floorwalker, who had charge of the room, testified that he could see the top of the window at the time it was closed; that the window closed rapidly, with a bang, and then he heard a terrible smash of glass. He said he examined the window immediately after the accident, and found the window glass broken out with the exception of some large pieces adhering to the beading around the edge. He also testified that, as far as he could see, the strips or beads which held the glass in the window sash were in perfect condition.

The defendant proved very satisfactorily that the window in question had been properly constructed, and the plaintiff does not on his part seriously contend that the window was not so constructed in the first place, but does contend that it was not maintained in a reasonably safe condition, and that, therefore, for its alleged failure so to maintain this window the defendant is chargeable with negligence. In what respect it was not maintained in a safe condition was not shown, and no evidence, except the fact of the breaking of the window under the circumstances above narrated, was adduced to prove any defect therein, unless the testimony of Mrs. Harman, plaintiff's wife, to the effect that a few days after the accident she was standing on the street and saw Mr. Kaufman, the glazier, putting new strips around the window, and the testimony of two other witnesses to the effect that, when they examined the window some time after the accident, they found the strips had been changed since the original construction, might be so considered. The evidence of

Mrs. Harman as to what occurred several days after the accident does not prove or fairly tend to prove any defect in the window at the time the accident happened. These strips or beads to which she referred were used to secure the glass in the sash after it had been set in the rabbet, and were fastened to the sash from the outside. Possibly the old strips were broken or injured in removing the fragments of glass that adhered to the sides of the sash after the accident happened. Possibly they were broken while being removed, preparatory to putting in a new glass. When the question at issue is the liability of defendant for the alleged faulty construction or improper maintenance of an appliance, evidence of events transpiring after the happening of the accident is usually inadmissible. *Columbia v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405; *Ziehm v. Electric Light, etc., Co.*, 104 Md. 48, 64 Atl. 61. We think, therefore, that, as this evidence was objected to, it should have been excluded, but, as the defendant upon cross-examination elicited evidence to the same effect, the ruling of the trial court in this regard furnishes no reversible error. *Leffler v. Allard*, 18 Md. 545. In the view that we take of the case, however, we do not consider this evidence important.

The defendant showed that the windows in the building had been in the first instance properly constructed by a competent builder; that such construction was a safe one; that the glass was good plate glass of glazing quality; and that the beading used to hold the glass in the sash was of the usual size and sufficient to make a good construction. Mr. Grim, a carpenter employed by the defendant, testified that he boarded up the opening the afternoon after the glass was broken out, and that the beads that held the glass in the window were in proper condition; no part of them being moved out of the way. Mr. Gregg, floorwalker for defendant, testified that he went to the window immediately after the accident, and found the window glass broken out, with the exception of some large pieces adhering to the beading around the edge, and that, as far as he could see, the beading seemed to be in perfect condition. He did not see where any of it was gone. Mr. Kaufman, the glazier who put the glass in the sash when the building was originally constructed eight or nine years before, testified that he put a new glass in the window after the accident, and that, when he went there for that purpose, he found the beads and everything all right, except that the glass was gone. This witness also testified that the beading originally put on the window to hold in the glass was five-eighths of an inch, and that when he went there to put in the new glass he found the beading to be seven-eighths of an inch. The witness Morrow also testified that the beading which held the glass in place was five-

eighths by three-quarters. On cross-examination this witness stated that the beading at the time of the trial was larger than that originally used for the purpose of securing the glass. When the larger beading was put on the window did not appear, except from the testimony of Mrs. Harman, as above stated. The only evidence in the case therefore, to show that the window was in any respect defective on the day that the accident happened is the inference to be drawn from the testimony that beading slightly different from that used in the original construction was put in the window after the accident. This inference is rebutted by the direct testimony of two witnesses who examined the window immediately after the accident happened, and who stated that the beading was then in good condition.

But, assuming that there was sufficient evidence of a defective beading at the time of the accident to justify submitting that question to the jury, what evidence is there that such defective beading caused or in any way contributed to the accident and injury? How was the beading defective? How did such defect, if any, contribute to the accident? Even if we assume that some defect in the beading did in some unexplained manner contribute to the accident, still where is the evidence legally sufficient to show that defendant did not use due and reasonable care to maintain the window in a safe condition? In order to recover in this case, it is incumbent on the plaintiff to show, not only how the accident happened, but also that the defendant was remiss in respect to some matter which caused the accident. *Buswell*, Per. Inj. 111a. The master's liability, if any liability attaches at all, depends altogether upon a breach by him of some imposed duty. Now, the law imposes upon the master the duty toward his servant of exercising due and reasonable care to provide and maintain proper and safe materials and appliances with which the servant may perform his work, but a master is not an insurer of his servant's safety. *Wood v. Heiges*, 83 Md. 269, 34 Atl. 872. When the servant engages to perform certain services for compensation, it is implied as part of the contract that, as between himself and his employer, he assumes all the risks incident to the service. In the absence of any rule or custom of the employer to inspect and test appliances with which his employes perform their respective services, and in the absence of any rule of law requiring him to do so, the employes themselves are expected to exercise circumspection for their own safety. As stated in *Buswell* on Per. Inj. § 204: "The principle is that, where a servant has as good opportunity as the master to ascertain and avoid the danger himself, he will have no recourse against the master in case he is injured thereby, and he accepts the employment upon this implied condition." Upon this principle the case of *McGorty v. Southern, etc., Tel. Co.*, 69 Conn.

625, 38 Atl. 359, 61 Am. St. Rep. 62, was decided. In that case the plaintiff, who was employed as a lineman by defendant, climbed an old pole for the purpose of removing the wires and cross-arms therefrom, and while thus engaged the pole fell, by reason of its being rotten at the base, and the plaintiff, falling with it, received serious injuries. It was not shown that there was any rule or practice of the defendant to inspect and secure poles before linemen were sent to work upon them, and the court, in disposing of the case, said: "Whether it is incumbent upon the master or upon the servant to perform such a duty is usually a question of fact depending upon the terms of the contract of employment; the servant's knowledge of the hazards of the work in which he is engaged; his ability and opportunity to discover dangers to which he is exposed, and to avoid them, and upon other circumstances." And it was determined, under the circumstances of that case, "that each lineman should look out for his own safety in climbing poles," and that the master was not guilty of negligence for failure to provide a system of independent inspection. The same principle was also applied in the case of *Piper v. Cambria Iron Co.*, 78 Md. 249, 27 Atl. 939, where this court said: "While employers should be held to a strict performance of duty toward their employes, yet the latter must be required to exercise some prudence, and to use the necessary means supplied to them to enable them to do their work in a safe and expeditious manner."

In the present case there is no pretense that the defendant had established any rule or custom of independent inspection of the windows in the building, and as the window in question was of simple design, and the plaintiff had ample opportunity to examine its condition from day to day for several months before the accident happened, no system of independent inspection would seem to have been necessary. The plaintiff was a man about 50 years of age, and there was nothing to show that he was not possessed of ordinary intelligence and capacity. It was therefore incumbent upon him to observe the condition of the windows from time to time for his own protection as well as that of the defendant. In fact, Mr. Gregg, the floor-walker, testified that it was the plaintiff's duty to report to him if any of the windows on that floor were out of order, and, while the plaintiff denied this when examined in rebuttal, yet we think that under the circumstances of this case this duty was imposed upon him by the very nature and character of his employment. As stated by Mr. Justice Field in *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755: "If the servant failed to exercise that prudence, care, and caution which prudent men under similar circumstances would ordinarily exercise and thereby contributed approximately to the injury, he was not en-

titled to recover." In Toledo, etc., R. R. Co. v. Eddy, 72 Ill. 188, where an employé was injured by a fall from a ladder of which he had been for some time in constant use, the fall having been caused by reason of some defect in the ladder, it was held that it was the duty of the employé himself to see and to know that the ladder was in repair, and, if not, to report the fact to the proper person for repair; that it was negligence on his part not to do so; and that the company was not liable.

Thus far we have proceeded upon the assumption that the plaintiff had proven, or given evidence tending to prove, some defect in the window, which caused or which directly contributed to the accident and injury complained of, while in fact no such evidence has been offered. The plaintiff contends, however, that the mere fact of the falling of the glass is itself evidence of such defect, and also of the defendant's negligence in not maintaining the window in good repair—in other words, that the doctrine of *res ipsa loquitur* is applicable to this case—and in this contention he is sustained by the ruling of the trial court in granting his first prayer. But, before this doctrine can be applied, the efficient cause of the accident must be shown by the testimony. Evidence of some defect, by reason of which the accident happened, must be adduced. Ordinarily it is necessary to show how the accident happened, and then to prove negligence on the part of the defendant in respect to some matter which caused the accident, and the mere fact that an accident happened which caused the injury is not of itself generally sufficient to authorize an inference of negligence. Buswell, Personal Inj. 111a. Until it is known what occasioned an injury, it cannot be said that the defendant was guilty of some negligence that produced the injury. *Benedict v. Potts*, 88 Md. 56, 40 Atl. 1067, 41 L. R. A. 478. To mulct a defendant in damages without proving what caused the accident is to punish it, not for any wrong it has done, or for any duty which it has omitted, but because we cannot prove what we wish to find out. *South Baltimore Car Works v. Schaefer*, 96 Md. 105, 53 Atl. 665, 94 Am. St. Rep. 560.

To test the soundness of plaintiff's contention, let us suppose that the whole pane had fallen out, unbroken, and had struck and injured the plaintiff on the first day of his employment. The reasonable inference is that such an accident could only have happened from some defect in the window, and the mere fact of its falling whole and entire from the sash would be evidence of such defect, and in the absence of satisfactory explanation by the defendant, it would speak against him as to the exercise of due care on his part. In such a case the rule would be applicable, because it could be fairly and reasonably inferred from the circumstances themselves that negligence on the part of the defendant in prop-

erly constructing or in properly maintaining the window caused the accident. But in this case the glass was broken into "a thousand pieces," to use the expression of the plaintiff, before it fell, and such breaking may have been caused by its being struck with a piece of furniture, in moving it, during the day, or by the force of the wind, or, as seems most likely, by its being shut with too great violence by the plaintiff himself. If it occurred under any of these circumstances the defendant would not be liable, because the plaintiff was in charge of the window and had opened and shut it daily for five or six months in absolute safety, and, if there were defects in the window and he failed to discover them, or if he broke the window by shutting it too violently, in either event his own negligence was the cause of the injury, and he could not recover. It has been held in a number of cases that the sudden breaking of machinery is not of itself sufficient to warrant the court in sending the case to the jury. *South Baltimore Car Works v. Schaefer*, 96 Md. 105, 53 Atl. 665, 94 Am. St. Rep. 560. As was said by this court in the case of *Benedict v. Potts*, 88 Md. 54, 40 Atl. 1068, 41 L. R. A. 478: "The negligence alleged and the injury sued for must bear the relation of cause and effect. The concurrence of both and the nexus between them must exist to constitute a cause of action." The negligence alleged and chiefly relied on in this case is that "the defendant failed to maintain said window in such condition that it could be safely used"; and the only evidence of any such defect is the inference to be derived from the testimony that after the accident happened new heading was used to hold the window in place, but there is no evidence whatever that any defect, if any existed, caused the accident complained of, or that there was any connection between such alleged defect and the injury. In *Schaefer's Case*, supra, this court, quoting from *Stringham v. Hilton*, 111 N. Y. 197, 18 N. E. 873, 1 L. R. A. 483, said: "The same machine was continued in use for several years. When used with ordinary care, there was no reason to suppose that harm or mischief would result. This fact brings the case directly within the rule that when an appliance or machine not obviously dangerous has been in daily use for a long time, and has uniformly proved adequate and safe, its use may be continued without imputation of negligence." We think this language is applicable to this case. The doctrine of *res ipsa loquitur* does not apply; at least not against the defendant.

It follows from what we have said that there was error in granting the plaintiff's first prayer, and, as we do not think the plaintiff is entitled to recover, the judgment appealed from will be reversed without a new trial.

Judgment reversed, with costs.

(76 N. J. L. 301)

BERRY et al. v. DE MARIS et al.

OLIPHANT v. EDWARD et al.

(Supreme Court of New Jersey. July 17, 1908.)

**1. FORFEITURES — PENALTIES — RELIGIOUS WORSHIP—TRAFFIC.**

Sections 10, 11, and 12 of the vice and immorality act (3 Gen. St. 1895, pp. 3710, 3711) enact that it shall be lawful for certain officers to seize any booth, tent, boat, or vessel and all articles of traffic of any person, other than those pursuing their regular business in the usual places, who shall have such booth, etc., for the purpose of selling or disposing of such articles of traffic within three miles of any place of religious worship during the times of holding any meeting for religious worship at such places. Such booths, tents, etc., and the articles of traffic are declared to be forfeited, and the officers are empowered to advertise and sell the same, and after deducting the expenses of such seizure and sale to pay the residue of the proceeds to the overseer of the poor.

*Held*, that the provision for confiscating the proceeds of the sale imposed a penalty upon the owner of the property by way of a forfeiture for violating the statute.

**2. CONSTITUTIONAL LAW — DUE PROCESS OF LAW—SEIZURE AND SALE.**

*Held*, that the owner could not be thus penalized or his property thus forfeited without his being first afforded a judicial hearing.

**3. NUISANCE — SUMMARY REMEDY—POWER OF LEGISLATURE.**

The power of the Legislature to authorize the summary destruction of property, which it has impressed with the character of a nuisance, is recognized, and the cases of *Weller v. Snover*, 42 N. J. Law, 341, *Shivers v. Newton*, 45 N. J. Law, 469, and *Newark v. Hunt*, 50 N. J. Law, 308, 12 Atl. 697, are discussed and distinguished.

**4. FORFEITURES—SALE OF PROPERTY.**

A statute may authorize the sale of property used in violation of a police regulation in some instances.

(Syllabus by the Court.)

Actions by Joseph Berry and Thomas E. Ackley against R. F. De Maris and others, and by Cooper H. Oliphant against F. Edward and others. Judgments for plaintiffs on demurrers to plea.

Argued June term 1907, before the CHIEF JUSTICE and REED, J.

Jona. W. Acton, for plaintiffs. Thomas B. Hall, for defendants.

REED, J. The declaration is an action of tort. It charges that the defendants, on August 25, 1906, converted 6 watermelons, 250 quarts of ice cream, half a ton of ice, 20 cases of soft drinks, 40 quarts of milk, 10 boxes of candy, 26 pounds of poultry, 100 pounds of beef, 3 bushels of oats, 100 pounds of cracked corn, 35 pounds of butter, 700 pounds of hay, 30 pounds of lard, and 1 ham, the property of the plaintiffs. The second plea sets up certain facts in justification of the tort. The facts so pleaded, it is insisted, legalizes the acts of the defendants by force of sections 10, 11, and 12 of the "Act for the suppression of vice and immorality." 3 Gen. St. pp. 3710, 3711. Section 10 of that act provides that: "From and after the passage of this act it shall not be lawful for any person or persons

to erect, place or have any booth, stall, tent, carriage, boat or vessel, or other place for the purpose or use of selling, giving or otherwise disposing of any kind of articles of traffic, spirituous liquors, wine, porter, beer, cider, or any other fermented mixed or strong drinks (except as hereinafter excepted) within three miles of any place of religious worship in this state during the time of holding any meeting for religious worship in such place." Section 11 provides that: "If any person or persons shall violate this act by doing the acts mentioned in the preceding section, the person or persons so offending shall first be informed of his, her or their violation of this act, and shall be warned by any justice of the peace, constable, or two freeholders of the county where the offense is or shall have been committed, to desist from such offense, and to remove such booth, stall, tent, carriage, boat or vessel, together with all such articles of traffic, etc., belonging to or in the possession of the person so offending; and if such person or persons on receiving such information and warning shall forthwith cease to offend against this act and shall remove at least three miles from such place of religious worship, then no other proceeding under this act shall be had against such person or persons; but if such person or persons shall refuse or neglect immediately to remove when notified or warned as aforesaid, then all the said articles of traffic, spirituous liquors, wine, porter, beer, cider, and other fermented, mixed and strong drinks, and all the vessels, chests and other things containing the same, together with such booth, stall, tent, carriage, boat or vessel, or other place prepared or used for the purpose aforesaid, shall be and are hereby declared to be forfeited; and it shall be lawful for any justice of the peace, and constable with two freeholders of the county, to seize and take possession of all or any part of the said forfeited articles and liquors, together with such booth, stall, tent, carriage, boat or vessel; and at any time within ten days after, to advertise and sell the same; and after deducting and paying the necessary and lawful expenses for such seizure and sale, the residue of the proceeds of such sale or sales shall be paid to the Overseer of the Poor of the township." Section 12 provides that: "Nothing in the act shall affect any licensed hotel keeper in his or her ordinary or lawful business at his or her usual place or residence specified in his or her license, nor shall it be so taken and construed as to affect any merchant, shopkeeper, farmer, mechanic, or other person in the usual and lawful prosecution of his or her or their ordinary concerns and business in their places of doing such business." The second plea sets out: That the plaintiffs, within three miles of a camp meeting, a place for religious worship, and during times of holding a meeting or meetings for such religious worship at such place then and there being held, had a certain building or place for the purpose and use of selling, bar-

tering, giving, or otherwise disposing of certain articles of traffic, to wit, the articles mentioned in the declaration, and which building or place was then and there being used by the plaintiffs as a place for the temporary sale, gift, or other disposition of such articles of traffic, and the same were then and there by the said plaintiffs sold, etc.; that the plaintiffs were warned by the defendant Potter, as a justice of the peace, the said Potter being then and there duly elected and qualified to perform the duties of a justice of the peace, and by one Milo, as constable, the said Milo being then and there elected as a qualified person to perform the duties and office of constable. De Maris and Fox, both freeholders of the county of Cumberland, warned the plaintiffs, who refused to cease from offending, whereupon the articles were taken in the possession of the defendants, advertised, and sold, and the expenses of the sale deducted, and the residue paid to the overseer of the poor.

The grounds of demurrer to this plea are: First, that the plea does not say that Potter, the justice of the peace, and Milo, the constable, were clothed with the authority claimed for them. This ground, as explained by the brief of the plaintiffs' counsel, rests upon the alleged failure of the plea to say that they were authorized to act in Cumberland county where the articles were seized. The statute confers power upon a justice of the peace and constable, and two freeholders of the county. Assuming that the two officers first mentioned must also be officers within the county, the plea sets out that they were then and there duly elected and qualified to act as such officers. "Then" refers to the last antecedent time mentioned, namely, August 24, 1906, and "there" refers to the place last antecedently mentioned, namely, in the county of Cumberland, state of New Jersey. It seems therefore that the statement was that each was elected and qualified to perform his official duties in the county of Cumberland at the date of the seizure.

It is next insisted that the plea is double. The duplicity of the plea is said to arise from the fact that it first denies the statement in the declaration that the plaintiffs were engaged in the occupation of shopkeepers in the usual and lawful transactions of their ordinary concerns and business, in their usual place of doing business, and then proceeds to set up other facts as justification. The plaintiffs' brief insists that the plea thus presented two defenses, namely, a justification under the statute, also a traverse of certain material facts set out in the declaration. But the traverse of the fact that the articles were being used by the plaintiffs in conducting a sale in their usual place of business and in the lawful transaction of their ordinary business did not in itself present a defense, for, if the traverse was proved to this extent only, the plaintiffs nevertheless would have been entitled to recovery. The allegation in the dec-

laration only became material in view of the entire plea setting out the steps taken pursuant to the statute to sell in a summary manner the articles mentioned. The single defense rested upon the entire plea, a necessary part of which was the statement that the plaintiffs were engaged in conducting a temporary business. There is nothing therefore in this point.

The third ground of demurrer is an attack upon the validity of the statute upon which the plea rests the justification. It is insisted that this statute is unconstitutional because it conflicts with the fourteenth amendment of the federal Constitution, and it also conflicts with the first and sixth sections of article 1 of the state Constitution. The statute under consideration was originally passed in 1820, and has but once been the subject of judicial consideration. It came before this court in the case of *Rogers et al. v. Brown et al.*, 20 N. J. Law, 119. The court construed the act as including within its provisions all articles of traffic, and as not being confined to the sale of intoxicating liquors alone. The constitutionality of the act was not called in question. Indeed, the decision was rendered a year before our present Constitution was adopted. I have no doubt of the ability of the Legislature, under the police power with which the state is vested, to pass an act providing that hucksters, peddlers, and temporary traders shall not assemble and ply their vocations in the vicinity of a religious meeting. The confusion resulting from the presence of such camp followers is calculated to distract the attention from the purposes of the gathering, and should afford sufficient ground for legislative recognition. Acts providing penalties for the disturbance of religious gatherings were common in England (*L. Russ. on Crimes*, 299) and in this state. Judge Patterson's act for suppressing vice and immorality, passed in 1798, provided a penalty for disturbing an assembly of people met for religious worship. In *Commonwealth v. Bearse*, 132 Mass. 542, 42 Am. Rep. 450, the Supreme Court of Massachusetts had occasion to pass upon the validity of a statute in every substantial feature, save power to take and sell property, like the present statute. The opinion of Justice Devens contained a full discussion of all the objections raised against the legislation and vindicated its validity. Similar results were reached in the cases of *State v. Cate*, 58 N. H. 240; *State v. Read*, 12 R. I. 137; *Meyers v. Baker*, 122 Ill. 567, 12 N. E. 79, 60 Am. Rep. 580; *State v. Stowell*, 103 N. C. 416, 8 S. E. 900. In these cases the acts of those temporary dealers who entered within the proscribed territories and plied their vocations were made misdemeanors and subjected the intruders to a penalty. There is thus abundant authority supporting legislation which prescribes a punishment by imprisonment, or fine and forfeiture after trial upon the perpetrator of acts similar to those mentioned in the present act.



The criticism of the present statute is aimed at that feature which permits the seizure and sale of the articles exposed for sale, together with the articles containing them, and the temporary structure employed for their exhibition, and the confiscation of the proceeds, without a previous trial. The fourteenth amendment to the federal Constitution, which provides that no state shall deprive any person of property without due process of law, is perhaps no more restrictive than section 1, art. 1 of our Constitution, which clause puts property under judicial protection, so that its owner cannot be deprived of it except by the law of the land. Both include the proposition that the owner shall not be stripped of his property without an opportunity to be heard in defense of his property rights. 10 Enc. of Laws, pp. 290-293, note 2. It is entirely settled, however, that the restriction upon the legislative power of the states imposed by either Constitution does not extend to a limitation upon the exertion of the police power which inheres in the state. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *In re Rahrar*, 140 U. S. 545, 11 Sup. Ct. 805, 35 L. Ed. 572. Inasmuch as the power of the Legislature, in the exercise of police power, to declare certain uses of property to be a nuisance, exists, and inasmuch as the power to abate nuisances has always existed, it is apparent that the scope of legislative authority to deal with property in this respect was left unaffected by these constitutional guaranties. The power of the Legislature, however, to fix upon certain uses of property the character of a nuisance, is not unlimited, but is subjected to judicial supervision. *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385. The power of the Legislature to deal with property which by use becomes a nuisance, by providing for its summary destruction or confiscation, is not unrestricted. 1 Cyc. 78, note 4.

The query is whether the legislation upon which the defendants rely in the present case is valid as a support for their action in selling and confiscating the proceeds of the sale of the property of the plaintiffs. There are cases in abundance in which the power of the Legislature to authorize the destruction of property used in violation of a statute, designed as a police restriction, has been judicially vindicated. In *Weller v. Snover*, 42 N. J. Law, 341, the Legislature provided for the protection of fish in the Delaware river. It empowered the fish warden to visit any apparatus for taking fish, for the purpose of removing same. It directed that officer to give notice that such contrivances were known to exist, and that they were declared common nuisances, and to order them to be dismantled. It empowered the officer, if after 10 days from the notice the dismantling had not taken place, to proceed to remove and destroy the obstruction.

This provision for the destruction of fish baskets was held to be valid. In *Shlyers v. Newton*, 45 N. J. Law, 469, the legislative provision which conferred upon a milk inspector the power to condemn and pour upon the ground any milk which he found to be adulterated was held to be constitutional. In *Newark, etc., Horse R. R. Co. v. Hunt*, 50 N. J. Law, 308, 12 Atl. 697, the act made glanderred horses a public nuisance and authorized their destruction by certain officers. It was held that the act was within the police power of the state. It was held that it was not prohibited by the fourteenth amendment of the federal Constitution, even although the statute authorized the destruction of obviously diseased animals in advance of judicial determination of the existence of a nuisance. It was also held, following *Hutton v. City of Camden*, 39 N. J. Law, 122, 23 Am. Rep. 203, that a right of action remained to property owners against the officers who destroyed property, and a right to recover in case there was no statutory nuisance. It was held that so long as the Legislature did not attempt to abridge that right the statute was sound. So it was held in *People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522, that jurisdiction to destroy property as a nuisance rested upon the proof that it was a public nuisance.

The power to destroy before trial was vindicted upon the ground that the cause was not final, and that the owner of the property retained his right of action in case the officers destroying the property exceeded their jurisdiction by the destruction of that which was not a nuisance. The cases of *Shivers v. Newton*, and *Newark v. Hunt*, *supra*, may be classed as cases exhibiting the legislative ability to provide for the summary destruction of property which is a nuisance per se. Glanderred horses likely to spread the disorder to other animals, and adulterated milk (*Deems v. Baltimore*, 80 Md. 173, 30 Atl. 648, 28 L. R. A. 541, 45 Am. St. Rep. 339), are instances of property in itself noxious to the public welfare. So the Legislature may authorize the tearing down of buildings erected within fire limits, if these are made nuisances per se. *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *King et al. v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89.

There is however, another class of nuisances which arises from the particular uses of property, which property is in itself innocuous. The power to abate nuisances of this class at common law extended only to acts which were essential to abolish its use and did not permit the destruction of the property, unless necessary for that purpose. Thus, houses used for the purpose of gaming, and houses used for the purpose of prostitution, could not be destroyed for the purpose of abating the nuisances of gaming and prostitution. Nor could the Legislature empower



the summary destruction of such houses without a notice and hearing afforded to the owners. Then there is a class of articles used in violation of police statutes, but also usable for other purposes, about the power to provide for the summary destruction of which there is a diversity of judicial sentiment. This diversity is exhibited in cases dealing with the summary destruction of gaming apparatus. *Lowrey v. Rainwater*, 70 Mo. 152, 35 Am. Rep. 420; *State v. Robbins*, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438; *Board of Police Com'rs v. Wagner*, 93 Md. 182, 48 Atl. 455, 52 L. R. A. 775, 86 Am. St. Rep. 423. There is the same diversity of judicial opinion respecting the right to destroy intoxicating liquors in the same circumstances. *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Lincoln v. Smith*, 27 Vt. 323; *Oviatt v. Pond*, 29 Conn. 475; *Sullivan v. City of Oneida*, 61 Ill. 242. In the case of *Weller v. Snover*, supra, the legislative ability to empower fish wardens to dismantle and destroy fish baskets set in the Delaware river and its tributaries, in violation of law, was, as already observed, asserted. In that case the point made against the legislation was that the statute warranted the destruction of the materials of which the fish basket was constituted. The court remarked that "the destruction of the basket did not call for any very nice care in preserving the materials of which it was composed." It is true that the justice writing the opinion further remarked that, "if the destruction of the basket would not warrant the destruction of the materials of which it was composed, it must yet be admitted that the basket was in the stream in clear violation of the law, and so was forfeited to the state, and, if forfeited, it was lost to the owner when seized, and he could not be injured by its destruction." This last remark, however, was beside the question whether there could be a forfeiture without a judicial determination of the facts upon which the forfeiture would arise. The first ground mentioned by the court in *Weller v. Snover*, supra, is in line with the view of the Supreme Court of the United States expressed in *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385. This case involved the constitutionality of a statute of New York which provided for the summary destruction of fishing nets employed in violation of the provision of a statute. Those provisions were similar to the provisions of the statute dealt with in *Weller v. Snover*, supra. The federal Supreme Court, after citing *Weller v. Snover*, remarked: "It is true there are several cases of a contrary purport. Some of these cases, however, may be explained upon the ground that the property seized was of considerable value. In *Ieck v. Anderson*, 57 Cal. 251, 40 Am. Rep. 115, boats as well as nets; *Dunn v. Burlleigh*, 62 Me. 24, teams and supplies in lumbering; *King v. Hayes*, 80 Me. 206, 13 Atl. 882, a horse."

There was here a plain intimation that, had the nets been of great value, a value plainly in excess of what it would have cost to try the question of the violation of the statute, or the cost of selling the articles, the court would have required a preliminary judicial determination before destruction, rather than put upon the owner of the property the burden of bringing an action after its destruction. In both the cases of *Weller v. Snover* and *Lawton v. Steele*, supra, the property was so nearly useless for any legal purpose, and was therefore so nearly a nuisance per se, that upon that ground alone the ability of the Legislature to enact its summary destruction could probably be rested.

The statute in the present case differs from that in the cases just mentioned: First, because it deals with property which may be of very great value; and, second, because it does not provide for the destruction of the property, but for its sale. It cannot be doubted that the Legislature may, in some instances, provide for the summary sale of property which is not a nuisance per se, but only becomes such by the manner of its use, or by the manner in which it is permitted to be used. The law respecting straying animals is an instance of this. Cattle, when permitted to run at large are, under the statutes of most states, nuisances, and can be impounded, and after notice can be sold, and, after deducting the expenses of the impounding, keep, and sale of the animals, the proceeds are to be paid over to the owner of the animals. These statutes have been held to be specimens of valid legislation. The owner is given the right to reclaim the animal, the expense of keeping the animal is self-destructive, and an early sale is reasonably necessary, and so long as the proceeds of the sale, after deducting reasonable expenses, are turned over to the owner, it is not a forfeiture of property, but an ordinary remedy for a public grievance. In *Grover v. Huckins*, 26 Mich. 482, and in *Wilcox v. Hemming*, 58 Wis. 144-151, 15 N. W. 435, 46 Am. Rep. 625, this matter is well discussed. So in similar cases where for the abatement of nuisances it is essential that property should be taken into the possession of certain officers to prevent its use in an illegal manner, in such instances, if the property is of a perishable character, it may be sold before the judicial determination of the rights of the parties. A provision for the summary sale of milk, fruit, and ice cream would be entirely justifiable, although they were not nuisances per se.

The power conferred by the present act does not stop with the taking of possession of the illegally used property, but provides for the sale, and, after paying the expenses of the taking and the sale, provides that the residue of the proceeds shall be paid to the overseer of the poor of the township. The statute deals with property of values ranging from the slightest to the greatest. It will include a box of matches, a tin cup, a ton of

hay, a railroad car, or a sloop or brig. In the language of Judge Thompson in delivering the opinion in the case of *Fetter v. Wilt et al.*, 46 Pa. 457, in speaking of a statute similar to the one under consideration: "Had the property been of the value of \$5,000, instead of the sum named, the power to confiscate it was equally adequate. Nay, even a steamboat or ship might be the subject of this summary process if moored to the shore of some of our larger streams within three miles of a religious meeting, if the owner should attempt to sell or dispose of articles of traffic and refused to move immediately at the bidding of some magistrate."

The feature, however, which particularly distinguishes the statute under consideration from those which have received judicial approval, is that which provides for the forfeiture of the proceeds of the sale of the property. The forfeiture of the property and the confiscation of proceeds of the sale thereof was designed as a penalty for the violation of the statute. The Legislature could not have provided for the levying of a fine, or pecuniary penalty upon the transgressor against the statute, or upon his property without affording him a hearing of a judicial character. Neither could it strip him of any portion of his property as a penalty, without affording him similar protection. Forfeiture of the property of a wrongdoer under the criminal law of England followed a trial and conviction. Forfeiture of lands to the crown followed an inquisition. In all the numerous statutes providing for the forfeiture of property used in violation of the revenue laws, I know of none that pretends to effect the forfeiture, save through a judicial decree of judgment. While there is no constitutional prohibition against a statutory provision for the forfeiture of property used to commit an unlawful act, such a statutory provision is not an exertion of the police power, but a provision that must be executed through the judicial power. Freund, *Police Power*, §§ 525, 526. In the language employed in 19 Cyc. 1359: "There can be no forfeiture of property unless the forfeiture be judicially determined. A statute or ordinance which allows the seizure and confiscation of a person's property by ministerial officers without inquiry before a court, or an opportunity of being heard in his own defense, is a violation of the elementary principles of law and the Constitution." This doctrine was recognized by our Court of Errors in the case of *Haney et al. v. Compton*, 36 N. J. Law, 507. The Legislature had enacted a statute to protect the rights of citizens of the state to fish for clams and oysters in the waters of the state, and had provided that it should not be lawful for any person who had not been for six months a resident of this state to rake or gather oysters or other shellfish in the waters of this state on board of any vessel; and further enacted that every person who should so offend should pay a penalty and enacted that

the vessel and apparatus for fishing should be seized, that notice should be given to two justices of the peace who were empowered to hear and determine the same, and, if the vessel was condemned, that it should be sold and the proceeds of the sale appropriated, one-half to the person who made the seizure, and one-half to the collector of the county where the offense was committed. This legislation was sustained as an internal police regulation. It was urged in criticism of the statute that it deprived the owner of the vessel of his property without due process of law, because the vessel could be seized without process being issued and without notice to the owner. The reply of the court to this criticism was, not that a judicial determination was not necessary to support the sale and the appropriation of the proceeds thereof, but the answer of the court was that the statute provided for a proceeding in rem, which was itself notice to the owner, and provided that before the condemnation of the vessel there should be a hearing and determination of the matter before a competent tribunal.

For the reason that no such provision is to be found in the statute invoked to support the plea in this case, we think the statute is unconstitutional, and the plea setting it up is bad. There should be judgment for the plaintiff on the demurrer to the plea.

In the case of *Cooper H. Oliphant v. James F. Edward et al.* the same questions arise on a demurrer to a plea, and for the reasons just given there should be judgment for the plaintiff on the demurrer to the plea in that case.

(74 N. J. E. 438)

#### PRYOR v. GRAY.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

#### CHATTEL MORTGAGES—EXECUTION—EVIDENCE.

Proof of the oath of one who did not, in fact, subscribe his name as a witness to the execution of a chattel mortgage by a corporation, although he deposes that he did so subscribe, is not the proving of an instrument sufficient to authorize its record so as to give it priority over creditors, under our statute, which requires such proof to be made "by one or more of the subscribing witnesses to it." The proof must be made by one who subscribes his name as a witness after seeing the writing executed, or hearing it acknowledged.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Robert W. Pryor, receiver, against Allan J. Gray. Decree for defendant, and plaintiff appeals. Affirmed.

Frank Benjamin, for complainant. Malcolm MacLear, for defendant.

BERGEN, J. The complainant, as receiver of an insolvent corporation, filed his bill of complaint, and therein prays that a chattel mortgage given by the corporation to the

defendant be decreed void as to creditors, because its execution was not proven as required by our statute. The attestation clause reads: "In witness whereof the said party of the first part has caused this mortgage to be signed by its president and the seal of the company affixed." The mortgage was signed by the president, its common seal affixed, and under it written: "Attested: Robert D. Gemeln, Secretary." The execution of the writing was attempted to be proven by the oath of a person who deposed that the seal of the company was affixed, and the mortgage signed and delivered by the president of the company as its voluntary act and deed, "and that he thereupon signed the same as subscribing witness." It is admitted that the deponent did not subscribe his name as a witness to the execution of the mortgage. The Vice Chancellor held that the proof of execution did not conform to our statute, and therefore the mortgage was void as to creditors. Whether the proof will be sufficient, if there be no subscription by the witness, provided the person making the proof testifies that the execution was completed in his presence, and that he subscribed his name as a witness, although in fact he did not do so, as suggested by the Vice Chancellor, need not now be determined. Our statute requires that instruments of this nature, when proved "by one or more of the subscribing witnesses to it," shall be received in evidence, and that, when so proved, may be recorded. It thus appears that, in order to justify the recording of any instrument, the execution of which is proven, instead of being acknowledged, the proof must be made by the subscribing witness, which is defined to be one who sees the writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness. The right to have a preference against other creditors by way of chattel mortgage is controlled by the statute, and, unless the requirements of the law are complied with that right does not exist, and the mere statement under oath, by a person who, so far as this mortgage was concerned was a stranger to the transaction, that he subscribed his name as a witness, when in fact he did not, does not meet the requirements of the law on this subject. He is not such a witness to it as is contemplated by the statute. But in addition to this, we think that the secretary was the subscribing witness and attested to the truth of the attestation clause, viz., that the corporation had caused the mortgage to be signed by its president and the seal of the company thereto affixed, and was the proper person to have made the proof, because as secretary, it is to be presumed, he had knowledge of the corporate action which justified the execution of the mortgage and the affixing of the seal.

As the proof of the execution of this chattel mortgage does not meet the requirements of our statute, the decree will be affirmed.

(78 N. J. L. 576)

## STATE v. KELLY.

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

## 1. CRIMINAL LAW—APPEAL AND ERROR—REVIEW—INSUFFICIENT PRESENTATION OF OBJECTION.

If an indictment was defective because it did not show that it was found within six weeks after the grand jury was impaneled, on the theory that under Act April 8, 1903 (P. L. p. 341), the life of the grand jury expired six weeks after its impanelment unless the court ordered the sheriff to refrain while summoning a new grand jury, the trial court's refusal to quash the indictment cannot be reviewed where the record does not exhibit the facts upon which the objection is grounded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2924.]

## 2. INDICTMENT AND INFORMATION—REQUISITES—GRAND JURY—SUMMONING.

No precept being required to empower the sheriff to summon a grand jury, it is no objection to an indictment that it does not appear that the grand jurors were duly returned by the sheriff; it being presumed when a panel is presented in court by the sheriff that it is done pursuant to his statutory authority, and such presumption not being overcome by the fact that the certificate is signed with the sheriff's name by "C. B., undersheriff," this meaning merely that the undersheriff certified the facts, and not that the sheriff did not summon the grand jurors, and the grand jury being a good one if selected by the sheriff whether there was a certificate or not.

## 3. SAME—METHOD OF OBJECTING TO GRAND JURY.

If it should have appeared of record that the grand jurors who found an indictment were duly returned by the sheriff, accused should have taken his objection by challenge to grand jury rather than by attacking the indictment.

## 4. JURY—DRAWING—OBJECTIONS—NECESSITY FOR MAKING SPECIFIC.

An objection that jurors were not drawn according to law is too general to cover an objection that the sheriff failed to select the general panel.

## 5. SAME.

That a sheriff, being ill, supervised the selection of jurors, while another marked the names suggested by him, shows that the selection was made by the sheriff.

## 6. CRIMINAL LAW—EVIDENCE—RES GESTÆ.

In a trial for keeping a disorderly house, the state could show conversations between men and women at such house, in accused's absence; all acts and conduct of the inmates being part of res gestæ.

## 7. DISORDERLY HOUSE—EVIDENCE—REPUTATION OF INMATES.

In a trial for keeping a disorderly house, the state could show the reputation of women seen inside the house, since the fact that prostitutes visited the house was competent testimony, and that persons visiting it were prostitutes could be shown by proof of reputation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Disorderly House, § 23.]

## 8. SAME.

In a trial for keeping a disorderly house, prosecuting witness testified that on September 1st he saw prostitutes enter accused's place with men, remain a short time, and leave. To impeach him accused showed that he made the complaint, which stated that on August 2d and for a long time prior thereto accused kept a disorderly house, and, being asked if he made the complaint as an allegation of fact, he stated that it was made on affidavits of girls who had been sent to the State Home for Girls. On redirect he was asked to what affidavits he refer-

red, and answered: "Had an affidavit of L., who had been sent to the State School for Girls by her parents for frequenting the place." Accused did not move to strike the latter part of the answer. *Held*, there was no error prejudicial to accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Disorderly House, § 23.]

#### Error to Supreme Court.

Edward M. Kelly was convicted of keeping a disorderly house, and he brings error from a judgment of the Supreme Court affirming the conviction. *Affirmed*.

The following is the opinion per curiam in the Supreme Court:

"This is a conviction for keeping a disorderly house. On the trial the ground upon which the disorderly character of the house was put was that it was a place wherein whoring was habitually permitted.

"The first assignment is based upon an exception to the refusal of the trial judge to quash the indictment. The first objection raised against the indictment is that it did not appear that it was found within six weeks after the grand jury was impaneled; the insistence being that the life of the grand jury, under the provisions of the act of 1903, (P. L. p. 341), expired six weeks after its impanelment, unless the court ordered the sheriff to refrain while summoning a new grand jury. If there is any substance in this objection, it is sufficient to say that there is nothing in the case to exhibit the existence of facts upon which the objection was grounded.

"It is next objected that the list of names purporting to be those of the grand jury which found this indictment is not signed by anybody, and so there was no legal grand inquest. The objection is that it should appear that the grand jurors which found the indictment were duly returned by the sheriff. The indictment is in the usual form, reciting that those who found it were duly commissioned and then and there duly charged to inquire in behalf of the state. No precept is required to empower the sheriff to bring in the grand jury. The law requires him to do so. When the panel is presented in the court by the sheriff, it is presumed to be done in pursuance of his statutory authority. This presumption is not overcome by the paper filed in the clerk's office and inserted in the record. This purports to be a certificate of the sheriff. It is signed by his name, followed by the words: 'By Cyrus Benedict, Undersheriff.' This does not show that the sheriff did not cause to come before the court good and lawful men to serve as grand jurors. It only means that the undersheriff, for the sheriff, certified to that fact; and, if the jury was selected by the sheriff, it was a good jury, whether there was or was not a certificate. If, however, there was any substance in this objection, it should have been taken by challenge to the grand jury."

"It is again assigned for error that the

sheriff failed to select the general panel of jurors for the September term. There was no challenge for this specific cause; the only challenge being that the jurors were not drawn in the manner provided by law, which was too general. Besides, the evidence shows that, although the sheriff was ill, he had attended to important business, and that he supervised the selection of the jurors, while Mason marked the names suggested by the sheriff. It is unnecessary to decide whether a deputy sheriff has power to select a jury; for in this case there was evidence to show that the selection was done by the sheriff.

"It is again assigned for error that the court illegally admitted evidence of conversations between men and women at the hotel, in the absence of the proprietor. This was permissible, because all acts and conduct of those within are part of the *res gestæ*. They are a part of the conduct which proves or disproves disorder. *Bindernagle v. State*, 60 N. J. Law, 307, 87 Atl. 619.

"It is assigned for error that the court permitted Mason to testify to the reputation of two women seen inside the house. The fact that prostitutes visited the house was competent testimony, and the fact that those visiting were prostitutes is provable by proof of reputation.

"It is also assigned for error that Mason was permitted to testify that, when he made the complaint against the defendant, he had the affidavit of one Josephine Lord, who had been sent to the State Home for Girls for frequenting this house when she was 17 years of age, and afterward permitted the said Josephine Lord to be called as a witness, when she could not testify to any fact within the time limited by the enactment.

"Mason had testified for the state that he on September 1st had seen two prostitutes enter the defendant's place, each with a man, and remain there for some time, and each came out with a man. For the alleged purpose of impeaching his truthfulness, he was asked by the counsel for the defendant whether he had not made the complaint upon which the defendant was arrested, and which stated that on August 2d, and for a long time prior, the defendant did keep and maintain a disorderly house. He was then asked whether he made this complaint as an allegation of fact. This question was designed to bring out that the complaint had been made without the personal knowledge of the witness who admitted that at the date of the complaint, namely, August 31st, he had not seen any women go into defendant's place. This inquiry was entirely irrelevant, but was admitted. The witness answered: 'It [the complaint] was made on affidavits of girls who had been sent to the State Home for Girls.' This left Mr. Mason in the position of having sworn out a warrant recklessly on the strength of affidavits made by other people. It was therefore open to the prosecu-

tion to show that his conduct had not been so regardless of truth by showing more particularly the character and strength of the affidavits upon which he had acted. So the prosecutor on his redirect examination asked: 'What affidavits do you refer to?' Then came the answer: 'Had an affidavit of Josephine Lord, who had been sent to the State School for Girls by her parents for frequenting this house when she was 17 years of age.' There was no motion to strike out the part of the answer which stated why the girl had been sent to the Reform School. The court, however, did say that the state could go into the details of what somebody else said; and the counsel for the defense remarked, 'That he wished to show that Mason did not get the information of his own knowledge,' and the matter then rested.

"There was no injurious error. The judgment is affirmed."

Frank E. Bradner and Michael T. Barrett, for plaintiff in error. Henry Young, for defendant in error.

**PER CURIAM.** The judgment under review herein should be affirmed for the reasons expressed in the memorandum filed in the Supreme Court.

(76 N. J. L. 551)

**COLLINS v. WEST JERSEY EXPRESS CO.**  
(Court of Errors and Appeals of New Jersey.  
July 8, 1908.)

**TRIAL—EVIDENCE—DIRECTED VERDICT.**

The plaintiff proved that he was injured in attempting to avoid a runaway horse that had been frightened by a collision with a wagon carrying the mail, upon which the name of the defendant company was painted, from which fact an inference arose that it was defendant's wagon. Defendant proved that neither the colliding mail wagon nor its driver was engaged in defendant's service; that its business was not that of carrying the mail, although a horse and wagon had been let out by it to another company for that purpose. *Held*, that the direction of a verdict for defendant was proper.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Daniel F. Collins against the West Jersey Express Company. Judgment for defendant, and plaintiff brings error. Affirmed.

See 72 N. J. Law, 231, 62 Atl. 675, 3 L. R. A. (N. S.) 373.

Jefferson & Wescott, for plaintiff in error. Bourgeois & Sooy, for defendant in error.

**MINTURN, J.** The substantial ground of complaint in this case, as presented by the assignments of error, is that the trial judge at the close of the case directed a verdict for defendant under the following state of facts: On the 15th of March, 1901, while a wagon was being loaded on Central avenue, in Atlantic City, another wagon carrying the United States mail, but bearing the name of the defendant upon it,

struck the former wagon, and the horse drawing the same, taking fright from the impact, dashed down the avenue up which plaintiff was coming. The plaintiff in an attempt to avoid the runaway broke his leg by falling over a lumber pile on the street, and instituted this suit to recover damages for his injuries. The defendant disclaimed responsibility by denying that the driver of the mail wagon was in defendant's employ at the time of the accident. The testimony in support of the relationship of master and servant was as follows: Lister, the driver on the wagon which was struck, was asked: "How did it happen? A. Why the West Jersey express wagon struck my wagon. I told him [the driver] to hold up; don't strike me; don't run into me." Newman, the driver of the mail wagon, was asked upon cross-examination whether upon a former trial he had not testified that at the time of the accident he was employed by the defendant, and he replied: "Not to my knowledge. If I did so, it was a mistake." The record of that trial was admitted to show that he did so testify.

The plaintiff's case thus constructed upon a basis of inferences was met by proof by defendant that the driver of the mail wagon had not been in the employ of the defendant during the year 1901; that he had been paid during that year by the railway company, in support of which the vouchers of the company were produced and admitted in evidence; that the West Jersey & Sea Shore Railway Company alone held the contract for the carriage of the mail during that year, and had not let it out in whole or in part; that the defendant held no such contract; and that its only connection with the business was to let out a horse and wagon to the railway company for use in that service.

Upon this uncontradicted proof, the direction of a verdict for the defendant by the trial court was manifestly proper. *McCormack v. Standard Oil Co.*, 80 N. J. Law, 243, 37 Atl. 617.

The judgment, therefore, should be affirmed.

(74 N. J. B. 560)

**VOIGT et al. v. DOWE et al.**

(Court of Chancery of New Jersey. July 11, 1908.)

**EVIDENCE—PAROL TESTIMONY—ADMISSIBILITY TO AFFECT WRITING.**

Parol testimony was admissible to show that the real consideration for a deed was natural love and affection, though the deed recited that the consideration was the payment of money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1912-1917.]

Bill by Frank Voigt and another, executors, against August H. Dowe and others. Bill dismissed.

Frank E. Bradner, for complainants. Nathan Kussy, for defendants.

**STEVENS, V. C.** The complainant's testatrix made a deed of land to the defendant Dowe, expressed to be for the consideration of \$2,000, the receipt of which was, in the usual, formal language, thereby acknowledged. The complainants bring suit for the consideration money, alleging its nonpayment. The defendant in his answer admits that the money was not paid, but he avers that the real consideration was natural love and affection.

The proof sustains the answer. The contention is that it is competent to contradict the writing for the purpose of showing nonpayment, but that it is not competent to vary it for the purpose of showing what the real consideration was. I have read with care the cases referred to in the brief of counsel, but I cannot find in them any support for the very inequitable proposition for which he contends, viz., that so much of the consideration clause as makes against complainants may be disproved, and so much as makes for them cannot. As the matter appears, either on the face of the deed standing by itself or on the proof standing by itself, the intent of the grantor was not to subject the grantees to a future money payment. It would be strange, indeed, if, by an arbitrary exclusion of part of the evidence, he should be subjected to it.

The cases in this state are all one way, and they hold "that the true consideration of a deed may be shown by parol, though it vary from that expressed; but not to vary or enlarge the grant." *Morris Canal v. Ryerson*, 27 N. J. Law, 457; *Herbert v. Scofield*, 9 N. J. Eq. 492; *Speer v. Speer*, 14 N. J. Eq. 240; *Silvers v. Potter*, 48 N. J. Eq. 547, 22 Atl. 584; *Hattersley v. Blissett*, 51 N. J. Eq. 507, 29 Atl. 187, 40 Am. St. Rep. 582.

The bill should be dismissed.

(73 N. J. E. 721)

# ATLANTIC CITY v. ASSOCIATED REALTIES CORP.

(Court of Errors and Appeals of New Jersey. June 15, 1908.)

## 1. DEED—CONSTRUCTION—RESERVATIONS.

The predecessors in title of the defendant by deed conveyed to the city of Atlantic City an easement or right of way over a strip of land on the ocean front, which deed contained a clear restriction against placing any building or structure upon the ocean side of the lands conveyed, with a proviso reserving the right to build a pier of a certain kind and length, on which the owners shall not permit the sale of any commodities "and be confined to charging only an entrance fee." The defendant erected a pier of the kind and length permitted, and charged visitors thereto an entrance fee of 10 cents. In addition, it charged such visitors after they had entered upon the pier additional sums for the hire and use of roller skates, and for checking garments. *Held*, that such charges, other than the entrance fee, were made in violation of the covenant that the pier owner should "be confined to charging only an entrance fee."

## 2. DEDICATION—POWER OF CITY TO ACCEPT.

The city of Atlantic City, as trustee for the public, has a right to accept a deed for a grant to the public of a right of way over lands on the ocean front for the purpose of a board walk, the deed containing a negative covenant granting in effect also a right of light, air, and view over and across the oceanward land from the board walk, notwithstanding this latter right is limited by a reservation to the donors of the privilege of placing thereon a certain kind of structure, when the use to which those structures should be confined is defined for the purpose of regulating the kind of structures and the number of structures which could and would likely be erected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 66.]

## 3. SAME—EVIDENCE OF ACCEPTANCE.

An acceptance of property dedicated to the public use may be shown by an instrument in writing executed by the proper authorities on behalf of the public, or by the use and improvement of the property dedicated, by the duly authorized authorities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 73-76.]

(Syllabus by the Court.)

## Appeal from Court of Chancery.

Bill by the city of Atlantic City against the Associated Realities Corporation. From a decree (67 Atl. 937) dismissing the bill, complainant appeals. Reversed.

Harry Wootton, Godfrey & Godfrey, and Gilbert Collins, for appellant. Thompson & Cole, for respondent.

**TRENCHARD, J.** This is an appeal from a decree of the Court of Chancery dismissing the bill of the complainant, the city of Atlantic City. The bill seeks to restrain the defendant from charging any fee to visitors to its pier, or any part thereof, except an entrance fee. The rights of the parties depend upon the legality and construction of an easement deed made by the predecessors in title of the defendant to the complainant.

In 1889 (P. L. 1889, p. 206) an act was passed empowering cities located on or near the ocean, and embracing within their limits or jurisdiction any beach or ocean front, by ordinance to lay out and open streets and drives, and to construct public walks along the beach or ocean front, and to grade and otherwise improve the same and to regulate the use thereof. Subsequently several supplements to this act were passed. By a supplement of 1890 (P. L. 1890, p. 159) it was provided that any walk constructed upon any such street so laid out should be elevated above the surface of the ground and be constructed on piling or other supports placed in the street; and, when such elevated walk should be constructed, the city could permit approaches to be made to connect with it from contiguous property on the landward side or side most remote from the ocean. By this supplement, the city was authorized to accept any dedication of lands or rights which might be made for the purpose of enabling such city to open and lay out such street or for the purpose of constructing any such walk,

or for the purpose of making any improvement in or to the same. By a further supplement of 1896 (P. L. 1896, p. 18), the common council was authorized to relocate, in whole or in part, any public walk or walks which might have been or which might thereafter be constructed or built. Under the authority thus given, the city of Atlantic City laid out a street 60 feet wide along the ocean front and constructed thereon a public board walk elevated on posts, and in the year 1896 relocated and laid out a street 60 feet wide along the beach or ocean front, and constructed thereon a new public board walk 40 feet wide and about 4 miles long of a more permanent and substantial character, elevated on posts. The owners, with one or two exceptions, of ocean front land over which the 60-foot strip extended, on April 30, 1896, executed and delivered to the city the right of way agreement or board walk dedication deed, by which they dedicated over their respective lands the 60-foot strip; and inserted in their deeds covenants protecting the use by the public of the 60-foot strip and board walk, and the lands on the ocean side thereof, and prohibiting the erection of buildings to the oceanward of the walk for the purpose of preserving a continuous ocean view from the board walk. Among such owners who executed such easement deeds were William Bowler, Elias J. Molineaux, George C. Governorator, and John H. Wahl, who were the predecessors in title of the defendant corporation. In these deeds the grantors covenanted, among other things, as follows: "The said parties of the first part, their heirs, executors, administrators, and assigns, shall not and will not put or erect or allow to be placed or erected on the lands hereby granted or on the ocean side thereof any building or structure, except as provided by ordinance, \* \* \* and that these covenants shall attach to and run with the lands and premises hereby granted and the lands on the ocean side thereof so long as the same shall be used for the purpose of a street and a public steel, board or plank walk, and that the same may be enforced or its breach or nonobservance may be restrained or enjoined at any time by the said party of the second part, its successors and assigns; \* \* \* provided, however, that the within grantors shall not be prohibited from building a pier in front of their property and connecting the same to the new walk to be erected, and upon the further condition that the said pier shall be at least one thousand feet in length extending into the ocean beyond the present 60-foot wide strip and constructed of iron or steel, and shall not permit the sale of any commodity upon the same and be confined to charging only an entrance fee." The 60-foot strip so dedicated by the predecessors in title of the defendant ran over the several tracts of land owned by them and constituting a tract of land on the western line of Arkansas avenue extending south-

erly 2000 feet to the exterior line fixed by the state board of riparian commissioners, having a frontage of 200 feet on the ocean front, which several tracts of lands by mesne conveyances became vested in Clement J. Adams, who, together with his wife, by deed of March 1, 1906, conveyed to the defendant corporation. The defendant subsequently built a pier upon this property on the ocean side of the 60-foot strip, and attached the same to the board walk. The testimony shows that the defendant charged visitors to its pier an entrance fee of 10 cents. In addition, it charged such visitors after they had entered upon the pier additional sums for the hire and use of roller skates and for checking garments. It is insisted that these charges, other than the entrance fee, were made in violation of the covenants already recited.

The main question is whether, assuming that the agreement is valid, the defendant has violated its terms by its charge for the hire and use of roller skates and for the checking of garments. We think that this charge is in violation of the covenant. The easement deed must be construed so as to effectuate, if possible, the intention of the parties, and to fulfill the common purpose of the grantors, unless inconsistent with settled rules of law. 13 Cyc. 601. The covenants therein contained show that the owners of the beach front lands were actuated by a common purpose to carry into effect by their joint action a general plan of mutual benefit to themselves and to the public to preserve an open view oceanward from the elevated public walk, and to that end to restrict the use of the land, and the business to be conducted, on the ocean side of the walk. The language of the covenant that the pier owner "shall not permit the sale of any commodity upon the same, and be confined to charging only an entrance fee," seems plainly to admit of but one construction, namely, that no pecuniary exaction beyond a fee for entrance to the pier is allowable. Of course, fees charged a visitor, after entering the pier, in addition to a fee paid for entrance to the pier, are not entrance fees, and such charges, not being entrance fees, are in violation of the literal words of the covenant.

In *Atlantic City v. Atlantic City Steel Pier Co.*, 62 N. J. Eq. 139, 49 Atl. 822, involving a construction of the same covenant with respect to a charge of an additional fee for reserved seats on the pier and additional fees for entrance to an inclosed hall on the pier, Vice Chancellor Reed, in disposing of the question, said: "I am constrained to the conclusion that these charges are in violation of the terms of the agreement. Reading the entire clause, not merely that part directed against the sale of commodities, but including the limitation in respect to what should be charged, the natural construction of the agreement seems to me to be that any additional charge for admission to any part of

the pier, after the payment of the entrance fee, conflicts with the restriction which the grantors imposed upon themselves, namely, that they should be confined to charging only an entrance fee. It seems too obvious for discussion that the fees charged after the visitor has entered upon the pier are not entrance fees. If not, then the purpose of the agreement, as well as its literal words, forbid this collection. It is said on the part of the defendant that the covenant contained in the proviso is an enabling and not a restrictive covenant. It is, however, perceived that the agreement itself contains a clear restriction against placing any obstruction upon the ocean side of the board walk. The proviso merely modifies the restriction by relieving the grantor from it, so far as to permit the building of a pier, of a certain length upon which certain things shall be done. The restriction is operative, except in so far as the proviso relieves it of its operative force. The grantor, therefore, must show that its structure, in form and in use, comes within the exceptive words of the proviso." In the present case the learned Vice Chancellor said that the "hiring a pair of skates for a limited period to a person going on the pier hardly falls within the description of a sale of 'any commodities,' nor can it be said to be a charge of an additional entrance fee," and concluded, therefore, that the covenant was not violated. While the charge for hiring skates and checking garments on the pier may not be considered as an additional entrance fee, yet it is certainly a charge made in addition to an entrance fee after a person has entered upon the pier and paid his entrance fee, and is a charge unassociated with the charge for entrance to the pier, and is in direct violation of the language of the covenant that the pier owner "shall be confined to charging only an entrance fee." If the extra charge cannot be classified as an entrance fee, then it must be an additional charge and such a charge as is forbidden by the language of the covenant. There is no distinction, from the view point of the covenant, between the character of the charge for the hire of skates and the charge for the hire of reserved seats such as was properly held in *Atlantic City v. Atlantic City Steel Pier Co.*, supra, to be a violation of the covenant.

The fact that in the case sub judice the payment of the entrance fee entitled the visitor to go to any part of the pier and to hear and see everything there provided for the entertainment of visitors does not alter the construction of the covenant. It will not do, in view of the language of the covenant, to say that because the visitor is not satisfied with the entertainment provided and desires to hire a pair of skates, he must pay for them. Under such a construction, the meaning and operative force of the covenant would be made to depend upon the notion or fancy of the visitor to the pier as to the kind of entertainment he desires. The rights of the

parties can rest upon no such basis, but must depend upon a proper construction of the covenant of the easement deed.

But it is insisted by the defendant that the deed is ultra vires, and the covenant therefore unenforceable. Substantially the same objection was raised by the defendant in the case of *Atlantic City v. Atlantic City Steel Pier Co.*, 62 N. J. Eq. 139, 49 Atl. 822. The Vice Chancellor there says: "This insistence is grounded upon the terms of the supplement of 1890, by which the city is authorized to accept any dedication for the purpose of enabling the city to open and lay out a street and build and improve a board walk. It is argued that, while a dedication of the land upon which a board walk is to be built is within the power so granted to the city, an agreement in respect to other lands is entirely aside from the provisions of the act. The language in the act is broad. It does not confine the city to the acceptance of land upon which the walk is to be constructed. It may accept any lands or rights for the purpose of making any improvement in or to the street or walk. But, assume that the act is as narrow as the defendant insists, it cannot be successfully contended that Atlantic City, as trustee for the public, would not have the right to accept a dedication of lands for a public purpose without express legislative authority. Such a grant is effectual even without trustees. All the land oceanward of the board walk could have been dedicated by its owners as a park or boulevard, or public bathing ground, or for any other purpose. Now, the agreement, as I construe it, contains a grant to the public of a right in the nature of an easement. It indirectly, by a negative covenant, grants a right of light, air, and view over and across the oceanward land from the board walk. This right is limited by a reservation to the donors of the privilege of placing thereon a certain kind of structure. And the uses to which those structures shall be confined is defined, for the purpose of regulating the kind of structure and the number of structures which could be, and would likely be, erected. The owners have themselves limited the uses to which such structures may be put. Such a restricted grant, in my judgment, the city may accept, and, as the representative and trustee of the public, may invoke the judicial arm of the government to protect." We think that the city of Atlantic City, as trustee for the public, has the right to accept a deed for a grant to the public of a right of way over lands on the ocean front for the purpose of a board walk; the deed containing a negative covenant granting, in effect, also a right of light, air, and view over and across the oceanward land from the board walk, notwithstanding this latter right is limited by a reservation to the donors of the privilege of placing thereon a certain kind of structure, when the use to which those structures shall be confined is defined for the pur-



pose of regulating the kind of structure and the number of structures which could and would likely be erected. And so are the authorities. 20 A. & E. Enc. of L. (2d. Ed.) pp. 1186, 1187; 13 Cyc. 459, 460.

It is again insisted that the easement deed was never accepted by the city. Acceptance may be shown by an instrument in writing executed by the proper authorities on behalf of the public or by the use and improvement of the property dedicated by the duly authorized authorities. Abbott on Municipal Corporations, p. 1767. In the present case acceptance is shown by both.

All other objections raised have been already sufficiently answered.

The complainant is entitled to have an injunction restraining the defendant, its officers, servants, agents, and employes, from charging visitors to its pier any fee or sum of money for the hire and use of roller skates, or for checking garments, in addition to an entrance fee to the pier or after entrance to the pier. The decree must therefore be reversed, and the record remitted to the Court of Chancery in order that a decree may be made in accordance with this opinion. The complainant is entitled to costs in the Court of Chancery and in this court.

(74 N. J. E. 528)

#### AGENS et al. v. KOCH.

(Court of Chancery of New Jersey. July 9, 1908.)

#### 1. VENDOR AND PURCHASER—VENDOR'S TITLE—OBJECTIONS.

That two judgments were on record against vendors was a valid objection to their title to land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 252.]

#### 2. SAME—DEDICATED STREET.

A dedication of a proposed street across land made by filing a map in 1857 was a cloud upon vendors' title, entitling proposed purchasers to refuse to take title in the absence of a vacation of such street, though the street was never accepted and the land covered by it had been mostly, if not entirely, improved and inclosed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 255-258.]

#### 3. SPECIFIC PERFORMANCE—TITLE OF VENDOR—SUFFICIENCY—TIME.

Ordinarily, if time is not of the essence of a contract to convey, it is sufficient if the vendor can give clear title at the date of a decree to compel the purchaser to specifically perform, though the vendor has no clear title when the bill is brought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 243.]

#### 4. SAME—TIME AS ESSENCE OF CONTRACT.

A contract dated September 22d provided for a conveyance of vacant land on or before October 15th, and that on the passing of title the purchaser might take possession. The purchaser intended to build and early possession was important, if not necessary, to effect the object of the purchase. Vendors knew that the purchaser intended to build, and that he desired immediate unclouded possession. Held, that while the contract itself did not make it so, considering its terms with the other facts stated,

time of passing title was of the essence of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 245-248.]

#### 5. SAME—TIME TO SUE.

Where one party to a contract to convey land notifies the other that he will not perform, a bill to specifically perform the contract must be filed speedily, unless the party receiving the notice be in possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 325-341.]

#### 6. SAME—NO LACHES.

That one who contracted to buy land rejected vendor's title October 19th, and they did not sue to specifically perform until February 19th, does not show laches barring their right to sue, where the purchaser was absent for some time in the meantime and did not sue to recover the deposit made by him on the purchase price until February 1st, and there were other circumstances which might have reasonably led plaintiff to suppose that the negotiations were not finally closed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 325-341.]

Bill by Frederick G. Agens and others against Julius Koch. Dismissal of bill advised.

A. F. Skinner and Pitney, Hardin, & Skinner, for complainants. Frank E. Bradner, and Woerner & Woerner, for defendant.

EMERY, V. C. This is a bill by the vendors for the specific performance by the purchaser of a written contract for the sale and purchase of land on Broad street, in the city of Newark, and to enjoin a suit at law brought by the purchaser for the recovery of the deposit money paid on the execution of the contract. The defendant resists the specific performance of the contract on two grounds: First, that the complainants have not, as required by the contract, "a perfect record title" to the premises; and, second, because the time of conveyance was of the essence of the contract, and, the complainants not being able to convey a perfect title by the time stipulated, specific performance should not be decreed. The first objection, as to title, was in fact well founded at the time of filing the bill and the answer, the premises being on the record incumbered by two judgments against the vendors, and also by a dedication of a proposed street across a considerable portion of the frontage of the premises, on Broad street, made by the filing of a map showing such proposed street (called Pyatt street) in the year 1857 by a former owner of the premises. The street was never accepted by the public, and the lands covered by it had been mostly, if not entirely, improved and inclosed, but the proposed street had never been vacated, and, in the absence of such vacation by public authority, the right of the municipal authorities to accept the dedication, even after this lapse of time, was a cloud on the title, and the defendant, who proposed to build upon the premises covered by the proposed street, was justified in declining to accept the title as a perfect rec-

ord title at the time fixed for passing title. These objections to the title, however, have been removed and at the hearing (February, 1908), releases, or discharges of the judgments, and also a vacation of the proposed street by the proper municipal authority were produced, and a perfect record title can now be given. Objection was made at the hearing to the validity of the vacation, but, as I think, without sufficient grounds. If time is not of the essence of the contract, it is sufficient ordinarily, if clear title can be given at the time of the decree. *Oakey v. Cook*, 41 N. J. Eq. 350, 363, 364, 7 Atl. 495; *Moore v. Galupo*, 65 N. J. Eq. 194, 55 Atl. 628 (Gray, V. Ch., 1903); *Fry, Spec. Perf.* (4th Ed.) 1366; *Pomeroy, Specific Perf.* § 422.

The material question, therefore, is whether time was of the essence of the contract, and whether by reason of the failure to tender a perfect record title at the time stipulated complainants have no right to specific performance. The contract was dated September 22, 1906, and by it the vendors, for the consideration of \$20,000, agreed to convey by deed of warranty, free from all incumbrances (the taxes for the year 1906 to be apportioned to the date of settlement), "a good perfect record title to the premises, subject to a mortgage of \$7,500, on or before the 15th day of October next ensuing the date hereof." The purchaser on his part agreed "to pay the said sum of \$20,000 as and for the purchase money, as follows: \$500 on signing the agreement, \$7,500 by taking the property subject to a mortgage for that amount now upon the same, interest to be apportioned to date of settlement, \$7,500 by giving a second mortgage for one year with interest at 5 per cent., payable semiannually, the balance to be paid on the delivery of the deed." It was then further agreed that the purchaser "may enter into and upon the said land and premises on the 15th day of October next ensuing the date hereof, or upon the day of passing title, and from thence take the rents, issues, and profits to his use." The time and place for the delivery of the deed and mortgage was then fixed for October 15, 1906, at the office of defendant's attorney. The deposit money \$500 was paid on the execution of the agreement. On October 15th, by written agreement indorsed on the contract, signed by the vendors, and by the purchaser through his attorneys, the time for the performance of the agreement was extended to October 19, 1906. The contract and this indorsement are the only writings signed by the parties bearing on the matter of fixing the time. The contract itself cannot be said to have made the time of passing title of the essence of the contract, but the clause expressly providing for the delivery of possession on October 15th has some weight as one circumstance showing the intention on this subject; for this provision as to possession on

October 15th, "or upon the day of passing title," must, in view of the fact that the conveyance was to be made "on or before October 15th," be taken to mean that by the contract itself, and, so far as any intention at all is shown, it was intended by the parties at the time of its execution that possession should be delivered not later than October 15th, and earlier if the title was passed. Possession after the delivery of the deed would be by virtue of the deed itself, in the absence of any qualification of this right by the contract, and the provision in the contract for possession "on passing the title" is therefore reasonably to be referred to a possession to be taken before October 15th. There is nothing in the contract itself, however, indicating that this delivery of possession on October 15th was of the essence of the contract, and the essentiality, if it exists, must arise out of the facts proved in relation to the purpose or object of the purchaser in making the purchase, and disclosed to the vendors. The property was vacant unimproved property, fronting on Broad street, in the vicinity of the Lackawanna Railroad station, and the defendant intended to build on the premises immediately on the purchase. The building which he proposed to erect was an automobile garage, in connection with a skating rink to occupy the second floor of the building, and the probable cost was about \$30,000. It is not disputed that the vendors knew before and at the time of the contract that the defendant proposed to construct a garage upon the premises. The adaptability of the lot for that purpose was one of the inducements to the contract discussed between the parties, or their representatives. A young man, Joo, living with defendant, and in whom defendant was interested, was engaged in the automobile business, had lately taken an agency for an automobile manufacturer, and one object of the purchase was to have a place in which he could without delay start this business. The vendors themselves had previously had plans made for a garage to be erected on the premises, and on the day of the execution of the contract gave these plans to the purchaser. Whether the vendors knew at the time of the contract that the building to be erected was also to have a skating rink is disputed. The vendors deny that any information of this kind was given, but on this disputed point I am inclined to think the weight of evidence is that this was also disclosed, and that the vendors knew that the purchaser was in negotiations with a tenant for the skating rink, and that to this tenant it was necessary that he should have the building by January 1st. Had the title been passed on October 19th, the building, as it was proved at the hearing, could probably have been ready for the skating rink within two months, and for the garage within three months. Immediately after the contract the purchaser

employed an architect to prepare plans for the building as a garage and skating rink, but further work on these plans was stopped not later than October 14th, after the purchaser had been notified by his solicitor on or about October 11th of the cloud on the title by reason of the proposed street. This solicitor on the 15th called the attention of the vendors to this dedication as a possible objection to the title and requested a week's extension for further investigation on this matter. The vendors declined to grant a longer extension than four days, and this extension was then indorsed on the contract. The defendant's solicitor says that the reason given for refusing a longer delay given by one of the vendors was that a higher price had been offered for the property, and they would not keep the matter open longer. This evidence was not contradicted, and, if true, would tend to indicate that in fixing the time in the extension of the contract time was considered essential, not only by the purchaser, but by the vendors. The mere fixing of a date by written extension has of itself been sometimes considered as having a bearing on the question whether time was considered of the essence of the contract. *Wiswall v. McGown*, 2 Barb. (N. Y.) 270. On the 19th the title was definitely rejected on account of the dedicated street. This rejection was made pursuant to instructions received from the defendant by his solicitor on the evening previous, after consultation at defendant's home with the solicitor, as to the time which would be required for removing the defect, estimated as at least a month and the improbability of securing a loan on any building erected before the defect was removed. The defendant shortly after October 1st was taken ill, and was not able personally to attend at the passing of title, but, on being communicated with over the telephone, he declined to grant any further extension of the contract.

On the evidence a question is fairly raised whether the defendant's illness and his inability personally to look after the building may not have had some influence on his determination not to extend the contract, but on the whole evidence relating to the purchase and its circumstances it would not be fair or just to conclude that the defect, or supposed defect, was a mere pretext to get out of the contract, or to refuse to extend the time. The evidence satisfies me that the object of the purchase was the immediate improvement of the premises by building, and that possession as early as practicable to pass the title, on or soon after October 15th or October 19th, was important, if not necessary to carry out the objects of the purchase. It is also clear, I think, that the vendors knew of this object, and knew also, at the time of the contract, of the defendant's desire for this immediate unclouded possession. The question is whether, under the circumstances, this knowledge on the part of the vendors

at the time of the contract, or of the extension is sufficient to make time of the essence of the contract. Under the clear language of the authorities, I think it was. *Baron Alderson*, in *Hipwell v. Knight*, 1 Young & Col. Exch. Eq. 401 (1835), one of the leading cases on this point, gives this clear statement of the equitable doctrine and its reasons (page 415, etc.): "While upon this subject of the essentiality of time a court of law ascertains only what the parties have expressed in their contract, a court of equity endeavors to ascertain what is in truth the real intention of the parties, and to carry that into effect. In so doing, however, the court must in the first place look carefully at what they have expressed, that being in general what they intend, and the burden is thrown on those who assert the contrary. In the ordinary case of purchasing an estate the fixing of a day for passing the title is merely formal, and the stipulation means in truth that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case and the nature of the title to be made. But this is a mere corollary from the general proposition, which is that the real contract and all the stipulations really intended to be complied with literally shall be carried into effect. We must take care, however, that we do not mistake the corollary for the original proposition. If, therefore, the thing sold be of greater or less value, according to the efflux of time, it is manifest that time is of the essence of the contract, and a stipulation as to time must then be literally complied with in equity as well as in law. The cases of sales of stock and of a reversion are instances of this. So, also, if it appear that the object of one party, known to the other, was that the property should be conveyed on or before a given period, as the case of a residence or the like." *Mr. Justice Story*, in *Taylor v. Longworth*, 14 Pet. (U. S.) 172, 10 L. Ed. 405 (1840), also a case of specific performance, says: "There is no doubt that time may be of the essence of the contract for the sale of property. It may be made so by the express stipulations of the parties, or it may arise by implication from the very nature of the property, or the avowed object of the seller or the purchaser." In both of these cases it had been contended that under the doctrines established by previous decisions in equity time could not be, and that it could not in any way be made, essential to the conveyance, and it was therefore pertinent to examine and define the grounds of exception to the general doctrine. The views of these distinguished judges that time may be of the essence of the contract, by reason of the avowed object of one party known to the other, has been followed as settled law in subsequent decisions denying the relief of specific performance. In *Tilley v. Thomas*, L. R. 3 Ch. App. 61 (1867), the object of the purchase, as the vendor knew, was the immediate occupation as a residence by

the purchaser, and this possession could not be given. In *Hyde v. Warden* (L. R.) 3 Exch. Div. 72 (1878), a farm was required, as the vendor knew, for immediate occupation for stocking purposes, and this could not be given. In *Nokes v. Kilmorney*, 1 De G. & Sm. 444 (63 Eng. Reprint), the purchase was for the purposes of building, and the time was extended for the purpose of perfecting title. On the failure to complete the title by the extended time, it was held that the purchaser was entitled to abandon the contract. I have not been referred to any decisions in our own courts upon the precise point, and have therefore referred to the decisions in other courts somewhat at length for the purpose of examining the principles which should control the case. The leading text-books repeat the doctrine of these cases. Fry, *Spec. Perf.* (4th Ed.) §§ 1061, 1086; Pomeroy, *Spec. Perf.* § 385.

It is my conclusion, upon the whole evidence, that in this case the time for passing the title fixed by the provisions of the contract and its extension was of the essence of the contract by reason of the object of the vendee in making the purchase for the purpose of immediate building thereon for the purposes of trade, which purpose of immediate improvement was known to the vendors at the time of making the contract. In such purchases of urban property for immediate improvement, the purchaser, as he is entitled to do on the faith of the contract, and the reasonable expectation that it will be carried out at the time agreed on, often, if not generally, incurs obligations and secures contracts in reference to the building and occupation of the premises dependent upon his procuring possession for building at the time specified. The essentiality of time in the performance of contracts made under these circumstances should not be disregarded.

Before the signing of the contract, the defendant had negotiations for renting part of the building proposed to be erected, and, upon the execution of the contract, at once continued these and secured agreements for renting, with security for the rent conditional on delivery of possession not later than January 1st, and, although these agreements may not have assumed such final formal character as to bind the parties legally, there is no reasonable ground for supposing that such binding contracts would not have been made had the title passed on the day agreed on. And these subsequent negotiations of defendant, relying on possession at the time fixed by the contract, and the fact that defendant has been deprived of the benefit of them, by the failure to deliver possession at the time fixed, are matters which can be fairly taken into account on considering the whole equities of the case for specific performance. In another aspect of the case the matter of time was relied on as a defense; this being the lapse of time which occurred between the time of defendant's re-

jection of the title on October 19, 1906, and the filing of complainants' bill on February 19, 1907, and not until after defendant had commenced suit at law on February 1st for the recovery of the deposit money. On October 20th complainants served written notice that defendant had defaulted on the contract on the 19th, while complainants were then ready and able to perform on their part, and that defendant would be held responsible for complete performance of the contract. At the same time they offered to remove the defect of title on account of the street, if such defect existed. Defendant on October 22d replied with a notice to complainants that the latter had defaulted on the contract by failing to produce a good record title, although defendant was ready to perform and demanded the return of the deposit money, adding that it was understood that time was of the essence of the contract by reason of the facts known to the vendors at the signing of the agreement that the premises were desired for the erection of a building before January 1st. The lapse of time, in this aspect, is set up as a defense to the suit, because of laches in seeking the equitable remedy, an altogether different question from the element of time in the contract itself. As to this defense of laches, the general rule is that where one party, arbitrarily or otherwise, notifies the other that he will not perform the contract, the bill must be filed speedily, unless the party receiving this notice be in possession. In *Ketcham v. Owen*, 55 N. J. Eq. 344, 349, 36 Atl. 1095, etc. (1897), I referred to the cases on this subject, and held that a delay of three years was fatal. The doctrine is that the failure of the party receiving notice of abandonment to make immediate assertion of his right to enforce the contract may be considered as such an acquiescence in the notice and an abandonment of equitable rights as to leave the parties to their legal remedies and liabilities. *Walker v. Jeffreys*, 1 Hare, 341, 348 (Wigram, V. C. 1842). Whether such delay is an acquiescence or abandonment depends, of course, on the circumstances of each case, and the explanation of the delay. In the present case, the delay is, I think, satisfactorily explained. The first definite notice received by complainant of the rejection of the title on account of the street dedication was on October 19th, and up to this time they had no notice of any such defect, nor were they reasonably chargeable with notice, for the land occupied by the proposed street had long been inclosed or built up, and no question had ever been raised on previous searches of the title. The defendant himself on October 19th was too seriously ill to attend at his attorney's office, and proposed to go to a milder climate as soon as possible. He told his attorney on the night of the 18th, when he instructed him to reject the title, that he might take

up the matter again on his return, and on the 19th at the meeting in the attorney's office it was stated to the complainants that on defendant's return he would in all probability go on with the matter. Complainants say this statement was made by the defendant's attorney, but the latter says this is a mistake, and that the remark was made by Mr. Joo, the young man for whom defendant proposed to build the garage. Joo, who was anxious that the purchase should be carried through, made this statement, but without any authority whatever either to bind or to speak for defendant. I am inclined to take the attorney's statement as the more reliable on this matter, but, so far as relates to the present subject, complainant's delay, it is immaterial, for, if the complainants from the conversation which then took place—Joo being one of the parties interested as procuring the purchase—were reasonably entitled to await defendant's return, such delay cannot be looked at as an acquiescence or abandonment of their rights, especially as they held in hand the deposit money, and the weight of the evidence is that no demand for the return of the deposit was made on the 19th. Defendant did subsequently go away and returned about December 10th, and a few days later one of the complainants called on him with reference to carrying out the purchase, and was then informed that the matter was closed, and would not be taken up again. Complainants then said they would have to take counsel as to their rights, and soon after did so. Defendant did not at once after this interview begin suit for the deposit as being money he was entitled to on his abandonment of the contract, and his short delay in commencing suit might with as much reason be considered as an abandonment of his notification, as complainants' failure to file a bill be taken as acquiescence in defendant's abandonment. The comparatively short delay in the assertion of their rights or claims made by complainants in this case cannot be considered under the circumstances as such acquiescence in the claims of the defendant as to bar any equitable rights they may have to specific performance. Their right to this, as I have said above, depends on the question whether time was in this case originally of the essence of the contract.

Being of opinion that it was, I must advise a dismissal of the bill for specific performance.

(76 N. J. L. 325)

#### TRAURIG v. GELB.

(Court of Errors and Appeals of New Jersey. June 23, 1908.)

#### DEED—DELIVERY—ACCEPTANCE.

That a partly completed deed to defendant was left with his attorney does not show a delivery to defendant, so as to defeat plaintiff's rights under a subsequent attachment, where it is clear that the attorney did not intend to ac-

cept the deed until it was completed by the signature of all the persons named as grantors; the facts taking the case out of the rule that the law presumes that one accepts what is for his benefit.

#### Error to Supreme Court.

Action by William Traurig against Max Gelb. From a judgment for plaintiff, defendant brings error. Affirmed.

Herbert Boggs, for plaintiff in error. Philip J. Schotland, for defendant in error.

**PER CURIAM.** The only errors assigned are the failure of the trial judge to order a nonsuit or direct a verdict for the defendant. The controversy turned on the time of the delivery of the deed, for the land in question, to the defendant. If it was delivered before the levy of the attachment under which the plaintiff claims, a verdict should have been directed for the defendant. We are satisfied that the case required the submission of this question to the jury, if indeed it did not justify the direction of a verdict for the plaintiff. Confessedly there was no delivery to the defendant himself prior to the levy of the attachment. At the time the deed was left with his attorney it was still incomplete, lacking the signature of one of the grantors, which the attorney had seen fit to require as a matter of precaution before passing the title; and, although the deed was left in his custody, it is clear that he did not mean to accept it, in behalf of the defendant, until it was completed by the signature of all the persons named as grantors. These facts take the case out of the rule that the law will presume that a man accepts what is for his benefit. This presumption is one of fact only. *Jones v. Swayze*, 42 N. J. Law, 279.

The judgment is affirmed with costs.

(76 N. J. L. 324)

#### KEHOE v. BOROUGH OF RUTHERFORD.

(Court of Errors and Appeals of New Jersey. June 22, 1908.)

#### APPEAL AND ERROR—LAW OF THE CASE.

It is not error to refuse to direct a verdict, where the direction would be contrary to the opinion of the Court of Errors and Appeals rendered in an earlier stage in the litigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4661-4665.]

#### Error to Circuit Court, Bergen County.

Action by John Kehoe against the borough of Rutherford. There was a judgment for plaintiff, and defendant brings error. Affirmed.

See 65 Atl. 1043.

John M. Bell, for plaintiff in error. Geo. P. Rust and Arthur S. Corbin, for defendant in error.

**PER CURIAM.** The only assignment of error challenges the propriety of the action of the trial court in refusing to direct a verdict for the defendant, at its request. Such a direction would have been in the face of our

opinion, rendered in an earlier stage of this litigation, and reported in 65 Atl. 1046. There was no error in its refusal.

The judgment under review will be affirmed.

(74 N. J. B. 629)

### CROCHERON v. SAVAGE.

(Court of Chancery of New Jersey. June 4, 1908.)

#### 1. ATTORNEY AND CLIENT — DEALINGS BETWEEN.

A solicitor, who purchases from his client property which is the subject-matter of the employment, must show, not only that the bargain is as good as could have been obtained by due diligence from other purchasers, but also that he gave his client all that reasonable advice against himself which his office of solicitor would have made it his duty to have given the client against a third person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 240-244.]

#### 2. SAME.

Where a solicitor, who purchased land from his client, was not his general solicitor, but acted solely in prosecuting a claim, as to such land, against a railroad company, and kept his client fully informed as to the negotiations with the company, and the client saw letters written by the company to the solicitor, and in particular one stating that the company was not disposed to make any substantial offer for the client's interest, if any she had, but stating that to close the discussion the company would pay \$100 for a quitclaim from the client, and where in the interview, which resulted in the sale to the solicitor, the only subject that was pointedly discussed was the question whether the company had offered more than \$100, and the client and her son, who was her adviser, knew as much about the situation and prospects of the land as the solicitor, the solicitor was in such a situation as to qualify him to become a purchaser of the land, provided the price was fair.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 240, 244.]

Bill by Valina R. Crocheron against Edward S. Savage. Decree for defendant.

The bill in this case is filed to set aside a conveyance, made by the complainant to the defendant, of an interest in a small tract of land in Middlesex county. The property consists of an undivided one-half interest in about three acres of salt meadow, lying at the junction of Thorps creek with Staten Island Sound. It is triangular in shape, is bounded on the north by Thorps creek, on the south by the Sound, and extends easterly to the junction between the creek and the Sound. It is thus bounded on its two long sides by water; the third, or westerly, side abuts upon land belonging to other proprietors. It is not accessible, except by boat, and that from the Sound side only. The railroad of the Port Reading Railroad Company adjoins the tract, and lies a short distance to the northeast of the mouth of the creek. The docks and other constructions of the railroad terminal are built wholly across the mouth of the creek and for a few feet in front of the salt meadow lot in question.

All parties agree that it has but little value to any one except the railroad company, and that such value arises from what is called "strategic situation." The railroad company claims title to the whole tract, and denies that either of the contending parties in this suit have any title to any part of it, or any interest in it.

Prior to 1903 the complainant employed a solicitor to make an attempt to dispose of the property and realize its value. The only obvious customer at that time was the railroad company. After the lapse of some year or two, no result having been reached, the complainant dismissed her solicitor, and in the early part of 1903 intrusted the management of the negotiations for the sale of the property to the defendant, who is a solicitor of this court; his compensation for his services in the matter being fixed at one-fourth of the recovery. The defendant took the matter vigorously in hand, opened anew the negotiations, and interested several of the railroad officials connected with its real estate department therein. These negotiations continued for about three years. During all this period the railroad company denied the complainant's title, and claimed title in itself, and, finally, toward the end of the negotiations, practically discontinued the same on its part, upon the ground that the whole title was vested in the railroad company. The company meantime had offered \$100 for a conveyance from the complainant, and it finally declined any further negotiations. All this is shown by the correspondence between the defendant and the railroad company, by the evidence of the defendant, and by that of the complainant and her son, Jesse O. Crocheron, who was the representative and adviser of his mother, the complainant. It may be said that Mr. Crocheron, who is about 42 years old, is engaged in the coal business at Rossville, on Staten Island, and he lives in the same house with his mother, and appears to be a man of business capacity and affairs. And it likewise appears that his mother consulted him about the property and its disposition, that he advised with her in relation thereto, and that he had more or less to do with the negotiations, and was kept quite fully advised of the whole situation.

The complainant, at the beginning of the negotiations with the railroad company, claimed to own only two-thirds of the undivided half of the undisputed territory. The other third was claimed by several persons, who were the children and descendants of a deceased brother of the complainant. They are known in the case as the "Virginia heirs." In 1903, very shortly after the defendant was employed by the complainant, these Virginia heirs conveyed all the undivided interest which they claimed to the complainant, for the mere purpose of convenience in making disposition of the land. All the correspondence between the defendant and the rail-

road company and the officials of its real estate department and Mr. Ephraim Cutter, a solicitor of this court, who in some way represented the railway company, was put in evidence. For the purpose of showing how the negotiations closed the following citations from this documentary evidence is made: On October 23, 1905, the defendant wrote to Mr. Cutter, inclosing a map of the premises, and notifying him that he was holding the papers, and would like to know whether he would be compelled to bring suit, or whether a conclusion could be arrived at without it, to which letter Mr. Cutter, on the following day, October 24, 1905, replied, making an appointment to meet the defendant at the railway station in Rahway for further conference. Mr. Cutter and the defendant met, in pursuance of that appointment. In his testimony Mr. Cutter describes what took place in that interview. He said that he told the defendant that he had looked into the matter of the title, and had spent two or three days in the Richmond county clerk's office, on Staten Island, and that he had come to the conclusion that the property that was claimed by the complainant was the property mentioned in the deed to the railway company under which it claimed title, although the description differed; that he told the defendant that if partition proceedings were instituted, the company could have its part set off nearest the docks, viz., the property that the docks were partly constructed on, to which the defendant replied that he did not know about that, that he thought the railway company would be compelled to remove the docks, but said, in response to a question put for the purpose, that he never admitted that the lands claimed by the complainant and the railroad company were the same property until that time. And on October 30th, the defendant again wrote to Mr. Cutter, notifying him that he intended to go to Philadelphia on the next day, and asking him if he had any communication for the railroad company, he would like to have Mr. Cutter write it out, so that he might take it with him, and notifying him that unless some conclusion was arrived at, he intended to make a demand on the railroad company before commencing an action in favor of his clients, who, he said, were disgusted with the two years' waiting.

The correspondence, for the period of nearly three years, between the railroad company and its officials and the defendant had been of this same inclusive character. It is, however, manifest from a close perusal of it that the railroad company declined to admit that the complainant had any interest in the property, but in order to save any question, they were willing to give \$100 for a conveyance of what was claimed to be the outstanding interest. From October 30th until the first week in the following January nothing appears to have been done. On January 3, 1906, the defendant went to the house of the

complainant on Staten Island, carrying with him a blank form of warranty deed, in which was typewritten a description of the undivided half interest which was claimed by her. Arriving at her house, in company with a witness named John Edgar, he saw the complainant, and asked for her son, Jesse O. Crocheron. She replied that he had gone across the Sound, and the defendant and his friend waited until he returned. In the meantime the defendant had no conversation with the complainant, and did not state what his business there was. When the son came home, the defendant told him, but not in the presence of his mother, the occasion of his visit. He told him that he could do nothing more for his mother in regard to the meadow in question; that he had spent all the time and all the money he intended to spend on it, unless they were willing to go into a litigation; that he had corresponded with Judge Campbell, and with Mr. Loomis of the railroad's real estate department, and that he had been referred from one to another, and back again to Mr. Cutter, and that the situation was no better than it was three years before; that the railroad company did not admit that his mother had any title, and that the only offer they ever made was the offer they made, a year or two before, of \$100; that he wanted to have a talk with the complainant and tell her the situation; that if she wanted to go on with the suit, he desired to explain to her that she would have to bring an action for partition, which might result in the division of the property, and she might thereby become possessed of a half interest, whereupon, according to his story, the son said, "The other half isn't worth anything," to which the defendant replied, "Now that is something for you to determine," and the son replied to that that his mother was too old to have a lawsuit, and did not want to have any, to which the defendant replied that he felt very much annoyed about the matter, had taken a great deal of interest in it, and he was up to the point where he would like to fight it out; that he did not want to influence her, but that he did not want to bring a suit for her unless she understood what might be the result if she won, and if she lost, to which the son replied: "We will go in and talk with mother." They then went into the house, and the defendant says that he substantially told the same thing to the complainant that he had told to Jesse outside; that the best offer he could get for the property was \$100; that he would rather give her \$200 and fight the railroad than to give up, to which she replied that "that don't seem very much money." Defendant said, "No." Complainant said: "We expected to get a good deal more." Defendant said: "I wouldn't have spent half the time on this, or half the money, if I hadn't expected to get you a great deal more money, but I want to say to you now that I cannot do any more until we have a lawsuit"—to which the complainant

replied that she did not want a lawsuit under any circumstances. Defendant then said: "Then you have got to give up your fight or your efforts, or you have got to have your lawsuit." She replied that she owed Lawyer Hyer some money, to which the defendant replied that Hyer would be willing to take \$50; that he would rather have that than have the property. After some further talk the defendant said: "Now I have got a deed here with the description in it. I will give you \$200, with the understanding that I am going to fight this railroad through. I am going to fight it out, and find out whether we have a half interest in this property or not." She replied: "I hope you will. I wish I was younger, I would like to fight them." Defendant then says that she went out of the room into an adjoining room with her son. They came back, and the son asked the defendant, in his mother's presence, "Do you say \$100 is the best offer the railroad company will make for this property?" to which the defendant replied, "Jesse, it is the only offer that I have ever been able to get them to make, and it is a question now whether you give up the fight or bring an action to maintain your title. In my opinion they won't pay anything until they are licked out." "Well," said Jesse to his mother, the complainant, "you do as you please." And she said: "Well, I would rather have the money." Defendant said: "Very well, Mrs. Crocheron, I will give you \$200 just for the privilege of fighting them. I have spent a good deal more money than that already in your behalf, and I think they are trying to make a fool of me. So," he said, "I will take this deed in the name of my clerk"—and he filled out the writing, as shown in Exhibit C24. After the deed was read to her, she remarked that she thought the defendant should pay Mr. Hyer's bill. This the defendant agreed to do. The complainant then signed the deed, and the defendant took her acknowledgment. The deed was to Albert Bruns, who is the defendant's law clerk. The defendant then paid her \$200. There was then some conversation as to whether the Virginia heirs would be satisfied with the amount that the complainant had received for the property, and Mr. Crocheron requested him to write a letter to the complainant, explaining the situation, so that she could send it down to them with their money. This the defendant did.

The testimony of Jesse O. Crocheron as to this interview is not materially different from that of the defendant, except that he denies that there was any conversation between the defendant and himself before they went into the house. His story about the interview is this: That the defendant went into the room where the complainant was; that he had a deed all ready for her to sign, and that his mother asked him what he thought she would better do about signing it; that he thought the matter over for a while, and

then particularly asked the defendant: "Mr. Savage, do you positively say now, before I have anything to do with this, that the Philadelphia & Reading Railroad Company have positively refused to buy this property, and there is no value to it?" The defendant said: "I do." Then Mr. Crocheron says: "I thought it over, and I told my mother, 'Well, you do just as you see fit'; that is all I had to say, and I went out." He further says that the defendant did not, at that time, say anything about the value of the property, but that he had at other times; that at other times he had said that the property was of no value to him, and that he, the defendant, positively refused to buy it. This interview is likewise described by the complainant. She says that she does not remember just what took place at first, but that the defendant said to her that the company would not take the land, would not buy it, would not have it, and did not need it; that he then offered her \$200, as she would never get anything more, because no one else would buy it, and that she never would get anything out of it; that she objected, and said she did not want to do it until she had heard from her nephews in the South, to which he replied that it would not make any difference, because they would never get anything; that she said she wanted a week to consider it, and that she would not sign the deed until she saw her son, who was over at the railroad company's dock buying coal. She mentioned the Hyer bill, which she says the defendant told her could be disposed of for \$25, and afterwards promised that he would settle with Mr. Hyer; that the defendant stayed around, and went to the shore, and stayed there until he saw Mr. Crocheron coming across; that he was beckoned to come in, and that the son came in; that the defendant had the deed with him. She says that he did not read it to her, and that it was not acknowledged, and that he did what he could in every way to persuade her to make the sale, but that the defendant told her that he had exhausted himself in endeavoring to get the railroad company to pay anything for the property, and that he had been to Philadelphia a half dozen or more times; that he would give her \$200 for the property, which was just \$100 more than he had ever been able to get the railroad company to offer, and in addition thereto would pay Mr. Hyer's bill; that then her son Jesse came in, and asked the complainant, "Do you mean to say they have positively refused to buy that meadow?" Mr. Savage said, "Why, certainly." Whereupon Jesse said to his mother that he did not know what to say about making the sale; that the complainant should do as she pleased. That this conversation between her and Jesse was not in the presence of the defendant, and with this information she signed the deed.

On February 21, 1906, Mr. Crocheron wrote



a letter to the defendant, stating that he had mislaid the letter which the defendant had sent him relating to the sale of the property, which was written for him to send to the Virginia heirs, and asking for a duplicate. The defendant sent him a duplicate of the letter, and shortly after that Mr. Crocheron and his mother sent to the Virginia heirs the portion of the money coming to them from the sale of the property. The transaction was thus wholly closed by the 1st of March, 1906. The bill was filed in the case on September 13, 1907, a few weeks after the defendant had brought suit against the Port Reading Railroad Company to compel it to remove its construction from the mouth of Thorps creek.

John J. Enright, for complainant. Robert H. McCarter, Atty. Gen., and William H. Osborne, for defendant Savage.

HOWELL, V. C. (after stating the facts as above.) The law has placed rather close restrictions upon the dealings between two parties, where one stands in a fiduciary relation to the other. In the case of trustee and cestui que trust the restriction amounts to a prohibition. In the case of other fiduciary relationships the burden is cast upon the purchaser of showing that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser. This rule applies to the relation of solicitor and client. Where a solicitor purchases from his client the property which is the subject-matter of the employment, the solicitor must show, in case the transaction is attacked, not only that the bargain is a good as could have been obtained by due diligence from other purchasers, but also that he gave his client all that reasonable advice against himself which his office of solicitor would have made it his duty to have given the client against a third person, or, in other words, he must show that the client was duly informed, duly advised, and that the transaction was fair. In the absence of these requisites the court will set aside the purchase if completed, or refuse specific performance of the contract. In *Edwards v. Meyrick*, 2 Hare, 60, Sir James Wigram, V. C., states the law to be that a solicitor is not under an actual incapacity to purchase from the client. "There is not in that case the positive incapacity which exists between a trustee and his cestui que trust, but the rule the court imposes is that, inasmuch as the parties stand in a relation which gives, or may give, a solicitor an advantage over the client, the onus lies on the solicitor to prove that the transaction was fair." *Montesquieu v. Sandys*, 18 Ves. 302; *Cane v. Allen*, 2 Dow. 289. The rule is expressed by Lord Eldon \* \* \* to be that if the attorney will mix, with the character of attorney, that of vendor, he shall, if the propriety of the transaction comes in question, manifest that he has given his client all that rea-

sonable advice against himself that he would have given him against a third person. *Gibson v. Jeyes*, 6 Ves. 266. \* \* \* In some cases, as between trustees and cestui que trust, the rule goes to the extent of creating a positive incapacity, the duties of the office of trustee requiring, on general principles, that that particular case should be so guarded. The case of solicitor and client is, however, different. \* \* \* The nature of the proof which the court requires must depend upon the circumstances of each case, according as they may have placed the attorney in a position in which his duties and his pecuniary interests were conflicting, or may have given him a knowledge which his client did not possess, or some influence or ascendancy or other advantage over his client, or, notwithstanding the existence of the relation of attorney and client, may have left the parties substantially at arm's length and on an equal footing." *Hatch v. Hatch*, 9 Ves. 292; *Wells v. Middleton*, 1 Cox, 112; *Hunter v. Atkins*, 3 M. & K. 113. See, also, *Hugenin v. Basely*, 2 W. & T. L. C. 1156, and notes at page 1216.

It was held by the House of Lords in *Lewis v. Hillman*, 3 H. L. C. 607, that, in case where an attorney was able to convince the court that he had a right to purchase from his client, he must purchase openly, and if he purchased in the name of a third person as his (the attorney's) trustee or agent, without disclosing the fact, the purchase was void. This case is mentioned, for the reason that it appears that in the case in hand the defendant took title, not in his own name, but in the name of his clerk, so that, under the authority last cited, the deed would be void if no disclosure of the name of the true purchaser was made. The defendant testifies that he made such a disclosure of the complainant at the time the deed was executed, and his statement in relation thereto is not denied by her. The point of the case of *Lewis v. Hillman* was that there the solicitors put forward their clerk as the real purchaser, when in fact the solicitor himself advanced the money, and was the responsible vendee. Here no such fact exists. The cases concerning this delicate relation between attorney and client are harmonious and of universal application. They have been adopted by the Court of Appeals of this state in the case of *Dunn v. Dunn*, 42 N. J. Eq. 431, 7 Atl. 842, and to the opinion, in that case, of Mr. Justice Magie, afterwards chancellor, nothing can be added. Applying the rule to the case in hand, we find that the defendant was not the general solicitor for the complainant, but acted with relation to the single matter above mentioned, that he kept the complainant fully informed of the progress of the negotiations which he was carrying on with the railway company, and that she saw, from time to time, the letters written by the railway company's officials to the defendant, and in particular did she see the letter of

(74 N. J. E. 609)

## WORTH v. WATTS.

(Court of Chancery of New Jersey. June 8, 1908.)

## 1. SPECIFIC PERFORMANCE — DEFENSES — FRAUD.

Reaffirmance by vendor of the original contract of sale on six several occasions, extending over a period of 18 months, and receipt by him, in the aggregate, of all but \$200 of the price, cannot be properly disregarded, where presented, in specific performance, to repel a presumption of fraud which might arise from inadequacy of price.

## 2. SAME.

Though equity will not decree specific performance of a contract which is unfair or unjust, any inadequacy of price, unaccompanied by other evidence of fraud, which is not so gross as to be of itself conclusive evidence of fraud, will not bar the relief sought, but may be considered in connection with other circumstances tending to show undue advantage or other elements of fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 152.]

Bill for specific performance by Nathan Worth against Ernest Watts, executor, etc., of Firman Dubel, deceased. Decree advised pursuant to prayer of the bill.

The bill is filed by complainant to procure the specific performance of an agreement for the sale of land, made by Firman Dubel in his lifetime. The following is a copy of a receipt embodying the agreement which complainant seeks to enforce:

"Burlington, N. J., February 2, 1904.

"Received from Nathan Worth two thousand five hundred dollars (\$2,500) on account of purchase price for house and lots 303, 305 High street, and 20 and 22 Union street Burlington, N. J., which I agreed to sell to him clear of all incumbrances for four thousand (\$4,000), deed to be delivered on the payment of the balance of the money, but to continue paying rent as before, until balance is paid  
Firman Dubel."

The body of this paper is in the handwriting of complainant, and the signature is that of defendant's testator.

Six additional receipts for payments, on account of the purchase price of the property, were received in evidence. These receipts are dated, respectively, June 17, 1904, July 11 1904, August 15, 1904, September 19, 1904, October 18, 1904, and November 1, 1904, and aggregate in amount \$1,300. The same language is used in each receipt, and the body of each receipt is in the handwriting of complainant, and each is signed by defendant's testator. These receipts, omitting dates and amounts, are as follows:

"Received of Nathan Worth ——— dollars as a payment for properties 303-305 High street and 20 and 22 Union street, Burlington, N. J., agreed to be sold by me to him as per receipt of February 2, 1904.

"Firman Dubel."

Firman Dubel died December 28, 1904, and upon the refusal of defendant, as his executor, to accept \$200, which was tendered

September 22, 1903, written by Mr. Loomis to the defendant, in which he says that he is advised that the railway company is not disposed to regard this tract of land of any signal value, or to make any substantial offer for the complainant's interest, if she has any, which seemed doubtful; that he was willing, however, in order to close the discussion, and avoid expense, to pay the complainant \$100 for a quitclaim to the company of any alleged interest in the property.

At the interview which resulted in the execution of the deed by the complainant to the defendant, the only subject that was pointedly discussed was the question whether the railway company had offered more than \$100 for the land in question. I have been unable to find any fact in the case which was kept from the complainant. When she executed the deed, she and her son, who was her adviser, knew as much about the situation, location, value, salability, and prospects of the property as did the defendant. It was within sight of her home, and there were annually more or less transactions to bring it to her attention. A perusal of her own testimony shows that she had perfect knowledge of the situation. It is significant that the complainant and her son tell the same story practically as does the defendant about the interview of January 8, 1903, when the deed was executed; and likewise significant that, after the proposition had been made by the defendant to purchase the land, the complainant and her son adjourned to another room to confer about the matter. I therefore think that the defendant had put himself in such a situation as to qualify him to become a purchaser of the land in question, provided the price was fair. There was no testimony in the case on behalf of the complainant, touching the value of the land, which can be relied upon as evidence of its present market value. In fact it would be difficult to ascertain the market value of a piece of land which was accessible only by boat, and admitted, on all hands, to be of little or no value to anybody except the railroad company. There was some conversation between the defendant and the railway officials, in which rather large values were mentioned, but these conversations took place after the deed had been executed by the complainant to the defendant, and were quoted by the railway officials and the defendant, in negotiations between the railroad company and the defendant for the partition of this land and the straightening of lines between his property and its property in other locations. I do not think that the valuations so discussed could be relied upon as any safe criterion of the present market value of the property. There was no evidence of sales in the neighborhood, nor any direct evidence by experts of the actual market value.

There will therefore be a decree for the defendant.

to him by complainant as the balance of the purchase price, this suit for specific performance of the contract was brought.

At the date of the agreement (February 2, 1904) complainant was occupying the premises referred to as 303 and 305 High street, under a lease from Dubel made June 10, 1902, at a rental of \$40 per month for the first year, and \$45 per month for the two subsequent years. At the end of the first year the increased rental provided for in the lease was waived by Dubel, and complainant thereafter continued to occupy the premises at \$40 per month.

Defendant has undertaken to establish such fraud, in connection with the agreement of sale which complainant seeks to enforce, as will operate to deny the relief sought.

John W. Wescott and Alex. J. Brian, for complainant. Eckard P. Budd and Joseph H. Gaskill, for defendant.

LEAMING, V. C. (after stating the facts as above). Defendant urges that the consideration named in the agreement is so grossly inadequate that it affords conclusive evidence of fraud. The law of this state touching inadequacy of consideration, as a defense to a suit for specific performance of a contract for the sale of land, may, I think, be said to be well settled. A court of equity will not refuse to decree the specific performance of a private contract for the sale of land because the price for which the land is to be sold is less than the market value of the land. Inadequacy of price, however, is a feature which may be considered in determining the existence of fraud. It may, in connection with other evidence, establish the existence of fraud, or the inadequacy of price may be so gross as to shock the conscience of the court, and thus furnish satisfactory and decisive evidence of fraud. In either case it may be said to be the fraud so ascertained, and not the inadequacy of price, which operates as the bar to relief. *Rodman v. Zilley*, 1 N. J. Eq. 320; *Executors of Wintermute v. Executors of Snyder*, 3 N. J. Eq. 489; *Ready v. Noakes*, 29 N. J. Eq. 497; *Shaddle v. Disborough*, 30 N. J. Eq. 370, 384; *Phillips v. Pullen*, 45 N. J. Eq. 5, 16 Atl. 9.

In the present case the difference between the market value of the land in question and the price named in the agreement for its sale closely approaches that which some eminent judges have defined as "gross inadequacy." Ten witnesses testified, in behalf of defendant, touching the value of the premises described in the contract of sale. From their testimony it is apparent that the value of the premises was about \$10,000 at the date of the contract. Assuming that amount to have been the value of the premises named in the contract of sale, it will be observed that the consideration specified in the con-

tract was something less than one-half of the value of the property. Any extended review of the adjudicated cases, with a view of ascertaining when the difference between the value and contract price may be said to become so great as to amount to gross inadequacy, and shock the conscience of the court, and in itself operate to deny relief, would, I think, be of little assistance. Most of the authorities touching that subject will be found collected in a footnote to 26 Amer. & Eng. Encyc. of Laws (2d Ed.) 28. Any considerable inadequacy of price naturally suggests unfair dealing on the part of the one favored by the terms of the contract, when the engagement is considered, as it must be, as a contract, and not as a gratuity; but it is difficult to conceive any case in which some circumstance may not exist which will operate to either repel or to accentuate such suggestion of unfair dealing. Even in a case where there exists such gross inadequacy of price as may be appropriately said to shock the conscience of the court, and afford in itself satisfactory and convincing evidence of unfair dealing, other circumstances may exist which, if considered, would tend to destroy the conclusion which might be otherwise reached. Such circumstances should, I think, be given due consideration. I am convinced that where it is established (as I understand it to be, both in this state and by the weight of authority elsewhere), that it is the ascertained fraud, and not the inadequacy of price, which operates as the bar to specific performance, such fraud must be ascertained by a consideration of all the circumstances of the individual case; and that it is quite impracticable to define any exact ratio between values and price as a boundary line, which, when crossed, affords, in itself, conclusive evidence of fraud. One feature of the present case well illustrates the thought here suggested. While the inadequacy of price in the present contract of sale may suggest that complainant in some improper way obtained an unjust advantage over defendant's testator when the original agreement was made, yet the mind cannot close itself from the knowledge that, on June 17, 1904, over three months after the original receipt which embodied the terms of the agreement was signed, defendant's testator signed a receipt for another portion of the purchase price, and in that receipt specifically referred to the receipt of February 2, 1904, as embodying the terms of the agreement of sale. If this second transaction was fairly conducted, it was a reaffirmance, by defendant's testator, of the terms of the original agreement. Again, in the following July, August, September, and October, respectively, additional receipts for portions of the purchase price were signed by defendant's testator, and in each receipt the original contract was, in like manner, referred to. Thus on six several occasions, ex-

tending over a period of 18 months, defendant's testator reaffirmed the original contract, and received, in the aggregate, all but \$200 of the purchase price. His death occurred in the month following the payment last referred to. Assuming that these payments were actually made at the times stated, and that the contents of the several receipts were fully understood by defendant's testator, it seems clear that such repeated affirmances of the original contract would have operated as a serious bar to any claim which might have been thereafter made by defendant's testator for a rescission of the contract, based upon fraud in the original transaction. Surely such affirmances of the contract cannot be properly disregarded, when presented to repel an assumption of fraud arising from an inadequacy of price of a degree which, standing alone, might be sufficient to lead the mind to a conviction of fraud. It is my opinion that specific performance of this contract cannot be properly denied upon the theory that the inadequacy of price, in itself, furnishes conclusive evidence of fraud.

But it is earnestly urged, in behalf of defendant, that other circumstances of the case, when considered in connection with the evidence touching inadequacy of price, justify the conclusion of fraud, or disclose a contract of such unfairness and hardship that a court of equity should deny relief. While a court of equity will not decree specific performance of a contract which is unfair, unreasonable, or unjust, any inadequacy of price (standing alone, and unaccompanied by other evidence of fraud or imposition), which is not so gross as to be, of itself, what some courts call conclusive evidence of fraud, cannot be treated as such an instance of unfairness or hardship as will bar the equitable relief sought; but such inadequacy may be considered in connection with other circumstances tending to show undue advantage, or other elements of fraud. As already stated, I understand that to be the rule established in this state, and also by the more modern authorities elsewhere. See *Pomeroy on Contracts*, § 194, and cases there collected. A number of circumstances, other than inadequacy of consideration, are urged by defendant as evidences of fraud upon the part of complainant. It has been shown that defendant's testator was 84 years of age; that he was a man with careless methods of doing business; that he was of a trustful nature, and habitually signed receipts without first reading them, and usually received money without counting it; that he drank to excess, and was more or less drunk almost every day; and it is also urged that complainant did not have sufficient money to enable him to make the payments evidenced by the receipts, to which reference has already been made. It was also shown that defendant's testator made some per-

manent improvements to one of the buildings covered by the contract, at a date subsequent to the date of the contract. I have undertaken to give adequate consideration to all of these circumstances, in connection with the low price at which the property was sold, with a view of reaching the conclusion that some improper conduct upon the part of the complainant may have existed; but I have been unable to reach that conclusion of fact. Any suggestions of improper conduct upon the part of complainant, emanating from the circumstances referred to, fail to impress upon my mind a conviction of fact; and especially is this true when all the evidence in the case is given due consideration. The suggestion arising from the advanced age and intemperate habits of defendant's testator, and from his custom to sign receipts without reading them, is that the signature to the contract may have been procured by complainant through some subterfuge, or that defendant's testator may have been incapable of fully comprehending his acts. But defendant's testator was a man who owned a considerable number of properties in that vicinity, and these properties were successfully handled by him, and his ability to intelligently transact his own business does not appear to have been materially impaired by either his age or intoxication. The impression of the man, as I have received it from the evidence, is that of a man who was quite as capable of making a bargain when under the influence of liquor as at other times. While he appears to have been in the habit of signing rent receipts for various tenants without reading the receipts, he was keenly aware of the times when the rent was due, and it cannot be inferred that he could have been induced to sign papers when nothing was due him, as he must have done if the contract now in question and the several receipts for payments on account of the contract price were signed by him when the payments called for in the receipts were not in fact made; for it must not be overlooked that if it be assumed that the original receipt, which embodies the terms of the contract, was signed by defendant's testator without an intelligent knowledge of its contents and force, or through any subterfuge upon the part of complainant, a like assumption must be indulged touching the several subsequent receipts, and it is impossible for me to believe that complainant has procured the signature to these seven papers without defendant's testator having comprehended the nature of any of them. Each month a rent receipt was signed in a book kept by complainant for that purpose. As to the claim that complainant was not able to raise the money which the receipts disclose that he paid for the property, it is my opinion that the claim is not supported by the evidence. While I have referred to the value of the premises

In question as \$10,000 (\$9,000 for the property which complainant occupied as a tenant, and \$1,000 for the property in the rear, which was occupied by the Salvation Army), it also appears that the rental paid by complainant was \$40 per month, and by the other tenants \$15 per month; and, according to the testimony, this rental, when used as a guide to determine valuation, indicates a total value of about \$7,000. It is, of course, impossible to determine what may have impelled defendant's testator to agree to part with his property for the amount named. The diversified considerations which control human conduct are too complex to warrant the effort of affirmative ascertainment. The evidence discloses that the relation of the contracting parties was, to say the least, friendly. That fact alone renders it natural and reasonable that the terms of payment should be made easy rather than otherwise. As the case has been tried upon the theory, on the part of counsel on both sides, that our statute forbids testimony, by either of the present parties to the record, touching statements made by or transactions with the deceased, we are denied the benefit of their testimony in that field. But the evidence discloses that the contract was in fact made, and I find nothing in the case to lead my mind to the conclusion that the contract was not the intelligent and deliberate act of defendant's testator.

I will advise a decree pursuant to the prayer of the bill.

(76 N. J. L. 435)

**MEEKER v. MAYOR, ETC., OF CITY OF EAST ORANGE.**

(Supreme Court of New Jersey. July 9, 1908.)

**WATERS AND WATER COURSES—RIGHTS TO PERCOLATING WATER.**

A city has an absolute right to appropriate percolating water flowing under land owned by it, though it is done to the injury of one, whose spring the water would reach if not so appropriated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 110.]

Appeal from District Court of Newark.

Action by Frank W. Meeker against the mayor and city council of East Orange. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued February term, 1908, before VOORHEES, J.

Guild, Lum & Tambllyn, for appellant. Jerome D. Gedney, for appellee.

**VOORHEES, J.** This is an appeal from the first district court of the city of Newark, and by consent was heard before a single justice pursuant to the statute. The case was submitted to the district court upon the following agreed state of facts: "The plaintiff owns and occupies a farm of about 100 acres, situated in the townships of Millburn

and Livingston, Essex county, N. J., and in the valley of Canoe brook. Plaintiff is a milkman, and has used his farm for the pasture and support of his cows and horses for a number of years last past. Canoe brook flows in a general southwesterly direction, and through the property of plaintiff. There are also two small streams tributary to Canoe brook, which flow through plaintiff's farm. On the plaintiff's farm there is also a spring, which is inclosed by a springhouse. Plaintiff has used the water of this spring, for a number of years last past, for drinking purposes, and for the storing and keeping of his milk. Plaintiff's cattle in pasture have, for a number of years, resorted to Canoe brook, and the tributary streams mentioned above, for drinking water. In January, 1905, the defendant city of East Orange began to take water from a number of artesian wells, which it had sunk and constructed upon a tract of land, containing about 680 acres, situated in the valley of Canoe brook, and in the township of Millburn. These wells of defendant are about 20 in number, and are situated about 1¼ miles distant from plaintiff's farm and spring. The wells are downstream from the farm, spring, and streams of plaintiff, and their location is southwesterly from plaintiff's property. The said plant of the defendant was installed, and the land upon which it is located was purchased, by the city of East Orange under the authority of an act of the Legislature of the state of New Jersey, entitled 'An act to enable cities to supply the inhabitants thereof with pure and wholesome water,' approved April 21, 1876, and the acts supplemental thereto and amendatory thereof. Defendant city of East Orange has expended more than \$1,000,000 in the construction of its said works, wells, and the mains and reservoirs connected therewith. As a result of the operation of the defendant's said plant by means of its wells, it has taken percolating underground water, which, but for its interceptions, would have reached plaintiff's spring or streams, but no water other than percolating underground water has been taken by defendant, and no water has been taken by defendant out of any surface stream or the spring of plaintiff after it (the water) has appeared on the surface, or in any surface spring or stream." The question at issue regards the appropriation, by the defendant, of percolating underground water, but for the interception of which by the defendant would have reached the plaintiff's spring, and excludes the abstraction of water by the defendant out of any surface stream or out of the plaintiff's spring. Judgment was given in the district court for the defendant.

The rules of law which are applicable to a stream flowing in a defined channel, either upon or under the surface of the ground, are not pertinent to this case. In New Jersey, so far as the subject has been discussed, the rule that the absolute right of such waters

is in the owner of the fee has been adopted. In *Ocean Grove v. Asbury Park*, 40 N. J. Eq. 447, 3 Atl. 168, it is said: "The courts all proceed upon the ground that waters thus used and diverted (underground waters) are waters which percolate through the earth, and are not distinguished by any certain and well-defined stream, and consequently are the absolute property of the owner of the fee as completely as are the ground, stones, minerals, or other matter to any depth whatever beneath the surface. The one is just as much the subject of use, sale, or diversion as the other. The owner of a mine encounters innumerable drops of water escaping from every crevice and fissure. These, when collected, interfere with his progress, and he may remove them, although the spring or well of the landowner below be diminished or destroyed." In the case of *Harper v. Mountain Water Co.*, 65 N. J. Eq. 479, 56 Atl. 297, former Chancellor Magie, then Chief Justice, at the circuit, incorporated the following words in his charge to the jury: "When the owner of land sinks a pit or well, and strikes an underground reservoir of water, or flowing underground water, he acquires a certain right to it, the right to use that water—the right to use it although the sinking of his well, and the use of the water from it, may have affected somebody else with respect to underground water; and, if a neighbor of his sinks another well and thereby affects the flow of his, or, as it is sometimes expressed, 'takes the bottom out of his well,' he is without redress. If it is a wrong, it is not an actual wrong; if it is an injury, it is an injury without redress by law. This rule applied, therefore, to all percolating underground waters, and the interception of waters by the sinking of such pits or wells as affect an underground reservoir or underground flow will not be the cause of any action on the part of a person whose underground flow or reservoir, to which he has resort before, is affected thereby. Now I am bound to hold in this case, and for the purpose of this case I do hold, that the like rule applies where an underground water is struck and intercepted by pits or wells, which water, if not intercepted, would reach the surface in springs or ponds, and so flow down streams, and the abstraction of such waters will not be an actual wrong, even if the water so abstracted is used otherwise than in the improvement of the owner's land. So that in this case, and for the purpose of this case, I charge you that the defendants may strike underground streams, and abstract underground water, and if they take nothing, except by interception of water, that otherwise would have come to the surface, they may even carry it off and market it and sell it."

This case, in another form, came before Vice Chancellor Emery, in *Harper, Hollingsworth & Darby Co. v. Mountain Water Company*, 65 N. J. Eq. 479, 56 Atl. 297. At page 488 of 95 N. J. Eq., and page 297 of 56 Atl.,

it appears that the above-mentioned charge came under review by the Supreme Court on a rule to show cause. This court then held that the defendants had no ground to complain of the law as laid down by the trial judge as to their liability, but that there was proof of an injurious diminution of flow by abstractions, such as was properly held to be actionable.

In a dictum in the case of *McCarter, Attorney General, v. Hudson County Water Co.*, 70 N. J. Eq. 695, 65 Atl. 489, the Court of Errors and Appeals, speaking by the present Chancellor, uses the following language: "We may concede, also, for present purposes that subterranean waters, such as may be reached only by driving wells, when thus acquired, become absolutely the property of the proprietor of the soil, and may be dealt with by him as merchandise, and that, if they be thus converted into a merchantable commodity, the state would not be permitted to prohibit its transportation beyond the confines of the state. Water thus taken from wells may be placed on the same plane with oil and natural gas."

These rulings have their foundation in the English cases; the leading one being *Chasemore v. Richards*, 7 House of Lords Cases, 349. The subject was there fully discussed, and by the unanimous opinion of all the judges it was held that the principles which regulate "the rights of owners of land in respect to water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in no known channels, and that where a landowner and a millowner, who had for above 60 years enjoyed the use of a stream, which was chiefly supplied by such percolating underground water, lost the use of the stream after an adjoining owner had dug, on his own land, an extensive well for the purpose of supplying water to the inhabitants of the district, many of whom had no title, as landowners, to the use of the water, it was held that such millowner had no right of action." It will be noticed that the facts in the case under consideration have undoubtedly been patterned after the case last cited, and so closely do they adhere to it that they present an academic question, rather than a practical situation. Mr. Justice Wightman, in discussing the question whether the plaintiff in *Chasemore v. Richards* had a right, *jure naturæ*, to prevent the defendant sinking a well in his own ground, and so absorbing the water which might otherwise be used for the working of the plaintiff's mill, says: "It is impossible to reconcile such a right with the natural and ordinary rights of landowners, or to fix any reasonable limits to the exercise of such a right. Such a right as that contended for by the plaintiff would interfere with, if not prevent, the draining of land by the owner. Suppose, as it was put at the bar in argument, a man sank a well upon his own

land, and the amount of percolating water which found a way into it had no sensible effect upon the quantity of water in the river, which ran to the plaintiff's mill. no action would be maintainable; but, if many landowners sank wells upon their own lands, and thereby absorbed so much of the percolating water, by the united effect of all the wells, as would sensibly and injuriously diminish the quantity of water in the river, though no one well alone would have that effect, could an action be maintained against any one of them, and, if any, which, for it is clear that no action could be maintained against them jointly." Lord Chelmsford, in that case says: "But the right to percolating underground water is necessarily of a very uncertain description. When does this right commence? Before or after the rain has found its way to the ground? If the owner of land through which the water filters cannot intercept it in its progress, can he prevent its descending to the earth at all, by catching it in tanks or cisterns? And how far will the right to this water supply extend? Are the most distant landowners, as well as the adjacent ones, to be bound, at their peril, to take care to use their lands so as not to interrupt the oozing of the water through the soil to a greater extent than shall be necessary for their own actual wants?" Lord Cranworth, in the same case says: "But if the doctrine (that applied to visible streams) could be applied to water merely percolating, as it is said, through the soil, and eventually reaching some stream, it would be always a matter that would require the evidence of scientific men to state whether or not there had been interruption, and whether or not there had been injury. It is a process of nature not apparent, and therefore such percolating water has not received the protection which water running in a natural channel on the surface has always received. If the argument of the plaintiff were adopted, the consequence would be that every well that ever was sunk would have given rise, or might give rise, to an action."

The plaintiff insists that the rule "*sic utere tuo ut alienum non lædas*" should be applied, and that correlative rights in percolating waters should be recognized by the court; that in this way protection would be afforded to adjoining property owners by limiting the rights of others to such amount of water taken by the sinking of wells, and in other like manner, as might be necessary for some useful purpose in connection with the land where they are sunk; that absolute ownership in the holder of the fee of the underground waters should not be recognized, but the right of the landowners to such waters should be exercised with reference to the equal rights of others in their lands. Lord Wensleydale, who had some doubts on the subject, however, agreed, in *Chasemore v. Richards*, and made the judgment of the

court unanimous. He inclined to the theory, contended for by the plaintiffs, that the use to be made of such subterraneous waters by the landowners must be reasonable; that is, confined to the uses of his property and those living thereon. He admitted that if the number of houses erected upon such property had increased, so that the quantity of water used by their occupants had been proportionately augmented, even then there could have been no just grounds for complaint; but when water was abstracted for the use of a large district not connected with the estate whereon the well was sunk, he doubted the legality of such acts, but conceded, however, that the abstraction of water for the use of dwellers upon the land whereon the well existed, even though they carried on trades such as breweries, would still be for their purposes only. The fallacy of this reasoning lies in the criterion set for a reasonable use. It is not quantity used, but purposes of use. Now the injury to the neighboring tenant is caused by the quantity abstracted; the purpose of abstraction is immaterial. The argument which permits breweries and like industries to be supplied, however great their consumption may be, loses sight of the cause of the injury. Taking the instance of the brewery, it is fair to suppose that the water used therein would become a part of its trade product, and would be sent to distant regions for gain, and thereby be abstracted in like manner, as it would be in supplying the inhabitants with pure water for use in like distant regions. The *Pennsylvania* case of *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721, is an adoption of the English rule. See the later case of *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511, in which reference is thus made to *Wheatley v. Baugh*. "Undefined water courses there spoken of, which a man may not divert to the hurt of an inferior proprietor, are not the hidden streams of which the owners of the soil through which they pass can have no knowledge until they have been discovered by excavations." See, also, *Lybe's Appeal*, 106 Pa. 634, 51 Am. Rep. 542. The rule of reasonable use has been adopted, however, in some states, notably in Massachusetts, *Hart v. Jamaica Pond Aqueduct Co.*, 133 Mass. 488; in New Hampshire, *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179; and in New York, *Forbell v. New York*, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666. In certain arid regions the English doctrine has been denied. In *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, the court, speaking of the English rule, says: "Such law as has been made upon the subject comes from countries and climates where water is abundant, and its conservation and economical use of little consequence, as compared with a climate like southern California."

I am inclined to think, however, that the

English rule, heretofore either adopted or recognized in this state, supported as it is by the great weight of authority in this country, is the better, and for these reasons the judgment of the court below should be affirmed.

(75 N. J. L. 557)

**MEEHAN v. BOARD OF EXCISE COM'RS  
OF JERSEY CITY et al.**

(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)

**1. CONSTITUTIONAL LAW—CLASS LEGISLATION.**

Section 4 of the act of April 13, 1906, commonly known as the "Bishops' Law" (P. L. p. 203), does not contravene the fourteenth amendment of the federal Constitution.

**2. STATUTES—GENERAL AND SPECIAL—SPECIAL LAWS REGULATING INTERNAL AFFAIRS OF MUNICIPALITIES.**

Section 4 of the act of April 13, 1906, commonly known as the "Bishops' Law" (P. L. 1906, p. 203), is not in contravention of article 4, § 7, subd. 11, Const., which prohibits the Legislature from passing private, local, or special laws regulating the internal affairs of municipalities, or granting exclusive privileges, immunities, or franchises.

**3. SAME.**

Section 4 of the act of April 13, 1906, commonly known as the "Bishops' Law" (P. L. 1906, p. 203), subjects "inns and taverns" (as well as "hotels") to the restrictions mentioned in the section, unless such inns and taverns have at least 10 spare rooms and beds for the accommodation of boarders, transients, and travelers.

**4. SAME—EFFECT OF INVALIDITY IN PART.**

Notwithstanding the unconstitutionality of section 5 of the act of April 13, 1906, commonly known as the "Bishops' Law" (P. L. 1906, p. 203), as heretofore declared by this court in *Decker v. Daudt*, 67 Atl. 375, the remainder of the act is not thereby overthrown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 53-66.]

(Syllabus by the Court.)

**Error to Supreme Court.**

Certiorari by Hugh Meehan to review a resolution adopted by the board of excise commissioners of Jersey City pursuant to Act April 13, 1906, § 4 (P. L. p. 203), commonly known as the "Bishops' Law." There was a judgment (78 N. J. Law, 382, 64 Atl. 689) sustaining the constitutionality of the act and the validity of the resolution, and Meehan brings error. Affirmed.

R. V. Lindabury, for plaintiff in error.  
George L. Record and Peter Backes, for defendants in error.

**PITNEY, Ch.** The question at issue is the constitutionality of section 4 of the act commonly known as the "Bishops' Law," approved April 13, 1906 (P. L. 1906, p. 203), being a supplement to the act to regulate the sale of spirituous, vinous, malt, and brewed liquors. The question was raised by a certiorari sued out of the Supreme Court to review a resolution adopted by the excise commissioners of Jersey City in pursuance of the section referred to. The resolution requires that "the interior of the bar or business room in which liquors and other intoxi-

cating drinks are sold and served under any license granted by this board shall, during such times as such sales are prohibited by law, be open to full view from the public street; provided, however, this rule shall have no application to such places as are exempt from its operation under the provisions of said law." The Supreme Court sustained the constitutionality of the legislation and the validity of the resolution in an opinion by Mr. Justice Fort, with whose conclusions we agree. In that court the attack upon the law seems to have been based principally upon the provisions of the fourteenth amendment of the federal Constitution. In this court the point is raised that section 4 of the act conflicts with that provision of the Constitution of this state which prohibits the Legislature from passing private, local, or special laws regulating the internal affairs of municipalities. Const. N. J. art. 4, § 7, subd. 11. It is insisted that the law is special because its classification is arbitrary and illusory. Even if it were special for this reason, it does not follow that the section conflicts with the constitutional provision thus invoked; for, as far as we can perceive, it does not in any wise regulate the internal affairs of municipalities. We are referred to *Paul v. Gloucester County*, 50 N. J. Law, 585, 15 Atl. 272, 1 L. R. A. 86, and *Berry v. Cramer*, 58 N. J. Law, 278, 33 Atl. 201, as settling the question that the section under consideration constitutes an attempt to regulate the internal affairs of municipalities. But the act that was in question in *Paul v. Gloucester County* (which is found in P. L. 1888, p. 142) classified the municipalities of the state according to their population for the purpose of establishing the minimum license fee to be paid upon liquor licenses in the several municipalities. It was this provision concerning which Mr. Justice Van Syckel said (50 N. J. Law, 592, 15 Atl. 275, 1 L. R. A. 86): "It is conceded that the section is a regulation of the internal affairs of towns and cities, and the diversity created by it is fatal to its validity unless the basis of the classification is a substantial one." It will be observed that the section referred to affected the municipal revenues, and therefore, under the principle laid down by this court in the case of *Freeholders of Passaic v. Stevenson*, 46 N. J. Law, 173, amounted to a regulation of "internal affairs." The act that was under consideration in *Berry v. Cramer*, 58 N. J. Law, 278, 33 Atl. 201 (being found in P. L. 1889, p. 77), likewise fixed a minimum license fee in respect of population, and also, by its fourth section, conferred upon the municipalities the local option of fixing a minimum license fee to be named in the petition for the election, but provided that such elections could only be held where licenses were required to be granted by the court of common pleas. Manifestly this was a regulation of the internal affairs of the municipalities.



The section now before us has no such feature. It applies uniformly throughout the state, and does not regulate the internal affairs of any municipality; for the "internal affairs" which by the Constitution must be regulated under general laws are those which are governmentally, and not merely territorially, internal to the municipalities. Nor is there in section 4 of the "Bishops' Law" and discrimination between municipalities considered as territories. The only discrimination is between liquor dealers.

It is, however, further insisted that the section is invalid because it is a special law granting exclusive privileges or franchises, contrary to the provision of our Constitution in that behalf. Const. N. J. art. 4, § 7, subd. 11. Upon this point *Alexander v. City of Elizabeth*, 56 N. J. Law, 71, 28 Atl. 51, 23 L. R. A. 525, is cited. In that case it was held by the Supreme Court that the statutory prohibition against the using of any race course that was not in use prior to January 1, 1893, without obtaining a resolution adopted by three-fourths of the members of board of freeholders declaring the maintenance of such a race course to be a public necessity, was a grant of an exclusive privilege to race courses used before the date specified to obtain a license without complying with the condition, that the condition was imposed without rational ground of discrimination as between old race courses and new, and that, therefore, the act was a special law granting to a corporation, association, or individual an exclusive privilege, immunity, or franchise. Without passing upon the propriety of that decision, we think it sufficient to say that it is not in point with the case now presented. In section 4 of the "Bishops' Law" there is no discrimination between places previously licensed and other places, nor between persons previously engaged in the liquor business and others. By our laws all persons are prohibited from retailing intoxicating liquors without license, and this section imposes regulations equally applicable to all, whenever licensed, provided they engage in a certain line of business. There is here no exclusive privilege, immunity, or franchise. The section is an exercise of the police power of the state, and, unless it be clearly arbitrary or violative of the natural or property rights of the citizen, it cannot be pronounced unconstitutional because of its discriminations.

It divides liquor dealers into two classes: The first class includes (1) keepers of inns, taverns, and hotels having at least 10 spare rooms and beds for the accommodation of boarders, transients, and travelers; (2) restaurant keepers who conduct business on more than one story; (3) keepers of picnic or recreation grounds; (4) keepers of bowling alley buildings; (5) regularly organized clubs or associations. In the second class are embraced all other liquor dealers selling liquor by license in smaller quantities than a quart. Manifestly this class comprises those who

are commonly called "saloon keepers" and the keepers of small hotels and taverns, whose chief business is the sale of intoxicating drinks. The regulations which apply to the second class, and not to the first, are the following: (a) No license shall be granted to sell liquors in any place excepting in a bar or business room upon the ground floor or basement of a building on a public street; (b) no liquor shall be sold or served in any room, except in such bar or business room; (c) the clear interior view of the whole of said room (excepting for toilet purposes) shall be in no way obstructed by a screen, nontransparent glass, shade, blind, door, shutter, or merchandise, or any other article placed in any of said rooms; (d) the court, excise board, or other licensing body shall, upon the days and times when the sale of liquors is by law prohibited, and may at any and all other times, require that the interior view of the bar or business room shall be open to full view from the public street. There is also a penal clause providing that for a violation of any of these provisions the license may be forfeited, and the party offending be deemed guilty of keeping a disorderly house. The limitation of the sales to a single room, and the requirement of a clear interior view of such room, are manifestly intended to prevent secrecy in the conduct of the business, and to render the bar-room easy of inspection by the police. The provision that the bar must be upon the ground floor or basement, and the provision requiring an open view from the street at times when the sale of liquors is prohibited by law and at other times in the discretion of the court, excise board, or other body charged with the granting of licenses, are likewise contrived with a view of rendering police inspection easy and efficacious. Police regulations of this character must, in the absence of clear evidence to the contrary, be deemed to be based upon facts within the possession of the Legislature rendering such legislation proper, if not necessary. See *Hopper v. Stack*, 69 N. J. Law, 562, 56 Atl. 1. The exemption of the larger taverns and hotels, of restaurants occupying more than a single story, of recreation grounds, of bowling alley buildings, and of clubhouses from the like restrictions is explainable on the ground that the Legislature presumably deemed the restrictions to be either impracticable or unnecessary as to these establishments. It will be observed that in the clause of section 4, which points out those drinking places to which the restrictions are to apply, the words, "if not in an inn or tavern or a hotel having at least 10 spare rooms and beds for the accommodation of boarders," etc., are construed by us as placing "inns and taverns" and "hotels" in the same category, so that the qualification "ten spare rooms and beds" pertains to inns and taverns, as well as to hotels. In doing this we require the punctuation, and the use of the disjunctive

"or" (which of themselves alone would indicate that a distinction was intended to be made), to yield to the presumption that the Legislature intended to enact a practical and constitutional law. We are not reminded of any legal distinction between an "inn or tavern" and a "hotel." And, if there be such, we are unable to perceive that there is any practical difference between them such as would render the regulations imposed by section 4 necessary and appropriate in the case of small "hotels," and not in the case of small "inns and taverns." We therefore construe the section as meaning that all inns, taverns, and hotels, unless they have at least 10 spare rooms and beds for the accommodation of boarders, transients, and travelers, are subject to the restrictions. Upon careful consideration we are unable to say that the discriminations established by section 4 of the act between the two classes of liquor dealers therein defined are either arbitrary or unreasonable; nor that they unduly interfere with the rights of citizens. The attack upon section 4 for unconstitutionality must therefore fail.

After the decision of the present case by the Supreme Court, the same court held in *Decker v. Daudt*, 64 Atl. 475, that the fifth section of the "Bishops' Law," which relates merely to the appointment of excise commissioners, is unconstitutional because special and regulative of the internal affairs of municipalities, and that decision has been affirmed by this court in 67 Atl. 375. We deem it clear, however, that the invalidity of that section does not overthrow the remainder of the act. The previous sections, including that under which the resolution now under review was passed, have a broad scope, and apply generally throughout the state. The fifth section is special, in that it applies only where excise commissioners were by law appointed by the mayor or governing body of the municipality. The Legislature cannot be deemed to have intended that this section, so narrow in its purpose and so local in its application, should be essential to the validity of the previous sections, which are wider in purpose and universal in application.

The judgment under review should be affirmed.

GREEN, J. (concurring). I fully concur in the result which has been reached in the above cause both in this court and in the court below; but there is a sentence in the opinion of the Supreme Court, not criticised in the opinion of this court, which I cannot pass without notice. The sentence is this: "There is no inherent right in a citizen to sell intoxicating liquors by retail." See *Meehan v. Excise Com'rs* (1906), 73 N. J. Law, 382, 387, 64 Atl. 689. The sentence is taken bodily from the opinion of the Supreme Court of the United States in *Crowley v. Christensen* (1890) 137 U. S. 86, 91, 11 Sup. Ct. 13,

34 L. Ed. 620, and it may seem, in view of this high authority, that it is quite presumptuous for me to say aught concerning it. I will, however, speak with plainness, but, I hope, with a becoming modesty.

1. My first objection to the declaration made in these words is that "inherent" is an ambiguous word; and ambiguity is ever a breeder of trouble. A pertinent example of the perplexities growing out of a misunderstanding of the force of terms is found in the late case of *Sopher v. State* (Ind. 1907) 81 N. E. 913, 916 (at bottom). The word "inherent" may mean "permanently or inseparably existing in a subject" or "naturally pertaining to a subject." *Standard Dict.*; *Worcester's Dict.*, ad verbum. In the former sense we use the word in speaking of the inherent powers of courts—powers which the Legislature did not give, and cannot take away, at least without destroying the very existence of the court affected. If this be the understood meaning of the word, I would be quite willing to admit that the right to sell liquor is not so inseparably existing in a man that, if it be taken away, he ceases to be a man. On the other hand, I would be unwilling to admit, some authorities notwithstanding, that the right to sell liquor is not a right naturally pertaining to a citizen of this state. I believe that in a free land every citizen has a right, naturally pertaining to him, to engage in any trade, occupation, or calling for which his tastes, talents, or training fit him, or to which his opportunities invite him. This does not mean that, in the exercise of such a right, any man is beyond and above law. The state, under the police power, may impose such limitations and restraints upon him in the exercise of these natural rights as are within the scope of the power, and are found to be for the general good. See a pertinent explication of the police power and its extent in *Black on Intox. Liquors*, §§ 24, 25, 26. For the loss which A. may sustain in some deprivation of personal right for the benefit of B. & C., he finds a compensation in the benefit which he gains from some restraint laid upon them; and so, in theory and usually in fact, the good of men, collectively and individually, is promoted.

2. My second objection to the declarative sentence quoted is that, so long as the word "inherent" is left ambiguous, the declaration involves possibilities of great evil. Some may think that it would not be a very unfortunate thing if no man was allowed to have a right to sell liquor. It is, however, a principle, rather than an example, which concerns me. Few will deem the practice of medicine and surgery or the making and selling of bread to be objectionable; and yet persons in both of these occupations have been subjected to restraints by the exercise of the police power. See 2 Gen. St. 1895, p. 2084; P. L. 1896, p. 266. If it be held that

no man has a right, naturally pertaining to him, to engage in the sale of liquors, because, under the police power, limitations and restraints may be laid upon him and his business, then it would seem that for the same reason we may hold no man to have a natural right to engage in the healing art, and no man to have a natural right to supply his neighbor with that which is called the staff of life. From this position it will be but a step to hold that no man has a natural right to adopt or pursue any profession, trade, or calling whatever; and, having taken this step, we will be logically compelled to admit the possibility and propriety of legislation of the most socialistic nature. Socialism consciously sets before itself as the final aim, the exaltation of organized society to the highest power, and the reduction of the individual man to zero. That which organized society directs him to be, he must be, nothing else; that which organized society assigns to him, he may have, nothing more. Any notion more destructive of individual initiative, effort, and progress I cannot conceive. Any theory of the state which, if put in practice, will more certainly fetter the bodies, minds, and souls of men, I cannot imagine.

Having good will toward my neighbors, I cannot pass over, in silence, even a chance sentence which may be pregnant of possibilities so ruinous alike to the state and to its citizens. "Irrestrainable" rather than "inherent" represents, I believe, the real thought of the courts; and "irrestrainable" is the word that I would use.

(76 N. J. L. 380)

**CUIRCZAK v. KERON et al., Com'rs of Excise of Elizabeth.**

(Supreme Court of New Jersey. July 20, 1908.)

**INTOXICATING LIQUORS — LICENSE — PROCEEDINGS TO FORFEIT.**

In proceedings taken under the supplement of 1906, to the act of 1889 (P. L. p. 77), regulating the sale of intoxicating liquors (P. L. 1906, p. 199), for the forfeiture of the license of an inn and tavern for noncompliance with the provision that "if the license be not in an inn and tavern, or a hotel having at least ten spare rooms and beds for the accommodation of boarders, transients and travelers," the interior shall be exposed to view from the street at all times when the sale of liquor is prohibited by law, the complaint must set forth that the inn and tavern whose license is sought to be forfeited did not have such accommodations for guests as to bring it within the class exempted by the statute.

(Syllabus by the Court.)

**Certiorari to Review the Proceedings of the Commissioners of Excise.**

Proceedings by John Keron and others, commissioners of excise, to forfeit the liquor license of Apolonia Cuirczak. From a judgment forfeiting the same, Cuirczak brings certiorari. Forfeiture set aside.

Argued February term, 1908, before REED, PARKER, and VOORHEES, JJ.

Alfred A. Stein, for prosecutrix. James C. Connolly, for defendants.

**PARKER, J.** This writ of certiorari brings up proceedings of the commissioners of excise of the city of Elizabeth, by virtue of which a license granted to prosecutrix to keep an inn and tavern and sell intoxicating liquors therein was declared forfeited. The return shows that the original license to prosecutrix was granted in November, 1905, to run until November 4, 1906, and was renewed as of November 4, 1906, to run another year. On September 20, 1906, the excise board passed a resolution pursuant to section 11 of the "Werts Act" of 1889 (P. L. p. 83) as amended in 1906 (P. L. p. 203 et seq.), requiring the interior of the bar or business rooms of all places for the sale of liquor not exempt by statute from such requirement to be open to view from the street during the times that sale of liquor was prohibited by law. No notice of the passage of this resolution appears to have been given to prosecutrix or to any other liquor seller. On July 6, 1907, complaint in writing was made that prosecutrix on June 30th, Sunday, violated the supplement of 1906, in that the interior of her premises was not open to view, etc. The hearing was set for August 15th, but adjourned over from time to time, and was finally had on December 12, 1907. Meanwhile the license sought to be revoked had expired, and a new license had been applied for and issued as of November 7, 1907, to run till November 7, 1908. Notwithstanding this fact, the hearing was held on December 12th, and the judgment, after reciting notice to the parties to appear on August 2, 1907, and show why the license heretofore granted, etc., should not be revoked, and the hearing pursuant thereto adjudged "said Apolonia Cuirczak to have been guilty of violating the provisions of said statute on Sunday the 30th day of June, 1907, and do declare the said license heretofore granted to the said Apolonia Cuirczak to be revoked and annulled." Prosecutrix claims that this judgment undertakes to revoke the license that was in force at the time of its rendition, viz., from November 7, 1907, to November 7, 1908; but we do not so construe the language of the judgment. The word "heretofore" as used in the recital of the note to show cause can refer to the granting of no other license than that then in force, and to expire November 4, 1907, and no other license is subsequently mentioned; so that the judgment of forfeiture operated on a license that had already expired by limitation, and did not affect the new one in force at the time it was rendered, nor, as we read the statute, could it have done so.

Further discussion of the questions of law raised by the reasons filed therefore seems merely academic; but, as prosecutrix is entitled to a decision on the question whether the proceedings were irregular as she claims, we may add that neither in the complaint nor the evidence does it appear that prosecutrix was subject to the operation of the "screen clause." The peculiar language of the statute has been commented on and paraphrased in

*Meehan v. Excise Commissioners*, first by this court in 73 N. J. Law, 382, 64 Atl. 689, and by the Court of Errors and Appeals in an opinion by the present chancellor, reported in 70 Atl. 363, where that court construes the statute as exempting hotels and "inns and taverns" which contain 10 or more spare rooms from the operation of the screen clause while subjecting to it the smaller ones containing less than 10 rooms. The wording of the statute is: "The \* \* \* excise board \* \* \* if said license is not in an inn and tavern \* \* \* having at least ten spare rooms and beds \* \* \* shall upon the days," etc., "require that the entire interior \* \* \* be open to view," etc. In view of this phraseology it seems clear that, if forfeiture of an inn and tavern license is sought, the complaint should state, not only the granting of such license, but should show that the screen clause applied to it, viz., that the license was not in an inn and tavern containing at least 10 spare rooms, etc.; or, more accurately, that the inn and tavern kept by prosecutrix under her license did not contain at least 10 spare rooms. *Robertson v. Lambertville*, 88 N. J. Law, 69; *Hoffman v. Peters*, 51 N. J. Law, 244, 17 Atl. 113. The complaint before us simply says that Apolonia Cuirczak, the owner and proprietor of an inn and tavern (giving location) for which a license was granted, did violate the act of 1906, in that the interior on June 30, 1907, was not open to view. Whether at the trial the burden rested on the prosecution of proving that the inn and tavern contained less than ten spare rooms, or on the defense that it contained ten or more, may be a question in view of such decisions as *Greeley v. Passaic*, 42 N. J. Law, 90, and *Jackson v. Camden*, 48 N. J. Law, 89, 2 Atl. 668, but it is clear that the prosecutrix was entitled to an accusation which by its terms brought her within the statute, and should not have been put on her defense unless it did so.

Several interesting questions are raised by other reasons filed by prosecutrix; e. g., whether she can avail herself of lack of notice to the owner as a ground of reversal, as seems indicated in *Tindall v. Monmouth Common Pleas* (N. J. Sup.) 68 Atl. 799, though apparently not necessary to that decision, and whether publication or notice to prosecutrix of the passage of the screen resolution by the board was required. The conclusion reached as to the insufficiency of the complaint renders it unnecessary to decide these questions or to consider other reasons relied on.

The judgment of forfeiture will be set aside, with costs.

(75 N. J. L. 688)

#### AXEL v. KRAEMER.

(Court of Errors and Appeals of New Jersey.  
July 6, 1908.)

#### 1. APPEAL AND ERROR—REVIEW—SCOPE.

A writ of error is the beginning of a new action in the appellate court, and, in such action,

the assignments of error and the joinder therein are the pleadings. To the issues made by these pleadings, the parties will be confined.

This notion of the nature of proceedings in error may relieve the appellate court from inquiring into the legal propriety of proceedings in the court below which are not questioned in error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3065-3073.]

#### 2. SAME—THEORY IN COURT BELOW.

Under the assignments of error in this case, it may be held that the Court of Errors, with a view to determining only the relevancy of evidence, will regard as the issue of fact to be tried that which was tendered and accepted as such by the parties in the court below, without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3402-3434.]

#### 3. PAYMENT—PLEADING—MATTER ADMISSIBLE UNDER GENERAL ISSUE.

At the common law, evidence of payment might be given by the defendant under the plea of the general issue, either in *assumpsit* or debt on simple contract. It is not suggested that the offering of such evidence has been forbidden by the new rules of pleading adopted by the Supreme Court.

The rationale of admitting evidence of payment, in a case like the present, is that it disproves a subsisting debt or legal liability, and so disproves the contract which rests upon such debt or liability as its moving consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 156-158.]

#### 4. SAME.

Notwithstanding the statute (Practice Act, § 104 [P. L. 1903, p. 567]) which, in effect, limits the evidence of the defendant, in an action upon contract, to such as denies the making of the contract sued on, if a specification of the defenses has been demanded and not given, evidence of matter (including payment) which tends to deny the existence of the consideration of an implied contract, at the time of the commencement of the action, may still be given under a plea of the general issue. Such evidence not only denies the debt, but the contract itself.

#### 5. WITNESSES — IMPEACHMENT—COMPETENCY OF IMPEACHING EVIDENCE.

The proof of additional payments which was excluded at the trial was relevant (a) because its tendency was to diminish the trustworthiness or impeach the credit of the plaintiff as a witness, and (b) because its tendency was to support the issue raised by the defendant.

(Syllabus by the Court.)

Error to Circuit Court, Union County.

Action by Bernard Axel against Michael Kraemer. Judgment for plaintiff, and defendant brings error. Reversed, and record remitted for a new trial.

This was an action *ex contractu* brought in the circuit court of Union county by Axel, the defendant in error, against Kraemer, the plaintiff in error. The counts of the plaintiff's declaration were, in the terminology of the common law, in *indebitatus assumpsit*. The indebtednesses alleged were for goods sold and delivered, work done and materials furnished, money lent, money paid, money had and received, interest on forbearance, and on an account stated. The contracts set up were that the defendant, in consideration of the indebtednesses, respectively, promised the plaintiff to pay him the said several sums of money, on request. Breaches were then



matters in dispute between the parties, as shown by the pleadings (*Crosby v. Wells* [1906] 73 N. J. Law, 790, 805, 67 Atl. 295), it is, however, our place to inquire what the issue was which the defendant conceived that he had tendered by the plea, and which the plaintiff accepted as sufficiently tendered, in the court below. Plainly, the issue was the existence or nonexistence of a contract or contracts for the payment of certain moneys by the defendant to the plaintiff, in consideration of certain indebtednesses, before-time incurred, by the defendant to the plaintiff. The plaintiff averred that there was or were such an implied contract or contracts. The defendant intended to say that there was no such contract. At least, he said that there was no consideration by which such a contract or contracts could be supported. The plaintiff, by his similiter, accepted the issue as tendered. A contract in which an intention to agree is, as a fact, implied by the law, is, like an express contract, made up of three material parts, to wit, a moving consideration, an agreement to do or to refrain from doing, and a thing to be done or to be left undone, and these stand in this logical order. In the essentials of pleading, notwithstanding certain differences of form (e. g., 2 Ch. Pl. [3d Lond. Ed.] \*36 and following, \*108 and following), there is no distinction between an implied contract and an express contract, because, in either case, the supposed or the actual promise or other contract must be alleged. 1 Ch. Pl. (6th Lond. Ed.) \*302; 1 Chitty on Cont. (11th Am. Ed.) 80. Nevertheless, there is a distinction in fact, which becomes more clear when we consider the evidence to be adduced. With respect to express contracts, for the most part, the three essential ingredients above mentioned are susceptible of proof; but, with respect to contracts implied by the law, only the existing consideration and the nonobservance of the undertaking are susceptible of direct proof. The agreement or undertaking itself is implied, as a fact, from the proven existence of the debt or duty. The intention is merely a presumption by the law from other facts. Consider 1 Parsons on Cont. (9th Ed.) \*7, note; 2 Wharton on Evid. (3d Ed.) §§ 1228, 1237; Leake on Cont. 12; Keener on Quasi Cont. 3-7; *Snediker v. Everingham* (1858) 27 N. J. Law, 143, 147, 150. Such a presumption, the law raises, however, only so long as the debt or legal duty exists. Gould on Plead. (3d Ed.) c. 6, §§ 46-50; Stephen on Plead. (4th Lond. Ed.) \*18. Hence, a plea which distinctly puts in issue the essential allegation of an existing indebtedness, which is the consideration of an undertaking to pay moneys, may be treated by the parties and by the trial court as putting in issue the alleged contract itself, which must fail, if the nonexistence of the debt or consideration be established. 1 Ch. Pl. (3d Lond. Ed.) \*334, \*469-472; 1 Pars. on Cont. \*428; *Morford v. Vunck* (1813) 8 N. J. Law, \*1031. At least,

under the assignments of error in this case, it may be held that this court, with a view to determining only the relevancy of evidence, will regard as the issue of fact that which was treated as such by the parties in the court below, without objection.

3. We may now inquire as to the relevancy of the excluded evidence, in general:

(a) Under the plea of the general issue in assumpsit, the defendant might, at common law, give in evidence most matters which go in discharge of the defendant's liability by showing that, at the time of the commencement of the suit, the plaintiff had no cause of action. 1 Saunders on Pl. & Evid. (3d Am. Ed.) \*138; 1 Ch. Pl. \*472. However singular such practice may appear, in principle, in actions upon express contracts, it was logical enough when the action was founded upon an implied promise, and in such cases evidence in discharge of a liability, once existing, seems to have been first admitted under the plea of non assumpsit. 1 Ch. Pl. \*471-473; Gould, Pl. c. 6, §§ 46-50. Glibert, Common Pleas, \*64, rather quaintly observes: "On this issue (nonassumpsit) everything may be given in evidence which disaffirms the contract, or goes to the gist of the action, since, if there be no contract to be performed at the commencement of the action, there could be no trespass for the nonperformance of it." And he instances a release, "for it shows that there was no contract at the time when the action was commenced." In *Emley v. Perrine* (1896) 58 N. J. Law, 472-474, 33 Atl. 951, the declaration contained only the common counts, and the general issue was pleaded. In considering the evidence offered, Magle, J., said: "Upon that plea, until the adoption of the new rules in the reign of William IV, the question was always whether there was a subsisting debt or cause of action at the commencement of the suit. This was the system adopted in this country." On an indebitatus assumpsit, the offering of evidence of payment, under the general issue, seems to have been well known as early as A. D. 1697. See *Brown v. Cornish*, 1 Ld. Ray. 217. See, also, *Van Hatton v. Morse* (1702) 2 Ld. Ray. 787.

(b) Under the plea of the general issue in debt, any matter might be given in evidence by the defendant, at common law, which showed that nothing was due at the time of bringing the action—such as performance, or a release, or other matter in discharge of the action. 1 Ch. Pl. (3d Lond. Ed.) \*476. Compare with 1 Ch. Pl. (6th Lond. Ed.) \*481. "Debt on simple contract, in respect of the evidence, differs in nothing from the action of assumpsit." 1 Saund. on P. & E. (3d Am. Ed.) \*410. Having already said that this court will regard the issue of fact tendered by the defendant and accepted by the plaintiff in the court below as being, in short, contract or no contract, we now say that evidence of payment before action brought was proper under the general issue in either as-

sumpsit or debt at common law, and it has not been suggested that it is otherwise under the new general rules of the Supreme Court already mentioned. It is obvious that the rationale of admitting evidence of payment in a case like the present is that it disproves a subsisting debt or legal liability and so disproves the contract which rests upon such debt or liability as its moving consideration. Gould, Pl. c. 6, § 48. It is no objection to this view that the payments proved may not discharge with exactness any debits in the notice annexed to the declaration. In assumpsit, under the general issue, the defendant might offer proof of partial as well as of full payment. *Dingee v. Letson* (1836) 15 N. J. Law, 259, citing English cases. The defendant may, it would seem, still do so in an action upon contract; the payment being given in evidence not in bar, but in mitigation of damages. 1 Ch. Pl. (6th Lond. Ed.) \*507; 1 *Sutherland on Dam.* (4th Ed.) § 167; *Dingee v. Letson*, 15 N. J. Law, 265. Partial payment might be thus given in the English practice, even after the Reg. Gen. of Hilary T., 4 Wm. IV. See *Shirley v. Jacobs* (1835) 1 Dowl. 136.

4. It is urged, however, for the defendant in error, that, whatever might be true at common law, the evidence of payments which the defendant below sought to introduce was properly excluded by force of a statute. This statute must therefore be considered. The statute referred to was once section 116 of the Practice Act of 1874 (2 Gen. St. 1895, p. 2552), and dealt with the action of assumpsit only, but in enacting "An act to regulate the practice of courts of law (Revision of 1903 [P. L. 1903, p. 537])," the Legislature took notice of the new rules of the Supreme Court, and made the section applicable to any action upon contract. The language of the revised act, so far as it need now be set forth, is as follows: "When a defendant in any action upon contract shall plead the general issue alone or in connection with other pleas, the plaintiff may make written demand for a specification of the defenses intended to be made under such plea, \* \* \* in case of the failure of the defendant to comply with such demand, such plea of the general issue shall be taken to import only a denial of the making of the contract sued on. \* \* \*" See P. L. 1903, p. 567, § 104; *Mott's Practice Act*, 52. This statute was construed with reference to the quantum of proof of the plaintiff, in *Turner v. Wells* (1899) 64 N. J. Law, 269, 274, 45 Atl. 641; but its operation upon the evidence of the defendant is res integra. Bearing in mind the conclusions already reached, to wit, that the defendant's plea is to be regarded as putting in issue the essential allegation of the indebtedness which was the consideration of an undertaking to pay moneys, and so putting in issue the alleged contract itself, and that, in support of such plea, the defendant might give evidence of payment of the indebtedness before action brought, in disproof of a subsisting debt, and

so of the contract implied in fact from the existence of the debt, we see nothing in the statute cited which imposes any further restriction upon the rights of the defendant in the present action. The question is still, in substance, as stated in *Emley v. Perrine*, supra. In an action upon an implied contract, the defendant may, under a plea of the general issue, deny, by his proofs, the existence, at the time of the commencement of the action, of the alleged indebtednesses which were the consideration of the alleged contracts, or of any of such indebtednesses. In so doing, he not only denies the debt or duty, but, in the language of the statute, he denies the contract sued upon. The defendant below, having offered evidence tending to show payments which pro tanto would have discharged his indebtedness, and such evidence having been excluded, there was injurious error.

5. It is argued on the behalf of the plaintiff in error that the excluded evidence of payment, so far as it might have been drawn from the lips of the plaintiff below, was legitimate under the ordinary rules of evidence, and, so far as it might have been given directly by the defendant below, was likewise legitimate.

(a) It will be observed, from the brief extract from the testimony set forth in the foregoing statement, that the plaintiff in effect said: "Everything that the defendant owed to me is shown by my books. Every credit to which he was entitled, I have therein given to him. He still owes me the balance \$1,564.55." It is plain, then, that inquiry as to other payments, which the plaintiff ought to have allowed the defendant, by way of credits, would tend to diminish the trustworthiness or impeach the credit of the plaintiff as a witness. Such inquiry was therefore proper under the ordinary rules relating to cross-examination. The rules in this aspect have been so lately expounded by us in *Crosby v. Wells* (1906) 73 N. J. Law, 790, 803, 804, 67 Atl. 295, that a bare reference to that decision will suffice.

(b) The evidence offered on the examination of the defendant which was directed to establishing payments by him to the plaintiff, other than and besides those admitted by the plaintiff, was proper from two points of view: It was relevant because it had probative value in support of a material proposition of the defendant. It was relevant because its tendency was to impeach the testimony of the plaintiff by contradiction from another competent witness. See, on both points, *Crosby v. Wells* (1906) 73 N. J. Law, 790, 805, 67 Atl. 295. Nothing having been alleged which should lead to a different conclusion, we think that, by the accepted rules of evidence, the proof of additional payments offered by the defendant should have been received. In the exclusion thereof there was error.

For the errors discussed, the judgment of the Union circuit court should be reversed, and the record remitted for a new trial.

(74 N. J. E. 353)

**SAFFORD v. BARBER.**

(Court of Chancery of New Jersey. May 18, 1908.)

**1. EQUITY—DEMURRER—GROUNDS OF—SPECIFICATION—NECESSITY.**

When the existence of an adequate remedy at law is made the ground of demurrer to a bill in chancery, the objection must be specified as a cause of demurrer under rule 209 of the court, and it cannot be availed of under a general demurrer for want of equity.

**2. SAME.**

Where the case made by the bill—that is, where all the facts taken together—make a case in which it is doubtful if the complainant be entitled to relief, the bill may be assailed for want of equity under a general demurrer; but where the want of equity springs out of some cause which can be distinctly stated in the demurrer in an intelligible proposition, whether it be collateral to the bill, strictly speaking, or whether involved in the main case, then the cause of demurrer must be specified.

**3. SPECIFIC PERFORMANCE—CONTRACT ENFORCEABLE—SALE OF CORPORATE STOCK.**

Where the corporate stock to which a contract of sale relates is not procurable in the market, and its pecuniary value is not readily ascertainable, specific performance will, as a rule, be decreed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 203.]

**4. SAME.**

Upon a sale of goods or lands and payment by the vendee of the consideration, the vendor holds the legal title to the property in trust for the vendee, and will be required to specifically perform the contract by making a proper conveyance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 196.]

**5. SAME—EVIDENCE—PRESUMPTIONS.**

It will not be presumed that the shares of stock in what is known as a "close corporation" can either be procured in the market, or that they have any market value, and, whenever their procurement and their value comes in question, proof of these facts will be required.

**6. SAME—PERFORMANCE BY COMPLAINANT.**

Where the complainant has performed all of the conditions of the contract on his part to be performed, so far as permitted to do by the defendant, the defendant will be required to specifically perform his part of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 249.]

**7. SAME.**

Where the vendee of real or personal property makes such performance of the contract on his part as satisfies the law, and the other party refuses to perform, a bill for specific performance will lie, and more especially so in a case where not only has the complainant performed, but the defendant himself has made part performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 249.]

(Syllabus by the Court.)

Bill for specific performance by James B. Safford against John C. Barber. Defendant filed a general demurrer to the bill. Demurrer overruled.

Gilbert Collins, for complainant. Charles D. Thompson, for defendant.

**WALKER, V. C.** The bill in this case alleges: That the Standard Car Truck Company, a corporation existing under and by

virtue of the laws of the state of New Jersey, was organized with a total amount of capital stock of the par value of \$150,000; the shares being \$100 each. That the defendant, who was one of the organizers of the company and its principal stockholder, received 1,490 out of the total issue of 1,500 shares, and, upon the incorporation of the company became, and has continued to be, one of its directors and its president. That the defendant, Mr. Barber, persuaded the complainant, Mr. Safford, because of the latter's extensive acquaintance with railroad organizations throughout the country, to enter into the employment of the Standard Car Truck Company for a period of three years; the complainant to be paid his necessary expenses and the sum of \$7 for each truck he should succeed in getting various railroad companies to put upon its cars, and, in addition, the defendant was to give to the complainant \$25,000 worth, par value—that is, 250 shares—of the full paid capital stock of the company, and to have the complainant elected a director therein, to all of which the defendant agreed, and the company thereafter, upon the request of the defendant, ratified the employment of the complainant and provided for his compensation as above stated, and he was elected one of the company's directors. That for upwards of two years the complainant continued successfully in the active discharge of his duties under the terms of his employment with the company, and while so in the employ of the company, and while he was performing his services, and without his consent or without legal justification, the company discharged him from its employment, notwithstanding his protests and his insistence that he should be allowed to continue his duties during the remainder of the term of his employment under the contract. That while the complainant was employed by the company, and at different times, the defendant delivered to him in all 35 shares of the company's capital stock, and no more. That the business of the company is now (1901, when the bill was filed) valuable and sells for almost par. That the defendant has failed and neglected to carry out his part of the agreement with the complainant, namely, to deliver him the balance of the stock of the company, although often requested so to do. That the defendant still has and possesses sufficient of the capital stock of the company, full paid, to carry out his contract with the complainant. That the defendant brought about and influenced the discharge of the complainant from the company which he (the defendant) controls. That the defendant claims and pretends that, because the complainant did not perform the services for the company for the entire period of hiring (three years), that he (the defendant) is exonerated and relieved from delivering any further stock to the complainant. The defendant was served personally



with subpoena in this state on January 2, 1901, and the cause slept until October 21, 1907, when the complainant took an order on him to plead, answer, or demur within 30 days after service upon his solicitor of a copy of the order. On November 4, 1907, the defendant applied for and obtained an order for security for costs, the complainant being a nonresident of New Jersey, and, security being given, the defendant on December 2, 1907, filed a general demurrer to the bill. Counsel for the defendant asserts that the demurrer to the bill raises the question of want of equity, and that the want of equity is that the complainant has an adequate remedy at law. This was the only proposition discussed upon the hearing.

Rule 209 of this court requires that every demurrer, whether general or special, shall distinctly specify the ground or several grounds of demurrer. It has been held, however, that, notwithstanding the rule just mentioned, a simple statement of want of equity, in the usual language of a general demurrer, will constitute a sufficient specification of the ground of the demurrer in cases where the court finds, on looking at the complainant's bill, that his right to relief is doubtful or uncertain; but where the defect is obscure or latent to such an extent that the court, on inspecting the complainant's bill, cannot readily discern it, there the demurrant will be required to make a more explicit statement of the ground on which his demurrer is founded. *Essex Paper Co. v. Greacen*, 45 N. J. Eq. 504, 19 Atl. 466; *Parker v. Stevens*, 61 N. J. Eq. 163, 47 Atl. 578; *Goldengay v. Smith*, 62 N. J. Eq. 354, 50 Atl. 456; *Demarest v. Terhune*, 62 N. J. Eq. 663, 50 Atl. 664; *Larter v. Canfield*, 59 N. J. Eq. 461, 494, 45 Atl. 616. However, under the same rule (209, formerly 225), the grounds of demurrer must be specified even where the defect in the bill is plain, if that defect be collateral to the main issue. *Van Houten v. Van Winkle*, 46 N. J. Eq. 380, 20 Atl. 34. In this case (*Van Houten v. Van Winkle*) the defendant under a general demurrer relied upon laches as a cause appearing upon the face of the bill which showed a lack of equity. Chancellor McGill remarked, at page 386 of 46 N. J. Eq., page 36 of 20 Atl.: "I will not say that the laches exhibited by this bill is not readily discernible, but I am most decidedly of the opinion that within the letter and spirit of the rule it was the duty of the demurrant to indicate that it was because of laches that he demurred. Not only should specification be made where the defect in the bill is obscure, but also even where it is plain, if it is collateral to the main case made by the bill, as it is in this instance." As no objection was made to the form of the demurrer, it was sustained.

It is at least doubtful, to my mind, whether the question of adequate remedy at law

is not collateral to the main case, the same as laches was held to be in *Van Houten v. Van Winkle*, *ubi supra*; but, be this as it may, it seems that legal remedy, when relied upon for cause of demurrer in a chancery suit, must be specified as a cause of demurrer. *Bishop v. Waldron*, 56 N. J. Eq. 484, 40 Atl. 447; same case on appeal, 58 N. J. Eq. 583, 43 Atl. 1098. In this case (*Bishop v. Waldron*), it is stated by Chancellor McGill (at page 487 of 56 N. J. Eq., page '88 of 40 Atl.) that the statute under which the complainant's bill was filed did not require any allegation to the effect that it was not in the complainant's power to put to rest the claim of the defendant with reference to the complainant's lands by one of the ordinary processes of the law. Nevertheless, it was squarely decided (at page 486 of 56 N. J. Eq., page 488 of 40 Atl.) that the ground relied upon by the demurrant that the bill did not allege that the complainant cannot attack the claim of the defendants by suits at law—that is, that the complainant has no adequate legal remedy—was objectionable under the rule which requires that the particular grounds upon which it rests shall be specified as construed in *Essex Paper Company v. Greacen*, and *Van Houten v. Van Winkle*, *ubi supra*. Chancellor McGill, in this connection, remarked: "The grounds taken at the argument could have been distinctly stated in the demurrer in intelligible propositions." If this is the test, then the rule would seem to be this: Where the case made by the bill—that is, where all the facts, taken together—make a case in which it is doubtful if the complainant be entitled to relief, the bill may be assailed for want of equity under a general demurrer; but where the want of equity springs out of some concrete proposition, whether collateral to the bill, strictly speaking, or whether involved in the main case, then the cause of demurrer must be specified.

While I hold that the demurrer in this case is bad for want of specification of the cause upon which the alleged lack of equity is rested, nevertheless, as the question of the sufficiency of the bill was fully argued upon the demurrer, I will decide that question also. Counsel for the defendant urges specific performance of a contract for the purchase or sale of stock will not be decreed where the stock is purchasable on the market or has a money value which may be readily computed, and cites 26 Am. & Eng. Ency. of Law (2d Ed.) p. 122. This is undoubtedly a correct exposition of the law; but the stock of a commercial or industrial corporation, which is usually a close corporation, so called—that is, one owned and controlled by a coterie of individuals—is usually not for sale, and has no market value. The bill in this case alleges that the defendant organized and controls the corporation whose stock the complainant seeks. It is a "close corporation." I think the complainant's case falls more nearly within that other rule stated in 26 Am.

& Eng. Ency. of Law (2d Ed.) p. 122, namely, that where the corporate stock to which the contract relates is not procurable in the market, and its pecuniary value is not readily ascertainable, specific performance will, as a rule, be decreed, especially where the court acquires jurisdiction of the action on the ground that there is an action to enforce a trust.

In *Adderly v. Dixon*, 1 Sim. & Stu. 608, 610, Sir John Leach, V. C., said: "A court of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for, inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods."

In *Duncuft v. Albrecht*, 12 Sim. 189, Vice Chancellor Shadwell made a distinction between public stocks of a known market value, and stocks of a particular company with none in the market, remarking (at page 199): "Now, I agree that it has been long since decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock; but, in my opinion, there is not any sort of analogy between a quantity of three per cents, or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market. And, as no decision has been produced to the contrary, my opinion is that they are a subject with respect to which an agreement may be made which this court will enforce." This distinction was recognized and approved by Lord Chancellor Chelmsford in *Cheale v. Kenward*, 3 De. G. & J. 27. He remarked (at page 29): "Now, there is no doubt that a bill will lie for a specific performance of a contract to transfer railway shares."

In *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 19 Atl. 312, 19 Am. St. Rep. 409, it was held that the Court of Chancery would entertain jurisdiction of a suit by a vendor against the vendee for the specific performance of a contract for the sale of chattels, where the payment was to be made by specific securities, and the remedy at law is inadequate. In that case Vice Chancellor Pitney remarked (at page 481 of 46 N. J. Eq., page 317 of 19 Atl. [19 Am. St. Rep. 409]): "The cases cited by Chancellor Runyon in *Cutting v. Dana*, 25 N. J. Eq. 285, and Professor Pomeroy and Judge Waterman, are mostly, if not all, cases of vendee against vendor, and the language used in the text of the treatises is mainly applicable to such cases; but the principle upon which they go includes the cases of vendor against vendee." In *Roth-*

*holz v. Schwartz*, the vendor put the vendee in possession, and relied upon his promise to execute the securities. With regard to the vendor in that case regaining possession, by replevin, of the goods which he delivered, which the Vice Chancellor thought was more than doubtful, he remarked that it seemed to him that a reclamation of possession by means of replevin would be treated at law as a rescission of the contract, and must be preceded by a repayment or tender or return of the part payment and an abandonment of all benefit from the contract. In the case at bar, there could be no rescission of the contract by the complainant, for the consideration given by him for the stock in question, together with that which has been delivered, was his work and labor performed for the company for a period of upwards of two years. Therefore, in this case, there could be no rescission by the complainant for the fraud of the defendant in withholding from him the delivery of the balance of shares to which the complainant is entitled under the contract. The observation of Vice Chancellor Pitney in *Rothholz v. Schwartz*, that it did not lie in the defendant's mouth to complain that the complainant had brought him into this court to administer his right under its protection and direction, is peculiarly applicable to the facts of the case at bar.

In *Curtice Bros. Co. v. Catts* (N. J. Ch.) 66 Atl. 935, Vice Chancellor Leaming held that no inherent difference between real estate and personal property controls the exercise of the jurisdiction of chancery to decree specific performance of a contract, and that, where no adequate remedy at law exists, specific performance of a contract touching the sale of personal property will be decreed with the same freedom as in the case of a contract for the sale of land. A vendor may bring a suit for specific performance against the vendee to recover purchase money. *Moore v. Baker*, 62 N. J. Eq. 208, 49 Atl. 836.

In *Goodwin Gas Stove, etc., Co.'s Appeal*, 117 Pa. 514, 12 Atl. 736, 2 Am. St. Rep. 696, the Supreme Court of Pennsylvania affirmed a judgment of the Philadelphia common pleas sustaining a master's report. The master's language is stated as follows (at page 528 of 117 Pa.): "The stock is not listed in the stock exchange of this city (Philadelphia), or elsewhere. It cannot be bought in the market. It has no market price. So far as the master is informed, there have been no open sales; all transfers having presumably been *inter partes*. It would seem to be difficult, if not impossible, to measure in money the value of such stock. Based upon its earning power, an estimate could be made of its value, and that sum of money fixed as the damages. The remedy then would not be complete. The damages must first be made out of some one whose ability to pay is not in evidence, and, moreover, when

the money damages are paid, stock in the same company cannot be procured. Other stock may possibly be purchased, while its earning powers may now be equal to those of the stock in question, non constat that they will continue to be equal, or that the circumstances and conditions of the two corporations are not so widely different that the real values of the stocks, as investment securities, albeit to-day paying the same dividends, may not be very far apart."

In *Ashe v. Johnson's Administrator*, 55 N. O. 149, 155, the court remarked: "Again it is said: Equity will not enforce the specific performance of an agreement to transfer or to accept stock. The reply is: That may be so with reference to government stock in England which, like corn or flour, may be bought for the money in market at any time; but the doctrine has no application to railroad stock." This was in the year 1855, when railroad stocks generally were not as valuable as now, and consequently were not generally regarded as good investment securities, and, while the question was not definitely decided in that case, the observation of the court, in my judgment, correctly states what is now the law.

In his conclusions in *Murray v. Skirm*, 69 Atl. 496 (Chancery, 1905), which is not yet officially reported, Vice Chancellor Bergen, speaking of certain shares of stock of a manufacturing corporation, said: "It was the stock of an industrial company, and its market value was an uncertain quantity." This case was recently decided on appeal by the Court of Errors and Appeals, and the decree of the Vice Chancellor affirmed. Speaking for the majority of the Court of Errors and Appeals in that case, Mr. Justice Garrison in his opinion said: "If, in the absence of fraud, it be admitted that that question of the value of the stock is at all relevant to the present controversy, it must also be admitted that, strictly speaking, the market value of the stock was not proved. The Vice Chancellor properly declined to take par value as the equivalent of market value, and he also rightly recognized that the price paid for stock to get a controlling interest was not a reliable criterion of the market value of the outstanding minority shares."

In *Raynolds v. Diamond Mills Paper Co.*, 69 N. J. Eq. 299, 309, 60 Atl. 941, 945, Vice Chancellor Stevenson, speaking of the value of shares of corporation stock, said: "But in fact in this case the complainant's stock is that of a private manufacturing corporation, a close corporation, whose stock does not appear to have any market value. I think the distinction drawn by counsel for complainant between private manufacturing corporation like this paper mill company, and banks and trust companies, and even railroad companies, the shares of which are readily salable at all times on the market, and the market price of which is directly

affected by the prosperity of the corporation, ought not to be overlooked," etc.

In *Baldwin v. Commonwealth*, 11 Bush (Ky.) 417, a sale of turnpike stock belonging to the state of Kentucky was by legislative act ordered to be sold by the commissioners of the sinking fund, and it was there held that a bid made for such stock which was accepted should be specifically enforced, and the commissioners were ordered to execute the contract of sale and transfer the stock. It so happened that after the sale was made the Legislature repealed the act under which it was ordered. Hence the commissioners refused to make the transfer. It may be said that specific performance was enforced in that case because the complainant had no remedy at law, and that may be true. Yet, it seems to me, the case is authority for the position that a sale will be specifically enforced where there are any special or peculiar circumstances which indicate that the complainant in equity is entitled to the thing he seeks, rather than damages resulting upon the deprivation of it.

If the stock in question in this suit has no market value for which adequate damages could be given at law, then this court undoubtedly has jurisdiction to specifically enforce the contract between these parties. Now, I would have no difficulty in holding that complainant in this case is entitled to a decree for specific performance upon the admitted facts, were it not for the allegation in the bill that the stock of the company is now (1901) valuable and sells for almost par. It may be urged that this is an allegation that the stock is practically worth par, and that it is salable. On the other hand, it may be urged that this is not an allegation that the stock is worth par, but that it is worth something less than par, and it is not salable on any market, and that, consequently, this is a case for specific performance, rather than one for remitting the complainant to his action at law for damages. These questions I will not attempt to decide. They make it at least doubtful whether or not the complainant has an adequate remedy at law, and this compels me to regard another question urged by counsel for the complainant; and that is, that the bill in this case presents a case of fraud and of trust mala fide.

The contract, it will be remembered, was that the complainant should enter into employment of the Standard Car Truck Company for a period of three years, which he says he did, and that he served faithfully for over two years, and until discharged by the company without cause and at the instigation of the defendant. For that consideration, namely, his services rendered, he was to have 250 shares of the company's stock, of which the defendant delivered to him only 85 shares. He alleges that he is entitled to have the balance of 215 shares delivered to him by the company, or to have its equiv-

alent in money, amounting, at par, to \$21,500. This, in effect, is what is pleaded, although the language used is different. As a matter of fact, the bill says the complainant is entitled to the balance of 2,465 shares, or its equivalent in money, amounting to \$246,500. This, of course, is a palpable error. I incline to the opinion that this is a case of fraud and of trust mala fide. The complainant performed the contract on his part—that is, he paid for the stock by his services—and therefore became its owner by the law of this state. Delivery is not necessary to complete sale of personal property. *Frazier v. Fredericks*, 24 N. J. Law, 162, 169. In this transaction, I take it, title passed to the complainant.

It seems that the Court of Chancery in this state has jurisdiction in cases of fraud equally with courts of law, even where there is a remedy at law. *Eggers v. Anderson*, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570. There is a constructive trust in this case. Mr. Perry says that "constructive trusts" are: "Third, trusts that arise from some equitable principle independent of the existence of any fraud; as where an estate has been purchased, and the consideration money paid, but the deed is not taken, equity will raise a trust by construction for the purchaser." 1 Perry on Trusts, 163. The Supreme Court of Tennessee, in *Matthews v. Crowder*, 111 Tenn. 738, 743, 69 S. W. 779, citing Perry, 168, said: "Equity in such a case will regard the vendor as the trustee of the legal title of the land for the benefit of the vendee." In my opinion the defendant in this case holds the legal title to the shares of stock in question for the benefit of the complainant, and therefore specific performance is a remedy available to the complainant, irrespective of the question of the adequacy of damages at law, and, too, irrespective of the question of fraud.

There is also another reason for decreeing a specific performance. It is that the complainant has performed all the conditions on his part to be performed, so far as he was permitted to do so by the defendant, and he is, for that reason, entitled to have performance from the defendant. *Frey on Spec. Perf.* § 904 et seq. In my judgment, where the vendee of real or personal property makes such performance of his part of the contract as satisfies the law, and the other party refuses to perform, a bill for specific performance will lie, and this is even more true in such a case as this, where not only has the complainant performed, but the defendant himself has made part performance.

In arriving at these conclusions, I have not overlooked *Joslin v. Stokes*, 88 N. J. Eq. 81, cited by counsel for the demurrant. Chancellor Runyon, in denying specific performance in that case, remarked that the complainant's remedy was at law, "except, perhaps, as to the issuing of the stock." In that case (*Joslin v. Stokes*) the complainant's con-

tract was with the defendants, and by its terms he was to acquire stock from a corporation, and the corporation was not bound. Other facts in that case differ from those in this case, and therefore, in my judgment, *Joslin v. Stokes* is without controlling effect in the case at bar.

For the foregoing reasons, the demurrer will be overruled, with costs.

(73 N. J. B. 648)

# MARR v. MARR et al.

(Court of Errors and Appeals of New Jersey.  
July 6, 1908.)

## 1. TRUSTS — PURCHASE OF TRUST PROPERTY BY TRUSTEE.

As a general rule, if a trustee becomes the purchaser of the trust property, such purchase is voidable at the instance of the cestui que trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 258, 332-334.]

## 2. SAME.

This rule applies notwithstanding the trustee purchase at a public sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 258, 332-334.]

## 3. CORPORATIONS—DIRECTORS—DUTY TO CORPORATION.

The director of a corporation occupies a position of trust or agency for his company of such a character that dealings between him and the company, where his interest is opposed to that of the company, will be subject to close scrutiny and not sustained against the stockholders, unless consistent with good faith and fair dealing on the part of the director.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1401-1415.]

## 4. SAME.

A director, who is at the same time a creditor of his corporation, may, for the purpose of collecting his debt, assume a position antagonistic to his company and its stockholders by bringing action and proceeding to judgment and execution for the recovery of the debt.

## 5. SAME.

But a director, who is also creditor of his company, must, on taking legal proceedings for collection of his debt, relinquish his trust pro hac vice, not covertly, but openly, and with fair notice to his company. Whether such notice should be given to the stockholders or to the directors may depend on circumstances.

## 6. SAME.

Under the circumstances of the present case, *held*, that the defendant director, who purchased at sheriff's sale all the property of the company under executions issued at his suit, and for a consideration not exceeding one-half the value of the property, took the title subject to an option on the part of his cestui que trust to have the benefit of the purchase.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1387.]

## 7. SAME—LACHES.

Relief, under the circumstances, granted to a single stockholder who by reason of infancy was not chargeable with laches, notwithstanding that the other stockholders might be debarred on the ground of their acquiescence or laches.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Phineas B. Marr against William A. Marr and others. Decree (66 Atl. 182) for defendants, and complainant appeals. Reversed, and record remitted.

Bleakly & Stockwell, for appellant. Thomas B. Hall and Dwight M. Lowrey, for respondents.

**PITNEY, Ch.** The bill of complaint herein is in form a bill filed by the complainant, as a stockholder of the Beacon Land Company, in behalf of himself and other stockholders, for the purpose of either setting aside certain sheriff's sales of the real estate and personal property of the company made to the defendant William A. Marr under executions issued upon a judgment held by the latter against the company, or else to impress a trust upon his title in favor of the complainant and other stockholders. William A. Marr and the Beacon Land Company were named as defendants. It appears, however, by the averments of the bill, that in the year 1902, and long prior to the commencement of this suit, the charter of the company was forfeited by reason of its failure to pay the state taxes assessed against it. P. L. 1902, p. 836. This fact was admitted at the hearing. It further appears from the answer of William A. Marr that there is no acting board of directors of the land company, and that from the time of the sheriff's sales in question, which took place in November and December, 1898, the organization of the company has been abandoned. Therefore the bill is, in effect, filed for the benefit of the complainant and other stockholders as upon a liquidation of the company.

It is argued that since, under sections 53 and 54 of the general corporation act (P. L. 1896, p. 295), a corporation, when dissolved, is continued for the purpose of winding up its affairs and dividing its capital, and the directors are made trustees for the purposes of the winding up, it was incumbent upon the complainant to notify the board of directors of his claim, and request them to take action in the matter. No such application having been made, it is insisted, upon the authority of *Seigman v. Maloney*, 65 N. J. Eq. 372, 54 Atl. 405, that his action cannot be maintained. If this objection had been interposed by demurrer to the bill (as was done in *Slegman v. Maloney*), or otherwise, before the hearing of the cause upon its merits, it might have required consideration. Since the case, however, has been fully heard upon the merits, no good purpose would now be accomplished by turning the complainant about and requiring him to ask the board of directors to do for him that which he has been able to do for himself, viz., produce the evidence necessary for a determination of his case upon the merits. It should be observed, also, that the point that the board of directors ought to be intrusted with control of the litigation is not raised by or in behalf of the corporation.

The bill was dismissed on the ground that the complainant had no equity. We will therefore, upon this appeal, pass upon the merits. The facts that give rise to the controversy are, briefly, as follows: The Beacon Land

Company was incorporated in the year 1892 for the purpose of acquiring and operating a seaside hotel at Point Pleasant, in Ocean county. The company was a sort of "close corporation"; the principal stockholders being at the outset James H. Marr (father of the complainant) and his brothers William A. Marr and George A. Marr, together with a personal friend of theirs, a physician by profession, named McWilliams. The outstanding capital stock, all of which was fully paid so far as appears, amounted to \$24,000, in par value, divided into 48 shares of \$500 each, of which James H. Marr held 21, William A. Marr 10, George A. Marr 3, Dr. McWilliams 10, J. W. Felty 3, Charles Lewis 1, and Mrs. Helen M. Crawford, a sister of the Marrs, 1 share. The directors at the beginning were William A. Marr, James H. Marr, George A. Marr, and Dr. McWilliams, all residents of Pennsylvania, and Mr. Lewis, who resided at Asbury Park, in this state. William A. Marr was, from the beginning, and at all times, the president. James H. Marr, father of the complainant, died in the year 1895. Whereupon his sister, Mrs. Crawford, was elected a director in his stead. Upon the settlement of his estate, 14 of his shares passed to a Philadelphia trust company as guardian of the complainant, the latter being then but 11 years of age, and 7 shares passed to Rebecca G. Marr, widow of the deceased and mother of the complainant. Except as mentioned, there appears to have been no change at any time in the stockholding interest, nor in the personnel of the board of directors.

At the death of James H. Marr the company was somewhat in debt, and during the next two years the indebtedness was considerably increased, either because the operations of the hotel were unprofitable, or because the profits were expended in improvements upon the property. Both before and after the death of James H. Marr, the defendant William A. Marr had advanced to the company considerable sums of money from time to time, and by the close of the year 1897 he had become its sole creditor. In the year 1896, Rebecca G. Marr sued the company in the Supreme Court of this state and recovered a judgment for \$2,057 and costs, and, upon her pressing for payment, William A. Marr paid to her the amount of the judgment and costs, and took an assignment thereof in January, 1897. At the same time the company owed him other moneys aggregating upwards of \$8,500, besides interest. In the month of September, 1898, he brought action against the company in the Supreme Court upon this claim, and recovered judgment a month later for \$10,287.90, besides costs. Upon execution issued upon this judgment, he caused the entire visible assets of the company (and the whole assets, so far as appears) to be sold by the sheriff, and became himself the purchaser. The real estate was struck off to him at the price of

\$3,000, and the personal property at the price of \$850. There was no advertisement beyond such as is required by the statute, and there were no bidders in attendance at either sale besides William A. Marr. So far as the amount of the purchase price is concerned, we agree with the learned Vice Chancellor that, since the corporation had no other assets, the bids are to be deemed, as between William A. Marr and the company, as in effect equivalent to the aggregate amount due upon the two judgments held by him, which, with interest, amounted to approximately \$12,500.

It was deliberately admitted at the hearing, and is therefore beyond controversy upon this appeal, that the property, real and personal, at the time of the sheriff's sales, was fairly worth \$25,000. The complainant and appellant claims that, under the circumstances existing at the time of the sale, William A. Marr was a trustee for the stockholders of the company, and obliged either to protect their interest by preventing a sale, or to give them fair notice that the execution sale was in contemplation, so that they might take measures for their own protection, and that since such notice was not given, and since William A. Marr bought in the property at much less than its value, he must be deemed to have purchased as a trustee for his stockholders. The learned Vice Chancellor entertained the view that the complainant was not entitled to relief, because, although no notice of the sale was given to the several stockholders other than the statutory notice, it would have been futile to give such notice, and that since defendant Marr had at a previous time earnestly tried to get the stockholders to interest themselves in raising the money due to him, and had found this impossible, he was warranted in putting his claim into judgment and bringing the property to sale without further notice to them.

The bill of complaint charges that some of the promissory notes upon which William A. Marr's judgment against the company was based were paid and satisfied before suit brought, and that the remaining notes were without consideration and fraudulently made by the defendant as president to himself. It is proper to say that the proofs wholly fail to support these allegations, and, on the contrary, affirmatively show that both the assigned judgment of Rebecca G. Marr and the judgment recovered by William A. Marr himself were based upon honest indebtedness of the company owing for moneys advanced to it in order to enable it to carry on its proper business. Nor do the proofs, as we think, support the charge that there was intentional fraud on the part of William A. Marr about bringing the property of the company to sale under his judgments.

It remains to be considered whether, under the circumstances obtaining at the time, and in view of the defendant's trust relation to his stockholders, and the fact that neither

the directors nor the stockholders had notice of the sale, the defendant must be deemed to have taken title as trustee for his stockholders.

The learned Vice Chancellor, of course, recognized the general principle of equity that, if a trustee becomes the purchaser of the trust property, such act is voidable at the instance of the cestui que trust. In *Staats v. Bergen*, 17 N. J. Eq. 554, 559, this principle was applied by this court in a case where the property sold did not belong to the cestui que trust. The property consisted of certain real estate subject to several mortgages, the second of which was held by the trustee, and the purchase was made by him at a public sale under foreclosure of the first mortgage. In that case it was expressly laid down in the Court of Chancery (*Staats v. Bergen*, 17 N. J. Eq. 297, 307) that the rule that, where a trustee or any person as agent for others buys the trust property, the cestui que trust is entitled as a matter of course to an election whether to acquiesce in the sale or to have the property again exposed for sale, applies notwithstanding the sale to the trustee was made at public auction, bona fide, or for a fair price. This statement of the rule was taken for granted in this court, 17 N. J. Eq. 557, 558. Another decision of this court to the same effect is *Marshall v. Carson*, 38 N. J. Eq. 250, 252, 48 Am. Rep. 319, where Mr. Justice Knapp said: "The rule that one clothed in a fiduciary character cannot, either directly or indirectly, become the purchaser of the trust property at his own sale and hold such property against the dissent of the cestui que trust, is of such universal prevalence and so grounded in the demands of public policy that no one ventures to question its existence or seeks now to overthrow it. \* \* \* It (the rule) recognizes the difficulty, if not impossibility, of tracing actual fraud in every case, and the frequent failure of justice and success of wrong that must be consequent thereon, and it attempts to apply a method that will remove all temptation from the mind of the trustee to profit by infidelity in the discharge of trust duties of every sort, and which will remove all inducement to act otherwise than faithfully toward the beneficiary, by utterly refusing to consider the question of good or bad faith, and holding the trustee, who attempts to deal with the trust property as an individual, to all the chances of loss and denying to him all possible gain. This rule, although, perhaps, most frequently found applied in the decided cases where the existing fact is a sale by or under the direction of the trustee, is by no means limited to that circumstance, as reference to decided cases will show." But how far is the rule modified when the trust or agency arises out of the fact that one is president or director of a corporation, and he at the same time is a creditor of the company, and the company's property is brought to ju-

dicial sale for the purpose of satisfying such debt?

It is settled that a director has not complete freedom to contract with his corporation. In *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. Law, 505, 522, Justice Dixon, speaking for this court, said: "After an examination of all the cases cited, and such others as I have found, and a careful consideration of the principle and the results of regarding it and of disregarding it, I have come to the conviction that the true legal rule is that such a contract is not void, but voidable, to be avoided at the option of the cestui que trust, exercised within a reasonable time. I can see no further safe modification or relaxation of the principle than this: A director of a corporation may have rights not arising out of express contract—such as the right to pass over its railroad, or to transport his goods over its canal, on paying reasonable tolls, or to have money which he had loaned it repaid to him—but where the right is one which must stand, if at all, upon an express contract, and which does not arise by operation or implication of law, then he shall not hold it against the will of his cestui que trust, for in the very bargain which gave rise to it, in which he should have kept in view the interest of that cestui que trust, there intervened before his eyes the opposing interest of himself." See, also, *Gardner v. Butler*, 30 N. J. Eq. 702, 721. We cite the last two cases because they show that a director occupies a position of trust or agency for his company of such a character that all dealings between him and the company, where his interest is opposed to that of the company, will be regarded with jealousy and suspicion and subjected to the closest scrutiny, and not sustained against the stockholders, unless they are consistent with the utmost good faith and fair dealing on the part of the director.

Conceding, as we do, that a director may, under such circumstances as are presented in the case before us, become a creditor of his corporation, it follows, ex necessitate, that he may for the purpose of collecting his debt assume a position antagonistic to his company and its stockholders. He may undoubtedly bring action against the company and proceed to judgment and execution for the recovery of his debt. But we deem it clear that the director, who is also creditor, must, on taking legal proceedings for collection of his debt, relinquish his trust pro hac vice, not covertly, but openly, and with fair notice to his company. Whether such notice should be given to the stockholders or to the directors may depend upon circumstances. If the company is equipped with other officers and directors who are actively representing the interests of the stockholders, it may well be that notice to such officers or directors would be deemed sufficient. But it is, as we think, inconsistent with the duty of a director (at least under circumstances such as are here presented) that he should assume an attitude

antagonistic to his company, unless he sees to it that the interests of the stockholders, which he, by reason of his personal interest, is for the time disqualified from protecting, are in the charge of other officers and directors able and willing to protect them, and to whom his notice may be given, or else sees to it that fair notice of his contemplated action be given to the stockholders, so that they may take measures to protect themselves.

In the present case it appears, as already mentioned, that the defendant Marr was the sole creditor, so that the only other interest in the company was that of the stockholders, who were few in number and easily reached. It appears that the board of directors had practically ceased to act in the affairs of the company; their last meeting having been held in July of 1897, and no meeting having been called after that date, nor any new board of directors chosen. It appears that the defendant Marr was not only the president, but was practically in sole charge of the current business of the company during the year 1897, and also during the year 1896. In the year 1897, the financial difficulties of the company became serious. What was done at the last meeting of the board of directors does not appear. A meeting of the stockholders was held in Philadelphia on December 29, 1897, at which the defendant Marr, George A. Marr, Mrs. Crawford, and Dr. Felty were present, and also a Mr. Glenn, who was the trust officer of the trust company that was guardian of the complainant. Mr. Glenn was at the same time acting as attorney for Mrs. Rebecca G. Marr, the mother of the complainant, who was herself a stockholder. At this meeting Mrs. Marr's judgment against the company and the assignment thereof to William A. Marr were reported and spread upon the minutes as a debt due to William A. Marr. The other indebtednesses due to William A. Marr were likewise mentioned and recognized. Another meeting of the stockholders was held in Philadelphia on February 16, 1898, at which William A. Marr, Dr. McWilliams, Mrs. Crawford, George A. Marr, and Mr. Glenn were present. After a general discussion of the indebtedness of the company and of its prospects, Mr. George A. Marr and Mr. Glenn were appointed a committee to make arrangements with an auctioneer for the sale of the property. This sale was appointed to be held in Philadelphia on a date in April. An upset price of \$18,000 was agreed upon by the committee, but no bid was received for an amount approaching that sum. At the two stockholders' meetings just mentioned, William A. Marr stated to Glenn and to the others present that, unless a sale of the property of the company could be effected, defendant would put his claims into judgment and sell the property. It appears, indeed, that none of the stockholders were at this time willing to come forward to contribute towards the payment of the debts, but Mr. Glenn had no information respecting the prospects of the

company or the value of its property, except that which he received from William A. Marr, and this information gave him the impression that there was no equity in the property over and above William A. Marr's claim.

The hotel was operated by the company during the summer of 1898, and reports of its operations were made to the defendant Marr as president, who advanced small sums to Mrs. Crawford, the manager, for expenses during that season. The defendant made no report to the stockholders or directors of the operations of the hotel for the season, and called no meeting of stockholders or directors after February, 1898. The indifference of the directors to the concerns of the company seems to have been his reason for pursuing this course; at least, that is the reason that is most favorable to him. In September, as already mentioned, he brought his action without notice to anybody representing the company, except as it may be inferred that some agent of the company received service of the process. In October, he recovered the judgment, and, in November, brought on the property for sale—all without notice to anybody concerned. Directors' meetings having been abandoned since July, 1897, and meetings of the stockholders substituted in December, of that year, and in February, 1898, and Mr. Glenn, representing the trust company which was guardian for the complainant, having appeared and taken an interest in the company's affairs, it seems to us that the scrupulous care which the defendant Marr owed to his cestui que trust required, under the circumstances, that at least the trust company or Mr. Glenn should have been notified when steps were actually taken to put the defendant's claim into judgment and sell the property thereunder. It is true Mr. Glenn testifies that with the information he had at his command he would not have felt warranted in expending the complainant's money in protecting the property at the sale; but, if he had been informed that there was an equity in the property worth as much as \$12,500, it is not to be presumed that he would have omitted reasonable efforts to secure competition in bidding at the sale.

The general notice given by defendant Marr at the meetings of December and February that, unless something was done about his claims, he would have to press them—the notice given hardly amounted even to a threat—did not, we think, dispense in fairness with the more specific notice that might and, in our view, ought to have been given when steps were actually imminent to sell the property of the company for the payment of his claim. The property of the company having an admitted value of \$25,000, and its total indebtedness being only half that amount (all held by the defendant Marr), it would seem that a sacrifice of the property might have been prevented by the expedient of a mortgage loan. Yet, so far as appears, this was not attempted, nor even suggested.

Nor was any statement of the assets of the company, or of their value, submitted by the defendant either to the directors or to the stockholders.

It thus clearly appears that the defendant Marr did not upon bringing action against the company openly relinquish his trust, nor give notice to the company that he had done so. If the directors were indifferent to the affairs of the company, he should have given such notice as would have brought home to them their responsibility. At least, he could have called them in meeting and informed them of his action. If they had abandoned the duties of their office, there was all the more reason for him to give his notice to the stockholders direct.

An important, and perhaps controlling, circumstance, is that in the outcome the property sold for only half its value. We cannot agree with the learned Vice Chancellor that it is a sufficient answer to this to say that the law court from which an execution issues can set the sale aside for inadequacy of price. He cites *Palladino v. Hilpert* (N. J. Ch.) 65 Atl. 721. In that case application was made to the Court of Chancery to restrain the sheriff from delivering the deed. In that juncture the application might have been made to the court out of which the execution had issued. After the delivery of the deed it is, of course, too late to do this. Where the law court sets aside a sale made under its process, it does so in the exercise of its equitable, not of its common-law, powers. See *Miller v. Barber*, 73 N. J. Law, 38, 62 Atl. 276, and cases cited. But these equitable powers are only incidental to the control which the court has over its own process of execution, and do not survive after the writ is fully executed. After the deed has been delivered to the purchaser, any application to set it aside for inadequacy of price must necessarily be made to the Court of Chancery, which court, in the exercise of its independent equitable powers, may either set aside the deed or treat the grantee as a trustee for others, to the extent that he has reaped an undue profit from the transaction at their expense.

We hold that, under the circumstances disclosed by the evidence, the defendant Marr took title at the sheriff's sale, subject to an option on the part of his cestui que trust to have the benefit of the purchase. Treating the company as a going concern, the option would have resided in it and would have had to be exercised within a reasonable time. But it is asserted by the defendant himself in his answer, and is abundantly clear from the evidence, that since the sheriff's sales the organization of the company has been abandoned. In 1902, as already observed, the charter of the company was forfeited. As there were no other creditors, the individual stockholders were the actual cestuis que trustent. But none of the stockholders other than complainant has asked relief, and it



may well be that the others are debarred from having any remedy against the defendant on the ground either of acquiescence or of laches. The present decision will therefore determine only the rights of the complainant.

Although complainant's bill was not filed until seven years after the sale, it was filed very promptly after he arrived at his majority, and laches is not attributable to him. Such notice as was given to his guardian was that already referred to, and was merely to the effect that, unless the defendant Marr's claim was paid, he would probably take legal proceedings. The guardian had no specific notice that legal proceedings had been commenced, nor was it placed in possession of such information concerning the value of the property as should have put it upon guard to protect the infant's interest. It is therefore unnecessary to decide whether, under other circumstances, the nonaction of the guardian would bar the infant's claim in equity.

The remaining question is: Just what measure of relief ought to be accorded to the complainant under the circumstances? Defendant has been in possession of the property since the sheriff's sale, and the evidence indicates that he has placed some improvements upon it. Whether these have increased the value of the property, and, if so, to what extent, does not appear. Under the peculiar circumstances of this case, we think the complainant is entitled to an option whether he will affirm the sale to the defendant Marr, and treat the latter as a trustee for the complainant to the extent that he profited by the purchase, or whether he will insist upon setting the sale aside. If he accepts the first alternative, then upon ascertaining the difference between the market value at the time of the sheriff's sale, which was \$25,000, and the amount of the claims held by the defendant Marr against the property with interest to the time of sale, the defendant Marr should be required to pay to the complainant his share of the difference, that is,  $\frac{14}{48}$ , or  $\frac{7}{24}$ , with interest thereon from the time of filing the bill of complaint herein. If complainant accepts the second alternative, an account should be taken of the amount due at the time of the sheriff's sale to the defendant Marr upon his judgments, and he should be credited likewise with the present value of any betterments placed by him upon the property since his purchase, and charged with a proper rental for the property since the sheriff's sales, and with a proper amount for depreciation and damage to the personal property, if any, during his possession thereof. In this accounting interest should be allowed with proper rests. Upon ascertaining the amount now due to defendant Marr upon such accounting, the property should be subjected to judicial sale, and out of the proceeds he should be first paid the amount due to him, and out of the

residue  $\frac{7}{24}$  should be paid to the complainant, and the remainder to the defendant Marr. In either case, the complainant is entitled to his costs in the Court of Chancery and in this court, to be paid by the defendant Marr.

Let the decree under review be reserved, and the record remitted to the Court of Chancery for further proceedings in accordance with the views above expressed.

(74 N. J. E. 635)

**SLOSS-SHEFFIELD STEEL & IRON CO.  
v. AETNA LIFE INS. CO.**

(Court of Chancery of New Jersey. June 2, 1908.)

**1. INSURANCE—AGENT OF INSURER—GENERAL AGENT—AUTHORITY.**

An insurance company designated an agent a "general agent," who so advertised, by means of letter heads and otherwise. The agent negotiated for, wrote, and delivered a policy. Insured did not know that the agent did not have the power, as shown by his apparent authority as general agent, to make contracts and fix the terms thereof. A telegram and letter from the company to the agent, and exhibited to insured, confirmed the opinion of insured that the agent had full authority. *Held*, that insured might treat with the agent on the theory that he was a general agent with the power to fix the terms of contracts of insurance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 117.]

**2. SAME.**

A clause in a policy that no condition or provision therein shall be waived or altered, except by written indorsement attached thereto, and signed by the officers of insurer, does not prevent a general agent from making a contract of insurance outside of the matters written and printed on the face of the policy itself, since the clause is directed against a waiver of provisions, or alterations, of a contract in existence, and which has become a binding obligation between the parties.

**3. EVIDENCE—PAROL EVIDENCE—ADMISSIBILITY—VARYING TERMS OF CONTRACT.**

Where the issue raises the question what really were the terms of a contract which has been reduced to writing, parol evidence is admissible.

**4. REFORMATION OF INSTRUMENTS—GROUNDS—MUTUAL MISTAKE—FRAUD.**

Contracts may be reformed by equity when, by reason of mutual mistake, the instrument fails to express the agreement on which the minds of the parties met, or where there is mistake by one of the parties, or fraud, or other inequity, on the part of the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 80.]

**5. SAME.**

A contract of insurance may, in a proper case, be reformed, and made to accord with the real agreement entered into between insured and the general agent of insurer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 11; vol. 28, Insurance, §§ 266-270.]

**6. SAME—"MISTAKE."**

Where a written contract of insurance was not the contract made by insured and the general agent of insurer, and insured, though knowing that the policy as written did not accord with the agreement as made, had the right to rely on the representations made by the general agent, and was led to believe that the misstatement in the policy was merely formal, and could

not be taken advantage of by insurer, equity can reform the policy, since insured either acted under an erroneous conviction in accepting the policy containing the terms not agreed on, or he was imposed on, and became a victim of misplaced confidence; the word "mistake" being defined to be either the doing of an act under an erroneous conviction, which act, but for such conviction, would not have been done, or some intentional act or omission or error, arising from ignorance, surprise, imposition, or misplaced confidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 80.

For other definitions, see Words and Phrases, vol. 5, pp. 4339-4542; vol. 8, p. 7722.]

Suit by the Sloss-Sheffield & Iron Company against the Ætina Life Insurance Company, to reform policies of insurance. Heard on bill, answer, replication, and proofs. Decree for complainant.

The bill of complaint in this case is filed by the Sloss-Sheffield Steel & Iron Company, a New Jersey corporation, against the Ætina Life Insurance Company, a Connecticut corporation, engaged, among other things, in issuing policies, of the class known as "employer's liability insurance policies," primarily to reform seven policies of liability insurance, issued by the defendant to the complainant, and incidentally to enjoin the insurance company from prosecuting an action in the New Jersey Supreme Court to recover an excess of premiums, which it claims has accrued on the policies during the years 1905 and 1906. The case turns on the authority of an agent of the insurance company, located at Birmingham, Ala.; it being claimed by the assured that the agency was of a general and unlimited character, and by the insurance company that it was limited to soliciting for business, and to the delivery of policies and the collection of the premiums. The agency which the insurance company had established was conferred upon the Alabama Real Estate & Insurance Company, of which, in 1904, one A. M. Hobson was president. This Alabama corporation at that time was advertising itself as the general agent of the insurance company. Letter heads were provided, on which was printed the name of the insurance company, and the fact that the Alabama corporation was its general agent. The Alabama corporation likewise occupied offices in an office building in the city of Birmingham, and on the entrance doors thereto were printed similar advertisements of the general agency of this corporation for the insurance company. There was nothing to indicate the fact that there was any limitation on the scope of the agency, nor was there, during all the negotiations hereinafter mentioned, any special notice given to the assured that the so-called general agents did not have the general authority necessary for the transaction of the business which the insurance company had intrusted to it. On May 18, 1904, the vice president and general manager of the assured received a letter from the Alabama corporation, which reads as follows: "If consistent, we

will call on you in the morning (19th inst.) in re your employer's liability insurance. We have a special inducement to offer for the above company, and hope to secure this business. Yours truly, Alabama Real Estate & Insurance Company, by A. Maben Hobson, President." This letter was written on a sheet of paper, at the head of which was a printed advertisement containing the names of the president, secretary, and assistant secretary of the insurance company, and the words "Accident and Liability Department, Ætina Life Insurance Company, of Hartford, Conn.," and the further words "Alabama Real Estate and Ins. Co., General Agents, A. Maben Hobson, President; Geo. A. Smith, Manager; M. Porter Walker, Secretary and Treasurer. 221-222 First National Bank Building." The assured by its vice president replied to this letter on June 13, 1904 (having in the meantime had a conversation with Mr. Hobson), in which reply he asked the Alabama corporation to quote the best rates at which it could carry its employer's liability insurance for one year on an estimated pay roll, the figures concerning which were given.

Considerable further negotiation ensued, which was carried on by the Alabama corporation, from the Birmingham office, by the so-called general agents, all the correspondence being written upon paper, with printed letter heads of the character herein above mentioned. There was nothing, during these days of bargaining, disclosed to the steel company which would indicate to the mind of its manager that the Alabama corporation did not have the power to conduct the negotiation, to fix the terms of the contract, and to close the transaction, without reference to the home office. It is true that the Alabama corporation reported its bargaining to the home office of the insurance company, and was instructed by telegram, as early as June 20, 1904, to decline to issue policies at a less rate than that which was established and set out in the manual of rates issued from the company's office; but it does not appear that this notice ever came to the attention of the steel company, and I do not think, therefore, that it can affect the situation as between the steel company and the insurance company. The policies were issued on June 24, 1904, on printed blanks, on and at the foot of which were printed the names of "Walter C. Faxon, Secretary," and "M. G. Bulkley, President." Under the printed signature of the president appears that of the Alabama corporation, its name being impressed upon the paper with a rubber stamp; the only writing being the name of "A. Maben Hobson, President," written over the words "General Agent." These policies on their face appear to be at the rate of \$10,502.10 premium for one year, on an estimated pay roll of \$1,400,000; that is to say, the premium was fixed at \$10,502.10, as the sum which the assured would have been obliged to pay under the terms of the policies for the one year's pro-

tection. The sum which actually was paid, however, was \$8,506.88; this sum having been fixed by the agreement between the assured and the so-called general agents of the insurance company. So far as appears, the insurance company permitted its agents to carry through this transaction without notice of the agents' incapacity, and under such circumstances, and with such general appearances, as to satisfy the steel company that the agents had the most ample power to do what they were doing. Mr. McQueen, the vice president of the steel company, testifies that at the time the transaction was closed, on June 24th, Mr. Hobson, the president of the Alabama corporation, stated most positively that the amount which the assured would be obliged to pay on the estimated pay roll before them was \$8,506.88, and that the reason why a different amount was written in the policies was that the policy rates were what are called "manual rates," that had been fixed by an agreement between the companies issuing liability policies, and related to business to be written in different districts, or in different lines of business, and that competition was keen, and that this was a desirable risk, and that the Alabama corporation was authorized to take it. There is one other circumstance attending the delivery of the policies, which throws light upon the manner in which the steel company dealt with the so-called general agents. When Mr. Hobson tendered the policies, there was attached thereto a rider, giving the assured the privilege of renewing the policies for three years at the same rate. The president of the assured, who was present at the time of the delivery, stated that he did not care to have the matter complicated, and that he would not receive the policies with the riders, whereupon these riders were then and there detached, and delivered back to the president of the general agent. Just before these policies expired, in 1905, the general agency of the Alabama corporation seems to have been revoked, and the firm of Walker & Egleston to have been appointed instead. Mr. Walker of that firm had been secretary of the Alabama Real Estate & Insurance Company, the predecessors of the firm of Walker & Egleston. On June 12, 1905, J. S. Rowe, assistant secretary of the insurance company, under whose general superintendence the employers' liability insurance business was carried on, sent a telegram to Walker & Egleston, in these words: "Endeavor renew Sloss last year's rates on three-year contract. Waive application new coal mine rates this risk." And at the same time he wrote a letter to Walker & Egleston, addressing them as general agents. The letter is important, and is here copied at length: "Ætna Life Insurance Co., Hartford, Conn., June 12, 1905. Walker & Egleston, G./A. Re Renewal Sloss-Sheffield S. & I. Co.—Gentlemen: Referring to above risk, which is now up for renewal, we to-day wired you as follows which is hereby con-

firmed: 'Endeavor renew Sloss last year's rates on three-year contract. Waive application new coal mine rates this risk.' You will observe that we have suggested that you endeavor to obtain renewal of this risk on a three-year basis, in order that same may be removed from annual competition. Yours truly, [Sgd.] J. S. Rowe, Sec'y."

About June 15th Mr. Walker, one of the general agents, called upon the vice president of the steel company, and exhibited to him the telegram from Mr. Rowe of June 12th, and at the same time, or at another time, the witness did not distinctly remember, Mr. Walker showed him the letter from Mr. Rowe of the same date, and in the conversation which followed Mr. Walker told Mr. McQueen that he could renew the insurance for three years, at the same rate at which it had been written for the previous year, and that he would give the steel company the privilege of cancelling the policies at the end of the first year, upon payment of  $2\frac{1}{2}$  per cent. more, making \$8,725, or, in other words, that he would write the policies for \$8,725 for one year on the estimated pay roll, and would deduct therefrom  $2\frac{1}{2}$  per cent., bringing the premium down to \$8,500.88, provided the policies should run for three years. This offer was put in writing, signed by Mr. Walker as general agent, and sent to Mr. McQueen, the vice president of the steel company. The letter is as follows:

"Birmingham, Ala., June 20, 1905.

"Mr. J. W. McQueen, Vice Prest. Sloss-Sheffield Steel & Iron Company, City—Dear Sir: We are in receipt of your favor of June 15th, also your supplementary letter of June 19th, in reference to your company's employer's liability insurance for one year, and in reply thereto we beg to quote you a net price of \$8,725, on a pay roll of \$1,400,000.00, divided as follows:

Furnaces .....	\$ 330,000 00
Machine Shops.....	25,000 00
Coal Mines (including convicts) ..	600,000 00
Coke Ovens .....	175,000 00
Quarry .....	20,000 00
Red Ore Mines (slope).....	150,000 00
Brown Ore Mines (surface).....	100,000 00
	<b>\$1,400,000 00</b>

"If your company will enter into an agreement to carry this insurance with the Ætna Life Insurance Company for three years, we will allow you a discount of  $2\frac{1}{2}$  per cent. from the price of one year, or \$8,506.88, practically the same figures at which the business was written last year, subject to cancellation at your election after the first year, by paying the difference between the price for one year and the price for three years. We have every reason to believe that our present adjusting arrangement for attorneys, which has proven so satisfactory, will continue, and assure you that should we rewrite your policies, no effort will be spared to take the same good care of you in the future as we have in the past. Yours very truly, M. Porter

Walker, General Agent Ætina Life Insurance Company of Hartford, Conn."

The terms offered by this letter were accepted by the assured, and later on the policies were delivered. The aggregate amount of the premiums provided for in the 1905 policies was \$10,502.10, the same as the year before. Nevertheless the general agents rendered a bill to the assured for \$8,506.88, which was also the same as the year before, and this was paid by the assured to the general agents on August 17, 1906, by a check which, with the receipt for the same, were produced. It appears now that the negotiations between the general agent and the assured were never truly reported by the general agent to its principal, the insurance company at Hartford; that the insurance company was not informed of the fact that the premiums received were at a rate less than the manual rates, and that whatever reduction in the premiums there were came out of the agent's commissions, and not out of the portion of the premium which was payable to the company, and that the general agent disregarded the positive directions of the insurance company touching this particular risk. The steel company canceled these 1905 policies at the end of the year, and the insurance company then brought a suit in the Supreme Court for the premium which would be due under the policies as they were written; i. e., at the high rate, but calculated at the short rates mentioned in the policies.

Frederick J. Faulks, for complainant.  
James Buchanan and M. G. Buchanan, for defendant.

HOWELL, V. C. (after stating the facts as above). From the circumstances above detailed I do not hesitate to declare that the insurance company held out the persons whom it designated as its general agents as agents, qualified not only to solicit business, but also to make contracts which would be binding on it. The 1904 policies were negotiated for, written, and delivered by these general agents, who had apparent authority; and secret instructions from the principal, not communicated to the other party, are entirely overridden by the apparent authority deducible from the circumstances. Again, these agents were not denominated special agents; the appellation given to them was of much broader significance. Any one dealing with them, knowing that they were general agents and, seeing the manner in which they transacted the business, would be naturally led to the belief that they had full authority to transact each and every part of the business in hand. This view is confirmed by the exhibition to the insured of the letter and telegram of June 12, 1905, which had a tendency to confirm the opinion, that the assured had previously derived from their manner of dealing, that they had full and ample authority to make original contracts. The case is within the rule laid down by Mr. Jus-

tice Van Syckel in the Court of Errors and Appeals, in the case of Millville Mutual Company v. B. & L. Association, 43 N. J. Law, 653. He quotes from Story on Agency (section 1): "On the other hand (although this is not the ordinary commercial sense), a person is sometimes said to be a special agent, whose authority, although it extends to do acts generally in a particular business or employment, is yet qualified and restrained by limitations, conditions, and instructions of a special nature. In such a case the agent is deemed, as to persons dealing with him in ignorance of such special limitations, to be a general agent; although, as between himself and his principal, he may be deemed a special agent. In short, the true distinction (as generally recognized) between a general and special agent) is this: 'A general agency does not import an unqualified authority, but that which is derived from a multitude of instances, or in the general course of an employment or business, whereas a special agency is confined to an individual transaction.' Such general authority enables the agent to bind the principal, without orders, in dealing with those who, acting in good faith, have no notice of the want of lawful power in the agent. One who intrusts authority to another is bound by all that is done by the agent within the scope of his apparent power, and cannot screen himself from the consequences thereof, upon the ground that no authority was given to do the particular act." A case similar to the one in hand is *Smith & Wallace v. Prussian National Insurance Company*, 68 N. J. Law, 674, 54 Atl. 458, where the question was as to the authority of an agent to make an original contract of insurance. The insured applied to one Vanderveer, an agent, for insurance on its warehouse. The agent, who appears to have been, as between him and his employer, a special agent, wrote what is known in insurance circles as a "blinder," and delivered it to the insured. A question arose about the rate to be charged for the insurance, and this question was left in abeyance for a short time, during which the building burned. The question was whether the agent had made a contract of insurance or not. Mr. Justice Garretson says: "It is admitted that Vanderveer was the agent of the company, appointed by a regular commission and authority from them, signed by the manager. As such agent, he had signed the binding slip in question, and did so within the limits of his authority as an agent to countersign and issue policies. His authority to enter into the contract in question for the insurance company will be inferred from his general agency." *Gulick v. Grover*, 31 N. J. Law, 182; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; *Brown v. Franklin Ins. Co.*, 165 Mass. 565, 43 N. E. 512, 52 Am. St. Rep. 534. The Alabama cases are to the same effect. *Piedmont Ins. Co. v. Young*, 58 Ala. 476, 29 Am. Rep. 770; *Robinson v. Ætina Ins. Co.*

128 Ala. 477, 30 South. 665; Triple Link Indemnity Ass'n v. Williams, 121 Ala. 138, 26 South. 19, 77 Am. St. Rep. 34; Birmingham Mineral R. Co. v. Tennessee C. & I. Co., 127 Ala. 137, 28 South. 679.

It is argued, on behalf of the insurance company, that clause N in the policy prevents the making of any contract, by the general agent, beyond and outside of the matters which are written and printed on the face of the policy itself. The clause in question reads as follows: "No condition or provision of this policy shall be waived or altered except by written indorsement attached hereto and signed by the president and vice president, secretary or assistant secretary of the company, nor shall notice to any agent, nor shall knowledge possessed by an agent or by any other person be held to effect a waiver or change in any part of this contract." In further support of this contention, cites the time-honored rule that parol evidence shall not be admitted to vary or contradict the written instrument, with a long line of cases from our own courts and elsewhere as authority for the proposition that an agent, without express authority, may not waive or alter the provisions of the contract. I think that the clause itself and the cases referred to are not applicable to the conditions of the case in hand. Clause N is directed against the waiver of provisions or the alterations of a contract which is in existence, and which has become a binding obligation between the parties. If this action were to recover on the established or admitted contract, the clause and the rule of evidence, and the cases cited by the defendant, would be pertinent and applicable as to matters which arose after the delivery of the policies, but such is not the case here. Here the inquiry is not as to what the contract means, or how it should be interpreted, or what remedy should be had on it, or how broad and deep its provisions are, but the question is far more fundamental. It is, what is the contract? The bill alleged that the parties agreed upon the terms of a contract, and that these terms were not inserted in the document that was delivered. This is denied by the answer, and this is made an issue as to what the contract is. Parol evidence is admissible on this class of issues, for the plain reason that in most cases no other evidence exists. To deprive the court of the benefit of the parol evidence on an issue as to what the contract is would be to destroy its jurisdiction to reform contracts and to avoid them for fraud or mistake. Vice Chancellor Pitney says, in *O'Brien v. Paterson Brewing & Malting Company*, 69 N. J. Eq. 117, 61 Atl. 437, concerning the rule against admitting parol evidence: "Without stopping, at this moment, to enumerate and classify the numerous exceptions to that rule, especially in a court of equity, it is sufficient to say that the evidence here relied upon does not tend to vary the terms of the contract.

There is no contention that the complainant did not understand that he was signing an absolute promissory note in favor of the defendant, payable one day after date, and negotiable in its terms. What he does contend is that it never had any binding effect upon him in equity. To show this by parol is no more a breach of the rule invoked than it is to prove that an absolute deed is given as a mortgage, or that a promissory note is given by the maker to the payee without consideration, and as an accommodation to the latter." In other words, the rule does not apply when the inquiry before the court is, what are the terms of the contract, what did both parties agree to, what were their respective rights, duties, and liabilities to be when the agreement was formally committed to writing? *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; *State Ins. Co. v. Hale*, 1 Neb. (Unof.) 191, 95 N. W. 473; *Mut. Ben. Life Ins. Co. v. Robison*, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325 (Caldwell, J.); *Wood v. Am. Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733.

The next question that arises is whether this contract of insurance can now be reformed, and made to accord with the real agreement entered into between the vice president of the insured and the general agent of the insurance company. This inquiry must be answered in the affirmative. Contracts inter parties may be reformed by this court whenever, by reason of a mutual mistake, the written instrument fails to express the agreement on which the minds of the parties met, or where there is a mistake by one of the parties, and fraud or other inequity attempted on the part of the other. Pomeroy says: "Reformation is appropriate when an agreement has been made or a transaction has been entered into or determined upon as intended by all the parties interested; but if, in reducing such agreement or transaction to writing, either through the mistake common to both parties, or through the mistake of the plaintiff, accompanied by the fraudulent knowledge and procurement of the defendant, the written instrument fails to express the real agreement or transaction, in such case the instrument may be corrected, so that it shall truly represent the agreement or transaction actually made or determined upon according to the real purpose and intention of the parties." Pomeroy, § 870. In *Bryce v. Lorillard Fire Insurance Company*, 55 N. Y. 240, 14 Am. Rep. 249, Folger, J., says: "The mistake which will warrant a court of equity to reform a contract in writing must be one made by both parties to the agreement, so that the intentions of neither are expressed in it, or it must be the mistake of one party, by which his intentions have failed of correct expression, and there must be fraud in the other party in taking advantage of that mistake, and obtaining a contract with the knowledge that the one

dealing with him is in error in regard to what are its terms." Beach, *Equity Jurisprudence*, section 544 and following. In *Lloyd v. Hulick*, 69 N. J. Eq. 784, 63 Atl. 616, 115 Am. St. Rep. 624, the same rule was supplied, in the opinion of Gummere, C. J., but to a quite different state of facts. Here the written contract is not the one that the parties made. It is true that the insured knew that the policies as actually written did not accord with the agreement as actually made, because this fact was stated at the time the policies were delivered, but the same course had been taken the year before, and the complainant had a right to rely upon the representations made by the general agent, and was led to believe that the misstatement of the premium rate was a merely formal matter, and, as such, the statement cannot now be taken advantage of by the insurance company. *Van Fleet v. C.*, in *Cummins v. Bulgin*, 37 N. J. Eq. 477, defined mistake to be: "The doing of an act under an erroneous conviction, which act, but for such conviction, would not have been done." Story defines it as: "Some unintentional act or omission or error arising from ignorance, surprise, imposition, or misplaced confidence." Story's Eq. Jur. § 110.

It must be conceded, I think, that the insured acted under an erroneous conviction in accepting the policies containing terms which had not been agreed upon. The more invidious view would be that it was imposed upon, or became a victim of misplaced confidence. Under either view it is entitled to a decree. There is a common-law action pending to recover \$5,400, which is claimed as the excess of premium earned over the premium paid. The insured admit an indebtedness of \$3,300. In order to save further litigation, the decree may provide for an adjustment of the difference, the amount of which I suppose counsel can readily agree upon.

(75 N. H. 23)

# LYDSTON v. ROCKINGHAM COUNTY LIGHT & POWER CO.

(Supreme Court of New Hampshire. Rockingham. June 27, 1908.)

## 1. HIGHWAYS—REASONABLE USE—QUESTION OF FACT.

Travelers on highways have the right to do all acts reasonably incident to a "viatic use of the way," and, as to incidental diversions of persons of mature years, the rule is that the point at which such diversions pass the bounds of legitimate recreation as a proper use of a highway is to be found by solving the question of reasonable use as a question of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 459, 473.]

## 2. MUNICIPAL CORPORATION—STREETS—USE BY TRAVELER.

The act of a pedestrian on a city street in placing his hand on an electric light pole in the street is not as a matter of law an unreasonable use of the street.

## 3. SAME.

Whether the act of a pedestrian on a city street in putting his hand on an electric light

pole in the street, and thereby receiving an electric shock killing him, was a reasonable use of the street and such an act as a traveler might lawfully commit authorizing a recovery, or whether the act was not a reasonable use of the street defeating a recovery, *held*, under the facts, for the jury.

## 4. WITNESSES—IMPEACHMENT.

The testimony of a witness who had made a statement that her only knowledge on a subject was her own conclusion from facts given is, on the explanation being found to be false, legitimate only to contradict the version she gave while testifying as a witness.

## 5. ELECTRICITY—ELECTRIC LIGHT COMPANIES—NEGLIGENCE—QUESTION FOR JURY.

Where, in an action against an electric light company for the death of a person coming in contact with an electrically charged running cable, an expert in electrical engineering testified that running cables were likely to become charged by the crossing of wires or by excessive moisture, that the particular cable had no circuit breaker and was in a dangerous condition, and that he had called the attention of the company's superintendent to it, the question whether the company was negligent was for the jury, though its employés all testified that they had never known of a running cable becoming charged, and that they had no reason to anticipate such an occurrence.

## 6. TRIAL—VIEW BY JURY.

A view by the jury may be allowed in the discretion of the court in order to give them a degree of familiarity with the locality which will render the evidence more intelligible, though it may be generally regarded of doubtful utility to allow a view where the condition of things has been changed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 77, 78.]

## 7. SAME—INSTRUCTIONS.

Where the cure of an alleged defect causing an injury is brought to the attention of a jury viewing the place pursuant to the order of the court, the court must direct the jury to disregard the fact that the defect had been remedied.

## 8. APPEAL AND ERROR—DISCRETION OF TRIAL COURT—VIEW BY JURY.

Pub. St. 1901, c. 227, § 19, authorizing the court in its discretion to direct a view of the premises by the jury, etc., places the determination of the question of a view in the discretion of the trial court, and it is not the practice to attempt to revise the exercise thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3845.]

## 9. MUNICIPAL CORPORATION—STREETS—USE BY TRAVELERS—INJURIES—INSTRUCTIONS.

Since whether there could be a recovery for the death of a pedestrian killed by an electric shock caused by his touching an electrically charged wire in the highway depends on the application of the doctrine of reasonable use of the highway, instructions that decedent had no right to touch the wire, unless it interfered with his passage along the highway, and that, if decedent voluntarily touched the same, there could be no recovery, were properly refused as amounting to a ruling as a matter of law on a question of fact, and as improperly limiting a traveler's right to the use of the way.

Transferred from Superior Court.

Action by Fred W. Lydston, administrator, against the Rockingham County Light & Power Company. There was a verdict for plaintiff, and the cause was transferred on exceptions to the refusal to direct a verdict for defendant. Exceptions overruled.

Case for negligently causing the death of the plaintiff's intestate by a current of elec-

tricity from the defendant's electric light wires. Trial by jury and verdict for the plaintiff. Transferred from the October term, 1907, of the superior court by Wallace, C. J., on the defendant's exception to the denial of a motion for the direction of a verdict in its favor. The plaintiff's evidence tended to show that on the evening of July 3, 1906, and prior to the accident, there was trouble with the defendant's electric light lines in Portsmouth, caused by a leakage of electricity. The defendant was notified, but took no steps to shut off the current. On the pole at the intersection of Middle street and a cross-walk there was a running cable and weight coming to within three feet of the ground. The light there was then poor. The decedent's attention was called to that fact, and he knew that policemen sometimes kicked the pole to start up the light. He started to walk past the pole, and when near it put his hand to the pole and instantly received a shock which caused his death. There was no insulator on the running cable at the time of the accident, but one had been put on before the trial. A view was had, subject to the defendant's exception. The jury were instructed that changes at the pole were irrelevant and should not be regarded by them.

Page & Bartlett and Ernest L. Guptill, for plaintiff. Kivel & Hughes, for defendant.

PEASLEE, J. Travelers upon public highways have the right to do all acts reasonably incident to "a viatic use of the way." "There may be a difficulty in maintaining as law the proposition that a sidewalk, so situated as to be naturally and inevitably used for the hygienic purpose of a reasonable frolic of children on their way home from school, cannot be so used without being transformed from a way into a playground, or that by the gambols of young animals on their way to pasture their use of the road as a way is abandoned." *Barney v. Manchester*, 58 N. H. 430, 434, 437, 40 Am. Rep. 592. As to such acts, and as to the incidental diversions of persons of mature years, the rule is "that the point at which such diversions pass the bounds of legitimate recreation as a proper use of a highway is to be found by solving the question of reasonable use as a question of fact." Applying this principle to the present case, it cannot be held as matter of law that the act of a foot passenger in placing his hand upon a pole erected in the street is an unreasonable use of the way. The soundness of this proposition does not seem to be seriously contested. The claim of the defense is that the evidence is conclusive that the decedent willfully intermeddled with its property and so met his death. The issue is as to the probative value of the evidence in the case.

The only witness to the accident was the wife of the decedent. She testified that she told her husband the light was not burning

properly, and that he had once told her that policemen started the light up by kicking the pole. As he was walking past the pole, he put his hand upon it and instantly fell. It was a rainy night. The decedent was a heavy man, 58 years of age, and habitually careful about electrical appliances and about walking in slippery places. Upon this evidence alone the question whether the decedent put up his hand as a traveler lawfully might, or whether he shook the cable to make the light burn, might well be left to the jury. There was, however, further evidence. It might have been found that the deceased was intending to cross the street at this point, and in that event he would not be unlikely to put his hand on the pole as he was about to make the turn. His hand was burned in but one place—across the palm. Had he grasped the wire, it would be likely that there would have been other burns. "The case is not one of a choice between two or more probable causes conceded to exist, but involves merely the power of the jury to determine as matter of fact the nonexistence of the causes" alleged by the defendant. *Boucher v. Larochelle*, 74 N. H. 433, 68 Atl. 870. There was also evidence that the witness had said that her husband took hold of the cable to make the light burn. She testified that her only knowledge on that subject was her own conclusion from the facts above recited, but, if her explanation of this statement was found to be false, the statement itself did not become positive evidence of the facts she stated. Its only legitimate use was to contradict the different version she gave on the witness stand. *Tabor v. Judd*, 62 N. H. 288; 139 Briefs and Cases, 139; 2 Wlg. Ev. § 1018.

It is claimed that the defendant was not negligent, because its employes all testified that they never knew a running cable to become charged, and that they had no reason to anticipate such an occurrence. An expert in electrical engineering testified that these cables were likely to become charged by the crossing of wires or by excessive moisture, that this cable had no circuit breaker and was in a dangerous condition, and that he called the attention of the defendant's superintendent to it several years before the accident. It was for the jury to determine whether this witness told the truth. If it was found that he did, it would follow that the defendant's employes either testified falsely or were grossly incompetent.

"It may be generally regarded as of doubtful utility to allow a view when the condition of things has been changed. \* \* \* It may be allowed in the discretion of the court, to give to the jury a degree of familiarity with the locality which would render the evidence more intelligible, but a caution would be needed to prevent the jury from being misled." *Dewey v. Williams*, 43 N. H. 384, 387. "A cure of the alleged defect may in some cases unavoidably be brought to the at-



tention of the jury, as, for example, where a view is taken; but in every trial matters may come to the knowledge of the jury which they cannot lawfully consider in making up their verdict. Whenever this happens, it is the duty of the court to instruct them that such matters are irrelevant and not to be regarded." *Aldrich v. Railroad*, 67 N. H. 250, 254, 29 Atl. 408, 410. In the present case the procedure above indicated was adopted. The court found that a view would help the jury to properly understand the case. The statute places the determination of this question within the discretion of the court (Pub. St. 1901, c. 227, § 19), and it has not been the practice to attempt to revise its exercise. *Fairfield v. Amherst*, 57 N. H. 479.

The request to charge that the plaintiff could not recover was properly denied for the reasons before stated. The evidence was not conclusive to the point that he "voluntarily exposed himself to danger which he had full opportunity to avoid." The instruction that "the plaintiff's intestate had no right to touch the wire of the defendant company, unless it interfered with his passage along the highway," amounts to ruling as a matter of law upon a question of fact. The question was to be settled by the application of the doctrine of reasonable use, and the instruction was rightly refused. So, too, the request to instruct that, if the decedent "voluntarily touched the running cable," there could be no recovery, was an attempt to limit a highway traveler's right to an extent not warranted by the decisions in this state. *Varney v. Manchester*, 58 N. H. 430, 40 Am. Rep. 592.

Exceptions overruled. All concurred.

(74 N. H. 552)

## WYATT v. STATE BOARD OF EQUALIZATION.

(Supreme Court of New Hampshire. Belknap. June 2, 1908.)

### 1. TAXATION—RAILROADS—EQUALITY OF TAXATION.

The railroads on paying on their property the same amount of taxes paid on the average throughout the state on the same amount of property bear their share of the public burdens, though as between certain individuals and the railroads some individuals pay more and some less than is paid on the same value of railroad property, and assessing taxes on railroad property in the state appraised at \$28,000,000 in the amount taxes are assessed on the average on each \$28,000,000 of property throughout the state, is a compliance with the constitutional rule of equality, requiring that throughout the same taxing district the same tax shall be laid on the same amount of property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 103, 119.]

### 2. SAME.

Where a particular item used in finding the average rate of taxation on the property in the state outside of railroad property, with a view of fixing the rate of taxation on railroad property, is so inconsiderable as not to affect the average rate of \$1.72 so found beyond the fraction of a cent, the rate found is the average

rate as nearly as it practically can be determined, and the question whether the particular item should, or should not be considered will not be determined.

### 3. STATUTES—CONSTRUCTION—MEANING OF WORDS.

Under Pub. St. 1901, c. 2, § 2, providing that words shall be construed according to the common and approved usage of the language, etc., the Legislature, in the absence of evidence that the terms employed in a statute have attained a peculiar significance in the law, must be understood to have employed the words in the statute with the meaning ordinarily attached to them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 288-280.]

### 4. PROPERTY—SAVINGS BANK DEPOSITS.

Deposits in savings banks are property.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

### 5. STATUTES—CONSTRUCTION—AIDS TO CONSTRUCTION—CONTEMPORANEOUS CIRCUMSTANCES.

A statute must be read in the light of the circumstances existing at the time of its enactment, the Constitution as it was then written, and the law as it was then declared.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 290-299.]

### 6. TAXATION—SUBJECTS OF TAXATION—POLLS AND ESTATES.

Under the Constitution as it existed and was interpreted from 1784 to 1903, the only subjects of taxation were polls and estates.

### 7. STATUTES—CONSTRUCTION—RE-ENACTMENT OF STATUTES—ADOPTION OF JUDICIAL CONSTRUCTION.

The re-enactment of a statute without change is, in the absence of weighty evidence to the contrary, an adoption of a previous judicial construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 302, 306.]

### 8. TAXATION—SAVINGS BANK DEPOSITS—TAX ON PROPERTY.

The tax of 1 per cent. on deposits in savings banks, imposed by Pub. St. 1901, c. 65, § 5, re-enacting a previous statute, passed to secure the taxation of such accumulations which had largely escaped taxation, and construed by the courts to impose a tax on property, is a tax on property.

### 9. STATUTES—CONSTRUCTION—HISTORY OF LEGISLATION.

A reference to the history of legislation on a subject is competent and often of great value in ascertaining the meaning of a particular enactment on the subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 293.]

### 10. TAXATION—EXEMPTIONS—EQUALITY OF TAXATION.

While the Legislature may select the subjects of taxation, and thereby exempt classes of property not named, it cannot limit the proportion to be paid by particular property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 68-78.]

### 11. SAME—TAXATION OF RAILROAD PROPERTY—STATUTES—CONSTRUCTION—"PROPERTY."

The word "property," in Pub. St. 1901, c. 64, § 1, providing that every railroad corporation shall pay to the state an annual tax on the value of its property at a rate as nearly equal as may be to the average rate of taxation on other property throughout the state, when considered in connection with the history of the legislation on the subject of railroad taxation, together with the decisions of the Supreme Court on the subject, and when considered in connection with similar language used in the statutes



governing taxation of telegraph and telephone companies, and of sleeping, dining, and parlor cars, includes savings bank deposits taxable by chapter 65, § 5, Pub. St. 1901, and, in determining the average rate of taxation on the property in the state, savings bank deposits must be considered.

## 12. COURTS—OPINIONS—OPERATION.

The language of an opinion of a court must be read in the light of the circumstances under which it is used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 360.]

## 13. STATUTES—CONSTRUCTION—ADOPTION OF JURIDICAL CONSTRUCTION.

The rule that the re-enactment of a statute is an adoption of the meaning given to it by the courts derives its sole force from the knowledge of the Legislature, actual or presumed, of the existence of a juridical construction, but it cannot be fairly inferred that the Legislature in enacting a statute had knowledge not possessed by the state assessors, counsel for the state, or members of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 302-306.]

## 14. SAME—CONSTRUCTION BY DEPARTMENTS OF GOVERNMENT.

Where the meaning of a statute is doubtful, great weight is given to the construction placed on it by the department charged with its execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 296, 297.]

## 15. TAXATION—EQUALITY OF TAXATION.

Taxes on property, mathematically equal and proportional, are constitutionally just.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 68-78.]

## 16. SAME.

The imposition of a tax on railroads at the average rate of taxation borne by other property in the state, including the tax on savings bank deposits, is not open to the constitutional objection that it is unequal, though the railroad tax rate is not equal nor proportional to the savings bank rate, and though it is not equal or proportional to the rate on other property than savings bank deposits throughout the towns and cities of the state.

## 17. CONSTITUTIONAL LAW—JUDICIAL POWERS—ADVISORY OPINIONS.

The court is not at liberty to advise the board of equalization, at its request, or at the request of an individual, as to whether or not the board, in determining the average rate of taxation on property throughout the state, for the purpose of fixing a rate to be imposed on railroad property, may consider the taxation of insurance capital.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 128.]

Peaslee and Bingham, JJ., dissenting.

Transferred from Superior Court.

Petition for certiorari by Walter C. Wyatt against the state board of equalization. There was a demurrer to the petition, and the cause was transferred from the superior court without a ruling. Demurrer sustained.

Shannon & Tilton and James W. Remick, for plaintiff. Edwin G. Eastman, Atty. Gen., for the State. William B. Fellows and John M. Mitchell, for defendants. John R. Eastman, pro se.

PARSONS, C. J. The question in controversy is the meaning of the statute which

provides that "every railroad corporation in this state, not exempted from taxation, shall pay to the state an annual tax upon the actual value of its road, rolling stock, and equipments on the first day of April of each year, at a rate as nearly equal as may be to the average rate of taxation at that time upon other property throughout the state." Pub. St. 1901, c. 64, § 1. Similar language is used in the sections governing the taxation of telegraph and telephone companies (Id. § 3), of express companies (Laws 1907, p. 83, c. 81, § 6), and of sleeping, dining, and parlor cars (Laws 1907, p. 92, c. 91, § 1). The petition sets up the legal proposition that the rate is to be found by taking the average of the local tax rates, without including the assessment laid upon savings bank deposits and fire insurance capital. The defendants deny the plaintiff's proposition, and the case has been argued upon this point alone. All other questions have been waived for the time being, and the parties have united in an effort to present this controversy unhampered by any collateral issue.

The plaintiff says that his construction was adopted by the court when it acted as the assessing board; that the question was decided the same way in 1883, and that no change has been made in subsequent re-enactments of the statute; and that a construction including the savings bank tax in determining the average rate of taxation upon other property throughout the state would necessitate a conclusion that the statute is unconstitutional, unless it were held that the Legislature intended to grant to railroads a special exemption supportable under the protective power. The constitutionality of the statute is material in the present proceeding only as evidence of the legislative intent. If it were discovered that the statute sought to be enforced herein was in contravention of the Constitution, the necessary result of such conclusion would be the dismissal of the petition. But whether the Legislature can constitutionally burden railroad corporations by imposing higher taxes upon them than upon other owners of property throughout the state, or whether they may without violation of the organic law relieve them by a special exemption from the whole or a part of the taxes generally assessed upon property, need not be considered. Judicial decisions in view of which existing legislation upon the subject was originally adopted and subsequently re-enacted establish a legislative intent to treat railroads, for the purpose of taxation, as individuals taxable for the true value of their property at the rate at which other property is taxed in the same taxing district, and exclude any purpose to tax them "for a greater sum than their proportionate and equal share with the other property in the state, ascertained as nearly

as it reasonably could be." *Boston & Maine R. R. v. State*, 63 N. H. 571, 572, 4 Atl. 571; *Boston, etc., R. R. v. State*, 60 N. H. 87; *Atlantic, etc., R. R. v. State*, 60 N. H. 133; *Cheshire County Tel. Co. v. State*, 63 N. H. 167; *Western Union Tel. Co. v. State*, 64 N. H. 285, 9 Atl. 547. The state board of equalization, upon whom the duty of assessing taxes upon railroads is placed, are required to "determine the value of the property to be taxed \* \* \* and the rate of taxation." Pub. St. 1901, c. 68, § 3; Id. c. 64, § 14. In the performance of this duty, it is alleged that the board added together the taxes assessed and collected by municipal officers, those assessed and collected upon unincorporated places by state and county officers, and those collected by the State Treasurer upon savings bank deposits, the capital stock of building and loan associations and insurance companies, and obtained the average rate of taxation by dividing the total amount of such taxes by the total of the selectmen's inventories, the valuation of unincorporated places, the savings bank deposits, and the building and loan and insurance capital. They then assessed the railroads of the state at the rate which in this way they found all other property in the state was assessed. If one person owned all the property in the state except the railroads, although he paid taxes at different rates upon different portions of it, the average rate of the taxation of the whole would be obtained by the division of the total tax by the total amount of property upon which the several sums were levied. As between two persons, one owning all the railroads and the other owning all the other taxable property in the state, the taxation of the total property of each at the same rate would produce the equal division of public expense required by the Constitution. As the taxation of all other property in the state at the same rate as railroads are taxed would produce in the aggregate the sum levied by varying rates on different classes or parcels of property, the owner of the whole could not complain that he paid too much, or the railroad owner too little, because each would pay the same. As the property in the state is divided among many, who hold the different classes of property in varying ratios, it follows that, as between certain individuals and railroads generally, some individuals will pay more and some less than is paid on the same value of railroad property. But, so long as railroads pay upon their property the same amount as is paid on the average throughout the state upon that amount of property, their share of the public burden is borne by them. This is the rule applied in tax appeals from local assessors. *Amoskeag Mfg. Co. v. City of Manchester*, 70 N. H. 200, 46 Atl. 470. As the method adopted by the board in assessing railroad taxes assesses upon the \$28,000,000 of railroad property (the appraisal of

which is not in question in this case) the same amount in taxes as is assessed upon the average upon each \$28,000,000 of property throughout the state, the result complies with the constitutional rule of equality in taxation, which "requires that throughout the same taxing district the same tax shall be laid upon the same amount of property." *Amoskeag Mfg. Co. v. City of Manchester*, 70 N. H. 336, 344, 47 Atl. 74. As the method of the board is apparently mathematically proportional and constitutionally just, the only ground upon which the result can be attacked is that some one or more of the taxes considered by them in finding the average is not a tax upon property, and cannot be considered in the distribution of the burden of taxation placed upon property. *Amoskeag Mfg. Co. v. City of Manchester*, 70 N. H. 336, 47 Atl. 74.

The plaintiff contends that the tax upon savings bank deposits, building and loan associations, and insurance capital should not be considered. It is not suggested that the tax on building and loan associations stands any differently from the tax on savings bank deposits. So far, however, as the consideration of the tax upon insurance capital is concerned in this case, the question is purely academic. The tax is so inconsiderable as not to affect the result. Considering it, the exact arithmetical average is a small fraction of a cent less than the rate (\$1.72) found by the board. Excluding it, the same rate is a similar fraction more than \$1.72. In either event, it cannot be held that the rate found by the board is not the average rate "ascertained as nearly as it reasonably could be." *Boston & Maine R. R. v. State*, 63 N. H. 571, 572, 4 Atl. 571. The substantial question is as to the savings bank tax. The plaintiff's contention is that the tax levied with reference to some \$86,000,000 of what the board considered property, owned by 183,243 depositors—nearly one-half the population of the state—should be excluded from the computation, and the tax be determined by the rate upon the remaining \$238,000,000, i. e., that more than one-fifth of the whole property taxed should be omitted from the calculation. Upon the concession of the plaintiff as to the power of the Legislature, the question appears to be, as stated at the outset, purely one of statutory construction. Giving to the language of the section its ordinary meaning, the only question raised by the plaintiff's contention that the sum collected by the state from savings banks should not be included in computing "the average rate of taxation \* \* \* upon other property throughout the state," is whether the sum so collected is a tax "upon other property throughout the state." As there is no contention that this sum so collected is not a tax of some sort, or that it is not exacted "throughout the state," the question is whether the savings bank tax is a tax upon property. As the question is the meaning

of the statute—what the Legislature intended by the words used—the exact point in issue is much narrower, and is: Was the savings bank tax understood by the Legislature in 1891 to be a tax upon property? Savings banks, under provisions of the Public Statutes enacted contemporaneously with the section under consideration, are required to pay taxes in two ways. They are taxed for all real estate owned by them in the towns where it is situate, precisely as all other individuals and corporations, except railroad, telegraph, and telephone companies, who are not so taxed for real estate used in their ordinary business. Pub. St. 1901, c. 64, § 12. This is conceded to be a property tax. The tax which is collected by the State Treasurer is not based upon property owned by the corporation. It is determined by the amount the bank owes its depositors. Section 5, c. 65, Pub. St. 1901, requires the payment of "one per cent. upon the amount of the general and special deposits on which it [the bank] pays interest." The tax is laid upon the depositors' interest, and not upon the property of the bank. The property of the bank, except real estate, the value of which is deducted from the amount of the deposits taxed, is not taxed. Pub. St. 1901, c. 65, § 12; *Laconia Savings Bank v. Laconia*, 67 N. H. 324, 38 Atl. 384. From the manner in which the tax is determined, it can be argued with great force that this tax is not a tax upon property of savings banks. It is so declared in effect in the statute, and has always been so understood. But, because it is not a tax upon property of the bank, it does not follow it is not a property tax. It is a tax upon the amounts intrusted to the bank by the several depositors. The question, therefore, is: Was a deposit in a savings bank commonly understood to be property in 1891? For the Legislature, in the absence of evidence that the terms employed in a statute having attained a peculiar significance in the law, must be understood to have employed the words in a statute with the meaning ordinarily attached to them. The Legislature has directed that the words of a statute should be so construed. Pub. St. 1901, c. 2, § 2. It cannot be claimed that deposits in savings banks are not commonly understood to be property. But it is not necessary to rely upon common understanding. That they are property is the foundation upon which the following decisions rest: *Mann v. Carter*, 74 N. H. 345, 351, 69 Atl. 130; *Robinson v. Dover*, 59 N. H. 521; *Berry v. Windham*, 59 N. H. 288, 47 Am. Rep. 202. The only possible basis for doubt as to the meaning of the plain terms of the statute is confusion as to the nature of the tax under consideration. If the tax is upon the deposits and against the depositors, in effect if not in form, it is a tax upon property. If it is a tax against the banks merely as corporations, as has been suggested,

it can be argued with force that it is not a property tax. The views that have heretofore been held by the court as to the nature of this tax may be incorrect. It may be true that since 1903 a governmental exaction which is not taxation in the sense in which that subject was before that time understood in this state, and which is "an application of property for public charges, but not a proportional division of public expense," is now permissible. *Thompson v. Kidder*, 74 N. H. 89, 94, 65 Atl. 392.

But neither of these considerations is now material. The Legislature cannot be presumed to have known in 1891 that the Constitution would be amended in 1903, or that the judicial declarations as to the nature and character of the tax, then unquestioned, would subsequently be doubted. The statute must be read in the light of the circumstances then existing, the Constitution as it was then written, and the law as it was then declared. Under the Constitution as it existed and was interpreted from 1784 to 1903, the only subjects of taxation were polls and estates. *Curry v. Spencer*, 61 N. H. 624, 60 Am. Rep. 337. As the savings bank tax is plainly not a poll tax, it must have been regarded as a property tax, unless it was understood to be supported, not as an act of taxation, but as an encouraging or discouraging exercise of the protective power. *State v. Express Co.*, 60 N. H. 219, 260, 263. Whether the tax was one or the other was the question directly raised and decided in *Bartlett v. Carter*, 59 N. H. 105; while in *Rockingham Ten Cent Savings Bank v. City of Portsmouth*, 52 N. H. 17, 27, 28, the present tax is expressly distinguished from the one-half of 1 per cent. on the amount of the capital stock which banks with a capital were formerly required to pay for the benefit of the literary fund (Gen. St. 1867, c. 85, § 1; Rev. St. 1842, c. 75, § 1), which Judge Perley, in *Nashua Savings Bank v. City of Nashua*, 46 N. H. 389, 390, says "is not named nor assessed as a tax. \* \* \* and has more the character of a bonus voluntarily paid for the right to exercise the privilege of banking than of an ordinary tax." *Bartlett v. Carter* was decided in 1879. The provision therein construed was re-enacted in 1891 (Pub. St. 1901, c. 65, § 5) without change. Applying the familiar rule that the re-enactment of a statute without change is, in the absence of weighty evidence to the contrary, an adoption of previous judicial construction, we have a legislative declaration that the tax in question is intended as a tax upon property of the depositors, and not as a privilege tax against the bank. That no different understanding was had of this tax by the Legislature in 1891 has also been decided by this court. *Petition of Savings Bank*, 68 N. H. 384, 386, 36 Atl. 17. That the tax differs in method of collection and rate from that on "other property" is

expressly recognized by the court; but, with those differences in mind, the tax, upon the ground of its history and purpose and the adjudications as to that effect, was unanimously declared to be a tax upon property. By common understanding and repeated judicial definition adopted by the legislative re-enactment of the statute, the tax, whose consideration by the board of equalization in determining the average rate of taxation upon property throughout the state is attacked, was in 1891 established as a tax upon property and as such comes within the plain terms of the statute. It may be that by overruling *Mann v. Carter*, 74 N. H. 345, 68 Atl. 130, *Petition of Savings Bank*, 68 N. H. 384, 36 Atl. 17, *Robinson v. Dover*, 59 N. H. 521, *Berry v. Windham*, 59 N. H. 288, 47 Am. Rep. 202, *Bartlett v. Carter*, 59 N. H. 105, and *Rockingham Ten Cent Savings Bank v. City of Portsmouth*, 52 N. H. 17, and by rejecting all reference to the history of the legislation and the language of the original act, in which the tax is described as a tax "on the depositors" (*Laws 1864*, p. 3058, c. 4028), it can now be held that this tax is not a property tax, but is a privilege tax. It may be that the authorities cited in *Bartlett v. Carter* from other jurisdictions, and upon consideration then rejected as inapplicable here, ought now to be followed. If all this be conceded, the conclusion, if adopted, can have no weight upon the question before the court; for there is no evidence that in 1891 the soundness of the judicial conclusion that this tax was a property tax had ever been questioned. There is direct evidence to the contrary. *Petition of Savings Bank*, 68 N. H. 384, 36 Atl. 17. It may even be conceded that scientific study of the subject of taxation has developed that constitutional provisions for the division of the expense of government by taking annually for that purpose a proportionate part of his property from each individual according to its value, does not equally distribute the burden, either in proportion to the ability of each to pay or in fair return for benefits received. *Thompson v. Kidder*, 74 N. H. 89, 92, 65 Atl. 392. Even if it could be held that the particular directions of the Constitution as to the method of taxation might be controlled by general principles of equality of right contained therein (*State v. Express Co.*, 60 N. H. 219, 247, 250, 255), such conclusions would not aid in the interpretation of a statute enacted at a time when the constitutional rule was universally understood to be equitable and just. *Amoskeag Mfg. Co. v. City of Manchester*, 70 N. H. 336, 344, 47 Atl. 74. It is said that the provision of the public statutes discussed is a re-enactment, without intent to change the meaning of the act of 1881 (chapter 53, p. 470), and that the language of this act excluded the savings bank tax. In support of this conclusion, the practice

of the court in assessing the tax under a prior statute somewhat similar in terms is relied upon. Consideration of this contention necessitates a reference to the history of railroad taxation and an examination of the earlier statutes relating to the subject—a proceeding always competent and often of great value in the attempt to ascertain the meaning of a particular enactment. Prior to Rev. St. 1842, c. 39, § 4, there were no special provisions for railroad taxation. Railroad stock, like bank stock, was taxable to the owner in the town in which he resided. *Laws 1832*, p. 98, c. 108, §§ 1, 2; *Pittsfield v. Town of Exeter*, 69 N. H. 336, 41 Atl. 82. By the Revised Statutes a special annual tax of 1 per cent. was imposed upon the value of that part of the capital stock of each railroad expended in this state, to be determined by the certificate of the justices of the superior court, to be paid to the State Treasurer and by him distributed, one-fourth to the towns in which the railroad was located in proportion to the capital stock expended therein for buildings and right of way, three-fourths to the towns in which the stockholders resided in proportion to the amount of stock owned in each town, the balance or the proportion owned by nonresident stockholders to be retained by the state. Rev. St. 1842, c. 39, §§ 4, 5. Before any tax was assessed at the 1 per cent. rate of the Revised Statutes, the act was amended so that it required the assessment of the tax to be "in proportion, as near as may be, to the taxation of other property on the first day of April \* \* \* in the several towns in which said railroads are situate." *Laws 1843*, pp. 53, 54, c. 34, §§ 2, 4. This scheme of taxation, modified only as to the method of assessment and by the provision taxing real estate not used in the ordinary business of the roads and the 10 years' exemption, is still in force. *Pittsfield v. Exeter*, supra; Pub. St. 1901, c. 65, §§ 1, 2, 4, 12, 13, 15. In the General Statutes of 1867, the subject of taxation was described as the "capital," instead of the "capital stock" of the railroad, and the actual present value of the capital of any railroad expended in this state was required to be determined by the justices of the Supreme Court. Gen. St. 1867, c. 57, §§ 1, 2. The Tax Commission of 1878, as a result of their investigations, reported to the Legislature sundry bills, one of which created the board of equalization, and another made new provisions as to railroad taxation. The action of the Legislature upon these recommendations established the board of equalization, one of whose duties was to assess the taxes upon the several railroads (*Laws 1878*, p. 198, c. 73; Gen. Laws 1878, c. 61), and laid down new rules for the taxation of railroads. "Every railroad corporation in this state not exempted from taxation \* \* \* shall pay to the state an annual tax upon the actual value of the road, rolling stock, and equip-

ments on the first day of April of each year, as near as may be in proportion to the taxation of other property in April of each year, in the several towns and cities in which such railroad is located, to be distributed according to existing laws." Laws 1878, p. 196, c. 70, § 1; Gen. Laws 1878, c. 62, § 1. While there are no reported cases disclosing the methods of the prior assessment by the justices, it seems to be established with reasonable certainty that they assessed the tax as a municipal tax of the railroad towns, that they took no account of the change in 1865 in the method of assessing the tax upon savings bank deposits; and it was claimed by counsel for the state in *Boston, etc., R. R. v. State*, 60 N. H. 87, that undervaluation of the property in towns for taxation was not considered in making the assessment. In 1879 the board of equalization followed the course that had been pursued by the justices for 36 years. They assessed the tax as a municipal tax of railroad towns, paid no attention to the savings bank tax, and did not take into consideration the undervaluation of other property. As the tax rate was not the same in all railroad towns, this action taxed the several railroads at different rates, as must have been the case for 36 years before. The act creating the board of equalization provided for an appeal to the Supreme Court, after the manner of the appeal from the selectmen's assessment, by any one aggrieved. Laws 1878, p. 200, c. 73, § 9; Gen. Laws 1867, c. 61, § 9; *Id.* c. 57, § 12; *Boston, etc., R. R. v. State*, 60 N. H. 87, 94.

The *Boston, Concord & Montreal Railroad* appealed from the assessment made against them in 1879, alleging as grievances overvaluation, lack of proportion because of the failure to take into consideration the undervaluation of property by the local assessors, and the lack of uniformity in the assessment of the different railroads. The case was heard by referees, who found the value of the railroad, assessed the tax according to the rate in the railroad towns, but reduced the rate in the proportion in which they found other property was undervalued by the selectmen. The questions presented to the court upon this report were the validity of the assessment at the average rate of taxation in the towns in which the railroad was located and the action of the referees in considering the undervaluation of other property. In support of their contentions, counsel for the state relied upon the uniform practice of the justices in assessing the tax as a municipal tax of the railroad towns and in refusing to consider undervaluation of other property. It is held in the case, solely upon the manner in which the tax was distributed (as to which no change had been made in the law since 1842), that the railroad tax was not a town tax, was not assessable in proportion to the taxation of other property in the towns in which the railroad was lo-

cated, and that it was "either a state tax, or a tax of a triple character, partly state, partly municipal in respect to the railroad towns, and partly municipal in respect to the stockholders' towns"; and the reduction on account of the undervaluation of other property was approved. The referees were instructed to find the facts necessary to be known if the tax were a state tax, or if either party claimed it was partly municipal. The subsequent history of the case shows that neither party claimed anything on account of the municipal character of the tax, and the case was disposed of upon the theory that the tax was a state tax. The assessment of the referees in proportion to the taxation in railroad towns was set aside, upon the ground that, so far as the tax was a state tax, to be held valid it "must be proportional with the tax of other property throughout the state." *Boston, etc., R. R. v. State*, 60 N. H. 87, 96, 97. Although this decision overturned the practice of the court for over a generation, it was not deemed necessary in the opinion to refer to that practice, or to consider the argument of the state based thereon. The former practice of the court, apparently regarded as of no weight at all upon the two questions presented by that case, is not entitled to serious consideration upon the question now presented. The case well illustrates the little weight as a precedent attached to decisions upon questions which may have been involved, but which were not presented to or considered by the court. This case contains no reference to the savings bank tax, although the language of the court, that the tax, if a state tax, "must be proportional with the tax of other property throughout the state"—an expression which it is not probable was used in entire forgetfulness of the decision a year before in *Bartlett v. Carter*—includes that tax unless some ground for exception can be found; but the particular question does not appear to have been presented, and it cannot fairly be said to have been decided, though embraced within the language used. Why the question now presented was not raised in that case, or the change heeded by the court in 1865, may not be very material. It should be borne in mind, however, that the practical question differs greatly to-day, when the taxable savings bank deposits have increased to \$66,000,000 and the difference in rate has also been augmented by the increase in the municipal rate, while the bank rate is less than in 1879. The act of 1864, taxing savings bank deposits, was not passed, as has been assumed in argument, to encourage such deposits by a special method of taxation; but its purpose was to secure the taxation of such accumulations, which under existing law were largely escaping taxation. The existing method of taxing railroad corporations furnished the pattern followed. *Robinson, Hist. Taxation in N. H.* 116, 117; Laws 1864, p. 2830, c. 2873; Laws 1861, p. 2447, c. 2493; *Rev. St.* 1842, c. 89, § 3;

*Nashua Savings Bank v. City of Nashua*, 46 N. H. 389, 394, 396. While if, prior to 1804, all deposits in savings banks had been taxed at the local rate in towns, the change then made would have decreased the taxes received therefrom, the facts that deposits of non-residents were not taxed at all, that deposits under \$300 were not taxed—the average deposit being less than \$200 (*Bank Com'rs' Rep.* 1864)—and that depositors could offset money on which they paid interest, practically exempted nearly all deposits. The result of the law was to tax property not before taxed and to furnish additional revenue to towns. Any computation based on the assumption that, but for the legislation of 1864, all deposits of taxpayers in towns would have been taxed at the local rate, is without basis in fact and misleading. The argument based upon the claim of partial exemption—that because the Legislature, under the practical construction given the Constitution, have the power to select the subjects of taxation and thereby exempt classes of property not named (*Canaan v. Enfield District*, 74 N. H. 517, 70 Atl. 250), they can limit the proportion to be paid by particular property—is equally unfounded in law, as has been recently held in Massachusetts. *Opinion of the Justices (Mass.)* 84 N. E. 499. The court in 1880, having declared the provisions for railroad taxation to be in conflict with the Constitution, the Legislature at the next session repealed the provisions requiring every railroad corporation to pay “an annual tax as near as may be in proportion to the taxation of other property in the several towns and cities in which such railroad is located,” and amended the section so “as to require every such railroad corporation to pay an annual tax as near as may be in proportion to the taxation of other property in all the cities and towns of the state.” *Laws 1881*, p. 470, c. 53. The occasion of the statute was the decision above referred to. Its purpose was to bring the statute within the constitutional requirements announced by the court, that such tax as a state tax “must be proportional with the tax of other property throughout the state.” *Boston, etc., R. R. v. State*, 60 N. H. 87, 96. The form used to express this purpose was probably suggested by the act for the taxation of railroads proposed by the tax commission of 1878. *Tax Com'rs' Rep.* 175. That the language was understood to have the meaning of that used by the court appears from a note on page 95 of that case: “By chapter 53, p. 470, *Laws 1881*, the tax is assessable in proportion to the taxation of other property throughout the state.” This note must be chargeable either to Judge Ladd, the reporter, or to Chief Justice Doe, the author of the opinion. As the view of either, the note is evidence of weight that the language of the act of 1881 was understood to have the meaning of the language used in the revision of 1891.

But there is other evidence. By chapter 54,

p. 182, *Laws 1878*, telegraph companies were required to pay a tax of 1 per cent. annually upon the value of their lines, to be appraised by the board of equalization. *Gen. Laws 1878*, c. 62, § 14. By section 2, c. 53, p. 470, *Laws 1881*, above referred to, the provision for the taxation of telegraph companies was amended so as to require them to “pay an annual tax as near as may be in proportion to the taxation of other property throughout the state, upon the value” of their property made taxable by the statute; and the board were required “to assess said telegraph property at the average rate of taxation of other property throughout the state.” The two forms of expression are used in the same act. There is no ground for holding that the Legislature intended to, or understood that they could, apply a different rule in the taxation of railroads from that by which they provided telegraph companies should be taxed. It must be concluded that the two expressions had exactly the same meaning. The latter is the form used by the court in the decision from which the legislation resulted. If the reference to cities and towns in section 1 would authorize the conclusion that only property taxed by city and town officers was referred to, the language is broad enough to include all property taxed in cities and towns, whether the tax is collected by municipal or state officers. As the expression used in section 2 of the act contains no terms implying a restriction to taxes collected by municipal officers, it follows that the terms of section 1 having the same meaning were not intended to be so restricted. Telephone companies in 1888 (*Laws 1888*, p. 94, c. 110) were required to “pay an annual tax, as near as may be in proportion to the taxation of other property throughout the state,” and the board of equalization was directed to assess their property “at the average rate of taxation of other property throughout the state.” In 1891 the commissioners in preparing the public statutes adopted the language found in the opinion of the court in 60 N. H. 87, and in the statutes taxing telegraph and telephone companies “throughout the state” in place of “in all cities and towns of the state” (*Pub. St. 1891*, c. 64, § 1), indicating in the margin that the change was not intended to alter the meaning. The only possible reason for the change was the belief that the new language expressed more correctly, with less liability to misunderstanding, the meaning of the old. If a meaning can be deduced from the old which is not fairly attributable to the new, it does not follow that this meaning should be ascribed to the new, but the new language is evidence of the meaning of the old.

It is urged that the question now raised was decided in accordance with the plaintiff's contention in *Boston, etc., R. R. v. State*, 62 N. H. 648. If this claim be correct, a peculiar and extraordinary situation is developed. The case was decided in June, 1883, and does not appear to have been forgotten or over-

looked. It is cited *Petition of the Union Five Cents Sav. Bank*, 68 N. H. 386, 36 Atl. 17; *Somersworth Savings Bk. v. Somersworth*, 68 N. H. 403, 44 Atl. 534; *State v. Gerry*, 68 N. H. 510, 38 Atl. 272, 38 L. R. A. 228; *State v. Griffin*, 69 N. H. 33, 39 Atl. 260, 41 L. A. 177, 76 Am. St. Rep. 139. The court having held in June, 1880 (*Boston, etc., R. R. v. State*, 60 N. H. 87), that the railroad tax could not constitutionally be assessed in accordance with the terms of the existing statute, the Legislature at the next session changed the statute to accord with the view of the court. Laws 1881, c. 53. Immediately after the decision was announced, it appearing to be conceded as the result of that case that the railroad tax was a state tax, the board of equalization voted to so assess it; and the court having said that as a state tax the tax "must be proportional with the tax of other property throughout the state," and having recently held in cases before referred to that the savings bank tax was a tax upon property, the board included the deposits and the tax upon them in computing the average tax upon property throughout the state. The tax has been so assessed annually ever since, without objection from any quarter until very recently. If the decision relied upon introduced an exception into the statute, the Legislature took no steps to make the written law conform to the judicial decision, and the exception has never been recognized in the execution of the law. Since that decision was announced numerous tax appeals by railroad, telegraph, and telephone companies have been determined, some of which have been before the court on questions of law and are to be found in the Reports, in which abatements were granted, which would have been much less in amount or entirely denied if the law as it is claimed it was decided in 1883 had been relied upon and applied. *Boston & Maine R. R. v. State*, 63 N. H. 571, 4 Atl. 571; *Western Union Tel. Co. v. State*, 64 N. H. 265, 9 Atl. 547; *Boston, etc., R. R. v. State*, 64 N. H. 490, 13 Atl. 874. Counsel for the state have acquiesced in the contrary view, and the Attorney General has officially advised against the plaintiff's contention. Although railroad taxation has been the subject of public discussion, no one claimed the case in question to be an authority against the method followed by the board of equalization, until they called the attention of the Legislature to the decision in their report for 1906. It is not to be presumed that all these public officers would have failed to heed the opinion of the court if they had understood such a decision had been made. It seems probable that the court, if they were aware the question had been decided by them, would have called attention to it in some of the subsequent cases, although the question was not directly raised. The only reasonable conclusion from the indisputable facts is that no one connected with the assessment of the tax or the conduct of the tax appeals under-

stood the decision to be what the plaintiff claims; and, if these persons did not have that understanding, the only probable inference that can be drawn is that no such decision was in fact made. Examination of the opinion in the light of the questions presented leads to the same conclusion.

The fundamental question is what did the case decide, not what is arguable from the language of the opinion. The language of an opinion, like that of all written documents, must be read in the light of the circumstances under which it is used. "Serious misapprehension of the scope and effect of a judicial opinion is often likely to occur, if the exact point in issue is disregarded." *Hedding v. Gallagher*, 72 N. H. 377, 391, 57 Atl. 225, 64 L. R. A. 811; *Richardson v. Mellish*, 2 Bing. 229, 252; *Quinn v. Leathem* [1901] App. Cas. 495, 506; 26 Am. & Eng. Enc. Law, 169, 170. In plain terms, to ascertain what a judge meant by what he said, it is necessary to know what he was talking about. The report of the case is brief. It is said to be an appeal from the assessment of the plaintiffs' tax of 1880, and that the facts were found by referees; but there is no statement of the facts found and no order for the disposition of the case. It is therefore impossible to determine from the printed volume what facts were before the court, or what effect the court thought the legal principles announced had upon those facts, further than both may be inferred from the language of the opinion, which, so far as it is claimed to relate to the present controversy, is as follows: "By the act of 1878 (Gen. Laws 1878, c. 62, § 1) and the act of 1881 (chapter 53, p. 470), railroads are taxed 'as near as may be in proportion to the taxation of other property' in towns and cities. The savings bank tax (Gen. Laws 1878, c. 65, § 8) is an anomaly, resting on peculiar grounds of public policy, and is universally understood to have acquired the position of an exception to the constitutional rule of equality. It is so regarded in the assessment of state, county, and town taxes upon unincorporated persons, and in their tax appeals; and the plaintiffs' charter is not a statutory or a constitutional ground of exemption." This is all there is by way of statement, argument, illustration, or conclusion. What was in fact decided must depend on the question presented. If the language was used in answer to, or in decision of, the question now raised by the plaintiff, the meaning might be tolerably clear, and constitute such a judgment as he contends for. The inquiry, therefore, is whether this or some other question was in the mind of the court at the time. The referees' report and briefs of counsel are accessible in 148 Briefs and Cases, 321 et seq. The files of the court contain the report and the written motion of counsel setting forth the legal questions raised upon the facts found. The report sets out in detail the method adopted by

the board of equalization to ascertain the average rate of taxation, including the savings bank deposits. This the board found to be \$1.44 on each \$100 of valuation; but upon the ground of the undervaluation of other property they found railroads should be taxed at the rate of \$1.25. The referees found the value of the road, reducing the appraisal of the board, and found that property included in the selectmen's inventories was taxed at the rate of \$1.52 on the appraisal, but was appraised at only 73.6 per cent. of its value. They also found that a tax should have been assessed at the rate of \$1.52 upon 73.6 per cent. of the valuation found by them. This produced the same result as assessing the tax upon the true value at 73.6 per cent. of \$1.52, or \$1.1872—the method of the board. Upon the filing of this report, counsel for the plaintiffs moved for judgment on the report in the following manner: (1) That the tax be wholly abated for the reason that the statute under which it was assessed was unconstitutional; (2) that, failing the sustaining of this contention, the tax be assessed at 1 per cent. of 73.6 per cent. of the actual value of the road as found by the referees; or (3) at 1 per cent. of the actual value. In his printed brief counsel states his position as to the assessment in controversy, as follows: "Can said assessment be sustained by reason of the fact that a smaller tax was imposed upon the deposits in savings banks?" The position was taken, not as an attack upon the findings or rulings of the referees as to what the tax should be, but the attack was upon "the assessment of 1880." The position taken was that the savings bank tax and the railroad tax, being both state taxes, must be uniform, and no higher tax could be assessed on railroads than upon the deposits. As counsel say in their brief: "When the Legislature has only \$42,000,000 [the total appraisal of railroads and deposits] of property on which to lay a tax, if they make that tax 1 per cent. on two-thirds of the property [the bank deposits] and 1.52 per cent. on the remaining one-third [the railroads], they undertake to do with respect to the remaining one-third what they are prohibited from doing by the Constitution of the state." The claim in effect was that the savings bank tax only could be considered in finding the average rate of taxation upon property throughout the state. Whether the tax upon deposits should be considered in connection with all other property and taxation in the state in determining the average rate of taxation, the court were not asked to decide. The propriety of so including it was apparently conceded, as counsel for the state took the position that such consideration was all the Constitution demanded or the plaintiffs could ask. The plaintiffs claimed more, and the denial of their contentions was a decision that constitutional equality did not require that railroads should be taxed at the same

rate as savings banks; that in ascertaining the rate it was not necessary to exclude all property and taxes, except savings bank deposits and the tax upon them. The substance of what was said was that, as taxes upon other property are assessed at a higher rate than savings bank deposits, the railroads are not wronged if their property is so taxed. How the average rate should be determined, or the validity of the assessment made by the referees, did not arise upon the motions presented to the court, was not discussed, and consequently was not decided. Limiting the decision to the question presented, the subsequent action in reference to railroad taxation, otherwise inexplicable, is readily understood.

The record contains no decree of abatement, and reference has been made to a settlement made by the parties with the State Treasurer in 1888. From the amount paid on the execution it can be inferred what the parties understood the judgment was, and their understanding may be considered correct. The proposition, however, that from the amount paid and accepted it must be inferred that legal questions not disclosed by the record were presented to and considered by the court, does not require answer. If there had been a judgment of abatement greater than the amount allowed by the referees by the sum which consideration of the tax on deposits would affect the result, there would be evidence that the claim was made and either assented to by the state or decided for the plaintiffs; but a judgment for the amount found by the referees furnishes no evidence that the question was considered by the court or the parties, because the abatement must have been the same, if the question was not considered at all, as it would have been if decided adversely to the plaintiffs.

An attempt is made, by assuming that, if the tax upon deposits were considered, the rate upon the valuation found by the referees would be \$1.44, instead of \$1.52, to show that the consideration of that tax would have materially affected the result, as a foundation for the argument that the question must have been raised and considered. But the referees did not find what the rate or valuation should be, considering only the taxation of the property included in the inventories and the deposits, although both may be computed from the facts found. The rate of \$1.44, which the referees say was found by the board of equalization, is the average rate only upon the assumption that the property in the inventories was appraised at its full value, as were the bank deposits. It is apparent that, the greater the undervaluation of the inventories, the nearer the tax of that property at \$1.52 and of deposits at 1 per cent. approach each other. Property taxed at \$1.52 upon 65.79 per cent. of its true value would produce the same tax if taxed at 1 per cent. up-



on its full value. If the undervaluation found to be 73.6 had been 7.8 per cent. greater the tax of both classes would have been equal. In this case consideration of the tax upon deposits would have reduced the rate upon the true value of the railroad property from \$1.11872 to \$1.1035, and the rate upon the reduced valuation from \$1.52 to \$1.50, approximately. The plaintiffs' tax would have been approximately \$279.68, exactly \$288.61 less. But the valuation to which the plaintiffs were entitled upon their petition for abatement was one at the same ratio to its true value as that of all other property taxed. *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 200, 46 Atl. 470. The valuation of polls should not be considered in determining the ratio. *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 336, 47 Atl. 74. The finding of the referees was: "The property included in said inventory, excluding polls and money, was value for taxation at 70 per cent. of its actual value. The entire property in said inventories, including polls and money, was value for taxation at 73.6 per cent. of its actual value." Taking account of the taxation of deposits at a less rate, the referees further found that "the property included in the town inventories, the railroads (exclusive of the B., C. & M. [the plaintiffs]), and the savings bank deposits, taken together, were valued for taxation in 1880 at 74 per cent. of their actual value." Upon these findings the questions decided in each of the *Amoskeag Cases*, as to the comparison of the valuation of the plaintiffs' property with all other property taxed, instead of with like property of individual taxpayers, and the exclusion of the poll taxes from the computation, might have been raised. If judgment was rendered sustaining the tax found by the referees, it does not follow that the court considered these questions and decided each of them adversely to the result reached when they were raised. Why the state did not ask for an assessment upon the basis of all other taxed property; why the plaintiffs did not ask for an assessment including the deposits and excluding other railroad property, or for the exclusion of the poll taxes in determining the rate of property undervaluation; or why, in the settlement of 1888, the state permitted the abatement upon the tax of 1881 to be applied upon the tax of 1880, after the court had expressly decided such application could not be made (64 N. H. 490, 13 Atl. 874), so that the whole amount paid in the settlement was less than was due if deduction were made on account of the tax on deposits,—is mere matter of speculation. The answers to these questions are immaterial. Any reason for failure to raise the questions would not show that the questions, or any of them, were considered and decided.

The case falls as an authority in the present controversy, because it does not appear that

any further questions of law as to what the tax should be were ever presented to the court or decided. The case stands precisely like *Boston, etc., R. R. v. State*, an appeal from the tax of 1881, reported on a minor point in 64 N. H. 490, 13 Atl. 874 (December, 1887), in which an abatement was granted on the basis of the board rate, as it was found upon the evidence presented, though the mistake of calling it \$1.40, instead of \$1.46, was made. The abatement was a considerable sum (\$2,331.10); while, if the rate had been computed excluding the savings bank deposits, no abatement could have been granted, because a tax assessed at that rate on the valuation found by Judge Smith would have exceeded the tax appealed from. This is not a decision against the plaintiff, because the question was not presented or decided. For the same reason, *Boston, etc., R. R. v. State*, 62 N. H. 648, is not a precedent in his favor. The question must be held to be an open one, now for the first time raised. If there were doubt as to whether the question was decided in 1883 as claimed, the subsequent history of the case and the 24 years' acquiescence in an opposite interpretation would forbid a decision to-day upon its authority alone, and would require a re-examination of the question. The only value of the case would be the weight and application of the arguments advanced in the opinion. To such consideration it is entitled under the opposite conclusion.

Relying upon his construction of the decision in 1883 (*Boston, etc., R. R. v. State*, 62 N. H. 648), the plaintiff contends that the re-enactment of the statute is an adoption of the meaning given to it by the court. If it were to be conceded for the purpose of the argument that the plaintiff's interpretation of the decision is correct, the rule invoked would have no weight in the present inquiry. Technically it does not apply because the tax involved in that case was assessed under the act of 1878 (as construed in *Boston, etc., R. R. v. State*, 60 N. H. 87), which was repealed in 1881. The decision did not and could not constitute an adjudication of the meaning of the act of 1881, passed a year later. The only reason which sustains the rule is the inference that the Legislature, knowing the meaning attached to the language by the court, would have changed the language if a different purpose were intended. From the knowledge of the Legislature, actual or presumed, the rule derives its sole force. The entire ignorance of every one connected with tax administration of the rule claimed to have been established in 1883 has already been referred to. It cannot fairly be inferred that the Legislature in 1891 had knowledge not possessed by the state assessors, counsel for the state, or members of the court. It has been said by the federal Supreme Court "that, when the meaning of a

statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution. \* \* \* And \* \* \* that the re-enactment by Congress, without change, of a statute which had previously received long-continued executive construction, is an adoption by Congress of such construction." *United States v. Hermanos*, 28 Sup. Ct. 532, 52 L. Ed. 821; *Robertson v. Downing*, 127 U. S. 607, 8 Sup. Ct. 1328, 32 L. Ed. 269; *United States v. Healey*, 160 U. S. 136, 16 Sup. Ct. 247, 40 L. Ed. 369; *United States v. Falk*, 204 U. S. 143, 152, 27 Sup. Ct. 191, 51 L. Ed. 411. This statute has received but one construction from the officers of the state charged with its execution since in effect it was formulated by the court in 1860 and enacted by the Legislature in 1881. The interpretation put upon the statute by the board of equalization is therefore supported by the fact that, so assessed, the burden placed upon railroad property is its constitutional and equal share compared with that placed upon all other property in the state; by the language of the court in *Boston, etc., R. R. v. State*, 60 N. H. 87, practically enacted into the statute; by the decision in *Boston & Maine R. R. v. State*, 63 N. H. 571, 4 Atl. 571, that railroads cannot be lawfully compelled to pay more; by the plain terms of the statute, defined by repeated decisions of the court, subsequently re-enacted without change; by the uniform practice for 27 years; by the re-enactment of the statute in the light of such practice; and by the use of similar language by the Legislature of 1907, when the question was matter of public discussion and had been fully presented to the Legislature by the board in their report for 1906, with the suggestion that the matter of a change in method was a subject for legislative action. The meaning of the words "at a rate as nearly equal as may be to the average rate of taxation \* \* \* upon other property throughout the state," in chapters 81, 91, pp. 82, 92, Laws 1907, cannot be questioned under these circumstances; and it is equally plain it was intended that the taxes thereby provided for upon express companies, sleeping, dining, and parlor cars should be determined as railroad taxes had been, and that both should be taxed the same. It is unnecessary to refer to the failure of the Legislature to change the law when the subject was before them in 1907. The only evidence upon the other side is the action of the court from 1865 to 1878, which was repudiated and disapproved when it was before urged as authority, and the reasoning of the opinion in *Boston, etc., R. R. v. State*, 62 N. H. 648. If the savings bank tax is an anomaly to the extent that other property holders may not claim that their property cannot be taxed at a different rate, the effect of the anomaly cannot be extended beyond the acquiescence which created it. As

there has been no acquiescence in the exclusion of the bank taxes in ascertaining the average rate of taxation throughout the state for the purpose of imposing a uniform tax upon railroads, but the reverse, there is no ground for the contention that such an exception to the constitutional rule of equality has been created by universal understanding. If the assessments, from 1865 to 1880, of a municipal tax upon railroads, without objection, amended the Constitution in this regard, the amendment, if it could apply to a tax assessed as a state tax, has been repealed by the contrary action for 27 years. The reason why the discrimination, if one exists, is not regarded in the taxation of unincorporated persons and in their tax appeals, if it cannot be, may be determined when such question arises. The fact that no unincorporated person has raised the question, and that it has not been decided, is not conclusive against the incorporated person who first raises it.

Reliance is also placed upon some expressions culled from opinions of Chief Justice Doe in tax cases. In *State v. Express Co.*, 60 N. H. 219, he said: "There can be no proportion or equality between that which is fixed and that which is uncertain and fluctuating." The truth of the quotation relied upon is as self-evident as a preliminary axiom in Euclid. Things that are not equal are unequal. The axiom was relied upon by Judge Doe to sustain the unconstitutionality of the fixed tax upon railroad expressmen, which was in issue in that case. Its only bearing in this case is to cast doubt upon the constitutionality of the savings bank tax, which is not now in issue. There would be no difficulty in mathematics or logic in assessing a tax upon railroads in proportion to the tax upon savings banks. So long as that tax only were considered, the two taxes would be the same. But it has not been claimed since 1883 (62 N. H. 648) that railroads were entitled to have only the savings bank rate considered in fixing the rate at which they should be taxed. The railroad tax rate (\$1.72) is not equal or proportional to the savings bank rate, because it is not the same. Neither is it equal or proportional to the rate of \$2.50 in Concord, or the average rate of \$1.52 paid in nearly half the towns upon property other than savings bank deposits, for the simple reason that it is not the same but a different rate. Neither the Constitution, nor the statute, nor the dictates of natural justice require that the railroad rate should be equal to each of the 238 or more different rates by which property is taxed throughout the state. It is impossible that it should be unless all rates are alike. The only equality possible is to the average, not of the rates, but to the average rate at which all property is taxed. If there is some property upon which the rate of taxation

is changed only by legislative action and at long intervals, that fact does not prevent the taxation of such property entering into the computation of the average rate. The rates do not enter into the computation at all. The total amount levied in taxes, divided by the total property taxed, gives the average rate. Every man's taxes, if assessed by this rule, are proportional and equal. So the rate is determined by every board of assessors in the state. There is no other way. Under it the railroad taxes, so far as the rate goes, are not only proportional, but equal to the taxes on other property. Aside from the effect of judicial decisions, constitutional interpretation, or the construction of statutory expressions of legislative purpose, the fundamental question involved in the discussion as to the proper method of assessing railroad property is whether the method employed imposes thereon its fair share of the public burden. Whether it does or not is evidence of the legislative purpose. Because individuals on the whole pay more on their property taxed by the local assessors, the impression has arisen that railroads were favored as to the rate; but, as the lower average rate is produced by the fact that on between one-fourth and one-fifth of their whole property individuals embracing nearly one-half of the population of the state pay a lower rate, there is no injustice, but mathematical accuracy, in imposing the average rate upon railroads, who are not depositors in savings banks, and whose money, if deposited therein, would not under existing legislation be exempt from taxation by the board of equalization. Pub. St. c. 64, § 12; *New England Tel. & Tel. Co. v. Manchester*, 72 N. H. 166, 55 Atl. 188; *Carter v. Whitcomb*, 74 N. H. 482, 69 Atl. 779. It is, in substance, conceded in argument for the plaintiff that the method followed is mathematically correct and just. Constitutional equality which is not also mathematically equal to a reasonable approximation is inconceivable. Taxes upon property, equal and proportional as a mathematical proposition, are constitutionally just. The substance of the entire argument in support of the plaintiff's claim is that a tax on savings bank deposits is not a property tax. If this proposition be conceded, the conclusions urged may properly follow; but, until some ground is suggested for holding that, when the language under discussion was used, the tax on deposits was understood to be an excise, and not a property, tax, the argument fails. There has been no argument or claim in the entire discussion that this tax has been at any time since the decision in *Bartlett v. Carter*, 59 N. H. 105, or is now, generally understood to be an excise, instead of a property, tax. The inclusion of the tax on deposits in finding the average rate is the method directed by the Legislature, and is

not open to constitutional objection. The constitutional question in this case and in *Boston, etc., R. R. v. State*, 62 N. H. 648, was involved and decided in the two cases—*Amoskeag Mfg. Co. v. Manchester*, reported 70 N. H. 200, 336, 47 Atl. 74. In those cases the plaintiffs claimed that because certain property owners, by a low appraisal of their property, had the benefit of an exceptionally low rate, their like property must be appraised—in effect taxed—at the same low rate, precisely as the railroad claimed in 62 N. H. 648, that their property should be taxed at the same rate as savings bank deposits. But it was held that the extent of the plaintiffs' right was to an appraisal of their property at the average rate of all the other property; that is, to have their tax assessed at the average rate. If the savings bank tax is not a property tax, under the law of these cases it should not be considered; if it is, it should be. On this question these cases throw no light. They do not hold, but deny, that A's right is to be taxed only the same amount as B. on a particular class of property. Upon the contention that on particular classes of their property individuals are taxed more than railroads on like property rests the whole claim of inequality so vigorously advanced. That claim was held to be unsound in the *Amoskeag Cases*, and no doubt is suggested as to the validity of the conclusions then reached.

The equality of the Constitution is a practical one. Strictly it may be doubtful whether railroad property not located or owned in a local taxing district can be assessed for the local purposes of such district. The difficulties of attempting to distribute the property of a railroad among all the towns in which it may be situate or owned, and to tax these separate parcels according to the varying rates—that is, of assessing the tax as a tax of a triple character—would be insurmountable. The statute as it has been worked out by judicial decision and executive application, in view of the utter impossibility of any other course, places these public service corporations in a class by themselves, and does substantial justice by requiring them to pay the same rate of tax as is paid by all other property not in that class. Whether the Legislature could properly devise some other method need not be considered. The method is just and equitable as between railroad and all other property, and does not violate any rule requiring proportional assessments. Even if the court agreed that some other method would be more economically sound, more productive of revenue, or technically more clearly within constitutional limits, the court has no power to improve the statute by adding to or taking therefrom. So long as the Legislature directs, as they plainly have, the inclusion of the savings bank taxes in finding the aver-

age rate, the court has no power to order their exclusion.

The question, so far as it relates to the taxation of insurance capital, has not been considered, because the result in this case would not be affected by any conclusion that might be reached. Upon the facts alleged, the writ of certiorari could not be maintained if the claim as to this tax should be held well founded. The court are no more at liberty to advise the board of equalization at the plaintiff's request than at their own. *Bingham v. Jewett*, 66 N. H. 382, 384, 29 Atl. 694; *In re School Law Manual*, 63 N. H. 574, 576, 4 Atl. 878; *Opinion of the Justices*, 62 N. H. 704, 706. It may not, however, be improper to remark that many considerations which require the inclusion of the savings bank tax do not apply to this tax. If it should in the future become material and there should be controversy as to it, the question can easily be presented.

Demurrer sustained.

WALKER and YOUNG, JJ., concurred.

PEASLEE, J. (dissenting). The opinion of the court decides that a new method of railroad taxation was adopted either in 1881 or 1891. It rejects the view that the act of 1881 and the revision of 1891 merely amended the law so far as necessary to bring it within the constitutional requirements laid down in *Boston, etc., R. R. v. State*, 60 N. H. 87. The conclusion is reached by giving too great weight to the acts of the board of equalization and the Attorney General, and too little weight to the history of the law and the action of the court in relation to it.

The first statute on the subject was passed in 1842, as an amendment to the report of the commissioners who revised the statutes. *Com'rs' Rep. Rev. St. 1842*, c. 39; *Rev. St. 1842*, c. 39, §§ 4-6. It provided for a tax of 1 per cent. upon the value of that part of the capital stock expended within this state, to be determined by the certificate of the justices of the superior court. *Id.* § 4. No tax was ever assessed under this law. The Revised Statutes became effective March 1, 1843 (*Rev. St. 1842*, c. 230, § 1), the court did not meet thereafter until July (*Rev. St. 1842*, c. 171, § 12), and before that time the statute of 1842 had been repealed by the act of July 1, 1843, which provides that the tax shall be assessed "in proportion, as near as may be, to the taxation of other property on the first day of April \* \* \* in the several towns in which said railroads are situate." *Laws 1843*, p. 54, c. 34, § 4. Under this statute, the court assessed a tax based upon the municipal tax rate from the beginning. In the language of their certificates filed with the State Treasurer, they "assessed a tax on said corporation in proportion as near as might be to the taxation of other property the present

year in the towns through which the road passes." *Certificate of Justices Gilchrist, Woods, and Eastman*, dated August 29, 1850. The idea that the tax was at the fixed rate of 1 per cent. until 1867 has apparently arisen from the error made by the compilers who edited the statutes in 1853. In this edition the Acts of 1842 and 1843 are both printed as though the tax were to be assessed at 1 per cent. and also at the local rate. *Comp. St. 1854*, c. 41, § 4. The apparent impossibility of complying with both these requirements (except by some process of assessorial ledger-deman) would of itself throw great doubt upon the editors' views. The action of the court is ample evidence that the act of 1842 was repealed in 1843, and further confirmation is found in the commissioners' report in 1867. "The capital of every railroad expended in this state shall be taxed as near as may be in proportion to the taxation of other property in April of each year in the several towns in which such railroad is located." *Com'rs' Rep. Gen. St. c. 58*, § 1. In adopting this section the commissioners understood that they were using substituted words to express the meaning of the existing law. They did not intend to change the sense. *Id.*, marginal notes; *Introductory Rep. p. iv*. The section was adopted without change (*Gen. St. 1867*, c. 57, § 1), and the court continued to assess the tax as it had from the beginning. The commissioners' report on this topic is entitled to more than ordinary consideration from the fact that each of the commissioners (*Samuel D. Bell, Asa Fowler, and George Y. Sawyer*) had been a member of the court and participated in assessing the railroad tax.

Prior to 1864 deposits in savings banks (less small exemptions) were taxed locally as money at interest. *Laws 1832*, p. 98, c. 108. So long as this was the law, the tax upon savings bank deposits was included in the calculations for obtaining the local rate. In 1864 the system of savings bank taxation was changed, and a tax of three-fourths of 1 per cent. on the deposits and accumulations due to depositors was collected by the state. That representing the deposits of residents was paid to the cities and towns where they resided, and that on the deposits of nonresidents was retained by the state. *Laws 1864*, p. 3053, c. 4028, § 1. This change brought before the court in 1865 the question now being litigated. Should the savings bank tax, collected by the state, but for the direct benefit of the municipality, be considered in determining the average rate of taxation upon other property? The act of determining this question was judicial. "In one class of tax cases our jurisdiction of the questions of liability and amount has been original. From 1843 to 1878 the statute required the railroad tax to be assessed by the justices of

this court. \* \* \* The obligatory force of this law has not been an open question since the judicial character of the assessment has been fully admitted. \* \* \* Whatever doubt or opinion may have been entertained by any or all of the judges before the judicial nature of the work was seen and acknowledged, the record shows that for at least 18 years—the latter half of the period during which the railroad tax was assessed by us and our predecessors—the assessors understood they were acting in the official capacity of justices of this court." Doe, C. J., in *Boody v. Watson*, 64 N. H. 162, 175, 176, 9 Atl. 794. In the performance of the recognized judicial duty, it was incumbent upon the court in 1865 to determine the status of the new tax as related to the railroad tax. The issue was not merely a theoretical one. Its decision involved substantial sums. In the *City of Nashua* alone, and as to one railroad only (the *Nashua & Lowell*), it would have made a difference of over \$200 in the annual tax. The circumstances were such as to call this matter into prominence. It was near the close of the War, when taxes were on the increase. To follow out the above example: The rate in *Nashua* went from \$1.40 in 1864 to \$2.25 in 1865. Twelve cents of this was caused by the withdrawal of savings bank deposits from the local assessment. The decision of the court was that the tax should be assessed at the local rate, as it had been, and the savings bank tax was left out of the reckoning. Each year thereafter, until 1879, the question was before the court for decision, and the construction put upon the statute was always the same. This alone may well be deemed to settle and fix the meaning of the statute. *Fitchburg R. R. v. Prescott*, 47 N. H. 62, 67. In that case it was said that it was the settled practice of the justices of the court in assessing the railroad tax to include fuel on hand for immediate use as part of the taxed estate; and it was held that, "upon the point whether these materials are properly so taxed, the long and settled practice of the court might well be considered as conclusive." This language is quoted with approval by Chief Justice Doe in *Boody v. Watson*, 64 N. H. 162, 176, 9 Atl. 794.

Early in the 70's tax agitation increased. Judge Sawyer's report in 1876, as chairman of the first commission, does not refer to the railroad tax; but the report of the second commission in 1878 gives the full record of the extended hearings upon this subject, and a copy of the legislation proposed by the commission. A perusal of the arguments advanced by counsel for the various railroads will disclose that none of them claimed that the savings bank tax was or ought to be included in calculating the rate. There was criticism of the theory adopted for valuing railroad property, and much complaint at the inequality of taxation caused by using the local rate, instead of the average rate throughout the state; but no suggestion was made that there was either legal or equitable claim under existing statutes to a reduction of the railroad tax because of the favor shown savings banks. App. Rep. Tax Com'rs, 1878, p. 43 et seq. In the brief filed by counsel for the roads, the disparity between the savings bank tax and the railroad tax is pointed out, and urged as a reason against further in-

creasing the railroad tax. It is not there claimed that the roads are entitled to share in the existing discrimination against taxpayers in general. Id. 68, 69. The commission proposed an act levying the tax on the road, rolling stock, and equipments at the average rate of taxation in all the cities and towns in the state (Id. 173), and an act establishing the state board of equalization (Id. 193). The commissioners to revise the statutes reported the existing law without change. Com'rs' Rep. Gen. Laws 1878, c. 58. The Legislature adopted a compromise measure making the basis for valuation the road, rolling stock, and equipment, but retaining the provision as to the local rate (Laws 1878, p. 196, c. 70; Gen. Laws, c. 62, § 1), and established the board of equalization (Laws 1878, p. 198, c. 73; Gen. Laws, c. 61). It would seem that this second re-enactment of the statute as to rate, after 35 years of uniform construction by the court, and in view of the arguments reported by the tax commissioners to the Legislature, must have given a clear and settled meaning to the language of the act. The legislators must have understood that the rate named in the statute was the rate in cities and towns.

In 1879 the board of equalization assessed the tax as the court had theretofore assessed it, excluding the savings bank tax. The *Boston, Concord & Montreal Railroad* ran through towns having a high tax rate; and, upon an appeal by that road, it was held that as the levy was in part, at least, a state tax, it must to that extent be assessed at the average rate throughout the state, because the state was the taxing district. The question whether it was wholly a state tax was left undecided. *Boston, etc., R. R. v. State*, 60 N. H. 87. The referees by whom the facts were found thereafter reported the average local rate throughout the state, and the court ordered the tax assessed at that rate.

After this decision the board of equalization voted that the railroad tax be considered a state tax and that it be assessed at a uniform rate. To determine the average rate, they added the total of the local inventories to the taxable savings bank deposits and the total local tax to the savings bank tax; and, dividing the second result by the first, found an average rate of \$1.44+. They then voted that the railroad rate be reduced from \$1.44 to \$1.25, because other property was undervalued, and assessed the tax at the last-mentioned rate. From the tax so assessed the *Boston, Concord & Montreal* again appealed, and the case was sent to three referees. Judge Jeremiah Smith was chairman of this board. The case was fully argued both before the referees and the court. 148 Briefs & Cases, 321 et seq. It was before the court on a preliminary ruling of the referees in June, 1882, and the next fall they made their final report. This report sets out in detail the method adopted by the board of equalization to include the savings bank tax. It also contains other computations, including that tax by a different method of calculation. After placing all phases of the matter fully before the court, the referees decided that the savings bank tax was to be wholly excluded, and found the amount of the railroad tax upon that basis.

In August, 1883, the court delivered the opin-

ion affirming the judgment of the referees. "By the act of 1878 (Gen. Laws 1878, c. 62, § 1), and the act of 1881 (chapter 53, p. 470), railroads are taxed 'as near as may be in proportion to the taxation of other property' in towns and cities. The savings bank tax (Gen. Laws 1878, c. 65, § 8) is an anomaly, resting on peculiar grounds of public policy, and is universally understood to have acquired the position of an exception to the constitutional rule of equality. It is so regarded in the assessment of state, county, and town taxes upon unincorporated persons, and in their tax appeals; and the plaintiffs' charter is not a statutory or constitutional ground of exemption." *Boston, etc., R. R. v. State*, 62 N. H. 648, 649. This language seems reasonably plain. The savings bank tax is an exception. It cannot be classified; and, as it is not taken into account in assessing the taxes of individuals, so it is to be disregarded in assessing taxes of corporations.

It is urged that, because this particular method of taking advantage of the savings bank rate was not argued to the Supreme Court, therefore the question was not there decided. This argument fails to take into account the nature of the proceedings and the duty of the court in the premises. The appeal is taken from the decision of the board of equalization to the Supreme Court at its law term, and upon the appeal the court is required to make such order as justice requires. Gen. Laws 1878, c. 61, § 9. By this procedure all questions of assessment are transferred to the court for final decision. *Boody v. Watson*, 64 N. H. 162, 175, 9 Atl. 794. The positions taken by Judge Ladd on behalf of the road were: (1) That the tax was wholly unconstitutional; (2) that it could not be assessed at a higher rate than the savings bank tax of 1 per cent. Both of these positions were denied by the court. Had it then decided the case? By no means. It had merely decided (as to two propositions) what the tax should not be. The problem of what the tax should be was still to be solved. The scope of inquiry had been narrowed by the elimination of these two propositions, but the question what the assessment should be remained. The judges had before them the referees' report, calling to their attention the somewhat crude method by which the board of equalization included the savings bank tax. It also presented a more scientific calculation for the inclusion of that tax; and it closed with the decision of the referees that the law was that the savings bank tax should be excluded. With this report to act upon, and in discharge of the duty to dispose of all questions presented as justice required, the court made use of the language before quoted. In so doing they intended to decide, as Judge Isaac W. Smith entered upon his files, that the tax was "to be assessed as if there were no savings banks"; or, to put it as Judge Clark made the entry in his docket, it was "agreed that no deduction of tax should be made on account of savings bank tax being 1 per cent. and other property 1½ per cent." The argument that, because the omission of the savings bank tax from the calculation would have made a difference of but a few hundred dollars in the tax assessed, therefore the court paid no attention to that matter, is hardly worthy of serious consideration. The

question involved was a legal one. It was not a commercial transaction.

It is further urged in disparagement of this case as an authority that the final order for abatement, made at the June law term, 1884, is not in harmony with this view of the decision. Before taking the appeal, the road paid \$17,000 on the tax assessed against it, and the referees were of opinion that the tax should be \$21,255.68, leaving a balance due of \$4,255.68. The claim is that the court thereafter allowed an additional abatement of \$2,331.10, so that the balance finally paid was but \$1,924.58; and from this it is argued that whatever the decision may mean it cannot be what the plaintiff here contends. When the facts are fully known, this position is seen to be untenable. The idea that only \$1,924.58 was paid comes from a statement in the printed report of the State Treasurer for the year 1888, wherein this sum is named as the balance received from the Boston, Concord & Montreal on account of the tax for 1880. In fact, it was the balance of the \$4,255.68 due upon the tax for 1880, after deducting therefrom an abatement of \$2,331.10 which the road had obtained on the tax for 1881. *Boston, etc., R. R. v. State*, 64 N. H. 490, 13 Atl. 874. The order allowing the abatement of \$2,331.10 was made in the appeal from the tax for 1881 in 1888, four years after the case involving the 1880 tax went off the docket. When the facts are rightly understood, it appears that the order made in 1884, and complied with in 1888, constitutes an additional affirmation of the rule by the court. Here, again, added weight is given to the transactions by the fact that the chairman of the referees and the counsel for the road had both been members of the court when it assessed the railroad tax. With the disposition of that case, litigation on this subject ceased, and the court had no further occasion to construe the statute until the question was raised in this proceeding. The record of 40 years' constant dealing with the matter of fixing the rate shows that one course was consistently pursued. From the assessment of the first tax in 1843, it was levied in proportion to the local rate. In 1865 it was decided by the judges to continue to assess at the local rate, and leave out the newly created savings bank tax. This decision was yearly reaffirmed when the assessments were made, until 1879. In that year the board of equalization followed the same rule, but abandoned it the next year. In 1882 Judge Jeremiah Smith held that the rule followed by the court was the correct one, rejecting the innovation sought to be introduced by the board of equalization. In 1883 the opinion heretofore quoted (62 N. H. 648) again asserted the position that the savings bank tax was not to be considered, and the order in the case made the next year reaffirms the decision. No other rule was ever countenanced by the court. The Legislature of 1881 amended the law to conform to the decision of *Boston, etc., R. R. v. State*, 60 N. H. 87, substituting "all the cities and towns of the state" for "the several towns and cities in which such railroad is located." Laws 1881, p. 470, c. 53; *Boston, etc., R. R. v. State*, 62 N. H. 648; *State v. Jackson*, 69 N. H. 511, 523, 43 Atl. 749. The commissioners to revise the statutes in 1891 reported the act with chan-

ges which were not intended to alter its meaning (Com'rs' Rep. Pub. St. 1891, c. 63, § 1), and the Legislature adopted the act as reported by the commissioners (Pub. St. 1891, c. 64, § 1). Applying the usual rule, it must be held that the construction of the statute has thus become settled, so that it cannot be changed except by legislative action. *Tomson v. Ward*, 1 N. H. 9; *Jewell v. Holderness*, 41 N. H. 161; *Frink v. Pond*, 46 N. H. 125; *Parsons v. Town of Durham*, 70 N. H. 44, 47 Atl. 600; *Burgess v. Burgess*, 71 N. H. 293, 51 Atl. 1074.

It is urged that there has been "continued uninterrupted acquiescence and recognition of the method of the board of equalization by the Legislature." This assertion is not borne out by the record history of the board and its relations to the legislative department. The act creating the board contained no provision for its making any report of its doings to the Legislature. An abstract of its equalization of local valuations throughout the state was to be compiled by the Secretary of State as a basis for apportioning the state tax. The Secretary of State was to lay this before the Legislature at the opening of the session when the state tax was to be apportioned. Laws 1878, p. 200, c. 73, § 8; Gen. Laws, c. 61, § 8. The records of the board's proceedings were to be filed with the Secretary of State. Laws 1878, p. 199, c. 73, § 2; Gen. Laws 1878, c. 61, § 2. A certificate of "their determination" as to the railroad tax was to be filed with the State Treasurer. Laws 1878, p. 197, c. 70, § 4; Gen. Laws 1878, c. 62, § 4. There were no other provisions for reporting the acts of the board. The provision requiring an annual "report of their doings" to be filed with the Secretary of State was added by the commissioners who revised the statutes in 1891. Com'rs' Rep. Pub. St. 1891, c. 62, § 7; Pub. St. 1891, c. 63, § 7. There are, then, three places where information concerning the acts of the board from 1879 to 1891 may be sought: The record filed with the Secretary of State; the reports to the Legislature; and the certificates filed with the State Treasurer. The records of the board for 1879 do not show what the rate was or how it was determined. After the decision in *Boston, etc., R. R. v. State*, 60 N. H. 87, the board met on September 7, 1880, and considered the recent decision of the Supreme Court in the appeal cases, and counsel were heard in reference to the intent and meaning of the decision. The next day it was voted that the tax upon railroads be regarded as a state tax and be assessed at a uniform rate. September 29th they adopted a resolution reciting that the average rate of taxation upon the taxable property of the state was about \$1.44, and that there was such undervaluation that the railroad tax ought to be assessed at \$1.25. Below the record of this meeting is an unsigned statement, evidently written by the secretary of the board, as follows:

#### Valuation and Taxation 1880.

Amount of Inventories .....	168,995,309.	Taxes on same .....	2,563,144.31
Savings bank deposits .....	28,293,929.	Taxes on same .....	282,339.29
Amount taxed.....	197,289,238.	Amount of taxes .....	2,845,083.60
Average rate, 1.442 on a \$100.			

This is the assessment from which the appeal was taken which is reported 62 N. H. 648.

In 1881, below the record of the meeting held September 21st is a similar statement of valuation and taxation, giving a rate of \$1.46. September 27th it was voted to fix the railroad rate at \$1.25, "so that the rate be fixed proportionally as much below the average rate upon other property as other property has been undervalued." In 1882 the board reheard many appeals from the tax of 1881, which were sent to them by the court under the rule adopted at the December, 1881, law term. There is no record of how the abatements were allowed, but the files of the court in the several counties seem to show that it was because other property was undervalued. The rate question was not considered. There is a similar statement as to valuation and taxation this year, giving a rate of \$1.41. The railroads were taxed at this rate, and their valuation was reduced 18 per cent. because other property was undervalued. By this method the railroads were given the benefit of the lower rate on savings banks twice—once by the reduction of rate and again by a reduction of values. The same thing is probably true of the preceding year, when the rate was reduced twice. From this time the method of reducing valuation, instead of a second reduction of the rate, was followed.

In 1883 a similar record was made. The rate was \$1.49 and 17 per cent. was taken from the valuation. All these assessments were made before the court decided the 1880 appeal. That decision was announced late in August, 1883, and the assessment for that year was made July 13th—a month or two earlier than in former years. The first secretary of the board died before their sessions in 1884, and there is no further record of how the rate was made up, nor does it appear (as it did appear in the 1879 appeal case) that any consideration was given to the decision of the court. From 1884 to 1890 the record merely shows a vote to assess at the "average rate" of so much, with certain percentages deducted from the valuation. The Legislature did not understand that under the law the board was required to report to it upon the railroad tax. In 1881 the house adopted a resolution requesting the board to report in what way and manner they made the railroad tax, upon what basis they valued the railroad property, how they determined the rate of taxation, and whether they made the assessment in accordance with the statute. The board replied: "We regarded the railroad tax as a state tax, and held that as such it should be assessed as near as practicable upon a uniform valuation with the other property of the state and at a uniform rate. How we endeavored to effect these objects will more fully appear from our answer to the other branches of your inquiry. \* \* \* The rate of taxation was determined by the average rate of taxation of the other property in the state, modified by a proportional value thereof. To this end we received evidence to show that the property of the state was not assessed at its full value; and, having ascertained, so far as the evidence showed, the extent of such undervaluation, we deducted from the average rate of taxation a per cent. equal to the per cent. of undervaluation, and thus made the valua-



tion and rate of taxation of railroads as near as practicable uniform with that of other property in the state. To the question whether this assessment is in accordance with the statute, we have to say: The statute (chapter 62, § 1, Gen. Laws 1878) provides that the tax on railroads shall be 'as near as may be in proportion to the taxation of other property \* \* \* in the towns and cities in which such railroad is located.' This implies that the railroad tax is a municipal tax; but the Supreme Court, in the case of the Boston, Concord & Montreal Railroad's appeal from our assessment of 1879, practically decided that this tax is a state tax. And in that opinion the court say that, 'if the railroad tax is a state tax, this statutory provision is in conflict with the Constitution, since a state tax must be proportional throughout the state.' Following what seemed to us the plain interpretation of this opinion, we assessed the railroad tax as a state tax, and disregarded the statutory provision referred to. A copy of the valuation and assessment of the several railroads is hereto annexed." Journals of Senate and House, 1881, p. 395. There was no statement of the rate, and no further information given as to how it was arrived at.

September 6, 1887, Governor Sawyer transmitted to the Senate and House the report of the board for that year. In the House this was ordered to be referred to a special committee of one from each county, and no further notice was taken of it. In 1889 the report of the board for 1888 was transmitted with other department reports. All others were referred, but nothing was done with this. Assuming that these were the printed reports, neither of them contained any reference to the railroad tax; and, aside from these, the journals do not disclose any reports from the board from 1881 to 1891. These two reports (for 1887 and 1888) are included with the bound volumes of department reports for 1887 and 1889, respectively. No others were so included up to 1891.

It might be urged that the Secretary of State presumably laid before the Legislature the printed summary provided for by the statute, that this was probably the statement entitled "Valuation and Taxation in New Hampshire," and that in this way the legislators were informed. Assuming this to be true, what does it show for the period under consideration? The printed report for 1881 contains a summary of the local assessments and taxes, and at the foot a computation adding these to the savings bank deposits and tax, and a statement that the average rate is \$1.46. This includes the savings bank figures, although that fact is not stated. Immediately following this, as a part of the same statement, is the following: "Add to the amount of taxes above given the railroad and telegraph taxes (estimated as assessed last year) \$176,192, and we have the whole amount of taxes assessed upon the persons and property of the state, to wit, \$3,111,007, being a little less than \$9 for each inhabitant." There is no other reference to the railroad tax.

In 1882 there is a similar recapitulation giving an average rate "including savings banks," followed by the summary for the preceding year. The reports for 1883, 1884, and 1885 are in similar form.

In 1886 there is the first statement of the railroad tax. It appears as a table giving the taxable valuation of and the tax assessed against each road. In the summary of valuations, similar to those in former years, the rate is this year omitted for the first time. A mathematical computation shows that in the cities and towns it was \$1.52, that including savings banks it was \$1.413, and that the railroads were assessed at \$1.42.

In 1887 the table of railroad taxes disappears, and the statement of the rate reappears. There was a similar report in 1888, with the additional element of capital in insurance companies and tax thereon.

In 1889 and 1890 the rate is given, followed by the usual statement of the rate, etc., for the previous year, and there is a table of valuation and taxation of railroads, but no accompanying statement of rate. In none of these years is railroad taxation or average rate mentioned in the preliminary report of the board. In the volumes of annual departmental reports, printed and bound by the state for preservation in its archives and for distribution to the towns and libraries in the state, this report was not included. Gen. Laws 1878, c. 5, § 6. The people were never officially informed of the acts of the board of equalization, until the passage of the act of 1891, calling for a report. Pub. St. 1891, c. 63, § 7. Such information on this subject as went to the Legislature was an addendum to tables returned as a basis for assessing the state tax, to which this information was not germane. It appeared as information of general interest, with nothing to show its relation to the railroad tax. When requested to state how they determined the rate, in 1881, the facts were not given by the board, and they never stated in plain terms how the railroad rate was made up. Their certificates filed with the State Treasurer follow, in substance, the form adopted by the court before 1878, and give no information on this subject. It is immaterial why these reports were made as they were. The issue here is the publicity given to the details of the acts of the board. It is evident that what they had done could have been discovered by a search of the records in the Secretary of State's office, coupled with mathematical computations based upon those records and the printed reports. But the claim here is that these acts were "notorious." The question is not: Could it have been proved that the acts were done? The issue is: Did the people know the facts? It rests upon the proponents of the doctrine of repeal by practical construction to establish their case. The available evidence here seems to disprove their proposition. Certainly it does not prove the things necessary to establish that the people of the state, by their representatives in the Legislature of 1891, knowingly and intelligently abandoned the right to a considerable portion of the tax upon public service corporations.

If further proof is sought as to how much or how little was known in the late '80's of this course of procedure, it may be found in the interesting history of the Boston, Concord & Montreal Railroad's appeal from the tax for 1881. That case was made an exception to the general practice in that year, and was heard by the court, instead of being sent for a retrial before the board of equalization. The reason



appears to have been that in this case there was a special question (the value of the road) not common to the other cases. At the trial early in 1888 counsel for the road claimed that the rate found by the board of equalization for 1881 was \$1.46. February 24, 1888, the secretary of the board, in response to an inquiry from counsel for the state, wrote him that the "board rate" for 1881 was \$1.40. This was accepted by counsel on both sides and by the court as final, and the decision in the case rests upon this letter. The rate was in fact \$1.46. That fact could have been ascertained either by inspecting the records of the board on file with the Secretary of State or from the printed statements of "valuation and taxation," often referred to as the reports of the board. The evidence was not obtained from either of these sources. The fact that the rate reported varied largely from that printed in the statement of valuation and taxation, and from the record at the state house, passed, unnoticed by either court or counsel. It is evident that the notoriety of this procedure did not extend to the legal profession at that time. Knowledge of how the state board of equalization was assessing a tax, not possessed by eminent counsel or by judges of the Supreme Court, is not to be imputed to the constantly changing membership of the Legislature.

There is another source from which it is quite likely the legislators obtained knowledge of this decision of 1883. Morrison's Digest, issued in the bound volume in 1891, was available in the advance sheets in 1890. Under the title "Taxation," subhead "Banks, Railroads, Telegraph Companies," he states the law of this case (page 735): "In the assessment of a railroad 'as near as may be in proportion to the taxation of other property' in towns, the rate at which savings banks are taxed by the state is not considered. *B., C. & M. Railroad v. State*, 62 N. H. 648." Whether this was or was not known to the legislators, it is convincing proof that knowledge of the overruling power of the acts of the board of equalization had not become universal in 1891. The evidence is more persuasive that the legislators did not, than that they did, know how the board was assessing this tax. In one year (1881) we have the direct testimony of the House that it was ignorant of the rate and wished to be informed. It knew no more (so far as this issue is concerned) after the board made answer than it did before. If, on the one hand, it is to be urged that, with all this evidence of lack of knowledge, it is still presumed that the legislators knew what was being done by this board of lay judges, and that it approved and adopted their acts, what is to be said about their knowledge of the longer period covered by the contrary practice of the Supreme Court, of the earliest practice of this board, and of the reversal of its later action by the court? It is not to be presumed that the Legislature understands that six years of disregard of a decision by the board of equalization overrules the action of the court of last resort. It is said that, conceding the soundness of all that is urged as to the history of the statute, yet the Legislature of 1891 must have intended to include the savings bank tax in the computation of the rate for the railroad tax because the

court in 1879 held the former to be a property tax. This argument only takes into account a part of the evidence. If the Legislature in 1891 knew that the court said in 1879 that the savings bank tax was a property tax, they also knew that in 1883 the court said "the savings bank tax is an anomaly, and is universally understood to have acquired the position of an exception to the constitutional rule of equality. It is so regarded in the assessment of state, county, and town taxes upon unincorporated persons, and in their tax appeals; and the plaintiffs' charter is not a statutory or constitutional ground of exemption." 62 N. H. 649.

But, aside from the question of precedent, the case is against the defendant upon principle, because of the nature of the savings bank tax. The tax is computed at three-fourths of 1 per cent. upon the amount of general and 1 per cent. upon the special deposits on which the corporation pays interest, including dividends declared, but not paid, with certain exemptions. Pub. St. 1891, c. 65, § 5; Laws 1895, p. 469, c. 108, § 1; Laws 1907, p. 101, c. 102. It is not a tax levied upon a valuation put upon the property of the bank. It is not computed at the varying rate which is determined from year to year by the extent of the public needs. Whether the bank has much or little surplus, whether its assets have been carried on the books at a high or low figure, the amount of the assessment is not varied; and, whether the needs of government be great or small, the rate is always the same. Such a tax is not a tax upon property, but rather a privilege tax, or an excise upon the franchise which the bank enjoys. This is the almost universal rule. *Jones v. Bank*, 66 Me. 242; *State v. Bank*, 71 Vt. 234, 44 Atl. 349; *Commonwealth v. Bank*, 5 Allen (Mass.) 428; s. c., sub nom. *Provident Institution v. Massachusetts*, 6 Wall. (U. S.) 611, 18 L. Ed. 907; *Suffolk Savings Bank, Pet'r*, 151 Mass. 103, 23 N. E. 728; *Coite v. Society*, 32 Conn. 173; s. c., sub nom. *Society for Savings v. Coite*, 6 Wall. (U. S.) 594, 13 L. Ed. 897; *Monroe Savings Bank v. City of Rochester*, 37 N. Y. 365; *State Assessors v. Railroad*, 48 N. J. Law, 146, 4 Atl. 578; *Trenton Savings Fund v. Richards*, 52 N. J. Law, 156, 18 Atl. 582; *United States, etc., Co. v. State*, 79 Md. 63, 23 Atl. 768; *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64 N. E. 564; *Pingree v. Auditor General*, 120 Mich. 95, 78 N. W. 1025, 44 L. R. A. 679; *State v. Anderson*, 90 Wis. 550, 63 N. W. 746; *Plummer v. Coler*, 178 U. S. 115, 20 Sup. Ct. 829, 44 L. Ed. 998; *Cool. Tax*. (3d Ed.) 412, 413. See, also, the authorities collected in the note, 66 L. R. A. 333.

An ad valorem tax is a tax "upon property by a valuation, and effect can only be given to it by means of assessors, who value the property and apportion the tax by their estimate." Specific taxes are "those which impose a specific sum by the head or number, or by some standard of weight or measurement, and which require no assessment beyond a listing and classification of the subjects to be taxed. License taxes and other taxes on business or occupation, stamp taxes, taxes on franchises and privileges, are usually specific. \* \* \*

As regards all such taxes, the law by which they are laid is of itself a complete apportion-

ment. Ministerial officers have nothing to do but to list the subjects of taxation; classify them where that is necessary; ascertain the number, weight, measurement," etc., "and collect the sum which the law has definitely fixed." Cool. Tax. (3d Ed.) 412, 413. "The decisive reason why it cannot be supported as a tax on property, in the sense in which that phrase is used in the Constitution in the article cited, is that it is not 'proportional'; that is, it is not laid according to any rule of proportion whatever, but is imposed only on the corporations designated in the act, without any reference to the amount required to be raised by taxation for public purposes, or to the actual property held by such corporation subject to taxation, or to the whole amount of property in the commonwealth liable to be assessed for the public service." *Commonwealth v. Company*, 12 Allen (Mass.) 298, 300. The amount of the tax "is not fixed or determined by a valuation of the property of the bank. The average of deposits during a certain period includes only the amount credited to depositors. It does not embrace a valuation of the investments made by the bank, or the market value of its property. The tax is assessed wholly irrespective of investments, and without any regard to the profit or loss made or incurred by the corporation on the property in its possession or on the business which it has carried on. The average of deposits during the period of time denoted in the statute may not be equivalent to the whole property owned by the bank, exclusive of money invested in the securities of the government. The amount of the tax in no way depends on the aggregate of the investments of the bank. It must be the same whether the investments have been profitable or otherwise. No valuation of property is necessary to the assessment of the tax, and none is in fact made. How, then, in any just sense can the assessment be deemed to be a tax on property?" *Commonwealth v. Inst. for Savings*, 12 Allen (Mass.) 312, 314. Much of the reasoning contained in these authorities appears to have been approved in this state. "The idea of proportional and reasonable or just and equal taxation is founded on the declaration in the Bill of Rights that every member of the community is bound to contribute his share in the expense necessary to the protection of his property. This proportion is wholly destroyed by fixing a tax upon value on one kind of property, and a tax on gross receipts upon another. While the amount to be raised on other kinds of property depends upon the amount required for public objects, and the rate of taxation depends upon the amount of property within the taxing district and the public necessities, under the statute in question, the rate is always the same. There can be no proportion or equality between that which is fixed and that which is uncertain and fluctuating." *State v. Express Co.*, 60 N. H. 219, 245. The last sentence states the present case in a nutshell. There can be no proportion between the fluctuating railroad tax and the fixed savings bank tax.

The suggestion that the savings bank tax is laid upon the property of the depositors is the only reason which has been advanced for the holding which is peculiar to this state. In

no case is the matter reasoned out. No attempt has been made to answer the convincing logic which has prevailed in substantially all other jurisdictions. If the conclusions here reached resulted from irresistible logic, they should be followed, even against the unanimous judgment of all other courts. If they did not so result, they should be abandoned. It was first held that the assessment upon savings banks was a property tax. *Bartlett v. Carter*, 59 N. H. 105. The next step in the progress of the argument is the decision that all property taxes must be proportional. *Boston, etc., R. R. v. State*, 60 N. H. 87, 96. Immediately after this follows the decision that our Constitution provides "no warrant for the imposition of any other tax than one assessed upon a proportional and equal valuation of all the different kinds of property on which it is to be levied." *State v. Express Co.*, 60 N. H. 219, 246. And then the question of the constitutionality of the savings bank tax was presented for decision. The court said: "The savings bank tax is an anomaly, resting on peculiar grounds of public policy, and is universally understood to have acquired the position of an exception to the constitutional rule of equality." *Boston, etc., R. R. v. State*, 62 N. H. 648; *Somerset Savings Bank v. Town of Somersworth*, 68 N. H. 402, 44 Atl. 534. The tax was sustained, as an anomaly, because of the universal understanding that such a tax was an exception to the constitutional rule of equality. It was anomalous because its name and kind had therefore been excluded by the court from the New Hampshire constitutional scheme for taxation. There was no power to lay a franchise tax in this state. But by the universal understanding, such a tax was given a place in a constitutional scheme for taxation. It was an exception to the constitutional rule of proportional equality, as all specific taxes are. So, while the court in this state generally denied the validity of these taxes that would be valid elsewhere, in this instance the tax was held to be valid. The universal understanding could not be ignored; yet the decision could not be reconciled with the previous utterances of the court. The court having declined to follow its argument to its legitimate conclusion, the logic of the situation called for a modification of the earlier cases. Whether the decision was intended to effect such a result cannot be ascertained. The matter was disposed of with the brief declaration that the law was as stated. There is in all this at least a suggestion that the earlier decisions against the constitutionality of any tax not assessed by a proportion common to all other taxes may have been erroneous. And this doubt appears to have recent sanction. *Thompson v. Kidder*, 74 N. H. 89, 90, 65 Atl. 392. But it is not necessary to now determine whether an excise on a franchise could or could not have been levied in 1880. By the amendment to the Constitution adopted in 1903, taxes upon franchises are expressly provided for, and must now be valid if not repugnant to other constitutional limitations. *Thompson v. Kidder*, 74 N. H. 96, 65 Atl. 392. If before 1903 franchise taxes were anomalies which could not be classified under our Constitution, they are so no longer. Not being a property tax, this levy upon savings

banks is not included in the class of taxes upon property. A tax upon a fixed basis of value, and at a fixed rate, has no logical relation to one upon the true value of property, assessed at a fluctuating rate adjusted to the varying public needs. "There can be no proportion or equality between that which is fixed and that which is uncertain and fluctuating." *State v. Express Co.*, supra; *Oliver v. Washington Mills*, 11 Allen (Mass.) 268, 277.

It is said that this reasoning is fallacious because the figures can be combined and the rule of three can be applied to the result. Of course, any figures relating to any subject, or to an indefinite number of subjects, can be thus combined and an arithmetically correct result obtained. But much more than a question of arithmetic is here involved. It is the constitutional question of whether in assessing taxes upon property (as distinguished from excises), the rule of proportional equality must be followed. The soundness of that rule has never before been doubted by the courts of this state. The same line of reasoning now adopted by the court was urged by counsel in *Amoskeag Mfg. Co. v. City of Manchester*, 70 N. H. 336, 47 Atl. 74, on the subject of including poll taxes in the determination of distribution of the common burden. It was there conceded that the defendants' mathematics were faultless; but the fact that there was error "in taking as the common burden to be proportioned the whole tax instead of the property tax" was then seen to be fatal to the proposed process. It is equally so here. By the process here adopted by the majority of the court, the railroad tax is in part based upon an equal distribution of the public needs from year to year and in part upon an arbitrary rate. The result cannot be a tax based wholly upon an equal distribution of the annual burden. Unless it is true that A.'s property tax can be levied at the rate required for public uses and B.'s tax upon his property at a fixed rate, the process adopted is faulty, and the conclusion reached is wrong. In *Boston, etc., R. R. v. State*, 62 N. H. 648 (where the question of the nature of the savings bank tax was involved), and again in *Somersworth Bank v. Town of Somersworth*, 68 N. H. 402, 44 Atl. 534 (where the constitutionality of that tax was directly in issue), it was said that the savings bank tax is "an exception to the constitutional rule of equality." Any other tax apportioned according to this tax must in turn be contrary to that constitutional requirement. The railroad tax is a property tax, and must be laid in accordance with the constitutional rule of equality. If the statute calls for a levy in violation of this rule, it is unconstitutional and void. *Boston, etc., R. R. v. State*, 60 N. H. 87. The presumption is that the Legislature intended to keep within constitutional limits. *State v. Jackson*, 69 N. H. 511, 43 Atl. 749. The mere fact that the statute can be construed to infringe the constitutional limitation is not enough to warrant such an interpretation of the legislative intent. The rule is imperative that such an intention is not to be implied. It must be clearly manifested. *Leavitt v. Lovering*, 64 N. H. 607, 15 Atl. 414, 1 L. R. A. 58. A legislative intent to thus violate the rule of equality is not shown in this case. The act of 1881 was passed because the court had just

said that the statute as it then existed was an offense against that rule. The evident and only purpose of the Legislature was to correct that error. It is as certain that it did not intend to include what the Constitution excluded, as that it intended to correct the former exclusion of that which the Constitution included. In a peculiar degree the thought that the statute be kept within constitutional limits must have been in the minds of those legislators. "And, when the intention of the Legislature is plain, it is the duty of the court so to construe the act as to carry out the intention if the language used will fairly admit of such construction." *State v. Jackson*, 69 N. H. 511, 528, 43 Atl. 749.

The case as to the insurance tax is still clearer. A stock fire insurance company pays "a tax of 1 per cent. upon the amount of its paid-up capital on the 1st day of April." Pub. St. 1901, c. 65, § 9. It is common knowledge that, while the stock in some of these companies has been and is of large value, in others has been worth nothing. But the same tax—1 per cent. upon the par value of the stock—is uniformly levied. It seems superfluous to extend the argument upon the proposition that this is not a property tax. The soundness of the conclusion appears to be conceded. Nor should the question be avoided upon the ground that the error has decreased the railroad tax but a few hundred dollars. In the year 1906 the board of equalization carried their tax rate to the third decimal. No good reason appears why this should not always be done in figuring these taxes, which deal with large amounts of property in single items. If the exclusion of the insurance tax meant great and impractical labor in the computation of the railroad tax, there might be ground to justify its retention in the calculations. It might then well be said that the result was as near an approximation as could reasonably be arrived at. But the situation presents the reverse of this proposition. The inclusion of the insurance tax adds one more factor to the complications of the computation. Its exclusion would simplify the matter. In this posture of the affair the erroneous inclusion which complicates cannot be justified on the plea of simplification; nor can the simplifying exclusion be refused because complications ought to be avoided. The question of the inclusion of this tax is directly involved in the present case. It should be decided. If, as the majority opinion suggests, the tax is to be differentiated from the savings bank tax, the reasons should be given.

The rights of the public service corporations are not infringed by the exclusion of the fixed savings bank and insurance taxes from the computation of their proportional shares of the public burden. Those heretofore unclassified anomalies are not considered in the assessment of property taxes upon unincorporated persons, and the public service companies' charters are neither statutory nor constitutional grounds for claiming an exemption. *Boston, etc., R. R. v. State*, 62 N. H. 648. The demurrer should be overruled.

BINGHAM, J. (dissenting). I agree with Judge PEASLEE in all that he has said; and, while little can be added to his able and ex-

haustive discussion, the question is of such importance, and the opinion of the majority is so fallacious in reasoning and unjust in its result, that I feel I would be remiss in the performance of my duties if I failed to state in part at least, the views I entertain.

The main question in the case is whether the taxes assessed upon savings banks and fire insurance companies shall be taken into consideration in ascertaining the rate at which railroad, telegraph, telephone, and express companies shall be taxed. The board of equalization, acting under the advice of the Attorney General and in disregard of the decision of the court in *Boston, etc., R. R. v. State*, 62 N. H. 648, have added the amount of savings bank deposits and fire insurance capital to the amount of property in the various cities and towns throughout the state, and the amount of the tax raised upon savings bank deposits and fire insurance capital, at the fixed rates of three-quarters of 1 per cent. and 1 per cent., to the amount raised in cities and towns throughout the state to meet the public charges incurred by them and by the counties, and such part of the state charges as have been apportioned to them; and, with these figures as a basis, have computed the rate for the assessment of the tax upon the above-named corporations. The result of this method of computation has been to reduce the amount of tax paid by public service corporations upon their taxable property from \$70,000 to \$75,000 each year below what they would have had to pay if their property had been taxed at the same rate at which individuals are taxed for town, county, and state purposes upon an equal amount of property. This being the result, the question presented is: Does the statute under which the tax is assessed authorize the adoption of such a method of computation; and, if it does, is it sanctioned under the provisions of our Constitution? In *Amoskeag Mfg. Co. v. City of Manchester*, 70 N. H. 336, 344, 47 Atl. 74, Chief Justice Parsons, then an associate justice, in delivering the opinion of the court said: "By an unbroken line of decisions in this state during the last 73 years, from the opinion of the Justices in 1827, 4 N. H. 565, to the decision in this case (ante, p. 200), it has been conclusively settled that the constitutional rule of equality in taxation requires that throughout the same taxing district the same tax shall be laid upon the same amount of property, 'so that each man's taxable property shall bear its due portion of the tax according to its value.' Opinion of the Court, 4 N. H. 565, 568. The share which every person is bound to contribute for the protection in the enjoyment of his life, liberty, and property to which he is entitled (Bill of Rights, art. 12) is his proportional part of the expense of such protection according to the amount of his taxable estate. \* \* \* Any scheme of mathematical reasoning which \* \* \* assesses against the plaintiffs a tax greater or less than that assessed to others upon the same amount of taxable estate—a result in conflict with the Constitution and fundamental principles of justice—is inevitably unsound and erroneous, either in the theory itself, or in the premises upon which such system is based. If the method is correct, the result must be right. If the result is wrong, the reasoning is fallacious. The accuracy of the

method of computation is safely and sufficiently tested by the result." Starting with these declarations as our premise, and they are undoubtedly sound, it is apparent that all taxes upon property which are sanctioned under the provisions of our Constitution must be proportional and equal; that each man's taxable estate must bear its due proportion of the public burden according to its value; and that any scheme of mathematical reasoning which assesses against the property of one man in the same taxing district a tax greater or less than that assessed to others on the same amount of taxable property is in conflict with the Constitution and fundamental principles of justice, and the reasoning by which such a result is reached is fallacious.

In *Boston, etc., R. R. v. State*, 60 N. H. 87, it was held, Chief Justice Doe delivering the opinion, that the tax required to be assessed upon railroads pursuant to the statute here under consideration was a proportional tax, that it must be laid according to the constitutional rule of equality, and that if it was a state tax it "must be proportional throughout the state." In other words, that the tax is a property tax; that the property of the railroad must bear its due proportion of the public burden according to its value. It having been thus determined that the railroad tax is a property tax, we will now consider the nature of the tax assessed upon savings banks.

In *Boston, etc., R. R. v. State*, 62 N. H. 648, 649, it was held, in an opinion delivered by the same Chief Justice, that "the savings bank tax (Gen. Laws 1878, c. 65, § 8) is an anomaly, resting on peculiar grounds of public policy, and is universally understood to have acquired the position of an exception to the constitutional rule of equality." In *Somersworth Savings Bank v. Town of Somersworth*, 68 N. H. 402, 44 Atl. 534, the constitutionality of the savings bank tax was sustained, not, however, on the ground that it was a property tax and that the property of the bank bore its due proportion of the public burden according to its value, but upon the ground, as announced in *Boston, etc., R. R. v. State*, 62 N. H. 648, that "the savings bank tax is an anomaly, resting on peculiar grounds of public policy, and is universally understood to have acquired the position of an exception to the constitutional rule of equality." The opinion in this case was written by Chief Justice Doe. It was edited by Judge Walker after Judge Doe's death, and was adopted by his surviving associates, including the present Chief Justice, as the opinion of the court. In *State v. Griffin*, 69 N. H. 1, 33, 39 Atl. 260, 41 L. R. A. 177, 76 Am. St. Rep. 139, Chief Justice Carpenter, in speaking of the savings bank tax and the statute authorizing its assessment, said: "This court in 1883, less than 20 years after the enactment creating the discrimination, declared that 'the savings bank tax is an anomaly, resting on peculiar grounds of public policy, and is universally understood to have acquired the position of an exception to the constitutional rule of equality.' *Railroad v. State*, 62 N. H. 648, 649"—and that it became an exception "solely by virtue of the statute creating it, and less than 20 years of public acquiescence." See, also, *State v. Gerry*, 68 N. H. 495, 510, 38 Atl. 272, 38 L. R. A. 228. It is therefore author-

Itatively determined by these decisions that in this state the savings bank tax is not a proportional and equal tax, that the property of the bank does not bear the same amount of tax as is borne by others upon a like amount of property, and that it is not a property tax within the meaning of our Constitution, but an anomaly and an exception to the constitutional rule of equality. These decisions (62 N. H. 648; 68 N. H. 402) are directly in conflict with the decision in *Bartlett v. Carter*, 59 N. H. 105, which must be considered as overruling it to the extent that they hold that the tax upon savings banks is an anomaly, and not a proportional tax laid upon property according to the constitutional rule of equality. It was also held in *Boston, etc., R. R. v. State*, 62 N. H. 648, that the savings bank tax, being an anomaly and not laid according to the constitutional rule of equality, was not to be taken into consideration in assessing the tax upon railroads; that it was not taken into consideration in assessing state, county, and town taxes upon individuals; and that the railroads stood in no different relation to the tax to be assessed upon them. The syllabus to the case states that, "in the assessment of a railroad 'as near as may be in proportion to the taxation of other property' in towns, the rate at which savings banks are taxed by the state is not considered." There can be no doubt as to the meaning of this decision. The entry of Judge Isaac W. Smith upon the record of the case preserved in 148 Briefs and Cases, 321, states that the tax upon railroads is "to be assessed as if there were no savings banks." The entry in Judge Clark's docket, that it is "agreed that no deduction of tax should be made on account of savings bank tax being 1 per cent. and other property 1½ per cent.," and the figures in the office of the State Treasurer show that the tax paid by the railroad was in accordance with the findings of the referees, which excluded the savings bank tax from the computation.

The question arose upon an appeal from the tax of 1880. The referees found that the true value of the railroad was \$1,900,000; that property generally throughout the state was assessed at 73.6 per cent. of its true value; that the railroad should therefore be valued for purposes of taxation at 73.6 per cent. of \$1,900,000, or at \$1,398,400; that the average rate of taxation throughout the state, excluding the tax on savings bank deposits, was \$1.52, and, including it, \$1.44; that the railroad should be taxed at the rate of \$1.52 on \$1,398,400, and should pay a tax of \$21,255.68. In 1880 the railroad paid to the State Treasurer on its tax for that year \$17,000. This left a balance of \$4,255.68 due the state. In 1888 an abatement of \$2,331.10 was allowed the railroad on its appeal from the tax of 1881. This sum was applied by the State Treasurer, under the direction of Attorney General Barnard and Edwin G. Eastman, our present Attorney General, upon the balance of \$4,255.68, leaving still due the state upon the tax for 1880 the sum of \$1,924.58. This balance, with interest to June, 1888, was then paid by the railroad. If its property had been assessed by the referees at the rate of \$1.44, which rate would have included the savings bank tax, the tax then assessed against it would have been \$20,136.96, or \$1,118.74 less than the tax in fact assessed,

and the payment made by it would have been correspondingly less. These facts clearly disclose the meaning of the court as expressed in their decision in this case, and demonstrate beyond a doubt that what the court intended to decide, and what they in fact decided, was that in assessing taxes upon railroads the tax upon savings banks should be excluded from the computation. Again, in the case of *Amoskeag Mfg. Co. v. Manchester*, supra, in which the opinion was delivered by our present Chief Justice, it was decided that in determining the amount of the public burden to be apportioned to the Amoskeag Company as a tax upon its property the tax assessed upon polls could not be taken into consideration; that a poll tax was not a property tax; that there was "no constitutional provision as to the relative amounts to be assessed upon polls and upon property"; and that "a legislative enactment requiring such a distribution of the taxes between polls and estates as would compel a portion of the taxpayers to pay on their property more than others paid on the same amount of property would be in violation of the Constitution." But the Chief Justice, in delivering the opinion of the majority in the present case and construing the statute directing the assessment of taxes upon public service corporations, not only holds that the act directs that a less amount of tax shall be imposed upon the property of public service corporations than is imposed upon a like amount of property owned by others, but also that the statute so construed would be constitutional; for he decides that the board of equalization were right in taking into consideration the savings bank tax in determining the tax to be assessed upon public service corporations, and this notwithstanding the direct effect of such a method of computation is to permit them to pay some \$70,000 or \$75,000 less tax each year than other taxpayers are required to pay upon the same amount of property. It is indisputable that such a construction of the statute and method of computation produces this result. The answer to the Chief Justice's present position is that the statute, if it must be so construed, is clearly unconstitutional; and, to use his own language as given in *Amoskeag Mfg. Co. v. Manchester*, supra: "Any scheme of mathematical reasoning which \* \* \* assesses against \* \* \* [the public service corporations of the state] \* \* \* a tax \* \* \* less than that assessed to others upon the same amount of taxable estate—a result in conflict with the Constitution and fundamental principles of justice—is inevitably unsound and erroneous, either in the theory itself, or in the premises upon which such system is based. \* \* \* If the result is wrong, the reasoning is fallacious. The accuracy of the method is safely and sufficiently tested by the result." The savings bank tax being a fixed tax, and not one laid according to any rule of proportion or equality—no matter by what name it may be designated, whether anomaly, excise, or something else—cannot be taken into consideration in ascertaining the proportional and equal share of the public burden to be assessed upon public service corporations; for, as said in *State v. Express Co.*, 60 N. H. 219, "there can be no proportion or equality between that which is fixed and that which is uncertain and fluctuating." This statement of the

court in that case was true when it was made and is true to-day, as applied to the assessment of proportional and equal taxes upon property, and cannot be belittled or snuffed out by being referred to as being "as self-evident as a preliminary axiom in Euclid."

What has been said as to the savings bank tax applies with equal force to the tax upon fire insurance capital. In neither case are the taxes assessed upon any basis of proportionality or equality to meet the public charges of government, as is the case with those levied upon public service corporations and individuals, and neither should be taken into consideration, in assessing the taxes required to be levied upon such corporations or individuals.

(108 Md. 522)

**WILLSON et al. v. WILLIAMS et al.**

(Court of Appeals of Maryland. June 25, 1908.)

**1. SET-OFF AND COUNTERCLAIM—NATURE OF CLAIMS.**

A judgment for costs and an indebtedness not reduced to judgment are obligations of the same kind and quality, so that the one may be set off against the other.

**2. SAME—EQUITABLE SET-OFF—INSOLVENCY.**

One against whom there is a judgment for costs is entitled to an equitable set-off thereof; the one having the judgment being insolvent, as well as indebted to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 9-11.]

**3. SUBROGATION — DISCHARGE OF DEBT — RIGHTS.**

Though the rights of officers of the court, whose compensation for services rendered in a cause is taxable as part of the costs, will be protected by the court as far as practicable, such officers have not such an absolute lien, on the judgment for costs, as may be unconditionally transferred to another, either by assignment or subrogation; so that a third person, who, for the accommodation of the party obtaining the judgment for costs, had paid fees of such officers, is not entitled, by subrogation, to the rights of such officers to be paid the amount of such fees out of such judgment, in preference to the right of the judgment debtor to an equitable set-off of the judgment, against the debt to him, of the insolvent judgment creditor, but the right of such third person to defeat such set-off is no greater than that of the judgment creditor.

**4. COSTS—EXTENT OF RIGHTS—WAIVER AND ESTOPPEL.**

In a suit to set aside, as fraudulent, a deed to T. and his mortgage to W., there was a decree setting aside the deed, but dismissing the bill as to W., and providing that he should have such costs, to be paid by plaintiff, as might be properly taxable as incurred by W. in defending the bona fides of his mortgage. On appeal by T. the part of the decree setting aside the deed was reversed, with costs to appellant above and below. *Held*, that a certain sum having been agreed on and accepted by W. as his share of the costs, he could not contend that he was obliged to expend more in costs, and so was entitled to more of the costs, as against the right of the plaintiff to have an equitable set-off of T.'s judgment for costs.

Appeal from Circuit Court No. 2 of Baltimore City; James P. Gorter, Judge.

Suit by W. Eason Williams and others against Tyson Willson and another for an equitable set-off; William B. Willson coming in as defendant, on leave of court. From an adverse decree, said William B. Willson appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and HENRY, JJ.

David Fowler and George Whitelock, for appellant. J. Milton Lyell and Thomas G. Hayes, for appellees.

**WORTHINGTON, J.** The object of this proceeding is to obtain the benefit of an equitable set-off. In order that the precise nature of the controversy involved in this appeal may be understood, it will be necessary to review the proceedings in the case of Willson v. Williams (88 Atl. 297), which was before this court at the October term, 1907, and out of which the present controversy arose. The proceedings in the earlier case were substantially as follows: On February 10, 1905, W. Eason Williams, the appellee in this case, filed in the circuit court No. 2 of Baltimore city a bill of complaint against Tyson Willson and Mary D. Willson, his wife, and against William B. Willson, the appellant herein, praying that a deed from W. Eason Williams and wife to Tyson Willson, dated April 2, 1904, and a mortgage from Tyson Willson to William B. Willson, dated May 4, 1904, be annulled and set aside by a decree of said court, on the ground that said deed was procured and recorded by fraud, and that the same was without consideration, and that said William B. Willson had knowledge that said deed was without consideration, and that the recordation of the same was fraudulent, and also that the mortgage to said William B. Willson was likewise fraudulent and void. Subsequently, on March 11, 1905, by an order of the complainant, W. Eason Williams, the case was entered to the use of Joseph N. Ulman, attorney and legal representative of a certain Allan M. Hirsh, a nonresident, who was a creditor of the complainant in a sum exceeding \$10,000. Subsequently the case was entered to the use of Allan M. Hirsh himself. A great deal of testimony was taken in this earlier case, and the lower court after argument dismissed the bill as to William B. Willson, but annulled and set aside the deed of April 2, 1904, from the complainant and wife to Tyson Willson. In dismissing the bill as to William B. Willson, the court in its decree provided that he should have such costs, to be paid by the plaintiff, W. Eason Williams, and the equitable plaintiff, Joseph N. Ulman, "as may be properly taxable in this case as incurred by the said defendant William B. Willson, in defending the bona fides of his mortgage." From that part of the decree annulling and setting aside the deed, an appeal was taken, and this court,

in an opinion by Judge Burke, filed December 6, 1907, reversed the same, and dismissed the bill of complaint, "with costs to the appellants above and below." The amount of the costs above and below, was \$914.15. It must be remembered that the appellants in this earlier case, to whom these costs were awarded, were Tyson Willson and his wife, Mary D. Willson, the defendants in this case, and that the appellees, against whom these costs were adjudged, were W. Eason Williams, Joseph N. Ulman, and Allan M. Hirsh, the plaintiffs in this case.

On December 19, 1907, the solicitors for the above-named appellants, Tyson Willson and wife, mailed from Baltimore to the clerk of the Court of Appeals an order directing him to issue the writ of fieri facias upon the decree of the Court of Appeals in that case, for costs above and below, against Joseph N. Ulman one of the appellees therein, said writ to be directed to the sheriff of Baltimore city and to be returnable to circuit court No. 2 of that city. On the same day that this order for a fieri facias was received by the clerk of the Court of Appeals, a motion for a reargument was received by him from the solicitors for the appellees, and filed. The motion for a reargument was denied, and this court, in an opinion by Chief Judge Boyd, in disposing of the questions presented by the filing of the motion and order at the same time, held that the motion for a reargument did not operate as a stay of execution, and that the writ of fieri facias could be issued against Joseph N. Ulman, the appellee, to whose use the case had been entered on March 11, 1905. This opinion of the Court of Appeals was filed on January 15, 1908, and on January 22, 1908, the bill of complaint in this present case was filed, setting forth the foregoing facts, and further alleging that the complainants had instituted suit in the superior court of Baltimore city against Tyson Willson and Mary D. Willson, his wife, for the sum of \$19,262.22, which they claimed to be due them by the defendants; that said defendants, Tyson Willson and wife were absolutely insolvent, and the complainants were without remedy in the premises, unless the court of equity would interfere, and the complainants be permitted to set off their indebtedness for costs to Tyson Willson and wife, against the indebtedness of the latter, to the complainants above mentioned. The prayers of the bill were for an equitable set-off, against the defendants, for an injunction restraining the issuance of the writ of fieri facias for costs in the earlier case, and for general relief. Upon the filing of this bill, with an affidavit of the truth of the matters and facts therein set forth, the court, on April 22, 1908, passed an order directing an injunction to issue as prayed, provided the complainants would deposit the sum of \$914.15, the amount of the costs, in bank to the credit of the cause. In substantial compliance with this provision of the decree the above-mentioned sum of \$914.15

was deposited with the clerk of circuit court No. 2. The defendants, Tyson Willson and wife, have not appeared to the bill of complaint thus filed against them, nor have they, so far as the record discloses, been summoned to appear, but William B. Willson, the father of Tyson Willson, having obtained leave of court to come in as a party defendant, has filed an answer, setting forth that he has paid, or assumed to pay, the sum of \$632 of said costs, and praying that the order of injunction, granted as aforesaid, be so far modified as to enable him to obtain said sum of \$632, out of the fund of \$914.15, on deposit with the clerk of the court. Exceptions were filed to this answer by the solicitors for complainants, suggesting that William B. Willson was not a proper party to the proceeding, and that by the decree of the lower court in the earlier case, to which William B. Willson was a party defendant, it had been provided, in dismissing the bill of complaint as to him, that he should have such costs, to be paid to him by the plaintiff W. Eason Williams, and the equitable plaintiff Joseph N. Ulman, as should be properly taxable against them, as incurred by William B. Willson in defending the bona fides of his mortgage.

The exceptions further averred that the proportion of costs, thus awarded to William B. Willson, had never been taxed or paid; and it was proposed that such costs be taxed and paid out of the fund of \$914.15, then in the hands of the clerk of the court, to the credit of the case. In accordance with this suggestion a petition was filed by William B. Willson, on April 4, 1908, setting forth that the amount of costs, to be paid him on account of the expenses incurred by him in defending the bona fides of his mortgage in the earlier case, had been "fixed, by agreement of all the parties concerned, at \$40," and praying that the court would pass an order directing the clerk to pay the petitioner the said sum of \$40, to which he was entitled in his own right, out of the fund of \$914.15, above mentioned. The complainants assented to the passage of such an order, and the same was accordingly passed by the court on April 4, 1908. It was agreed, for the purpose of hearing the application of William B. Willson for a modification of the order of injunction above mentioned, with the understanding that the rights of Tyson Willson and wife should not be affected thereby, that said Tyson Willson and wife are insolvent, and have been so since January 1, 1902, and that they are indebted to the plaintiffs herein in an amount exceeding the sum of \$914.15, on an indebtedness due by them to the plaintiffs prior to February 10, 1905. The prayer of the appellant for a modification of the order of injunction was heard by the lower court upon the bill, answer, exhibits, and agreed statement of facts, and the learned judge refused to modify said order. From this decree refusing the application of William B.



Willson for a modification of the order of injunction, the present appeal was taken.

The only question in the case for this court to decide is, therefore, whether the lower court was right in refusing the modification for which the appellant prayed, or, to state the case differently, the question is whether the equitable rights, asserted by William B. Willson in his answer, are superior to those asserted by the complainants in their bill of complaint filed in this case. Willson asserts the equitable right to be reimbursed out of the costs awarded to the appellants in the earlier case, the whole sum laid out and expended, or assumed by him, for costs and expenses in that case, to wit, the sum of \$632, less, of course, the sum of \$40, already received by him as his share of the costs incurred in defending the bona fides of his mortgage. The complainants claim that, as they were the appellees in the earlier case, against whom the costs were decreed by this court, they are entitled to set off the whole amount of these costs (less the sum of \$40, paid William B. Willson) against the indebtedness due them by the appellants in that case, Tyson Willson and wife. It should be understood that the rights of Tyson Willson and wife are not involved in this appeal. While they are the only original party defendants to the bill of complaint, they have not been summoned, and have not voluntarily appeared. But as their potential rights are necessarily involved in this appeal, and as it will conduce to clearness to consider them separately, we will give them consideration preliminary to the consideration of the rights of the appellant. Courts of equity, acting independently of the statutes of set-off, are accustomed to order a set-off, when reason and justice require it, in cases where courts of law would be unable to grant relief. *State v. Northern Central Ry.*, 18 Md. 193; 19 Ency. P. & P. 718. When final judgment or decree is pronounced, costs become a debt due, from the party against whom they are awarded, to the party in whose favor they are awarded. 11 Cyc. 263. *Ruddell v. Green*, 104 Md. 379, 65 Atl. 42. "If the judgment be against the plaintiff, the liability at once ripens into a debt, due by the party on whom the costs are imposed." *Id.* A judgment or decree for costs can only be rendered in favor of a party to the suit. 11 Cyc. 153. Upon the decree of this court, in the case of *Willson v. Williams*, supra, reversing the decree of the lower court, so far as the appellants' rights in that case were concerned, and awarding costs above and below to the appellants, the amount of such costs, viz., \$914.15, less the sum of \$40, agreed on as the share thereof incurred by William B. Willson in defending the bona fides of his mortgage in the lower court, became a debt due, by the appellees in that case, who are the complainants in this case, to the appellants in that case, who are the original defendants in this. On the other hand, the debt claimed

by the complainants in this case, and admitted, to the extent of more than \$914.15, to be due, is a debt due to them by the appellants in that case. The demands of the respective parties are therefore mutual, and in the same right. *German Luth. Ch. v. Heise*, 44 Md. 453. A judgment may be set off against a claim or open account, not reduced to judgment. *Levy v. Steinbach*, 43 Md. 212; *Lane v. Fallen*, 16 Md. 352; *Waterman on Set-Off*, § 176. In this respect, therefore, the contention of the appellant, to the effect that the obligations of the respective parties are not of the "same kind or quality," cannot be sustained, and we have not had pointed out to us, nor can we discover, any other respect in which this dictum would apply, so as to defeat the complainant's right to an equitable set-off as prayed. Insolvency has long been recognized as a distinct equitable ground of set-off (*Waterman on Set-Off*, § 396), and for the purpose of this appeal Tyson Willson and wife are admitted to be insolvent. As against them, therefore, if they were before the court upon the facts as they now appear, we think the complainants in this case would clearly be entitled to the benefit of the set-off, which by their bill of complaint they seek to obtain.

But the appellant very earnestly contends that, as he paid certain costs in the earlier case to the clerk, the examiner, and the stenographer, as well as to the clerk, to the Court of Appeals for printing the record, and has also assumed to pay King Bros. for printing the appellants' brief in that case, he is entitled to be subrogated to the rights of these respective persons, who have, as he asserts, an absolute right to their compensation, which the courts will always protect. We agree that the rights of officers of the court, whose compensation for services rendered in a cause is properly taxable as part of the costs of the case, will always be protected by the court so far as practicable (as in *Hall v. McPherson*, 3 Bland, 529, where the payment of the fees of a commissioner was enforced by a summary order of the court, and as in *Reddick v. Cloud*, 2 Gilman [Ill.] 670, where it was held that a sheriff, who had collected costs under an execution, may be compelled to pay over, out of the costs so collected, to the officers entitled to the same, the amount of their lawful fees), but we cannot agree that the officers have any such absolute lien, on the taxed costs of a case, as may be unconditionally transferred to another, either by assignment or by subrogation. The court will, so far as it may, exercise its incidental powers to enforce the payment of costs for the protection of its own officers, and for the more efficient administration of justice; but these reasons do not apply when it is called upon to extend the exercise of these powers for the benefit of third persons, who have themselves paid these fees or costs. Even in a case where the court held that the officers had a lien on the judgment for costs, a set-



off was allowed the successful party, against the unsuccessful one, to the extent of all costs actually paid. The court refused the set-off only as to the costs not actually paid, because the officers were entitled to their fees, and had a lien on the judgment for them. *Alken v. Smith*, 57 Fed. 423, 6 C. C. A. 414. In the present case, if the officers, and other persons rendering services, whose compensation is properly taxable as part of the costs of the case, but whose fees have not been paid, would suggest to the court that they desire to be paid out of the cost fund in court to the credit of the case, the court would be justified in passing an order authorizing its clerk to pay these unpaid fees and expenses out of that fund, but the case just cited is an authority against the contention of the appellant that a third person, who has paid certain fees and expenses for the accommodation of a party, is entitled to be reimbursed through the intervention of the court, in the same manner as the officers themselves may recover the compensation due them. In such a case the person discharging the fees and expenses must look to the party at whose instance the services were rendered. The reason for this distinction, no doubt, is that in contemplation of law the parties to a suit pay their own part of the fees and expenses, as they are incurred, during the progress of the case, and judgment for costs is rendered in favor of the prevailing party, upon the theory that he has paid or is liable for the fees and expenses incurred by him, and to reimburse him therefor. 5 Ency. P. & P. 253.

The party requiring an officer to perform services for which compensation is to be made is primarily liable therefor, and the fact that the costs may be ultimately adjudged against his adversary does not relieve such party of his liability to the officer entitled thereto. If the adversary against whom costs are adjudged fails to pay the same, or if for any reason the officer is unable to collect his compensation from such adversary, he still has his remedy against the party at whose request, in the first instance, the services were performed. If, therefore, the costs incurred by one of the parties during the progress of a case are paid by a third person, the right of such third person to reimbursement is primarily against the party for whom the costs were paid; and, if such party be the successful one to whom costs are awarded, the right of the third person to any part of these costs is only through and by virtue of the right of the successful party thereto. The right of such third person can therefore be no higher than that of the successful party, and such right is necessarily subject to all the equities which would exist against that party himself. A similar contention to that of the appellant in this case was fully considered by this court in the case of *Marshall v. Cooper*, 43 Md. 46. In that case, as in this, a bill was filed to obtain the benefit of an equitable set-off. One Utterback

had obtained a judgment against Cooper for \$6,000, and costs of suit. This judgment had been entered to the use of Messrs. Marshall and Fisher, who thus became liable for a large amount of costs incurred in prosecuting the suit. As incidental to the relief of set-off, an injunction to restrain the enforcement of this judgment was prayed for. It was urged in that case that Marshall and Fisher should at least have the costs for which they were responsible excepted from the operation of the order directing such an injunction to issue. But this court held that the rights of Messrs. Marshall and Fisher were subject to the equitable rights of set-off claimed by Cooper, and the decree of the lower court restraining the enforcement of the judgment was affirmed.

But the appellant contends that he was a party to the earlier case, and, as such, obliged to lay out and expend a large sum in the lower court in defending the bona fides of his mortgage, and that he should at least be reimbursed for these costs which he was obliged to pay. We think this contention is answered by what we have said, but in addition to the reasons already given, it must be remembered that the lower court in the earlier case awarded Mr. William B. Willson a proportion of the costs incurred by him in that case, and the sum agreed upon and accepted by him, was \$40. No appeal was taken from the decree of the lower court, in that case, so far as it determined his rights, and consequently that part of the decree remains undisturbed. His acceptance of the \$40 as his share of the costs operates effectually against his contention that he was obliged to pay the residue for which he seeks reimbursement. As to this residue, he stands in no better position than a stranger to the proceedings, who has paid the fees and expenses for the benefit and accommodation of one of the parties. He may be subrogated to the rights of such party, but not to the rights of the officers whose fees he has paid. We have carefully examined the able briefs of counsel for the appellant, but we cannot give our assent to the application of the doctrine of subrogation, in the way and manner which is so earnestly contended for therein. We do not think the cases cited support such contention as applicable to the circumstances of this case.

It follows from what we have said that we do not consider the right of the appellant to reimbursement for the fees and expenses defrayed by him for Tyson Willson and wife, in the earlier case, out of the costs awarded them in that case, superior to the right thereto of Tyson Willson and wife themselves, against whom, as we have seen, on the facts as they now appear, the complainants are entitled to the equitable set-off which they seek. The decree of the lower court will therefore be affirmed.

Decree affirmed, with costs.

(108 Md. 564)

**MERCHANTS' & MINERS' TRANSP. CO. v. STATE ex rel. HAZELTON.**

(Court of Appeals of Maryland. June 25, 1908.)

**1. MASTER AND SERVANT — ACTIONS FOR DEATH — PRESUMPTIONS AND BURDEN OF PROOF.**

In an action for the death of an employé, the burden is on plaintiff to establish the allegations in the declaration, failing in which, it is error to refuse to direct a verdict for the employer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 895-905.]

**2. NEGLIGENCE—QUESTIONS FOR JURY.**

The fact of negligence is for the jury, where there is evidence legally sufficient to prove it, but in the absence of such evidence, it is the duty of the court to withdraw the case from the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 282.]

**3. SAME.**

A scintilla of evidence, or a mere surmise that there may have been negligence, will not justify the court in leaving the case to the jury, but there must be evidence on which they may reasonably conclude that there was negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 282, 284.]

**4. MASTER AND SERVANT — ASSUMPTION OF RISK.**

It is implied, as a part of a contract to perform services for compensation, that as between the employé and the employer, the employé assumes all the risks incident to the service, including such as arise from the hazardous character of the service, and from the negligence of other servants in the same employment, though of a different grade.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 538-543, 550.]

**5. SAME—DUTY OF MASTER TO FURNISH PROPER MATERIALS AND APPLIANCES.**

A master is required to use due and reasonable care to provide proper materials and appliances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 172, 173.]

**6. SAME—FELLOW SERVANTS—CARE REQUIRED OF MASTER.**

A master is required to use due and reasonable care in the selection and employment of competent and careful fellow servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 336.]

**7. SAME—EXPOSURE TO EXTRAORDINARY PERILS.**

A master cannot negligently expose a servant to such extraordinary perils in the course of the employment that the servant, from the want of knowledge, skill, or physical ability, cannot by ordinary care, under all the circumstances, guard himself against them.

**8. SAME—CARE REQUIRED OF MASTER.**

A master is not liable for injury to a servant, unless chargeable with some neglect of duty, measured by the standard of ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 139.]

**9. SAME — DUTY OF SERVANT TO EXERCISE CARE.**

A servant is required to provide for his own safety, where the danger is either known to him or discoverable by the exercise of ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706-722.]

**10. SAME—ISSUES, PROOF, AND VARIANCE.**

In an action for the death of an employé, based on the charge that the employer negligent-

ly caused the employé to become entangled in a hawser, thrown from one of its ships to its wharf, and to be thereby dragged from the wharf and drowned, recovery cannot be had on the ground that the employer negligently failed to rescue the employé after he had been dragged into the water.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 871, 872.]

Appeal from Baltimore City Court; George M. Sharp, Judge.

Action by the state, for the use of Annie Hazelton, widow, against the Merchants' & Miners' Transportation Company. Judgment for plaintiff, and defendant appeals. Reversed, without a new trial.

Argued before BOYD, O. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and HENRY, JJ.

Walter L. Clark and William L. Marbury, for appellant. Emil Budnitz and J. Cookman Boyd, for appellee.

BRISCOE, J. This action was brought in the Baltimore city court, by the appellee, against the appellant, to recover damages for the death, on the 20th of March, 1906, of William Harry Hazelton, the husband of the equitable plaintiff, while in the employ of the appellant corporation as a line tender on one of its wharves, in Baltimore city, by reason of the alleged negligence of the appellant company. The declaration alleges that the defendant is the owner of and operates a line of steamships running to and from Baltimore, and that on the 20th of March, 1906, the deceased, while using due care and caution, and by reason of the wrongful act, neglect, and default of the defendant, its officers, and agents became entangled with a hawser, thrown from one of the defendant's steamships to its wharf, in Baltimore city, and he was thereby dragged overboard and drowned. And, further, that the deceased was employed by the defendant as a stevedore, but that he was ordered by the defendant to catch and make fast the hawser, although the same was not within the scope of his employment; and, although unknown to the deceased, and not notified thereof, but well known to the defendant, it was exceedingly dangerous for one man alone to attempt to catch and make fast the hawser, as the defendant was ordered to do, whereupon he was dragged overboard and drowned. The bill of particulars filed by the plaintiff states the cause of the action as follows: To recover damages for the death of the deceased, which was caused by the wrongful act, neglect, and default of the defendant company in ordering and causing the deceased, who was employed as a stevedore by the defendant, to attempt to catch and make fast to the defendant's wharf a hawser thrown from one of the defendant's ships, whereby he became entangled in same and was dragged overboard and drowned. Secondly, that it was well known to the defendant, although it was not known to the de-

cedent, and he was not warned, that it was dangerous for one man alone to attempt to catch and make fast the hawser, and the same was without the scope of the decedent's employment.

At the trial of the case, the appellant reserved three exceptions. Two to the admission of evidence, and the third to the granting of the plaintiff's prayer as to the measure of damages, and to the rejection of the defendant's four prayers, which instructed the jury that, under the evidence and upon the pleadings, the verdict of the jury must be for the defendant upon the issues joined. The objection to the admissibility of evidence embraced in the second exception, and to the exception to the granting of the plaintiff's prayer, was practically abandoned in this court, but it is contended that there was error in the action of the court in its ruling upon the admission of the testimony, in the first bill of exceptions, and in its refusal to grant the appellant's prayers, set out in its third bill of exceptions. As these prayers present the prominent questions upon which the decision of the case must turn, and as we are of the opinion, after a careful consideration of the record, that they should have been granted, we will proceed to state, as briefly as possible, the reasons for the conclusion we have reached. It will be seen, that the specific allegation of defendant's negligence, as set out in both the declaration and the bill of particulars, and the ground upon which the recovery was sought, was, by reason of the neglect and default of the defendant, its officers, and agents, the deceased became entangled with a hawser, thrown from one of the defendant's steamships to its wharf, in Baltimore city, and was dragged overboard and drowned, and that it was dangerous for one man alone to attempt to catch and make fast the hawser; that the work was without the scope of the decedent's employment; that the danger was well known to the defendant, but not known to the decedent, and he was not warned of the danger.

The defendant's prayers are based upon the insufficiency of evidence to prove that the death of Hazelton was occasioned by the negligence of the defendant, as alleged in the pleadings. It is well settled that the defendant had the undoubted right to have the jury confined to the issue made by the pleadings. *City Pass. Ry. Co. v. Nugent*, 86 Md. 360, 38 Atl. 779; *Fletcher v. Dixon* (Md.) 68 Atl. 878. The burden of proof was upon the plaintiff to establish the allegations in the declaration as the ground of the action; and, failing to offer evidence tending to prove these, it was error in the court below to refuse the defendant's prayers. The law is well established that the fact of negligence is for the jury where there is evidence legally sufficient to prove it; but, in the absence of such evidence, it is the duty of the court to withdraw the case from the consideration of the jury. All the cases hold that a scintilla of evidence,

or a mere surmise that there may have been negligence on the part of the defendant, clearly would not justify the judge in leaving the case to the jury. There must be evidence upon which they might reasonably and properly conclude that there was negligence. In the leading case of *State v. Malster*, 57 Md. 309, Judge Alvey, in delivering the opinion of this court, thus lays down the rule: "It is incumbent upon the plaintiff to show affirmatively all the elements of the right to recover. Unless the court can see that there is such evidence in the cause as will fairly support a verdict, if the jury should find it to be credible and proper to be made the basis of their finding, it becomes an imperative duty of the court to instruct the jury to find their verdict for the defendant. Conjecture or irrational speculation by the jury as to conclusions of fact should not be allowed; and, unless there be such proof as would justify a deduction of a rational conclusion as to the existence of the essential facts to entitle the plaintiff to recover, the instruction should be for the defendant. Otherwise there would be no certainty attained, and often the grossest injustice would be inflicted in the trial by jury."

In the case at bar there was no evidence whatever that the deceased became entangled in the rope or hawser that was thrown from the defendant's steamship to the wharf, and was thereby dragged overboard and drowned, as alleged in the declaration. On the contrary, the evidence is to the effect that he was not entangled in the rope at all, and was not dragged or pulled over by the rope, because the rope remained on the pier, after he had fallen in the water. According to the undisputed facts of the case as shown by the testimony, the deceased, while attempting to lift the rope over the last pile, lost his balance, and fell overboard, and there is no evidence whatever tending to prove negligence on the part of the defendant company in connection with it. The witness Fisher, who was present at the time of the accident, and saw the deceased when he fell overboard, testified as follows: "Q. What was he doing after you left him and went up forward? A. You see, after I went forward, he had to take the line off the cleat, and lift it on the pier—it was not on a level. Q. Wasn't it on the same level? A. No, sir; he was down on a little flat. Q. How far up did he have to take it? A. The step was about three steps, or something like that. Q. You looked down and saw him? What was he doing then? A. He had got the line over around the corner, and was bringing it along the side of the wharf to the cleat, and in bringing his line along, these little piles stick up, and this line of his was catching in them piles, and you have to swing that line over the pile, you know, to carry it along further, and he had stopped there—they piles held it—and in swinging this line, you see, in swinging over these piles, that

pulled him off his balance, you see." He further testified that the eye of the hawser was still on the wharf after the man had fallen in the water, and he put it over the cleat. But, apart from a failure of evidence to establish that the death of the deceased was directly caused by the negligence of the appellant company or its agents, and as alleged in the pleadings, there was no legally sufficient evidence to show a failure on its part to perform any duty that it owed the appellee's husband, the omission of which caused his death, and which would support the verdict rendered in the case. This legal proposition was directly submitted by the appellant's fourth prayer. The burden of proof was upon the appellee to establish the negligence as a basis of the action; and, there being a failure of evidence in this respect tending to prove it, there was error in the refusal of the court to grant this prayer.

It is contended, however, that it was dangerous for one man alone to attempt to catch and make fast the hawser; that this danger was known to the defendant, but the plaintiff was not warned of it, and the same was without the scope of his employment. The settled principle in England and in this state, applicable to the liability of the master to his employé, is clearly stated in the case of *Wood v. Helges*, 88 Md. 267, 34 Atl. 872: "When a servant is engaged to perform certain services for a compensation, it is implied, as a part of the contract, that, as between himself and his employer, he assumes all the risks incident to the service. And these risks include such as arise from the hazardous character of the service, and from the negligence of other servants in the same employment, even though they may be in a different grade. But the master himself is bound to use ordinary (that is, due and reasonable) care and diligence to provide proper materials and appliances to do the work, and in the selection and employment of competent and careful fellow servants. In addition to this the master cannot negligently expose the servant to such extraordinary perils in the course of the employment that the servant, from the want of knowledge, skill, or physical ability, cannot by ordinary care and prudence, under all the circumstances of the case, guard himself against them." *State v. Maister et al.*, 57 Md. 307; *Wonder v. B. & O. R. R. Co.*, 32 Md. 417, 8 Am. Rep. 143. In the case now before us there is no contention or intimation that the master did not exercise due and reasonable care in providing safe and proper materials and appliances and premises to do the character of work he was sent to do, or in the selection of fellow servants of competent skill and prudence.

The deceased was employed as a stevedore, whose general duty was to assist in loading and unloading freight on board the steamers at the wharves, and also to attend as a "line

tender"; that is, to catch the lines when the ships came in. On the day of the accident the deceased, with one Fisher, was sent from Pier 5 to Pier 6, in Baltimore city, to the steamer *Nantucket*, to catch her lines and make her fast to the wharf. They caught the stern line, and made it fast to the cleat. The mate of the boat then directed them to catch the forward line, and make it fast, stating that it did not take two men to attend to one line, and "sent one forward, and kept one aft." Fisher took the forward line, and made it fast. The deceased, while attempting to remove the stern line from the cleat and make it fast on another, lost his balance, and fell overboard, as heretofore stated. There was positive and uncontradicted evidence that he had been employed to do similar work on another occasion, and had caught lines before. He had worked for the company, on its wharves, for two years, in connection with mooring vessels and handling lines. There was no evidence of inexperience in the work he was sent to do, and he voluntarily undertook the employment. The risk attending and surrounding the handling the line was open, patent, and obvious, and must have been known to any man of average intelligence, and there is no proof "that any of his senses were impaired, or that he was not possessed of ordinary power of observation." There was testimony, also, to the effect that anybody could handle these lines who had worked around ships and seen lines handled, and who had sufficient "presence of mind" to do the work. In *Gans Salvage Co. v. Byrnes*, 102 Md. 249, 62 Atl. 155, 1 L. R. A. (N. S.) 272, it is distinctly said: "If the place was really dangerous, the appellees must have known that it was, because the means of knowledge were as open and obvious to him as to the master, and by voluntarily working there he assumed the risks of being injured by causes which were open and obvious, and he cannot hold the employer responsible in damages if those open and obvious causes produced the injuries." In *Wood v. Helges*, 83 Md. 269, 34 Atl. 872, it is said: "The master is not an insurer of the servant's safety. He cannot be bound for his servant's injury without being chargeable with some neglect of duty, measured by the standard of ordinary care. On the other hand, the servant is under an obligation to provide for his own safety when danger is either known to him, or is discoverable by the exercise of ordinary care. He must take ordinary care to learn the dangers which are likely to beset him; and, where the servant is as well acquainted as the master with the dangerous nature of the instrument used, he cannot recover." Upon the whole record we are of the opinion there was a failure of evidence to prove negligence on the part of the defendant or its agents, as alleged in the pleadings, and there was a legal insufficiency of evidence to show that the death of Hazelton was caused by

failure of the appellant to discharge any of its legal duties towards him.

As to the right of recovery for alleged negligence in failing to save or rescue the deceased after he fell in the water, we need only say there was no such issue of negligence involved in the case on the pleadings. The suit was based upon a charge in the declaration for negligence in causing the deceased to be dragged overboard, by becoming entangled with a hawser thrown from one of the defendant's steamships to its wharf, and he was thereby dragged overboard and drowned. There could be no recovery, based upon subsequent negligence, under the pleadings in this case. *Fletcher v. Dixon* (Md.) 68 Atl. 878; *City Pass. Ry. Co. v. Nugent*, 86 Md. 360, 38 Atl. 779.

It follows, for the reasons given, there was error in the refusal of the court below to grant the appellant's prayers withdrawing the case from the jury, so the judgment appealed from must be reversed; and, as it is apparent the appellee is not entitled to recover, a new trial will not be awarded.

Judgment reversed, with costs, without awarding a new trial.

(108 Md. 300)

#### ARND v. HECKERT.

(Court of Appeals of Maryland. June 24, 1908.)

##### 1. BILLS AND NOTES—QUESTIONS FOR JURY—BONA FIDE PURCHASER.

In an action on a note, whether plaintiff was a bona fide purchaser *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1879.]

##### 2. SAME—FACTS CONSTITUTING HOLDER IN DUE COURSE.

An instruction that if defendant signed the bill in question, and if plaintiff became the holder of the instrument in due course, the jury should find for plaintiff, was properly refused, since the facts constituting a holder in course is a question of law, and should not be left to the jury.

Appeal from Circuit Court, Allegany County; Robert R. Henderson, Judge.

Action by William Arnd against John H. Heckert. From a judgment for defendant, plaintiff appeals. Affirmed.

The prayers offered by plaintiff were as follows:

"(1) The plaintiff prays the court to instruct the jury that there is no evidence in this case legally sufficient to prove that plaintiff took or purchased the single bill offered in evidence with knowledge of any fraud in its obtention, or of any failure of consideration therein.

"(2) The plaintiff further prays the court to instruct the jury that if they find from the evidence that defendant signed the single bill offered in evidence, and shall find that plaintiff became the holder of said instrument in due course, then they must find for the plaintiff, even though they further find that said instrument was obtained from de-

fendant by fraud and misrepresentations of third parties.

"(3) The plaintiff further prays the court to instruct the jury that if they find from the evidence in the cause that defendant signed the single bill sued on in this case, and shall further find that same was passed to the plaintiff for a valuable consideration before maturity, and shall further find that plaintiff purchased said single bill in good faith without notice of any fraud in its obtention or of any failure of consideration therein, then their verdict must be for the plaintiff.

"(4) The plaintiff further prays the court to instruct the jury that if they find from the evidence in the cause that the plaintiff purchased the single bill sued on for value, in good faith and before maturity, with no other knowledge that the single bill furnished on its face, then they must find that the plaintiff was a bona fide holder of said single bill, and no knowledge of fraud or want of consideration in the giving of said single bill subsequently acquired by him can affect his title as a bona fide holder for value.

"(5) The plaintiff further prays the court to instruct the jury that there is no evidence in this case legally sufficient to prove that the plaintiff took or purchased the single bill offered in evidence with knowledge of any fraud in its obtention or of any failure of consideration therein, and their verdict must be for the plaintiff."

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

J. W. Scott Cochrane, for appellant. Robert H. Gordon, for appellee.

PEARCE, J. This is an action brought by the appellant against the appellee upon the following instrument of writing: "May 4th, 1906. Allegany County, Maryland. \$100.00. Three months after date I promise and bind J. H. Heckert, heirs, executors, etc., to pay to R. B. Parks or order one hundred dollars for value received, bearing interest from date, at the rate of 6 per cent. per annum, and hereby waive the benefit of the homestead exemption, or any other law, that is now or may hereafter be enforced to prevent the collection of the same, and further agree to pay all attorney's fees for collecting, if collected by suit. Witness ——— hand and seal this 18th day of April, 1906. P. O. Pinto, Md. J. H. Heckert. [Seal.] Witness: E. C. Heckert. [Seal.]" Under the negotiable instruments act (Code Pub. Gen. Laws 1904, art. 13, § 25) the addition of a seal to the maker's signature does not affect the negotiable character of this obligation, which was indorsed in blank by R. B. Parks and subsequently passed into the hands of the appellant. The declaration set out the obligation in full, and alleged that it was executed by Heckert and delivered by him to Parks, "and

that the said R. B. Parks indorsed said bill obligatory, and the same was passed to plaintiff, who is the holder thereof," and that no part of the money secured thereby had been paid. The suit was brought in July, 1907. The defendant pleaded never indebted as alleged; never promised as alleged; and also that the obligation is a false and fraudulent paper, and that the plaintiff took it well knowing it to have been obtained by fraud, and that it was not a good and valid obligation at the time he took the same. Issues were duly joined, and at the trial the plaintiff offered evidence tending to prove the due execution of the instrument, and that the services of the plaintiff's attorney in the case were worth \$25, and then offered the instrument in evidence, and rested.

The defendant then proved by himself and his son that at the time he signed the paper two men representing themselves to be R. B. Parks, the payee therein, and William Barker, came to him, claiming to be agents of the Franklin Insurance Company of St. Louis, Mo., and promised to get him a 10-year policy in that company, if he would sign a note for \$100 and that the policy would be delivered in about 10 days, but that the company would not insure the barn unless a lightning rod was put up, and that he then paid them \$10 in cash to put up a lightning rod 85 feet long, which they did within three-quarters of an hour, and, as soon as the paper was signed, they hurried away; that he never received any policy of insurance, and was unable to ascertain anything about the insurance company named; and that he had never seen or heard anything of Parks or Barker, except that the note was sent on for collection. The defendant also proved by Mr. D. Lindley Sloan, an attorney, that during the term of court in April, 1906, a man claiming to be William Barker, and to be from Council Bluffs, Iowa, came to him wishing him to identify him, and that immediately after this he heard the sheriff was looking for William Barker. The plaintiff's own evidence, taken under a commission in Council Bluffs, Iowa, was offered in rebuttal. It appears therefrom that he is a resident of that city, and engaged in the real estate and loan business; that he purchased the note in question May 4, 1906, at Council Bluffs for \$90, and he testified in chief that he had no knowledge but what the note was a bona fide obligation given for a valuable consideration, and had no cause to believe there was or would be any defense thereto. On cross-examination he said that at the same time he purchased this note he purchased a note of S. C. Morgan and one of Henry North, all from William Barker, paying for all in cash and discounting each note \$10; that he knew nothing of any of the makers of these notes, except that Barker said they were responsible men; that he did not know R. B. Parks at all, had never seen him, did not know where he lived, or anything about his

financial responsibility. Upon the return of this commission it was by order of court remanded that the plaintiff might answer certain additional interrogatories upon cross-examination. He then testified that in the last two or three years he had purchased from William Barker notes to the amount of \$2,000 or \$3,000; that he had known Barker over 20 years; that he was in the real estate business and was worth \$20,000 to \$25,000, city property and farms; that he traveled a good deal, but that his residence was in Council Bluffs and he had seen him that morning; that he did not know whether Barker knew Parks, and that Barker never told him who Parks was, or what his business was, nor where he (Barker) got the note; that he did not require Barker to indorse the note, because he relied upon his representation that Heckert was good for it; that he was not loaning money to Barker on the note as collateral, and that Barker did not promise to repay him if the note was not paid; that he kept accounts in three banks, and was the president of one of these banks, but paid in cash for all the notes mentioned; that he was worth \$25,000 above all liabilities in real estate, bank stocks, notes, and cash on deposit, and in his safe. He also admitted he had heard that some years ago Barker was in the lightning rod business.

The plaintiff then offered five prayers which will be set out by the reporter. The court granted the third and fourth prayers, and rejected the first, second, and fifth. No prayers were offered by the defendant, so that the single exception is to the rejection of the first, second, and fifth prayers. The two prayers granted by the court are the same which were approved by this court in *Totten v. Bucy*, 57 Md. 446, a case of the same character as the one now before us, and in our opinion they gave the plaintiff all the law to which he was entitled. The fraud in this case on the part of Parks and Barker is gross and transparent, and the evidence tending to prove that the plaintiff did not take the note in good faith and without notice of facts tending to show fraud in its obtention is abundant, if not overwhelming. The suspicious circumstances are too numerous and glaring to be consistent with any rational theory of the good faith and innocence of the plaintiff in this transaction. Without enumerating them all, we may mention the absolute want of knowledge of the financial worth of the maker 1,000 miles from the plaintiff in another state; the absolute want of knowledge of who Parks was or what was his worth; the failure to present the note in time to hold Parks as indorser; the failure to require the indorsement of Barker; the heavy discount charged; the neglect to have Barker testify as to the facts attending the obtaining of the note, though the plaintiff had seen him the same morning his own testimony was given; his confession that he had heard Barker had been engaged in the light-

ning rod business, which, to an ordinarily prudent and intelligent man, has almost come to be a badge of fraud, at least as to these peripatetic artists in that line, and the extent to which he dealt in securities of this description. It is impossible to believe that a shrewd business man, and a bank president of any experience, could have engaged in good faith in such transactions as this, and on the scale shown by his own testimony. The inference is almost irresistible that there was some secret undisclosed connection between Parks, Barker, and the plaintiff, through which he participated in the fruits of their fraud. In *Williams v. Huntington*, 68 Md. 598, 13 Atl. 337, 6 Am. St. Rep. 477, the court in commenting upon the duty of the plaintiff in such a case to establish by proof that he was a bona fide holder without knowledge or notice of any infirmity in its origin or transfer used this language: "In discharge of the burden thus cast upon him he offered his own testimony, and none other. Its credibility was wholly for the jury to determine. They were at liberty to disregard it altogether, if in their judgment it was intrinsically improbable, or if it was stamped with, or inherently furnished, indications of its unreliability." This language is especially applicable to the present case. No court could, in the face of all the facts here in evidence, have granted the first prayer which sought to take the defense of fraud from the jury, and it was defective, moreover, in not including notice as well as actual knowledge of fraud in the obtention of the note. *Griffith v. Shipley*, 74 Md. 591, 22 Atl. 1107, 14 L. R. A. 405; *Valley Savings Bank v. Mercer*, 97 Md. 478, 55 Atl. 435.

The second prayer was properly rejected. It submitted to the jury a question of law in permitting them to determine what facts constitute "holder in course." The third prayer, which was granted, correctly and clearly instructed the jury upon that question. The fifth prayer was properly rejected for the same reasons given as to the first prayer. In such cases it is the duty of the court to hold those who deal in securities obtained as these were to a rigid requirement as to the proof of absolute good faith in the transaction, and to guard juries against any misleading phraseology in the instructions, as far as possible.

Judgment affirmed, with costs to the appellee above and below.

(108 Md. 269)

BAKER et al. v. BAKER et al.

(Court of Appeals of Maryland. June 24, 1908.)

# 1. RECEIVERS — APPOINTMENT — PETITION — MATTERS CONSIDERED.

In an equity suit in which a petition for the appointment of a receiver is filed, and which refers to the proceedings therein, the court has the right to consider all the proceedings in the cause in passing upon the petition.

## 2. APPEAL AND ERROR—REVIEW—PRESUMPTIONS—RECEIVERSHIP PROCEEDINGS.

On an appeal from an order granting the appointment of a receiver, on a petition filed in an equity suit to the proceedings of which the petition refers, it will be presumed, in order to sustain the action of the court, the record in the appellate court not showing that all the necessary parties were not in court, that all necessary parties had been actually or constructively served with process.

## 3. LIS PENDENS—APPOINTMENT OF RECEIVER —PARTIES TO SUIT—PRESUMPTIONS.

A bill in equity for the sale of property was filed against a decedent's widow and the executor of a mortgagee who held two mortgages on the property and others. The executor assigned his mortgages to the widow after the bill was filed, and made a disclaimer, alleging that he had no interest in the mortgages, having assigned them to the widow, and made affidavit to the disclaimer. The day following the widow made affidavit as to taxes, as assignee of the second mortgage (the first mortgage not appearing of record in the suit), and the affidavit as to taxes and the disclaimer were filed the same day. *Held* that, on an appeal from an order granting a petition in the equity suit to appoint a receiver, it would be presumed, in order to show that the widow was a party to the proceedings as assignee of the mortgages, and subject to the lis pendens, that the executor was a party to the equity suit before he made the assignments.

## 4. MORTGAGES—DEFAULT—RIGHTS OF PARTIES—POSSESSION—RENTS.

Upon the default of a mortgagor, the mortgagee is entitled to possession; and, when a mortgagor is allowed to remain in possession after default, he is entitled to collect the rents and profits, but, after the demand for possession by the mortgagee, or a demand of the rents, then the mortgagee is entitled to the same.

## 5. RECEIVERS — APPOINTMENT — ORDER — APPEAL—STATUTORY PROVISIONS—EFFECT.

Code Pub. Gen. Laws 1904, art. 16, § 192, provides that the court may at any stage of the cause, or matter concerning real or personal property, on its own motion, or on application, pass such order as it may see fit with regard to the possession of the property pendente lite, or the receipt of the income of the same, and gave a right of appeal as provided in section 191, which authorized an appeal in such manner and on such terms as is allowed in the case of injunction. Section 190 provides that the court can at any stage of a cause or matter on its own motion, or on application, order a mandate or injunction as therein provided. *Held*, that the statute was not intended to, and did not, abolish the rules relating to the appointment of receivers, and it is only when there is enough shown in the proceedings to authorize such appointment that the court can act on its own motion, or where the proceedings and application are sufficient for that purpose.

## 6. APPEAL AND ERROR—REVIEW—SCOPE—APPOINTMENT OF RECEIVER—NECESSITY OF NOTICE.

Under Code Pub. Gen. Laws 1904, art. 16, § 191, giving a right of appeal from an order appointing a receiver pendente lite, as provided by section 190, authorizing the appointment of a receiver on the court's own motion or on application, the rule that the court will not appoint a receiver until the defendant is first heard, unless the necessity be of the most stringent character, is one which can be enforced on appeal only on appeal from the order appointing the receiver.

## 7. RECEIVERS — APPOINTMENT — PETITION — SUFFICIENCY.

A bill in equity for the sale of property was filed against a decedent's widow and the

executor of one who held two mortgages on the property and others. The executor assigned the mortgages to the widow, and filed a disclaimer in the suit. A petition, under Code Pub. Gen. Laws 1904, art. 16, §§ 190-193, authorizing the appointment of receivers, was filed in the suit, and alleged that the widow was in possession of a portion of the real estate, while other portions were in the occupancy of tenants under leases providing for the payment of money rents; that the widow was claiming the whole of said rents, while the petitioners, as heirs at law of the decedent, disputed the rights of the widow, either as doweress or as mortgagee, to the whole of the rents; that there was no one authorized to collect said rents, and that there was danger of loss and injury to all the parties concerned, and asked that a receiver be appointed to collect the rents. *Held*, that the petition was insufficient to authorize the appointment of a receiver, in that it did not show the rights of the parties in the property, or show that there was any imminent danger of loss, or show why the mortgagee (the mortgagor being in default) was not entitled to the rents.

#### 8. SAME.

And the fact that by Code Pub. Gen. Laws 1904, art. 16, § 129, a sale of lands under a bill, similar to the one in question, was authorized, free and clear of mortgages, or other incumbrances on land, or an undivided interest therein, did not make the petition sufficient to authorize the order.

Appeal from Circuit Court, Frederick County, in Equity; John C. Motten, Judge.

Suit by Alice M. Baker and others against Charles N. Baker and others for the partition and sale of real property. Pending the suit Charles N. Baker and other defendants petitioned for a receiver of the property involved, and, from the appointment of a receiver, plaintiff and defendants Isabell M. Baker and others appeal. Reversed, and petition dismissed without prejudice.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HENRY, JJ.

Eugene L. Rowe, for appellants. Hammond Urner, for appellees.

BOYD, C. J. A bill in equity was filed by Alice M. Baker, a daughter of Nicholas Baker, deceased, against J. Bernard Baker and other heirs of Nicholas, Isabell M. Baker, his widow, Charles W. Nussear, executor of Mary C. Nussear, who held two mortgages against the property of the decedent, and some lien creditors of J. Bernard Baker, for the sale of the real estate left by the decedent, on the ground that it was not susceptible of partition. The executor of Mary C. Nussear assigned the mortgages to Isabell M. Baker, the widow, after the bill was filed. An answer was filed by three of the heirs and a judgment creditor of J. Bernard Baker, admitting the allegations of the bill, excepting as to the dower of the widow, and alleging that she was only entitled to dower in the surplus over the mortgages. The executor of Mary C. Nussear filed a disclaimer, alleging that he had no interest in the mortgages, having assigned them to the widow. Afterwards Charles N. Baker, Mary A. Dukehart, and

Jennie Adelsberger, three of the children of Nicholas and defendants in the equity case, filed a petition therein, alleging that the real estate of Nicholas descended to them, J. Bernard Baker, and Alice M. Baker as his heirs at law, subject to the dower of the widow and also subject, as to certain portions of the real estate, to the two mortgages, and making other allegations which will be hereinafter referred to. It asked for the appointment of receivers and for general relief. The court passed an order upon the petition appointing Eugene L. Rowe, who was the solicitor for the plaintiff in the bill, and Edward H. Rowe receivers, but the former declined to act. Afterwards Alice M., Isabell M., and J. Bernard Baker filed answers to the petition, as required by the statute, and entered an appeal from that order, but the answers cannot be considered by us.

The question for our determination is whether that order was properly passed. Section 192, art. 16, Code Pub. Gen. Laws 1904, provides that "the court may, at any stage of any cause or matter concerning property, real or personal, on application, or of its own motion, pass such order as to it may seem fit, with regard to the possession of the same, pendente lite, or the receipt of the income thereof, on such terms preliminary thereto [as to security, etc.] as to it may seem just, subject to the same right to move for its discharge, and the same right of appeal as is given in the preceding section." The section (191) referred to provides that "an appeal may be taken by any of such parties from the order granting such mandate or injunction, or the refusal to discharge or dissolve the same in such cases, and in such manner and on such terms as is now allowed in cases of injunction." Section 190 provides that the court can at any stage of a cause or matter, on the application of any party in interest by motion, or petition, or of its own motion, order a mandate or injunction, as therein provided. Sections 190 to 194, inclusive, of the Code of 1904, were added to article 16, by Acts 1890, p. 754, c. 441, and have since then been in force, being numbered 177-181 in Code Pub. Gen. Laws 1888, art. 16. What is now section 192 has not hitherto been passed on by this court, but section 190 was referred to in *County Com'rs v. School Com'rs*, 77 Md. 283, 26 Atl. 115; *Supreme Lodge v. Simering*, 88 Md. 288, 40 Atl. 723, 41 L. R. A. 720, 71 Am. St. Rep. 409; *Baltimore City v. Poole & Son Co.*, 97 Md. 68, 54 Atl. 681; *Horner v. Nitsch*, 103 Md. 508, 63 Atl. 1052. Although it must be admitted that a somewhat liberal construction was placed on section 190, as to the procedure under it, those cases do not throw any light on the question now before us. There can be no doubt that some of the objections made by the appellants to this petition cannot be sustained, and it is clear that the application for receivers was intended to be under section 192. The petition is filed in the original equity cause, and



the proceedings therein are referred to. Inasmuch as the bill and exhibits show the title of the petitioners, it was unnecessary to be more explicit on that subject, as the court had the undoubted right to consider all the proceedings in that cause. It had jurisdiction over the subject-matter involved, and apparently over all the parties, although the record does not affirmatively show that all of them had been brought into court by subpoena or orders of publication. Inasmuch, however, as the appellants brought the record to this court, and it does not show that the parties were not in court, we would, in a proceeding of this character, presume that, when the judge below acted, all necessary parties had been actually or constructively served with process. Nor can we have any doubt that Mrs. Isabell M. Baker was subject to the doctrine of *lis pendens*, as announced in *Sanders v. McDonald*, 63 Md. 503. The executor of Mary C. Nusslear made affidavit to the disclaimer filed by him on June 28, 1907, while the affidavit as to taxes made by Mrs. Baker, as assignee of the second mortgage, was made June 29th (the assignment of the first mortgage not appearing in the record), and the assignment and the disclaimer were filed the same day. We would, therefore, for the purposes of this case, assume that the executor had been brought into court before he made the assignment in so far as necessary to make her subject to the *lis pendens*, as announced in *Sanders v. McDonald*, without deeming it necessary to consider whether she, having knowledge of the pendency of the cause and being a party in another capacity, as widow, would not be bound, regardless of that question.

But there are other questions involved, which present difficulties that seem to us not to have been met by the appellees. While it is true that the court is authorized by section 192, even of its own motion, to "pass such order as to it may seem fit, with regard to the possession of the same, pendente lite, or the receipt of the income thereof," and, although we deem the power given broad enough to authorize the appointment of a receiver in a proper case, the statute did not mean to abolish the rules on the subject of the appointment of a receiver, which this court had adopted and followed for so many years. It is only when there is enough shown in the proceedings to authorize such step that the court can of its own motion act, or when the proceedings and the application are sufficient for that purpose. The right of appeal is expressly given, and "the rule laid down in the cases cited, that the court will not appoint until the defendant is first heard, unless the necessity be of the most stringent character, is one which can only be enforced upon appeal from the order appointing the receiver." *Voshell v. Hynson*, 26 Md. 94. In the leading and well known case of *Blondheim v. Moore*, 11 Md. 365, Chief Judge Le Grand announced certain rules for the government of

courts in appointing receivers, which have often since been repeated and followed. After saying that the power of appointment must be exercised with great circumspection, that it must appear the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve it, and that in no case should the court make an appointment merely because it could do no harm, he said: "(4) That 'fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved'; and (5) that, unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application." Granting that there may be cases in which the enforcement of the fifth rule may not be necessary, if the appointment is made under the provisions of this statute, it is ordinarily the safer rule to follow, and, generally speaking, when the parties are already in court, there is no occasion for such delay as might endanger the interests of the applicant if immediate action be not taken. But, when the petition does not fully disclose the facts necessary to inform the court of the real situation, such as the right of the petitioner to relief, and of the necessity or reason for proceeding without notice to others to be affected, especially if it shows some right of possession of the property or to the rents and profits in another, the court ought not to proceed *ex parte*. In *Johnson v. Lippert*, 96 Md. 584, 54 Atl. 114, in considering an order appointing a receiver, the court quoted from *Lamm v. Burrell*, 69 Md. 272, 14 Atl. 682, in which an order granting an injunction was reversed, that, "to warrant the court in issuing an injunction, a full and candid disclosure of all the facts must be made. There must be no concealment, and the *res gestæ* must be represented as they actually are. \* \* \* The court must be informed by the bill itself and its accompanying exhibits, if any, of every material fact constituting the case of the plaintiff, in order that it may seem whether there is a just and proper ground for the application of so summary a remedy. Strong *prima facie* evidence of the facts on which the plaintiff's equity rests must be presented to the court." The principles in regard to a bill for an injunction apply also to one for a receiver. *Miller's Eq. Proc.* 729. Indeed, there is often more necessity for strict rules in the latter, as the appointment of a receiver may result in taking from one entitled to them the possession of his property and the income from it.

Keeping the general rules in mind, let us see how far the petition on which the order appealed from was passed complies with them. It alleges: "(4) That the said widow is now in possession of a portion of said real estate, while other portions thereof are in the occupancy of tenants under leases providing for the payment of money rents. (5) That

the said widow is claiming and demanding from said tenants the whole of said rents accruing from said real estate, while your petitioners, as heirs at law of the said decedent, dispute the right of said widow, either as dowress or mortgagee, to the whole of said rents, and pending the determination of the rights of the respective parties in the premises there is no one authorized to collect said rents, and by reason of said conflicting claims the said rents are remaining unpaid and uncollected. (6) That there is danger of loss and injury to all parties concerned under existing conditions, as hereinbefore mentioned, and it is to the interest and advantage of all the said parties that a receiver or receivers should be appointed by your honorable court to collect and hold the rents accruing and accrued from the said real estate," etc. It had previously alleged that Isabell M. Baker had taken by assignments the mortgages, and now claims certain interests as mortgagee in certain portions of the real estate in addition to her dower. It is impossible to know from the petition, or the proceedings in the original case, what portion of the real estate the widow was in possession of, or what portions thereof were in the occupancy of tenants, or whether the tenants were occupying any of the properties included in the mortgages, and, if so, what part. It may be, so far as the petition discloses, that all of the properties occupied by the widow and the tenants are included in the mortgages. If they are, prima facie she, as mortgagee, is entitled to the possession and to the rents. Both of the mortgages were overdue, and hence were in default. "It is the settled law of this state that, upon default, the mortgagee is entitled to possession." *Barron v. Whiteside*, 89 Md. 448, 43 Atl. 825, and cases therein cited. "When a mortgagor is allowed to remain in possession after default, he is entitled to collect for his own use the rents and profits, but, after a demand for possession by the mortgagee or a demand of the rents, then the mortgagee is entitled to the same." *Id.* In that case it was further said: "In order to put an end to the authority of a mortgagor to collect the rents, it is only necessary for the mortgagee to manifest his intention to do so. For this purpose slight acts will be deemed sufficient, and in *Boyce v. Boyce*, 6 Rich. Eq. (S. C.) 302, where, as here, the mortgaged property was in court, a claim for the rents made to the court by a party to the suit in the progress of the cause was all that was required." See, also, *Baker v. Hill*, 100 Md. 130, 59 Atl. 275. The petition shows that the widow was claiming and demanding the rents, and, although it does not in terms say that she was doing so as mortgagee, it does say that the petitioners disputed her right to them "either as dowress or mortgagee." It does not say that she was not doing so as mortgagee, and, excepting in so far as we have stated, leaves the court in the dark on the subject.

The order appealed from appointed the re-

ceivers "to collect and receive all rents accrued and to accrue from the real estate mentioned in these proceedings, during the pendency thereof," and it is clear that, in the absence of some allegation showing a valid reason why the mortgagee should not have the benefit of the general rule, the order, at least in so far as it applied to rents from the mortgaged property, was improvidently passed. But, in addition to what we have said, there is nothing in this case to show any imminent danger of loss, or real necessity for appointing receivers, at the instance of the petitioners. Mrs. Baker, as mortgagee, had the right to have a receiver appointed, if necessary for her protection, but that did not give the petitioners the right to do so, and especially not to take the rents from the mortgaged property from her control. There is no allegation or suggestion that the tenants, or any of them, were insolvent, and that would hardly be suggested as to the widow; for, if there is a sale of the property, she will be entitled to distribution on the two mortgages, which do not appear to be disputed or in any way questioned. She could be made to account for the rents, and, if she did not in any other way, they could be charged against her distribution. It was not enough to allege that the petitioners disputed her right to the rents, and it certainly was not sufficient to say that "by reason of said conflicting claims the said rents are remaining unpaid and uncollected." The petitioners themselves are causing the conflict, which prevents the rents from being paid and collected, although the mortgagee is prima facie entitled to those from the mortgaged property. As was said in *Knighton v. Young*, 22 Md. 372: "There is no allegation that the rents, issues, and profits of the real estate, supposed to be subject to dower, will be lost irretrievably, by reason of the insolvency of those receiving them, or that the complainant has not adequate remedy at law for such of the rents as he may be entitled to. It is not sufficient to allege they are in jeopardy, but it must be shown how they are jeopardized."

We have not overlooked the fact that receivers are sometimes appointed to collect rents pending partition proceedings, or that the statute (section 129, art. 16) now authorizes the sale of lands, under a bill such as this, free and clear of mortgages or other incumbrances on said lands, or an undivided interest therein, but being of the opinion that this petition, although taken in connection with the other proceedings in the cause, was not sufficient to authorize the court to appoint receivers, the order must be reversed. As we cannot be sure that it may not become necessary to appoint a receiver to collect some of the rents, we will dismiss the petition without prejudice.

Order reversed, and petition dismissed without prejudice, the appellees to pay the costs above and below.

(108 Md. 419)

**CARROLL et al. v. GEORGE WATERS & CO. et al.**

(Court of Appeals of Maryland. June 24, 1908.)

**CONTRACTS—TERMINATION—NECESSITY OF NOTICE.**

During cessation, owing to sickness of the contractor, of work on a building, it was agreed by the owner and materialmen, who had previously furnished materials for the contractor, that the owner should have charge of the work, and should be liable only for materials furnished therefor up to the time the contractor should resume work. *Held*, that the resumption of the work by the contractor terminated the contract between the owner and materialmen, relieving him from liability to them for material thereafter furnished, without any notice from him to them, their contract with him not providing for such notice, and they knowing, before they furnished any more materials, of the resumption of work by the contractor.

Appeal from Circuit Court, Baltimore County, in Equity; Frank I. Duncan, Judge.

Suit by George Waters & Co. and others against Harry J. Carroll and another. Decree for plaintiffs. Defendants appeal. Reversed, and bill dismissed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, and WORTHINGTON, JJ.

Harry M. Benzinger and Edgar H. Gans, for appellants. Maurice E. Skinner, for appellees.

**BRISCOE, J.** This is a bill in equity filed in the circuit court for Baltimore county, by the appellees against the appellants to enforce the payment of certain mechanics' liens, under article 63 of the Code of Public General Laws of 1904, titled, "Mechanics' Liens," for materials alleged to have been supplied the defendant Carroll for the erection of a cottage and stable on his property situate near Rockland, in the Greenspring Valley, Baltimore county. The defendant corporation, the Eutaw Savings Bank of Baltimore, is the holder of a mortgage dated the 9th day of May, 1906, for the sum of \$8,000 on the land, covered by the buildings, and adjacent thereto, against which the lien is asserted and sought to be enforced, and is, therefore, made a party defendant to the proceedings. The plaintiffs George E. Waters & Co. are lumber merchants doing business in the city of Baltimore, and claim the sum of \$506.20 to be due them by the defendant Carroll, the owner, against the ground and the improvements thereon for materials furnished by the lienor for the erection and construction of the buildings, at the request of the owner, according to a bill of particulars filed in the case; the sum of \$280.28 being the amount of claim against the dwelling house, and the sum of \$315.92 being the amount against the stable. The plaintiffs Macarthy & Harper are hardware merchants doing business in the city of Baltimore, and assert a lien claim of \$189.44 against the dwelling and the sum of \$20.90 as the amount against the

stable, as set forth in a bill of particulars filed with the bill, as Plaintiffs' Exhibit No. 2. The bill to enforce the alleged liens was filed on the 21st of August, 1906, and avers, in substance, that the sums of money stated in the bills of particulars being due the plaintiffs for the materials furnished by them and the sums being unpaid, they did on 18th of August, 1906, file in the clerk's office their respective claims for liens under article 63 of the Code against the grounds and buildings belonging to the defendant Carroll, and prayed that a decree be passed for the sale of the property, and the proceeds of sale be distributed among the lienors, under the direction of the court. The defendant Carroll answered the bill on the 6th of October, 1906, and denies any contract with the plaintiffs for the sale and purchase of either the lumber or hardware used in the erection of the dwelling house and stable upon the grounds owned by him; that he did not request either of the plaintiffs to furnish the materials set out in their lien claims; and that he does not owe the amounts alleged or claimed by them, nor any sum whatsoever, and insists that the plaintiffs or either of them had no reason whatsoever for filing such lien claims. The case was heard in the court below upon bill, answer, and proof, and, from a decree sustaining in part the plaintiffs' contentions, this appeal has been taken.

The facts upon which the decision of the case must rest, briefly stated, are these: On the 18th of May, 1905, the defendant Carroll entered into a written contract with one I. S. Owings, as contractor, to erect for him a house and stable upon his property, situate in Baltimore county. The contract price, as agreed upon between the parties, was the sum of \$9,700, the contractor stipulating to do the work and furnish all necessary materials. The contract is the usual builder's contract as set out in the record, and contains the following stipulation (article 5) bearing upon the questions at issue and upon the principal controversy involved in the case. It is as follows: "Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect, or failure being certified by the architect, the owner shall be at liberty after ten days' written notice to the contractor to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract. And, if the architect shall certify that such refusal, neglect, or failure is sufficient grounds for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the prem-

ises and take possession, for the purpose of completing the work included under this contract of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor, and, in case of such discontinuance of the employment of the contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the whole amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner, to the contractor; but, if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or finishing the work, and any damage incurred through such default, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties." It is admitted, and it so appears from the record, that Owings, the contractor, began work under the contract, and continued thereon, until November 22, 1905, when he was taken sick, and removed to Mt. Hope Hospital for treatment. He remained there on or about three weeks. He returned home, at the expiration of this time, and resumed work shortly afterward upon the buildings under the contract. The contract to furnish lumber and hardware had been awarded by the contractor to the plaintiffs, and on the 22d of November Owings, the contractor, owed the plaintiffs Waters & Co. on or about \$6,000, and the plaintiffs Macarthy & Harper between \$600 and \$700, on account of this and other contracts. The defendant Carroll paid the contractor the sum of \$1,500 prior to the 22d of November, 1905, on the contract price, and there is no contest in so far as these proceedings are concerned as to the materials furnished the contractor before his disability and prior to his going to the hospital.

The real question at issue, and the one we are called upon to decide, is: What was the contract of sale between the plaintiffs and the defendant Carroll as to the materials furnished by the former to the latter to be used on the property subsequent to the date when Owings went to the asylum. The question is an exceedingly narrow one of fact, and rests upon a large mass of contradictory testimony, to support an oral agreement between the parties, alleged to have been made by the appellant Carroll and the appellees in November, 1905, shortly after Owings was sent to the hospital for treatment. The contention of the plaintiffs is that the defendant Carroll, under the oral contract of November, 1905, agreed to pay for all the material furnished for the completion of the contract for the erection of the house and stable. The defendants claim and insist that Carroll, the

owner, only agreed and contracted to pay for such material as was necessary to continue the work during the time Owings was in the hospital, and not able to look after the work; that Carroll should have charge of the work and be liable to pay for materials only so long as the contractor was at the asylum, and until he resumed work. Now, it appears from the undisputed testimony that the contractor left the hospital between the 15th and 20th of December, and resumed work on the buildings shortly thereafter, in the early part of January. It also appears, by the uncontradicted proof, that Carroll paid the bills for materials furnished by the plaintiffs during the time Owings was in the hospital, and an additional sum of \$500 was paid by check to Owings on January 26, 1905, and turned over to the committee for the benefit of Owings' creditors. This check is indorsed by both Owings and by the plaintiffs Macarthy & Harper. The claim of Waters & Co., as allowed by the court below, is based on a bill for lumber furnished on February 23, 1906, for \$10.50, and on March 7th amounting to \$421.58. The other items amounting to \$174.62, and alleged to have been furnished after the last-named date, were disallowed. The claim of Macarthy & Harper consists of hardware furnished from March 29, 1906, to July 11th, amounting to the sum of \$210.34 and was allowed in full by the decree of court dated the 8th of October, 1907.

Upon the main question in the case—and that is, did the owner of the buildings, Carroll, agree to become responsible for all the materials furnished by the plaintiffs, or did he only become liable for the materials furnished while the contractor was in the hospital and resumed the work again—the testimony is very contradictory and absolutely irreconcilable. The record is a voluminous one, and contains a large mass of testimony, contradictory not only on the principal questions at issue, but upon nearly all the details that could throw any light upon the real intention and understanding between the parties to the alleged oral agreement. It would then answer no good purpose for us to discuss it here, or to attempt to reconcile the conflicting statements of the witnesses for both the plaintiffs and the defendants. We fully concur in the conclusion reached by the court below in that part of its opinion wherein it is stated: "In view of the very conflicting testimony referred to, I am forced to accept what appears from all the facts and circumstances to be the most reasonable contention of the two above set out; i. e., that the defendant would be responsible for such materials as would be necessary to continue the work during the time Owings was in the hospital and unable to look after the work." The burden of proof was upon the plaintiffs to establish the contract upon which they sought to recover, and, without discussing the testimony in the record, we are of opinion that the evidence is not only insufficient

to support the plaintiffs' contentions, but the weight of evidence affirmatively sustains the defendants' position that the parties agreed that Carroll should have charge of the work and be liable to pay only for materials so long as Owings was in the asylum and until he resumed work. This conclusion practically disposes of the case, because the lumber and hardware furnished by the plaintiffs to be used on the buildings and included in their lien claims was confessedly furnished after Owings left the hospital and after he resumed work, and clearly could not have been covered by the terms of the oral contract between the parties; and this being the contract, as established by the evidence, and by the ruling of the court below, Carroll's responsibility for materials furnished ceased and terminated when Owings left the asylum and resumed the work. The fact, then, that Owings resumed the work upon the buildings under the original contract, after he returned from the asylum, necessarily terminated the contract, and relieved him from any further liability to the plaintiffs.

There was no reason or necessity for Carroll to give notice to the plaintiffs when Owings resumed work, as ruled by the court below, because there is no evidence to show that "notice" to this effect was a requirement of the agreement. Mr. Carroll testified: "I made no agreement to notify any one, and I did not notify any one until Mr. Waters sent his bill (in March, 1906), as I did not think it was necessary under the agreement I made." But, as a matter of fact, the record shows that the plaintiffs had actual knowledge of the fact that Owings had resumed work on the buildings before the materials now in dispute were furnished. The firm of Waters & Co. accepted orders in Owings' handwriting, as far back as January 10, 1906, and Macarthy & Harper received the January check for \$500 as early as January, payable to the order of Owings, and indorsed by him to them. Mr. Waters testified, as to the order of January 10th, that Mr. Owings was out and had just as much charge of the job as he ever had. The bill of March 7th, amounting to \$421.58, was ordered by Owings of Waters & Co. in person, and both the plaintiffs had personal knowledge from interviews and their course of dealings with Owings that he had resumed work under the original contract. Upon this state of facts, it is clear that the plaintiffs had actual knowledge of the very fact, which the court held it was necessary for the defendant to give them notice before he could be relieved of the responsibility. Besides this, there was no stipulation in the oral contract that notice should be given the plaintiffs of the resumption of work by the contractor, and, under the facts of the record, the notice held by the court to be necessary to support a recovery would have been nugatory, and of a fact the plaintiffs already had knowledge.

We are therefore of opinion, upon both the

law and evidence, that the court below committed an error in allowing the plaintiffs' claims as liens in this case, and, as it follows from the conclusion we have reached upon the record that there can be no recovery, upon the claims filed by the plaintiffs, the decree of the lower court will be reversed, and the bill dismissed.

Decree reversed and bill dismissed, with costs.

(108 Md. 427)

**HARRISON v. McLAUGHLIN BROS., Inc.**  
(Court of Appeals of Maryland. June 24, 1908.)

**1. CONTRACTS—BUILDING CONTRACTS—ARCHITECTS—COMPENSATION—PERCENTAGE.**

An architect contracted to furnish plans and specifications, and, in addition, to supervise the construction of the building, for which he was to get 10 per cent. of the total cost. There was a recital in the contract that by the estimates the cost would not exceed \$12,000. *Held*, that there was nothing in the contract, in the absence of a showing of want of good faith on the part of the architect, to prevent him from recovering the 10 per cent. on the total cost, which exceeded \$12,000.

**2. SAME — CONSTRUCTION — APPROVAL OF WORK—PARTIES BOUND.**

A firm of contracting architects and engineers contracted to erect a building in consideration of 10 per cent. of the total cost, estimating the cost to be \$12,000. By reason of extra work, the firm claimed 10 per cent. on an amount over the \$12,000. The contract provided, as to extra work, that the "owner reserves the right, through the architect, to make any additions to, or deductions from, the work, without impairing the contract, but no work shall be considered extra work unless a written order directing the same to be executed is issued, signed by the architect, and approved by the owner." *Held*, that the provision, in view of other provisions of the contract, such as speaking of the parties as principal and agent, requiring condemned material to be removed by the contractor with the approval of the architect, did not refer to the firm, but referred only to contractors to whom the firm might sublet the work, and hence did not affect its right to compensation on the extra work.

**3. SAME—RECOVERY OF COMPENSATION—FORM OF REMEDY.**

Where a contract, under seal, for the erection of a building, makes no provision for extra work, a claim therefor must be sued on in *assumpsit*.

**4. SAME.**

Where a building contract does not provide for compensation for extra work, and, the contract being under seal, the extra work must be sued for in *assumpsit*, the agreement as to the compensation fixed in the contract will control as to the compensation for the extra work, where practicable.

**5. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In an action by an architect for commissions on extra work done under a contract which limited his commissions to 10 per cent., the admission of evidence as to what was usually paid for extra work, though irrelevant, is harmless, where the jury were instructed to limit the commissions to 10 per cent., and the verdict was only for that amount.

**6. CONTRACTS — BUILDING CONTRACTS — ACTION FOR COMPENSATION — EVIDENCE — ADMISSIBILITY.**

Where, in an action by an architect to recover commissions on extra work, in which the

defense was that the architect had estimated the cost at \$12,000, but that the building cost nearly 80 per cent. more than that, and by contract the architect was made the agent of the owner, it was proper, on the question of the good faith of the architect as such agent, to show what would be the usual way in which a contractor would estimate the cost of a building, where the plans and specifications had been submitted to him, so as to show that the cost was reasonable.

**7. SAME—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.**

In an action by an architect for the balance due on commissions, for acting as agent of the owner in erecting a building, in which the defense was the increase of cost by extra work which was beyond the estimate made by the architect, a prayer given on the theory that defendant had approved the orders of plaintiff for materials, and the pay rolls for labor, and accepted the building, held supported by evidence that weekly statements were rendered to plaintiff, showing the amount of the pay rolls, cost of materials, etc., and that checks were given by the defendant to cover the amounts, and that plaintiff made payments covering all costs, excepting a balance of \$665, and made no objection at any time to the character of the work, or the expense, and explained his failure to make certain payments by "tight money," and that no extra work was done without a detailed statement to defendant.

**8. SAME.**

The evidence also sufficiently showed that a sum certain was due to plaintiff for labor and material furnished by plaintiff to defendant so as to sustain a prayer on that theory.

**9. SAME—SET-OFF—TESTIMONIAL.**

In an action by an architect for the balance due on commissions for the erection of a building, in which defendant set off against the claim a testimonial to plaintiff given in consideration of the amount due, a prayer, submitting the issue of the fraudulent character of the testimonial, is supported by evidence that defendant stated that he willfully violated his conscience in giving the testimonial, and that he could not conscientiously give it, but that, on thinking it over, he thought it better to "boost them along."

**10. SAME—VALIDITY—LEGALITY OF CONSIDERATION—FRAUD.**

In an action by an architect for the balance of commissions due on the construction of a building, a testimonial given by defendant to plaintiff in consideration of the waiver of the balance, which is false in its statements, and would be a fraud on the public, is no defense to the action for the balance.

**11. TRIAL—INSTRUCTIONS—REQUEST.**

The rejection of a prayer which is fully covered by another prayer given is not error.

Appeal from Baltimore City Court; CH. E. Phelps, Judge.

Assumpsit by McLaughlin Bros., incorporated, against Albert W. Harrison, to recover commissions on the cost of the construction of a building. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

Benj. H. McKindless, for appellant. William J. Ogden, for appellee.

BOYD, C. J. This is an action of assumpsit by the appellee against the appellant for a balance alleged to be due for labor done

and materials furnished under an agreement to build a warehouse. The parties entered into a written contract, under seal, which recites that the party of the first part (appellant) contemplated erecting a factory building upon land owned by him, that the parties of the second part (appellee), described as constructing architects and engineers, had prepared plans and specifications for the erection of the building, "and have prepared estimates of the cost thereof, and by such estimates the entire cost of said building, including plans, specifications, supervision and commission, will not exceed twelve thousand dollars." It was agreed that the appellee would furnish the plans, specifications, and details for construction, superintend the erection, and "purchase on behalf of and as the agents of the party of the first part all the necessary materials, and likewise employ all necessary labor and incur all other necessary cost for the proper construction of the said building according to the said plans and specifications." The appellee also agreed to furnish the appellant a weekly statement of all materials purchased, of all labor employed, and every other reasonable statement required by him. The appellee agreed to render faithful service to the appellant, to purchase the materials, and employ the labor at the lowest possible cost, and not take for itself any discounts on materials furnished, or labor supplied, but to give the appellant the benefit thereof and of any wholesale prices the appellee might obtain. After providing for a liability policy, to be procured by the appellant, but to be included in the total estimate for the construction of the building, these provisions follow: "The party of the first part on Saturday of each week will furnish the necessary money to carry on such work and pay for material and for the weekly payment of labor and all other actual expense as the same shall be required by the party of the second part. The party of the first part agrees to pay to the party of the second part for all services in connection with the said building, so rendered or to be rendered by the party of the second part, including the furnishing of plans, drawings, elevations and specifications, an amount equal to ten per cent. of the total cost of the building. The plans and specifications referred to in this contract are the same plans and specifications which have been submitted to the party of the first part by the said second party and are referred to in this contract with the same force and effect as though they were annexed hereto."

It will thus be seen that the appellee was to act as agent of the appellant in purchasing materials, employing the necessary labor, and incurring all costs, and that the appellant was to pay it for all its work, including plans, specifications, supervision, etc., "an amount equal to ten per cent. of the total cost of the building." Although there is a recital in the contract that by the estimates

the entire cost would not exceed \$12,000, there is no covenant or agreement that it should be so limited, and the plaintiff's testimony tends to show that the increased cost was the result of changes made by the appellant, having rented the building for a chocolate manufactory, instead of for a laundry and other purposes originally intended. Mr. McLaughlin, secretary and treasurer of the appellee, testified that the changes entailed an additional cost of \$5,430.90, including a foundation, which it was thought would not be necessary. The account filed with the declaration states the total cost of the building, including the 10 per cent., to be \$17,037.25, and allows credits paid by the appellant amounting to \$17,021.85, leaving a balance claimed to be due of \$665.40.

One of the questions which entered largely into the trial of the case was whether the plaintiff could under the contract recover commissions on the cost above the \$12,000. We have already intimated that there is nothing more than an estimate of the cost in the contract; but, of course, the appellee, as agent of the appellant, was required to act in good faith and render faithful service to him. If the jury believed the testimony of the plaintiff, as to the cost of the changes which were made at the instance of the defendant, there was little or no room to question the good faith of the appellee on that ground, and, unless the contention of the appellant is correct, that the changes were not authorized by reason of a provision in the specifications, made part of the contract, there is nothing to prevent a recovery of the "ten per cent. of the total cost of the building." The provision referred to is: "The owner reserves the right, through the architect, at any time during the progress of the work, to make any additions to or deductions from the work without impairing the contract, but no work shall be considered as 'extra work' unless a written order directing the same to be executed is issued, signed by the architect, and approved by the owner, and given to the contractor." Although the court below seems, by granting the appellant's eighth prayer, to have adopted his theory as to that provision, it seems to us to be clear that it is not applicable to what was to be done by the appellee. James McLaughlin testified, without objection: "That the first nine pages and the first three lines of the tenth page of the typewritten copy of the specifications were intended to apply to such contracts for special portions of the work that they might find it desirable to have done by contract, rather than to do the work themselves as the agents of the defendants. That such contracts were let during the progress of the work, as, for instance, the painting, plumbing, roofing, and stone work. That only that portion of the specifications below a dotted line on page 10 and the succeeding pages of the specifications were intended to

apply to the work of the plaintiff in the contract of March 30th."

The provision with reference to "extra work" is above the dotted line, and it would seem to be clear that it was not intended to apply to the arrangement between the appellant and the appellee excepting where contracts were let to others. The contract itself in terms speaks of the relation between them as that of principal and agent, and not that of contractor and contractee. The appellee was the architect, and it would have been remarkable to require it to give a written order "directing the same (extra work) to be executed" by itself as "contractor." There are many provisions in the specifications before this clause which conclusively show that the appellee was not understood to be the "contractor." For example, the contractor is required to remove materials, etc., condemned by the architect, and substitute for them satisfactory materials, etc., and if the removal was not begun in 24 hours after notice, the architect was empowered to remove them at the expense of the contractor, and all costs were to be deducted from moneys due or to become due on the contract. As the appellee was the architect, it surely was not the contractor within the meaning of that provision, as it would have been absurd to provide for its condemning its own materials, replacing them with others, and deducting the cost. These and other provisions would be in direct conflict with the terms of the written contract, and we must assume that the uncontradicted statement of Mr. McLaughlin gave the correct version of the intention of the parties.

Before considering the exceptions, it would be well to observe that the fact that the original agreement was under seal does not prevent the suit in assumpsit, for the balance due, from being maintained. Under our construction of the agreement there was no provision for extra work, except as applicable to other contractors, and hence there could be no recovery for it under that agreement; but it must be recovered, if at all, in assumpsit. 1 Poe, § 150. The evidence on behalf of the plaintiff was that new plans were made out, and the work was done according to them. There was unquestionably evidence tending to show that the extra work was done at the instance of the defendant, and that it was accepted by him. But even if it be conceded that the original agreement was not waived and a new one substituted for it, the recovery sought in this case is for the balance of the excess over the \$12,000 contemplated by that agreement. The defendant testified that he had paid the "commission up to \$12,000, and a fraction over, but not much," and, as he had paid all except the balance of \$665.40, it is manifest that the plaintiff was seeking to recover for a part of the "extra work," which we have said could not be recovered by an action of covenant on the agreement under



seal because it is not therein provided for. It is proper, however, that the commission fixed by the agreement control the parties. As is said in 1 Poe, § 103, in reference to recovery for extra work not specified in the contract: "If the original contract has not been lost sight of in the work as actually done, it will be applied as far as it can be traced; and the contract prices shall govern, even as to the extra work, wherever practicable. Nor will the jury be warranted in departing from the contract prices, except in cases where the cost of the work or materials has been enhanced by the fault of the defendant." An action of assumpsit might also be sustained on the ground that the plans referred to in the agreement were abandoned and new ones substituted by parol agreement, under such cases as *Watchman v. Crook*, 5 G. & J. 239; *Insurance Co. v. Hamill*, 5 Md. 170; *Orem v. Keelty*, 85 Md. 344, 36 Atl. 1030. Having said this much in reference to the contract and specifications, and of the form of action, some of the questions raised will be simplified, and we will now consider the exceptions in the order they are found in the record.

1. The first was to the following question: "You have answered a question that I did not ask you, but I will now ask you what is the usual commission charged by builders where they supply plans and specifications and supervision on a percentage on the cost of the work?" It is difficult to see the relevancy of that question, unless it was, perhaps, intended to reflect upon the good faith of the appellee. The answer was: "From 10 per cent. to 15 per cent." But as the prayer granted on behalf of the appellee expressly limited the amount to 10 per cent., and that is the sum fixed by the contract, and the verdict was only for that amount and interest, the appellant was not injured, and hence there was no reversible error in allowing the question.

2. At the conclusion of the plaintiff's case, the defendant made a motion "to exclude from the consideration of the jury the testimony of the witness McLaughlin and the testimony of the witness Dowd fixing the cost of the erection of the plaintiff's warehouse upon the basis of the measurement thereof as testified by said witnesses." The testimony intended to be excluded by the motion had been admitted subject to exception. The witnesses had undertaken to show what would be the usual way in which a contractor would estimate the cost of a building where the plans and specifications had been submitted to him. They replied that it was by ascertaining the cubic feet of the building, and then figuring so much per cubic foot. As the contract had provided for the compensation of the appellee, it was not necessary, or proper, to show what the building would cost by the usual methods, unless it be for the purpose of reflecting upon the good faith of the appellee. As it

was the agent of the appellant, and the latter's theory was that the former had subjected him to an expense of over 30 per cent. more than the building was to cost, the appellee was called upon to explain what caused it and to show that it did render faithful service to the appellant. The appellee did not claim that it was entitled to recover more than the contract allowed it; but, on the contrary, Mr. McLaughlin said that "the price Mr. Harrison gave was a fair price," referring to the actual cost, as claimed by his company; but, as reflecting upon the question whether the cost was reasonable, he and the witness Dowd were permitted to show what the ordinary cost would have been. Under the circumstances, we do not see how the appellant was injured by the refusal of the court to strike out the testimony.

3. The plaintiff offered 5 prayers, which were granted, and the defendant offered 23, all of which were rejected except his second, eighth, fifteenth, and sixteenth. A motion was also granted to exclude certain testimony of the defendant and his witness Welsner, and the court overruled special exceptions of the defendant to the plaintiff's first, second, and fifth prayers. We do not feel called upon to discuss all of these prayers separately, and can perceive no valid reason for having so many in a case of this character.

The plaintiff's first prayer was properly granted. There was a special exception to it "because there is no evidence in this case legally sufficient to support the theory of said prayer that the defendant had approved the orders of the plaintiff for materials and the pay rolls for labor and accepted the building." Mr. McLaughlin testified: That the building was accepted by the defendant; that during the entire progress of the work weekly statements were rendered to him showing the amount of the pay rolls, cost of materials, and for work subcontracted, to which was always added the 10 per cent. for commission, for which the defendant gave his checks covering the amounts; that on August 10th there was an unpaid balance of \$247.90, and after that there was always an unpaid balance, so that on September 30th there remained unpaid a total of \$2,765.40. He said: That afterwards, to wit, on September 30th, October 31st, December 16th, and December 19th, the appellant made payments amounting to \$2,100, leaving a balance due of \$665.40; that "at no time did the defendant ever complain to the plaintiff or find fault or make objections to the character of the work, or the expense, but, on the other hand, explained his shortage by tight money, and promised to pay shortly." He also testified that, while he did not go over with the defendant any special estimate for additional costs, arising from the change of the plans, he did send him detailed statements of every item of cost including the items for such additional work,



which statements were on a printed form, on the top of which was: "This is a copy of an order sent to you to-day charged to you as shown. If this is not satisfactory, kindly notify us at once." "That no work or expenditures ordered by the plaintiff, whether performed by the plaintiff directly or contracted for by a contractor under a bid for such work, was done until it had first been submitted to the defendant on the form containing the words" above quoted. Therefore there was ample evidence to be submitted to the jury.

The special exception to the second prayer, on the ground that there was no evidence legally sufficient to prove any certain amount due and owing by the defendant for labor and materials furnished the defendant by the plaintiff, was also correctly overruled. The plaintiff testified, as we have seen above, that he furnished the defendant with statements of what was due, and after the payments made on and after September 30th there was still due \$665.40, including the commission, and the figures given in the testimony enabled the two to be easily separated, if desired, although that was not necessary. The plaintiff's first, second, third, and fourth prayers were properly granted.

The fifth prayer and plaintiff's motion to strike out the evidence admitted subject to exceptions, in reference to a testimonial letter given October 24, 1904, will be considered together. In that letter the appellant said: "In reply to yours of the 22d inst. would say that my dealings with your company have been very pleasant indeed. Previous to meeting your representative I had plans and estimates from four or five contractors for a three-story building to be erected on my lots 15 and 17 S. Frederick street, on which your firm built me a four-story bldg., costing somewhat less than the estimates I had from others on the three-story bldg." This prayer instructed the jury that if they found that the defendant admitted that this letter "was untrue in fact and known to him to be untrue, and that in giving it he violated his conscience, then such an admission amounts to a total failure of consideration and cannot be considered by the jury as a set-off or recoupment against the plaintiff's claim." The motion was "to exclude from the consideration of the jury, and to strike out as inadmissible, that portion of the testimony of the defendant and his witness Welsner which was offered to show the sale of a written testimonial by the defendant to the plaintiff as a set-off to the plaintiff's claim." The prayer was excepted to on the ground that there was no legally sufficient evidence to support the statement in it, but the defendant's testimony on the subject is as follows: "Q. What did you mean when you said to Mr. Welsner, when he asked for the testimonial, that you could not do it conscientiously? A. I felt they were not entitled to it, and I could not give the letter with a

clear conscience, unless they were entitled to it. Q. Did you give it to them? A. I did after thinking it over. Q. You willfully violated your conscience? A. Yes, we often do that. You often do this; you change your mind. When you are going to whip a child sometimes, you change your mind and don't." He also said in chief that he told Welsner: "I cannot conscientiously give those people, or your people, a letter of indorsement." And again: "I thought I had better overlook this matter, as they were willing, and bury it, and I thought I had better give them a little letter and boost them along." The defendant had testified that he wrote the letter in consideration of the plaintiff agreeing not to charge the commission in excess of \$12,000. The special exception was properly overruled, as there was ample evidence to sustain it.

The remaining question is whether the prayer should have been granted and the testimony excluded. The plaintiff was a new company in Baltimore seeking to get work, and there can be no doubt that the letter was calculated to deceive the public, if the appellant's opinion of the appellee was correct. If he owed this \$665.40, as the jury has found he did, he was, according to his statement, to be paid that sum for furnishing an untrue testimonial, and we are met with the question whether the law will sustain an alleged contract, which is based on such a consideration—a false statement calculated to impose on the public. Mr. McLaughlin denied that the letter was given for that consideration, and it is at least doubtful whether he had authority to discharge a debt due the company in order to procure such a letter. The prayer is peculiarly drawn, but we understand the object of the appellant, in introducing the evidence, was to escape payment of the balance due by showing that he had already paid it by the testimonial letter, although he admits that he believed what he wrote in the letter was untrue. To permit that to be done would be introducing a somewhat novel, but exceedingly dangerous, method of payment into business transactions. As we have indicated, the only use the letter could be to the appellee was the inducement to others to employ it, and if the letter was false, and known to the appellant to be so, it would necessarily have a tendency to impose on the public. The burden was on the appellant to prove payment, after the appellee had made out a prima facie case, and to permit him to use the letter for such purpose would be giving him the affirmative aid of the law in enforcing a contract based upon an alleged consideration which had as its basis nothing but an attempted fraud upon the public—dealing with it from the standpoint of the appellant. It is well settled that an agreement to perpetrate a fraud upon a third person is illegal and void, and an "agreement which is intended, or directly tends, to defraud the public generally, even though it may not amount to a criminal con-

spiracy, is illegal and void." 9 Cyc. 469. See, also, 15 Am. & Eng. Ency. of Law, 944. Such an agreement is in violation of the rules of the common law. So without regard to the particular form of the prayer, or of the motion, as the result was to exclude from the consideration of the jury evidence which the appellant's own testimony had made illegal, and such as the law condemns, the action of the lower court will be sustained.

The defendant's second prayer, which was granted, gave him the benefit of all he was entitled to on that subject, and therefore the rejection of the first was not reversible error. From what we have already said, the third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, thirteenth, fourteenth, seventeenth, eighteenth, nineteenth, and twenty-first were properly rejected, and need not be further discussed. The one marked 11½ and the twelfth, which refer to the letter of October 24th, were also properly rejected for reasons stated above. The one called 11½ was properly rejected, without giving other reasons, because there was no evidence that the plaintiff agreed, at or about the time the cost of the warehouse had reached \$12,000, that he would not charge commission on the amount in excess of that sum. The building was completed early in September, and the appellant swore that when he wrote the letter of October 24th the appellee agreed to abate the commission, and, as we have seen, the agreement to abate was, according to the appellant, in consideration of that letter being given. The twentieth was properly rejected. In the first place, in the absence of some evidence to the contrary, the presumption is that the building inspector did his duty; but as the case was tried more than three years after the building was completed, and there was no suggestion in the evidence that the changes made were not approved of by the inspector, or that the appellant in any way sustained injury by the changes not being approved, if they were not, we cannot understand upon what possible theory such a prayer could have been granted.

Being of the opinion that there was no reversible error in any of the rulings of the court, the judgment will be affirmed.

Judgment affirmed; the appellant to pay the costs above and below.

(220 Pa. 591)

#### EDSALL v. JERSEY SHORE BOROUGH.

(Supreme Court of Pennsylvania. April 20, 1908.)

#### 1. MUNICIPAL CORPORATIONS — CHANGE OF GRADE—ASSESSMENT OF DAMAGES.

A street railroad in laying its tracks in a borough changed the grade of the street without authority. Thereafter the borough adopted the new grade and laid a pavement on the street. *Held*, in a proceeding to assess damages for such change of grade, evidence as to effect on value of abutting property will be confined to the date of the adoption of the new grading by

the borough, and not to that of the construction by the railway.

#### 2. SAME—EVIDENCE.

In assessing damages by change of grade in a street, evidence that the change was a part of the general improvement is admissible.

#### 3. SAME—ACTS OF BOARDS.

Where an official board desires to exercise the authority given it by law, it must do so as a body at a meeting duly called as authorized by law.

#### 4. SAME—CHANGE OF GRADE—ASSESSMENT OF DAMAGES.

A street railway changed the grade of a street in laying its tracks, and in a proceeding to assess the damages on a subsequent change of grade by the city a profile map was produced by an officer of the company. *Held*, properly excluded, where there was no evidence that it had been approved by the borough, or that the change of grade had been authorized by the borough.

#### 5. SAME.

In assessing damages for change of grade of a street, evidence of the cost of raising plaintiff's house and lot to a new grade was inadmissible.

Elkin, J., dissenting.

Appeal from Court of Common Pleas, Lycoming County.

Action by Annie A. Edsall against the borough of Jersey Shore. Verdict for defendant, and plaintiff appeals. Affirmed.

At the trial, when P. L. Barker was on the stand, the following offer was made: "Counsel for plaintiff offer to prove by the witness on the stand that, he is a civil engineer and supervisor of purchases and buildings upon the New York Central Railroad, that it is his business to give estimates on buildings, that the Edsall building requires to be raised to grade, and to prove by the witness the cost thereof, so far as the witness can testify. (Objected to by counsel for defendant for the reason that the criterion or measure of damages is the market value of the property, affected by the injuries complained of; that the witness is unable to give the market value of the property in question before or after the alleged change of grade; and that therefore the offer now made is irrelevant, incompetent, and immaterial.) The Court: When a witness goes upon the stand and is able to give the market value of property, both before and after the change, it is competent to show by him of what items his estimate was made up, but to introduce it as a distinct proposition, independent of the question as to whether or not the change affected the market value of the property as a whole, is a different proposition. For the present the objections are sustained, to which the plaintiff excepts, and at her request an exception is noted and bill sealed."

When F. T. Wilson, a civil engineer of Jersey Shore borough, was on the stand, he was asked this question: "Q. (by Mr. Munson) Let me understand: These grades you have talked of were all between Main street and Depot street? A. Yes, sir. Q. Now, the grade past Mrs. Edsall's property? A. I graded everything clear on up to the end of

the street, graded everything for the street car company, but the council had approved of all these things, different members of it. Sometimes they would send a committee of one, two, or three, whatever it might be, to settle on these things, to see whether there were any disagreements. On several occasions there were disagreements, but we settled them up by compromise or otherwise. I haven't got my working plans here. (Counsel for the defendant object to so much of the testimony of the witness on the stand as refers to any approval by individual members of council as not binding on the borough of Jersey Shore.) The Court: We sustain that objection. One member of council cannot bind the body, unless he is authorized to do so by the body for the purpose of doing what he undertakes to do. To which the plaintiff excepts, and at her request an exception is noted and bill sealed."

Thomas J. King, superintendent of construction for the Jersey Shore Electric Railway Company, was asked this question: "Q. In what building does the council of Jersey Shore borough meet? A. In the borough building there. Q. Were you notified of their meetings from time to time and were you invited to be there? A. I was invited to attend meetings. Q. By the borough council? A. Some of the borough council. Q. In pursuance of such invitation were you present with your profile map on this occasion? A. Yes, sir. Q. What action did council take upon the profile map submitted by you? (Counsel for the defendant object, because the best evidence is the record of council itself.) The Court: The objection sustained; to which the plaintiff excepts, and at her request an exception is noted and bill sealed."

The court, it is claimed, erred in rejecting the offer of proof by the witness Daniel Smith, which offer, objection thereto, and ruling of court thereon is as follows: "Q. You were asked on the stand this morning the cost of raising the house of Mrs. Edsall, the actual cost of it. Have you figured on the cost since? A. I have figured on it some; yet, sir. Q. How much would it cost to raise the house to grade? (Counsel for defendant object to the question and ask counsel for plaintiff what he proposes to prove by the witness on the stand. Counsel for plaintiff offers to prove, by the witness on the stand and others, the cost of raising the property of the plaintiff to grade and filling the lot, for the purpose of giving the jury information as to the damage, or approximate damage, that may have been sustained by the plaintiff. Counsel for defendant object to offer: (1) Because this is not the proper means of ascertaining the plaintiff's damages; that evidence as to the cost of filling the plaintiff's lot, or raising her residence, cannot be allowed as part of the damages recoverable. (2) Because incompetent, irrelevant, and immaterial.) The Court: The objections are sustained, and the evidence rejected; to which

the plaintiff excepts, and at her request an exception is noted and bill sealed."

Plaintiff presented these points:

"(1) If the jury find from all the evidence that the grade of Allegheny street in front of the plaintiff's property was changed by the defendant in the fall of 1902, then the plaintiff is entitled to recover such damage as she may have suffered by reason of the change of the grade of the street as of that date. Answer: The evidence on the part of the plaintiff being that the grade of the street was changed without authority of the councils of the borough of Jersey Shore, in the fall of 1902, but that the change of grade thus made was substantially adopted by the defendant when the grading of the street was done preparatory to paving the same, in the year 1905, the damage, if any, to the property of the plaintiff occasioned by the change of grade must be estimated as of the time when the grading was completed and the pavement thereon laid, taking into consideration the market value of the property immediately before the grading was commenced in 1902, and the market value of the property when the grading and paving of the street were completed, in 1905.

"(2) If the jury find from the evidence that the defendant commenced the change of grade of Allegheny street in front of plaintiff's property in September, 1902, and such change of grade was not completed until 1905, then the plaintiff is entitled to recover the damage which she sustained from the defendant as of the date of the commencement of said change of grade. Answer: This point is refused for the reasons above given in the answer of the court to the plaintiff's first point.

"(3) That in the assessment of damages for the injuries sustained by the plaintiff's property, by the change of grade of Allegheny street in front of her property by the defendant, any benefits conferred upon the plaintiff's property by reason of the subsequent paving of Allegheny street by the defendant cannot be taken into consideration in this action, and such benefit is not a set-off against nor can it be used in mitigation of the damages which the plaintiff is entitled to recover by virtue of the change of the grade in front of her property, which she is seeking to recover in this proceeding. Answer: This point is refused."

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

N. M. Edwards, for appellant. C. La Rue Munson (W. R. Peoples, on the brief), for appellee.

POTTER, J. This was an issue framed upon an appeal from the report of viewers to determine the amount of damages sustained by plaintiff by reason of a change in the grade of a borough street in front of her property. The plaintiff was the owner of a house and lot located on the north side of

Allegheny street in the borough of Jersey Shore. The lot was lower than the level of the street and sloped away northward to a stream at its rear. When plaintiff built, the lot was filled so as to be above the grade of the street, which was then unpaved and only a dirt road. In 1902 the Jersey Shore Electric Railway Company laid car tracks on Allegheny street in front of plaintiff's property, and in doing so raised the grade of the street some three feet, bringing it above the grade of plaintiff's lot. There was no evidence that this change was officially authorized by the borough, nor did it take any part in the work; but in 1905 the borough adopted the new grade and laid a brick pavement on the street in front of plaintiff's property at that grade. After the work of laying this pavement had been completed, plaintiff filed her petition for viewers to assess her damages caused by the change of grade. She appealed from their award, and upon the trial the court below instructed the jury that the proper measure of damages was the difference between the market value of the plaintiff's property in 1902, immediately before the change of grade, and in 1905, after the work of paving had been completed. There was conflicting evidence as to the depreciation in value; defendant's witnesses testifying that there had been no damage suffered by plaintiff, and some saying that the change resulted in an enhancement of the value of the property. The jury found that there was no damage, and rendered a verdict for defendant.

Counsel for appellant contend that the damages should have been assessed as of the date of the change of grade in 1902, taking the market value before and after the construction of the street railway; but there is no evidence as to the value of the property immediately after the construction work which was done in 1902. When plaintiff was on the stand, the court confined her testimony to value after the paving was completed in 1905. Exception was taken to this ruling at the time, but it is not assigned for error, and the case stands without any testimony from which the jury could have found the market value in 1902. Nor was there any evidence of any official action by the borough authorizing any change of grade in 1902. Formal action by the borough, adopting the new grade, was not taken until 1905, and upon that depends the right of plaintiff to recover here, so that, when the market value in 1902 was permitted to be taken into consideration, the court below gave the plaintiff more than she was entitled to.

Counsel for appellant complains, also, of the fact that the improvement caused by paving was taken into consideration; but the question to be determined here was as to the depreciation in value, if any, caused to the plaintiff by the entire improvement, and, in order to ascertain this, the testimony of all the witnesses for plaintiff as to the value

of the property in 1905, as affected by the change of grade, very properly took into consideration the completed paving. That was an essential part of the scheme. There was no evidence of the value of the property without the paving, and therefore nothing to sustain the plaintiff's third point, which asked for instructions that the value of the property was to be considered without reference to the paving. Every part of a general scheme of improvement which would affect the value of the land is proper for consideration. In *Bond v. Philadelphia*, 218 Pa. 475, 67 Atl. 805, which was a proceeding to assess damages caused by the change of grade of a street, we held that it was proper to admit evidence that the change was part of a general scheme of improvement, which included the establishment of a public park in the neighborhood.

The trial court was also clearly right in excluding testimony as to the acts of individual members of the borough council, unless coupled with proof of express authority. The general rule is thus stated in 2 *Abbot on Mun. Corp.* (1906) § 655: "Official authority or power must be exercised not only in the manner prescribed by law and in the name of the public, but also, when exercised by an official board or body, by that board or body acting as such at a meeting duly called and authorized by law and at which under the law or regular rules of procedure, particular action can be taken."

The testimony of the witness King, superintendent of construction for the street railway company, who was called for the purpose of showing by parol the action of the borough council, authorizing the laying of the railway tracks, was also properly stricken out, for the reason that he did not undertake to say his profile map was approved officially, and on cross-examination the witness said he knew of no official action of council approving any map, or on the question of any grade, and he admitted that the authority to go ahead was given by some one individual member of council, but who it was he did not remember. The rejection of evidence of the cost of raising plaintiff's house and lot to the new grade is directly in accordance with the decision in the recent case of *Bond v. Philadelphia*, 218 Pa. 475, 67 Atl. 805, in which the case of *Mead v. Pittsburg*, 194 Pa. 392, 45 Atl. 59, cited by the court below in the present case, is also approved and followed. In the former case we held that, where a change of grade left the lot further below the grade than before, evidence of the cost of filling so as to bring the lot to the new grade was not admissible. Our Brother Stewart said (page 479 of 218 Pa., page 808 of 67 Atl.): "It is impossible to understand how any such inquiry as that proposed would aid the jury in ascertaining the difference in market value before and after the change. It ought to be quite as easy to determine the market value of a lot 16 feet below the sur-

face of the street it adjoins, as the market value of one only five feet below. \* \* \* If this be so, and we see no reason why it should not be, any inquiry as to the cost of filling would be irrelevant and of no help in the determination of the real question."

We see nothing in the record of this case which affords appellant any just cause of complaint.

The assignments of error are overruled, and the judgment is affirmed.

ELKIN, J., dissents, on the ground that the borough council accepted the responsibility for the change of grade made by the street railway company by afterwards paving the street at that grade.

(220 Pa. 634)

**EXCELSIOR SAVING FUND v. COCHRAN et al.**

(Supreme Court of Pennsylvania. April 20, 1908.)

**1. MORTGAGES—FORECLOSURE—PROCEDURE.**

Act July 9, 1901 (P. L. 614), amended by Act April 23, 1903 (P. L. 261), making the owner of mortgaged land a party to the sci. fa. sur mortgage proceedings, does not affect the jurisdiction of the courts, but is a regulation only of service necessary in such proceedings.

**2. SAME—QUESTIONS DETERMINED—TITLE TO PROPERTY.**

Act July 9, 1901 (P. L. 614), making owner of the property a party to sci. fa. sur mortgage proceedings, as amended by Act April 23, 1903 (P. L. 261), does not authorize the determination of questions of title to real estate on the enforcement of a mortgage debt by scire facias, and therefore the judgment following is not a lien on any land not owned by the mortgagor.

**3. ESTOPPEL—BY DEED—MORTGAGEES.**

Where on scire facias sur mortgage the case proceeds only against the owner, the latter cannot show superior title in him to the premises described in the mortgage independent of any that could be asserted for the mortgagor, and that the mortgagor was without interest in the land that could be made subject to the lien.

Appeal from Court of Common Pleas, Delaware County.

Action by the Excelsior Saving Fund against I. Engle Cochran, Jr., and Lydia Gibbons. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Jos. H. Hinkson, for appellants. O. B. Dickinson and W. B. Harvey, for appellee.

STEWART, J. This was an action of scire facias sur mortgage. The writ was directed not only against the mortgagor, but against Lydia Gibbons, the appellant here, as owner, and those occupying the premises under her, as terre-tenants, in conformity with the requirements of Act July 9, 1901 (P. L. 614), amended by Act April 23, 1903 (P. L. 261). Judgment by default having been taken against the mortgagor on two returns of nihil, the case was proceeded with to trial against the owner who, after filing an affidavit of de-

fense, had pleaded regularly to the action. On the trial she sought to introduce by way of defense the several matters set out in her affidavit; that is to say, she offered to prove title in herself to the premises described in the mortgage superior to and wholly independent of any that could be asserted for the mortgagor, and that in point of fact the mortgagor was without any interest in the land that could be made the subject of lien. The several offers of evidence in support of this attempted defense were excluded, and the jury was instructed to return a verdict for the plaintiff. It is this action of the court that is here called in question. The contention on part of appellant is that, having been made a party to the action as owner in accordance with the requirements of the act of July 9, 1901, she not only had the right to set up her superior title as a defense to the action, but that she was bound to do so or be concluded with respect to it by the verdict. If correct in this, then concededly the effect of the act of July 9, 1901, is to make what was before a statutory proceeding, intended exclusively for the collection of a mortgage debt, a partial substitute at least for the common-law action of ejectment for the determination of questions of title.

We might very well rest our conclusion with respect to the question here involved on the case of *Park Bros. & Co. v. Oil City Boiler Works*, 204 Pa. 453, 54 Atl. 334, a case which seems to have been overlooked upon the argument, where, speaking by the present Chief Justice, we held that the act of July 9, 1901, was without reference to the jurisdiction of the courts, and was a regulation of service only. Since, however, the present controversy arises over a different clause in the act than that there considered, a further expression of view seems to be called for.

Just what the legislative purpose was in requiring that the owner of the mortgaged premises be made a party defendant in a proceeding of this kind may not be readily apparent; nor is it necessary to inquire, since we are all of one mind that, whatever that purpose was, what is here contended for by the appellant does not fall within it. One sufficient reason for this view is that the statutory proceeding for the foreclosure of a mortgage is wholly inappropriate to and inadequate for the determination of questions of title, except as we import into it those provisions which relate exclusively to the action of ejectment, and for this no warrant can be found in the act. Had it been the purpose to enlarge the scope and effect of the proceeding by scire facias, so as to make it accomplish what before could only be reached through an action of ejectment, certainly provision would have been made for adapting it to the end proposed. Another entirely satisfactory reason is to be found in the fact that the only purpose expressed in the act is "to furnish a complete and exclusive system in itself relative to the service of all such writs." This

appears in the tenth section of the act. Whether this does or does not express the whole and only purpose, with this much expressed, and the reference being to a change in practice and procedure not nearly so radical and violent as would be the change here contended for, it is only reasonable to conclude, from the fact that there is no expression of purpose to make the latter change, that no such change was intended. Other reasons might readily be suggested, but we deem these quite sufficient for the determination of the question presented. All that we here decide is that the act of July 9, 1901, as amended, does not so widen the scope of the statutory proceeding by *scire facias* for the enforcement of a mortgage debt that it may now be applied to determine questions of title to real estate. As the law stood before the passage of the act in question, no prejudice could result to an owner with respect to his title from a verdict for the plaintiff in such proceeding. No more can it now. The proceeding remains just what it was—a remedy for the collection of a debt. The judgment which follows is not and cannot be made a lien upon any land not owned by the mortgagor. The reason which prevailed, before the act was passed, to give the terre-tenant the right to intervene and denied it to the owner, obtains as much now as then, notwithstanding both are made parties. The one may be prejudiced by the verdict; the other cannot.

Our conclusions with respect to this, the main question in the case, necessarily dispose of all the assignments of error.

The judgment is affirmed.

(220 Pa. 568)

**PALMER et al. v. CENTRAL BOARD OF EDUCATION OF CITY OF PITTSBURG.**

(Supreme Court of Pennsylvania. April 20, 1908.)

**1. MUNICIPAL CORPORATIONS—SCHOOL BOARD—ERECTION OF SCHOOLS—PROCEDURE.**

The board of education of a city appointed a committee to take charge of the erection of a school building, and authorized it to select, subject to the approval of the board, a competent architect. The committee submitted a report that it had determined to select an architect by competition, which report was unanimously approved. The committee prepared instructions to the competitors, which instructions were never formally approved by the board. *Held*, that such approval was unnecessary.

**2. SAME—CONTRACT WITH ARCHITECTS.**

A committee of a school board, under its authority, prepared for the erection of a school building and invited architects to submit plans, under instructions that a fair examination would be made and a choice made by the committee, and that, if the first choice of the committee failed of approval by the board, the others would be reported in the order of their merits until a selection was reached, and the architects invited submitted plans, and the committee made a selection, which plan was not approved by the board, whereupon the board appointed a new building committee, and under a scheme adopted by it an architect was duly elected. *Held*, that a contract existed between the board and the architects who competed under the directions of the committee first appointed.

**3. INJUNCTION—JURISDICTION—ADEQUATE REMEDY AT LAW.**

Where a school board authorized a committee to erect a school building and to procure plans from architects under an arrangement for competitive examination of such plans, with an agreement to select a plan from those presented by the competing architects, and plans were submitted, and thereafter the board proceeded to the selection of an architect under a different plan, and the original agreement provided for a payment of a certain sum to each of the competitors whose plans were not accepted, an action at law for breach of such contract would afford no adequate remedy, and a bill to compel the board to act under the competition agreement would lie.

**Appeal from Court of Common Pleas, Allegheny County.**

Bill by George C. Palmer and others against the Central Board of Education of the City of Pittsburg. Decree for plaintiffs, and defendant appeals. *Affirmed*.

The court below found the following conclusions of law:

"(2) It was a lawful exercise of the powers of said Central Board to pass the resolution of February 13, 1906, whereby it determined to erect a new central high school building, created a special committee to have charge of the erection of the proposed building, and authorized it to select, subject to the approval of the board, an architect, and to have preliminary plans prepared. It was equally a lawful exercise of the powers of said Central Board to pass the resolution of May 8, 1906, adopting the report of said building committee (finding of fact 5), whereby said Central Board of Education determined to select an architect by competition, selected Warren P. Laird as professional adviser to the building committee, and prescribed as part of his duties the preparation of instructions to competing architects, of regulations governing the conduct of the competition, and of the terms under which the successful architect was to be engaged.

"(3) It was likewise competent for said building committee and said adviser to prepare the program of competition (finding of fact 6), and to invite the architects to enter into competition, as set forth in finding of fact 7. These acts were within the scope of the authority conferred upon the building committee and the adviser, under the resolutions of February 13 and May 8, 1906, and thus they became and were the acts of the Central Board of Education itself.

"(4) The aforesaid invitation to enter the competition and the acceptance thereof by said architects constituted a contract between said Central Board of Education and said competing architects, whereby said architects, on their part, obligated themselves to each prepare a design for said high school building and to submit the same in competition, and whereby the said Central Board, on its part, undertook to consider the said designs and to pass upon the same in accordance with the provisions of the

program (Exhibit No. 1), paragraphs Nos. 40, 41, 42, and 43. There was ample consideration to support this contract. On the part of said Central Board, it was to receive the expert information which it needed in the performance of a most important public duty. These architects, on their part, undertook to use their skill, judgment, and experience in the preparation of designs for a school building, for the benefit of said Central Board and at its request—things which, prior to the agreement, they were not legally bound to do. This consideration is sufficient. *Newhall v. Paige et al.*, 70 Mass. 386; *Devecmon v. Shaw*, 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422; *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693. Of course, these architects had the hope and expectation that some one of them would obtain the valuable prize of being the architect of this building, and this possibility is a sufficient consideration. *Molyneaux v. Collier*, 13 Ga. 406.

"(5) Whether or not some one of these competitors is entitled to be chosen the architect is a question which is not now before us. It would seem that the power of the Central Board to approve a choice of the committee implies the power to reject all designs. The presumption is that the members of the board will perform their duty, under their oaths of office and with due fidelity to the constituencies which they represent. With their discretion we have no disposition to even attempt to interfere, even if we could do so; but when a contract is submitted, such as we have found, and a breach of it is shown, we have a case presented which calls for appropriate remedy, such as the law provides, and it is equally our duty to apply the remedy under proper complaint.

"(6) Pursuant to the aforesaid contract, these competing architects, including the plaintiffs, prepared and submitted their designs, and the said building committee selected one of them and so reported to the Central Board; but the board did not approve the selection, though it did not formally reject the choice, and then it went no further. It has now attempted to abandon the method of choosing an architect prescribed in the resolution of May 8, 1906, by adopting another and a different method altogether. This was a breach of the aforesaid contract between the Central Board of Education and the competing architects. Having performed their part of the contract, as far as they could, these architects, including the plaintiffs, are entitled to the fruit of their labors, which is that the competition, which was lawfully instituted by the Central Board of Education, shall be completed according to its terms. It is no matter that the Central Board of Education has since reorganized and changed its committee. The relations between the board and these architects are contractual, and a

municipal corporation, or division, can no more avoid the obligations of its lawful contracts than can an individual party.

"(7) The very nature and subject-matter of the controversy are such that there can be no adequate, convenient, or sufficient remedy at law for these plaintiffs. What rule could any court give to a jury, whereby it could adequately assess the damages? Even the \$750 which, it was stipulated, should be paid to each of the competitors, whose designs were not accepted, cannot be paid until there is a final disposition of the competition. But this is only a small part of the subject-matter of this contract, in which these plaintiffs are interested. It seems to us that there is jurisdiction in equity, and only in equity, to afford adequate, convenient, and sufficient relief. *Appeal of Brush Electric Co.*, 114 Pa. 574, 7 Atl. 794; *Conemaugh Gas Co. v. Jackson Farm Gas Co.*, 186 Pa. 443, 40 Atl. 1000, 65 Am. St. Rep. 865."

The court entered the following decree:

"And now, to wit, January 2, 1908, this matter came on for hearing upon bill, answer, and replication filed, the testimony taken at the preliminary hearing, and the findings of fact and conclusions of law of the court thereon made, being, by agreement of counsel, taken as though made upon final hearing, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the said defendant the Central Board of Education of the City of Pittsburg be enjoined and restrained from proceeding to award the plan for the construction of a high school for the city of Pittsburg on a lot on Forbes street, acquired from Hon. Christopher Magee, and to select an architect for the construction thereof outside of the nine different architects who have entered into competition therefor, and whose names are set forth in the foregoing bill, until the plans submitted by said architects have been acted upon in the manner set forth in the resolution of the said board of May 8, 1906, attached to plaintiffs' bill and marked 'Exhibit A.'"

Argued before MITCHELL, C. J., and FELL, BROWN, ELKIN, and STEWART, JJ.

James C. Gray, W. J. Brennen, J. Scott Ferguson, Clarence Burleigh, and Wm. A. Challenger, for appellant. Thomas Patterson, for appellees.

STEWART, J. The Central Board of Education of the City of Pittsburg, by resolution passed February 13, 1906, decided upon the erection of a new high school building, and appointed a committee of nine of its members to take charge of the work. This committee was authorized, among other things, to select, subject to the approval of the board, a competent person as architect. Later on, May 8, 1906, the committee submitted to the board a report, in which it was stated that the committee had determined to select the architect by competition, and to employ a competent

expert as professional adviser to prepare instructions to the competing architects as to the rules governing the conduct of the competition, and the terms under which the successful competitor, if approved by the board, was to be engaged. This report was the same day unanimously approved. The committee determined to limit the number of competitors to nine; these to be chosen by the aid of the expert assistant from among architects of highest professional standing. The instructions to the competitors, subsequently prepared by the expert assistant, with the approval of the committee, provided that examination of all the plans submitted was to be made first by the expert assistant, who was required to report to the committee his choice of the designs submitted, and that the committee was then to carefully examine his report and make selection of the design it decided to be the best, and award the prize—the appointment as architect—to the author of the plans selected, subject to the approval of the board. A further instruction was that, in case the board disapproved of the committee's choice, the committee would then select from the remaining designs that one which in its judgment was the best, and repeat the above procedure with respect to this design and its author; and, in case the second selection by the committee failed of approval by the board, the committee would then proceed in like manner with each of the remaining designs, taken in the order of their merit as this might be regarded by the committee, until the board should finally approve the selection of one of the competing architects. Each of the nine architects submitted plans, and thus engaged in competition for the prize. These several plans having been examined, the committee on November 22, 1906, made its selection, and reported it to the board. For reasons which we need not inquire into, this report failed of approval by the board, and was held over. Without any further action having been taken with respect to the report, on February 12, 1907, the board, having reorganized, appointed a new building committee with authority to procure plans in open competition from all competent architects, and to select from those submitted the plan it deemed most suitable for the purpose, and to proceed to obtain proposals for the erection of the building in accordance with the plans selected. This new committee, on June 4, 1907, reported that it had selected a certain plan, giving the name of the author. By resolution passed the same day this report was approved, and the author of the plan was elected architect. Thereupon three of the competing architects under the original scheme filed the bill in this case setting forth the facts as we have stated them, and asking that the Central Board of Education be enjoined from rescinding and ignoring the plans of competition adopted under the resolution of May 8, 1906, and that it be required to proceed to consider the

plans submitted by the competing architects at the invitation and request of the earlier committee, and make a selection therefrom, in accordance with the rules adopted by said committee. The answer put in issue no material fact. The proceeding resulted in a decree enjoining the defendants from selecting plans and choosing an architect until the plans submitted by the plaintiffs and other architects who engaged in the first competition had been acted upon in the manner set forth in the resolution of the board of May 8, 1906. This appeal followed.

The assignments of error relate exclusively to the conclusions of law by the court, and raise but two questions, namely: (1) Did any contract relation between the competing architects and the Board of Education result from the submission of plans by the former under the resolution of the board of May 8, 1906? And (2) if such relation did result, have the plaintiffs an adequate remedy at law for any breach of the contract? The case is free from difficulty. The report of the original building committee of the method it had adopted for the selection of a plan and architect was full and explicit. While it did not set out in detail the instructions to be given those willing to engage in the competition, it did expressly indicate that instructions were to be given, by whom they were to be prepared, and what they were to embrace. One of the duties imposed upon the professional expert assistant was, in the language of the report, to prepare instructions to the competing architects of regulations governing the conduct of the competition, and the terms under which the successful architect was to be engaged. The instructions thus required of the expert assistant were prepared, and, with the approval of the committee, were furnished to those who proposed to compete. They specifically stated in detail just how the final selection was to be made, promised the competitors a fair examination of each plan submitted, and provided that, in case the first choice by the committee should fail of the board's approval, the others would be reported in the order of their merit according to the judgment of the committee, until a selection would be reached with the board's approval. Had these instructions appeared in the report of the committee, approved by the board, it is admitted that any submission of plans thereunder would have established a contract relation between the board and the competing parties; but inasmuch as they were the work of the committee, not passed upon specifically by the board, it is argued that they were without binding effect. In other words, the contention is that the instructions went beyond what the committee was empowered to do in this behalf and were nugatory. In this view we cannot concur. So far as we can see, there is absolutely nothing in the instructions not fairly embraced within the authority given the committee. Competition was authorized and provided for.



This method, approved by the board, necessarily implied an examination of the plans to be submitted and a fair opportunity to contest for the premium. The instructions went no further than to express in terms what the law would imply from the method itself. The order in which the plans were to be considered, in case the first selection of the committee failed of the board's approval, was mere matter of detail, in no wise inconsistent with the scheme as approved by the board, but in entire harmony therewith. Full authority as to the determination of these details was given the committee. The adoption of the report by the board was a full authorization for the committee to proceed in the way it had recommended, and thereafter what was done by the committee in accordance with the recommendations contained in the report was the action of the board itself. Under any fair and reasonable method of selection by competition, the chief inducement for any one to take upon himself the labor and expense incident to the submission of plans would be the chance that upon a fair and impartial examination his plan might win acceptance. Disappointment in this regard, after labor expended and expense incurred, under such circumstances as we have here, constitutes not only a breach of good faith, but a breach of contract resting, not on doubtful terms, but on expressly admitted facts, from which an unmistakable legal obligation resulted.

That a common-law action for breach of such a contract would afford no adequate remedy we think obvious. What could be recovered in such an action? Certainly not compensation for the thing lost. What the plaintiffs lost was the chance of having some one of the plans submitted win the prize, and this was the inducement to the expenditure of labor involved in the preparation and the submission of plans. But how is compensation for such a loss to be measured? The contract itself provides no method for determining the damages, and the law furnishes no standard. To recover anything more than nominal damages in a common-law action, actual, substantial injury would have to be shown, and in the very nature of the case that would be impossible here. To show actual loss, plaintiffs would be required to show affirmatively at least a reasonable probability that some one of the plans submitted would, had they been examined, have received the approval of the board. Since the acceptance of any of the plans rested ultimately in the discretion of the board, this would be impossible. If we regard the plaintiffs singly, as independent competitors, the difficulty is only increased by a multiplication of the chances of missing the prize. But it is argued that recovery could be had for the value of the plans and specifications submitted. This is a mistaken view. Plaintiffs have not lost their plans and specifications.

They are still theirs as much as ever. If the time and labor expended on them were solely to secure a chance, how can the plans be of value except a reasonable probability be shown that the chance would have been realized? It is impossible to disassociate the plans from the chance in determining value. So much was ruled in *Adams Express Company v. Egbert*, 36 Pa. 360, 78 Am. Dec. 382, a case not exactly parallel with this, but involving the same principle. In saying that the contract itself provided no measurement of damages, we have not overlooked the fact that there is a provision in the contract that the unsuccessful competitors were each to receive \$750 as full compensation. Manifestly this is without application here. The parties complaining are not in the position of unsuccessful competitors. Their complaint is that there was no competition. Admittedly there was none, and, until there shall be by a fair and impartial examination of the plans submitted, none of those competing can be said to be unsuccessful competitors. We thus resolve the two questions in the case against the appellants. The decree entered simply restrains the appellants from awarding the plans for the construction of the school building, and selecting an architect to superintend the construction of the same, outside of the nine architects who had entered into competition, until the plans submitted by said architects shall have been acted upon in the manner set forth in the resolution of the board of May 8, 1906. The decree exacts nothing of the appellants beyond what good faith requires and what the plaintiffs had a right to demand.

Decree affirmed, and appeal dismissed, at the costs of the appellants.

(221 Pa. 77)

In re ADAMS' ESTATE et al.  
(Supreme Court of Pennsylvania. April 27, 1908.)

#### 1. TRUSTS—DUTIES OF TRUSTEE.

Though a trustee is required to exercise good faith and reasonable diligence, he is not an insurer against losses occasioned by the bad faith of his co-trustee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 347.]

#### 2. SAME—MISCONDUCT OF CO-TRUSTEE.

Where a trustee learns of any matters relating to mismanagement or misapplication of trust funds by his co-trustee, his failure to take steps to prevent the same renders him liable for the resulting loss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 347.]

#### 3. SAME—LIABILITY FOR NEGLIGENCE.

Where, through the negligence of a trustee, his co-trustee is permitted to convert the trust funds to his own use, the failure to exercise diligence renders him liable for the loss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 347.]

#### 4. SAME.

The illness of a trustee before the default of his co-trustee does not excuse his failure to guard the interests of the beneficiaries, where

he had knowledge before his illness of the acts of his co-trustee which should have put him on guard against the subsequent misappropriation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 347.]

5. SAME.

That a trustee reposed great confidence in his co-trustee, who was his brother, does not excuse his failure to protect the funds against a misappropriation of them by such co-trustee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 347.]

6. SAME—DUTY TO PROTECT TRUST FUND.

Where a trustee informs the beneficiaries of suspicious acts of his co-trustee, it does not relieve him from liability arising from repetition of such conduct, where he took no steps to protect the trust funds in the future.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 347.]

7. SAME—EVIDENCE—LIABILITIES.

A trustee, knowing that his co-trustee's financial condition was bad, examined the box in which the trust securities were kept and found them missing. On notice to his co-trustee, the latter replaced them on the following day. About a year after he notified one of the beneficiaries of such act, and that he had compelled his co-trustee to return the securities and had arranged with the deposit company that both trustees must be present when the box was opened. There was no evidence to show that the deposit company was made a party to this agreement as alleged. Some eight years thereafter the trustee became a helpless invalid, but prior to this time he had visited the box with his co-trustee and found the securities intact. The co-trustee died suddenly some two years thereafter, and it was found that he had converted all the securities. *Held*, that the surviving trustee was liable for the loss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 347.]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Robert Adams, deceased. From a decree dismissing exceptions to adjudication, Clara H. Adams and Martha A. Moran appeal. Reversed.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Joseph De F. Junkin, Charles Sinnickson, and Frederick C. Newbourg, Jr., for appellants. Thomas Leaming, for appellee.

MESTREZAT, J. The duties and liabilities of co-trustees in Pennsylvania are well settled. A trustee is not an insurer of trust funds against the possibility of loss, nor a surety for his co-trustee. His undertaking is personal, requiring of him good faith and reasonable diligence, and, if these requirements be met, he is not liable for losses occasioned by the bad faith or embezzlement of his co-trustee. *Fesmire's Estate*, 134 Pa. 67, 19 Atl. 502, 19 Am. St. Rep. 676. The law requires of the trustee fidelity to the trust, and the exercise of the same measure of diligence that a man of ordinary prudence may be expected to exercise in the care of his own property under the same circumstances. *Jones' Appeal*, 8 Watts & S. 143. While, as a general rule, a trustee is not liable for

trust funds received by his co-trustee, yet he is required to exercise a general superintendence and care over the trust. If he hear of any fact tending to call his attention to the mismanagement or misapplication of the trust funds by his co-trustee, it is his duty to intervene and prevent a devastavit. His failure to do so would be a breach of trust imposing liability upon him for the loss. Mr. Perry, in his work on Trusts (section 419) says: "In all cases, if a trustee becomes aware of any fact tending to show that his co-trustee is committing a breach of trust, or if he learns any fact endangering the trust funds, he must communicate it to his co-trustees, or make application to the court, and take active measures to protect the fund, or he will be personally liable for its loss." In effect, the same doctrine is announced in *Pim v. Downing*, 11 Serg. & R. 66, 71, where Tilghman, C. J., said: "It is clear enough that, where one who does not receive the money consents that the other should misapply it, particularly where he has it in his power to secure it, he is responsible." The joint receipt by co-trustees of trust funds imposes a joint liability. The obligation rests upon each trustee to exercise good faith and use reasonable diligence in executing the trust. If, through the negligence or default of either trustee, the other trustee is permitted to dissipate the funds or convert them to his own use, he is responsible for the loss. The possession of the trust funds is joint, and it is the duty of each trustee to exercise good faith and reasonable care to protect the trust funds against his co-trustee as well as against others.

The trust funds in the Adams estate were awarded to the three trustees, sons of the testator, on June 4, 1895. They accepted the funds jointly and proceeded to administer them jointly. Within a year one of the three trustees was discharged. The other two trustees retained joint possession of the funds and distributed the income as required by the trust. The securities in which the trust funds were invested were kept in a box in the Western National Bank of Philadelphia to which each of the trustees had access. On July 8, 1896, H. Carlton Adams, the surviving and accounting trustee, knowing that his co-trustee's financial condition was bad, visited the box alone and discovered that all the securities had been removed. This greatly troubled him and naturally aroused his suspicions. He called upon his brother, Robert Adams, Jr., the other trustee, who admitted that he had taken the securities from the box, and requested Robert to return them by the following day, which he did. The trust funds in the box consisted of unregistered securities, coupon bonds, etc., which could be negotiated by either of the trustees. At the time the accounting trustee discovered the removal of the securities from the box and requested his brother to return them, it does not appear what, if anything,

was said why they were removed without the knowledge of the co-trustee, or what purpose Robert had in removing them. In a subsequent conversation between the accounting trustee and Mrs. Moran, one of the cestuis que trustent, in 1897 or 1898, he told the latter, as she testifies: That the securities had been taken by his brother and put up as collateral; that he had compelled him to return the securities, and she need have no further anxiety about it; and that he had arranged at the bank that both executors must be present when the box was opened. The testimony of the appellee's wife tended to show that the accounting trustee told Mrs. Moran that the securities had simply been placed in another box. The trustees agreed that each should have access to the box containing the securities of the estate and visit the box together; but, as the auditing judge found, there was no evidence showing the bank to have been a party to the agreement, or that any notice had been served upon the bank that the trustees had made any such agreement between themselves. In 1904 H. Carlton Adams, the accounting trustee, became an invalid and has continued such to this time. The auditor found that he was "a helpless invalid, a physical wreck, unable to lift his arm. \* \* \* His mental faculties are weakened, and his memory poor. He is unable to carry on a coherent conversation and in talking rarely takes the initiative." He also found "that, as a rule, his answers were more or less exact when, under agreement of counsel, his depositions were taken at his present place of abode." The last joint visit of the two trustees to the box containing the securities was on February 8, 1904, and the securities were then intact. Robert Adams, Jr., one of the trustees, died suddenly on June 1, 1906, and an examination of the box on June 4, 1906, showed that it was empty, and that all the securities were gone. The surviving trustee has refused to account for the securities, alleging that his brother and co-trustee, Robert Adams, Jr., removed them from the box and converted them to his own use. The accountant claims that the securities were not lost by reason of his failure to perform any duty imposed upon him as trustee, nor by any negligence or default on his part. If his position be correct, the loss of the securities does not rest upon him, and he is not under any obligation to account for them to the cestuis que trustent. The court below refused to surcharge the accountant for the devastavit created by the loss of the securities awarded to the trustees by the orphans' court. It was held that the conduct of the accountant did not disclose any negligence or default on his part in the management of the trust or in protecting the trust funds. The court held that the accountant's conduct in the management of the trust funds was that of a reasonably prudent man and did not show any lack of good faith or reason-

able diligence in the execution of the trust.

We cannot agree with the conclusion reached by the learned court below. We think that the facts disclosed by the evidence before the auditing judge, and not controverted by the accountant himself, clearly show negligence and a lack of reasonable diligence on his part with regard to the securities of the trust estate which were converted to the use of the co-trustee. The simple question presented for solution, and the answer to which will determine the liability of the accountant, is whether the securities held by the trustees jointly were lost to the estate by reason of the failure of the accountant to exercise reasonable care to protect them. What were the duties of the accountant under the circumstances? The trust funds were awarded to and accepted by the three trustees jointly. After the discharge of one of the trustees, the trust funds were in the possession of the two remaining trustees to be jointly administered by them. The duty resting upon each trustee was that of good faith and the exercise of such care as a reasonably prudent man might be expected to exercise in the protection and management of his own property. There was a duty resting on each trustee to exercise prudence and care to insure the safety of the trust funds. In the absence of inculpatory circumstances, he was not required to regard his colleague other than honest, nor to believe that he would not honestly and properly administer the trust. At the same time, the funds being in the joint possession of the two trustees, the law required each to exercise general superintendence over them and to observe reasonable and proper precaution in protecting them against loss or embezzlement by the other trustee. Neither trustee could shut his eyes and fold his arms and permit his co-trustee to use the funds at his own pleasure and for his own purpose. If either trustee had any reason to believe that his co-trustee was not acting in good faith or might convert the trust funds to his own use, it was incumbent upon him to take the necessary steps to prevent such misapplication of the funds. This was unquestionably his duty, and the failure to observe it will impose liability for any loss caused thereby.

On July 8, 1896, the accountant discovered that all of the trust securities in the box in the Western National Bank to which he and his co-trustee had access had been removed. This was done without his knowledge or consent; and, of course, without his authority. The two brothers, the trustees, had agreed that the box should only be opened in the presence of both. This was a proper precaution on the part of each of the trustees, and, of course, the agreement should have been observed. The securities, representing the whole trust estate, were in that box. Their removal, without his knowledge or consent, very naturally aroused the suspicions of the accountant. As his co-trustee was the only

other person who had access to the box, the accountant knew that he had withdrawn the securities from the box. He demanded of his brother their immediate return to the box, and the demand was complied with on the following day. No explanation why they were withdrawn was demanded or given. Concede, as contended by the appellee, that they were simply taken from the box of the trust estate by the defaulting trustee and placed in the latter's own box in the Philadelphia Trust Company, yet that was an improper act on the part of the defaulting trustee, and sufficient to require the accountant to take the necessary precautions to prevent a repetition of the act and a misapplication of the trust funds by his brother. The agreement between the trustees required the box to be opened only in the presence of both. This agreement had been violated by Robert, and he had taken the trust funds and placed them in his own box in another institution to which alone he had access. There is no evidence in explanation of this conduct. When the accountant demanded the return of the securities, Robert offered no explanation, and the accountant demanded none, why they were removed from the joint possession of the trustees to the possession of the one who had abstracted them. This is a singular and suggestive incident. They could not have been removed for the purposes of the trust, as its administration devolved upon both trustees. It was not made to appear before the auditing judge that there was any necessity for the removal of the funds in the administration of the trust. The securities were just as safe in the box in the Western National Bank as they were in the box in the Philadelphia Trust Company to which they were removed, and to which alone Robert had access. If it was necessary to sell or dispose of them, the duty rested upon both of the trustees to act in the matter, and therefore they should have remained in the common box. The securities were removed without the knowledge of the accountant, and if the purpose of Robert in removing them was a proper one, and in the interest of the trust estate, he should, and naturally would, have stated the purpose to the accountant when their return was demanded. This was not done, and we can only surmise Robert's purpose in thus violating his agreement and abstracting the securities from the common box and placing them in a trust company beyond the reach of his co-trustee. That it was for an improper purpose, and sufficient to excite the grave suspicions of his co-trustee, we have no doubt, in view of the admitted fact that the accountant knew at that time that Robert's financial condition was bad. No man of ordinary prudence or business sagacity would, under such circumstances, have permitted his own funds to have remained, as it were, at the mercy of another whose conduct, unexplained, showed an intention, as well as an

attempt, to appropriate the funds to his own use.

We are not favorably impressed with the argument of the learned counsel for the appellee in which he attempts to minimize Robert's conduct in abstracting the securities from the common box of the trustees. It was an act that would naturally suggest to a co-trustee or a co-owner an intention on the part of Robert to deal with the funds as his own, and to apply them to his own purposes. It was enough to require the accountant to take the necessary steps to deprive Robert of an opportunity of misapplying the trust funds, and there has been no reasonable excuse for the accountant not taking such precautions. It would, indeed, be a very dangerous precedent to hold, as suggested in argument, that the accountant was justified in not taking steps to prevent the defaulting trustee from converting the funds to his own use by the fact that Robert was "prominent in society and in politics." There would, indeed, be little protection to trust funds throughout this country if such an excuse could avail to protect a trustee from the defaults or crimes of his colleague. Common knowledge derived from everyday experience tells us that such reason is frequently assigned as the cause for the default of personal representatives and trustees. At all events, it is no sufficient excuse, or one which will relieve a trustee when he has knowledge that the defaulting trustee is in financial straits, and has been guilty of an act which discloses an intention to convert the trust funds to his own use. Such act is an admonition which a co-trustee cannot ignore, and which, if he does disregard, subjects him to liability for the loss that follows. If Carlton Adams had not discovered in July, 1896, the removal of the securities from the common box and demanded their return, there might have followed shortly thereafter a devastavit of the estate. Robert's conduct on that occasion was, in the light of the circumstances, highly censurable, and could not have been in the line of his duty as a trustee. It is the first step a trustee would take if he intended to defraud the trust estate and apply the funds to his own use. After Robert had removed the securities to his own private box in the Philadelphia Trust Company, he had absolute and sole control over them, and could have disposed of them and placed the proceeds in his pocket. This condition of affairs, in view of Robert's financial condition known to the accountant, was sufficient to require the latter to put the trust funds where Robert could not again abstract them and divert them from the purposes of the trust. This could readily have been done by an arrangement with the bank that both executors should be present when the box was opened. Such an agreement, as we have seen, was made between the trustees when they received the trust funds; but the bank was not a party to it, and had no right to enforce it. This simple and obvious precaution should

have been taken by the accountant after he was warned of the danger of a misapplication of the funds by Robert's conduct in July, 1896. If this had been done, it is manifest that Robert could not have converted the securities to his own use without the knowledge of the accountant. It was the failure of the accountant to exercise this reasonable precaution, and thus protect the funds that gave Robert the opportunity to commit the devastavit and to deprive the cestuis que trustent of their property.

It is contended, however, that the accountant should not be surcharged with the default because he was a helpless invalid for more than two years before it occurred, and while he was unable to protect himself or the trust estate. This position is untenable and cannot be sustained. The dereliction of duty on the part of the accountant did not arise and was not confined to the time during which he was an invalid. He committed a breach of duty, imposed upon him by the acceptance of the trust, immediately after he discovered the conduct of Robert in July, 1896, by not then taking the necessary steps to prevent a recurrence of Robert's misconduct and to protect the trust funds. This breach of duty was a continuing one and began in July, 1896. The accountant, although warned not only of a possibility, but of a probability, that Robert might misapply the trust funds, took no effective measures whatever to prevent such conduct. The door was left wide ajar, and at any time within the 10 years Robert could have entered and despoiled the trust estate. That he did not do so earlier may be attributed to the fact that his necessities did not require it. It was not because the accountant had taken any steps to prevent it. If, after the discovery of Robert's misconduct in 1896, the accountant had notified the bank to require the presence of both trustees when the box was opened, there could not have been, as has been suggested, a conversion of the securities by Robert without the accountant's consent. This would have been equally true during the accountant's illness. The latter could, in case of his inability to be present, have acted by an agent, or he could have resigned, and thereby cast upon the cestuis que trustent the responsibility of protecting themselves. There is no reason given, nor, so far as the record discloses, can any reason be given, why the accountant did not appoint an agent to act in the matter when his enfeebled condition prevented his presence when the box was opened. Instead of taking this precaution to protect the trust estate, or resigning and thus admonishing the cestuis que trustent that they must protect their own interests, he continued to invite the confidence of the beneficiaries of the trust by remaining a trustee, thereby affording Robert a still greater opportunity to plunder the estate.

It is contended that the accountant bestowed the same degree of care upon his own in-

terest in the trust estate and upon his own private securities as he did upon the interest of the other cestuis que trustent, but that is no excuse for his dereliction of duty. It is not the standard of care required of a trustee. His conduct is gauged by that of a reasonably prudent man in the management of his own property. That Carlton Adams saw proper to rely upon the honesty of his brother in the management of the trust estate, beyond what a prudent and careful man would have done, cannot relieve him from the devastavit committed by the one who abused his imprudently bestowed confidence. It may well be that the kindness to, and confidence in, a brother account for the loss which gives rise to this litigation; but it cannot be held to be either an equitable or legal reason why a co-trustee should not account for funds misappropriated by reason of that kindness and confidence. Carlton Adams had a right to trust his brother to any extent with his own estate, but that rule does not prevail as to funds held by Carlton Adams as a trustee. The overconfidence naturally reposed in a brother is not a sufficient justification for failure to perform a duty in the administration of a trust estate.

It is suggested that the accountant is relieved from surcharge by reason of the fact that he communicated to the cestuis que trustent the conduct of Robert in removing the securities from the common box of the estate, but this did not relieve the accountant from performing the duties imposed upon him by law as a trustee. He occupied a position of confidence, and a trust was reposed in him that he would protect the estate or exercise reasonable diligence and good faith in securing the trust estate to those entitled to it. The cestuis que trustent had a right to rely upon the performance of this duty, and, when they were informed of Robert's misconduct in abstracting the securities from the common box, they were justified in believing that the accountant would prevent a repetition of such conduct, and take the necessary steps to guard the estate from any further attempt to despoil it. In fact, they not only had the right to assume that the accountant would take such action to protect the estate, but he gave them the assurance, if the only testimony on the question is believed, that they "need have no further anxiety about it, that he had arranged at the bank that both executors must be present when the box was opened." It was not incumbent upon the cestuis que trustent, under these circumstances, to employ counsel to compel the accountant to perform a duty which he himself recognized as a duty. As the testimony shows, the accountant knew that he could effectively protect the trust funds from misapplication by Robert by an arrangement with the bank, and the cestuis que trustent had a right to rely upon his doing so.

We are unanimously of the opinion that

the loss to the trust estate sustained by the devastavit of Robert Adams, Jr., trustee, was attributable to the negligence of the accountant, his co-trustee, and that therefore the latter should be surcharged with the amount of the devastavit.

The decree of the court below is reversed, and the record is remitted, with directions to restate the account in accordance with this opinion.

(104 Me. 308)

### CUNNINGHAM v. INHABITANTS OF FRANKFORT.

(Supreme Judicial Court of Maine. June 9, 1908.)

#### 1. HIGHWAYS—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF.

To maintain an action against a defendant town to recover damages for personal injuries received by reason of an alleged defect in a highway which such defendant town is obliged by law to maintain and keep in repair, it is incumbent on the plaintiff after proving the notices required by the statute to prove affirmatively that such highway was not safe and convenient for travelers at the point where the accident occurred, that no want of ordinary care on his part contributed to cause the accident, and that his injury was occasioned through the defect alone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 526.]

#### 2. SAME—TEST OF LIABILITY.

Section 56, c. 23, Rev. St., declares that "highways, townways, and streets, legally established shall be opened and kept in repair so as to be safe and convenient for travelers," etc., and section 76 of the same chapter provides that "whoever receives any bodily injury, or suffers damage in his property, through any defect or want of repair \* \* \* in any highway \* \* \* may recover for the same in a special action on the case." These two sections were clearly intended to be in harmony with each other and counterparts of the same enactment. They have always been construed to mean that a plaintiff is entitled to recover damage only when he suffers it through any defect or want of repair that will prevent the way from being safe and convenient for travel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 478-485.]

#### 3. SAME.

The only measure of duty prescribed by the statute and the only test of liability created by it will be found in the requirement that the way shall be kept "safe and convenient for travelers." But in the practical application of the statute to the highways of the state it has uniformly been held by the court of Maine that the words, "safe and convenient," are not to be construed to mean entirely and absolutely safe and convenient, but reasonably safe and convenient in view of the circumstances of each particular case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 480, 481.]

#### 4. SAME.

The words, "safe and convenient," are considered to be relative terms, and the question of safety and convenience must be determined with reference to the special facts and conditions existing in each case, such as the location of the way, the nature and extent of the travel to be accommodated, and all the circumstances which may reasonably influence the conclusion. A condition that might readily be accepted as reasonably safe and convenient on a crossroad

in a country town might be grossly unsafe for an important thoroughfare that is in constant use for public travel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 480, 481.]

#### 5. SAME.

Towns are not made insurers against accidents and injuries on the highways. The statute does not impose upon them the obligation to guarantee the safety of public travel within their limits.

The question is not whether in a given case the town used ordinary care and diligence in the construction and maintenance of the way, but whether as a result the way as constructed and maintained was in fact reasonably safe and convenient for travelers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 480.]

#### 6. SAME—METHOD OF REPAIR.

The methods of constructing and repairing townways are necessarily determined in the first instance by the officers of the town to whom that duty is committed, but whether the result fulfills the requirement of the statute is a question which must be ultimately passed upon by the court and jury when it arises.

#### 7. TRIAL—COURSE AND CONDUCT—VIEW BY JURY.

While a view taken by the jury of the scene of an accident upon a highway may render the testimony more intelligible and otherwise afford valuable assistance, yet it does not authorize the jury to ignore physical facts or disregard settled rules of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 738.]

(Official.)

Exceptions from Supreme Judicial Court of Waldo County.

Special action on the case by James E. Cunningham against the inhabitants of Frankfort. Verdict for plaintiff, and defendant moves for a new trial, and also excepts. Motion sustained, verdict set aside, and new trial granted.

Special action on the case brought under the provisions of Rev. St. c. 23, § 76, to recover damages for personal injuries received by the plaintiff by reason of an alleged defect in a highway which the defendants were obliged by law to maintain and keep in repair. Plea, the general issue.

Tried at the September term, 1907, of the Supreme Judicial Court, Waldo county. Verdict for plaintiff for \$1,000. The defendants filed a general motion to have the verdict set aside, and also excepted to the ruling of the presiding justice that, "for the purposes of the trial," the notice given by the plaintiff to the municipal officers of the defendant town within 14 days after the injuries complained of in the writ contained "a sufficient description of the nature and location of the defect," and was "sufficient in law to enable the plaintiff to maintain his action under the evidence introduced."

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, and CORNISH, JJ.

W. P. Thompson, for plaintiff. Dunton & Morse, for defendant.

WHITEHOUSE, J. This is an action to recover damages for personal injuries received by the plaintiff on the 19th day of August, 1905, by reason of an alleged defect in a highway which the defendants were obliged by law to maintain and keep in repair. In the plaintiff's declaration the accident is alleged to have occurred on "a certain public highway leading from the road which leads from Black's corner in Searsport to Frankfort marsh, about one-third of a mile westerly from the dwelling house of Charles Robinson and at the four corners of the road," and the defect is described as "a large rock in the traveled part of said way protruding about 18 inches above the ground or top of the road and in the wheel track of the road." With respect to the cause of the accident, the declaration further states that the plaintiff was riding along this road with his son-in-law Adelbert Small, in a top buggy drawn by one horse, when the wheel of the carriage came in contact with the rock described and the carriage was thereby overturned, causing a fracture of the plaintiff's left leg and the other injuries of which he complains.

In the notice given by the plaintiff to the municipal officers of the defendant town on the 28th day of August, eight days after the accident, the defect is described as a "large rock in the traveled part of the highway, about 18 inches thick," without stating that it was "protruding above the ground or top of the road," as was alleged in the declaration. It also satisfactorily appeared from the evidence that the rock was not actually in the traveled part of the way. The defendant further claimed that the plaintiff's description of the location of the rock in both the declaration and the notice was inaccurate in stating it to be at the "four corners, a third of a mile westerly from the house of Charles Robinson," since it appeared from the evidence that the direction of the "four corners" where the accident occurred is not in fact "westerly" from the house of Charles Robinson, but north 35 degrees east from his house. It is also shown by the evidence that there are two other crossings of the ways making "four corners" at the two other points northwesterly from the house of Charles Robinson, and at such a distance therefrom that either of the last-mentioned four corners would correspond more nearly with the description contained in the notice than the four corners where the accident happened. It was accordingly contended by the defendant that there was a fatal variance between the notice and the evidence respecting both the nature and location of the defect. But, for the purposes of the trial, the presiding justice instructed the jury that the notice contained a sufficient description of the nature and location of the defect, and was sufficient in law to enable the plaintiff to maintain his action under the evidence introduced. To this ruling the defendant took exceptions.

The jury returned a verdict in favor of the plaintiff for the sum of \$1,000, and the case comes to the law court on exceptions to the ruling of the presiding justice holding the notice sufficient, and on a motion to set aside the verdict as against the law and the evidence.

To maintain his action against the defendant town, it was incumbent upon the plaintiff, after proving the notices required by statute, to prove affirmatively that the highway was not safe and convenient for travelers at the point where the accident occurred, that no want of ordinary care on his part contributed to cause the accident, and that his injury was occasioned through the defect alone.

Section 56, c. 23, Rev. St., declares that "highways, townways and streets, legally established shall be opened and kept in repair so as to be safe and convenient for travelers," etc., and section 76 of the same chapter provides that "whoever receives any bodily injury or suffers damage in his property, through any defect or want of repair \* \* \* in any highway \* \* \* may recover for the same in a special action on the case." These two sections were clearly intended to be in harmony with each other and counterparts of the same enactment. They have always been construed to mean that a plaintiff is entitled to recover damage only when he suffers it through any defect or want of repair that will prevent the way from being safe and convenient for travel.

Thus the only measure of duty prescribed by the statute and the only test of liability created by it will be found in the requirement that the way shall be kept "safe and convenient for travelers." But in the practical application of the statute to the highways of the state it has been uniformly held by this court that the words, "safe and convenient," are not to be construed to mean entirely and absolutely safe and convenient, but reasonably safe and convenient, in view of the circumstances of each particular case. They are considered to be relative terms, and the question of safety and convenience must be determined with reference to the special facts and conditions existing in each case, such as the location of the way, the nature and extent of the travel to be accommodated, and all the circumstances which may reasonably influence the conclusion. A condition that might readily be accepted as reasonably safe and convenient on a crossroad in a country town might be grossly unsafe for an important thoroughfare that is in constant use for public travel. A condition of perfect safety beyond the possibility of an accident is, of course, unattainable. A condition of reasonable safety only is required. Towns are not made insurers against accident and injury on the highway. The statute does not impose upon them the obligation to guarantee the safety of public travel within their limits. And the question is not whether in a

given case the town used ordinary care and diligence in the construction and maintenance of the way; but whether as a result the way as constructed and maintained was in fact reasonably safe and convenient for travelers.

The methods of constructing and repairing public ways are necessarily determined in the first instance by the officers of the town to whom that duty is committed, but whether the result fulfills the requirement of the statute is a question which must ultimately be passed upon by the court and jury when it arises. *Moriarty v. Lewiston*, 98 Me. 482, 57 Atl. 790. "A defect such as the statute contemplates must be something which unlawfully impairs the reasonable safety and convenience of the way." *Bartlett v. Kittery*, 68 Me. 358.

The highway in question in the case at bar, upon which the plaintiff was traveling in going from Belfast to Mosquito Mountain, is a country road with but little travel upon it, being chiefly used by the workmen going to and returning from their work at the granite quarry. It appears to have been constructed more than 50 years ago, and in the process of building at the four corners in question some rocks were evidently removed and deposited upon the right-hand side as the traveler passes around the curve from one road to the other in the direction in which the plaintiff was traveling when he received his injuries. These rocks have never been moved since the road was built. It is a matter of common observation that it is the natural tendency of travel in turning the corner of a highway to swerve toward the outside of the road, and that granite posts or guides are frequently erected to prevent it. It is undoubtedly true that the result of this tendency was to bring the wheel track nearer the rocks in the course of 50 years. But, according to measurements made by Surveyor Brock of Searsport a short time before the trial, there was a smooth and unobstructed roadbed 15 feet in width between the rock which the plaintiff's carriage wheel is alleged to have struck and the northerly side of the road. This witness further states that no part of this rock is in the wheel track; that as he drove around the corner in his carriage he allowed his horse "to take her own way"; that she followed the horse path, and that the wheel of the carriage as it went around passed about two feet from the base of the rock. It also appears from his testimony, corroborated by the photographs in evidence, that for some distance west and south of this rock there is a ridge of earth with grass growing upon it between the horse path and the right hand wheel track. Mr. Brock was called by the defendant, but he appears to have been a disinterested witness.

It is alleged in the plaintiff's declaration and notice that the rock complained of was in the traveled part of the road, but there is no evidence in the case which would warrant a jury in so finding. The plaintiff himself

gives no testimony in support of the allegation, but simply states that the rock "sits right on the edge" of the wheel track. The plaintiff's son-in-law Adelbert Small, who was driving the team, gives contradictory testimony in both direct and cross-examination, but the full extent of his claim is expressed by his statements that the rock was a foot in height above the ground, and "clear up to the wheel track," "perfectly flush with the wheel track." The highway surveyor in that district called by the plaintiff testifies that the rock was from "one to two feet" from the wheel track. By reason of the intersection of the two roads at this point, the two wheel tracks come together nearly opposite this rock, and according to actual measurements made by Mr. Clark, chairman of the board of selectmen, the face of the rock was two feet and six inches from the wheel track of the straight road that leads from the Frankfort road past the rock, and six inches from outer edge of the wheel track going easterly.

Thus it appears that the alleged defect was a structural condition which had existed without material change for more than 50 years with an ample width of well-wrought road where two teams approaching to meet might safely and conveniently pass each other without coming in collision with this rock.

The defendant earnestly contends that a country road in such a situation and condition, with the amount and character of the travel accommodated by this one, must be deemed reasonably safe and convenient.

In *Perkins v. Fayette*, 68 Me. 152, 28 Am. Rep. 84, the facts of which were closely analogous to those at bar, the subject is thus treated in the opinion by Judge Peters: "A question arose at the trial as to what extent towns were responsible for injuries to travelers occasioned by their teams coming in collision with obstructions on the side of the road beyond the traveled way. The judge instructed the jury that towns were not required to render the road passable for the entire width of the whole located limits, and that the duty of the town was accomplished by making a sufficient width of the road in a smooth condition so that it would be safe and convenient for travelers. He also directed the jury that the town had the right in making or repairing a road to remove stones and stumps onto the sides of the way and leave natural obstructions there, provided the same were situated so far from the traveled track that persons passing over the road with teams might pass without danger of coming in collision with them. We think it would be utterly impossible for towns as a general rule to do more than that. No doubt there is a chance that the team of a traveler, in the dark or from fright of the horse or some other mishap, might strike against a rock on the side of the way. So, if the rock was not there, it might get into a ditch or bog or against a railing or fence, or encounter some other dis-



aster. It is enough that the way is safe and convenient in view of such casualties as might reasonably be expected to happen to travelers. All possible accidents cannot be provided against by anybody."

In that case it appeared that the plaintiff's horse became frightened at cows in the road having boards on their horns, and, being beyond the control of the driver, ran out of the traveled way until the wagon came in collision with a rock which had been left on a line with the outside of the ditch and two feet from the traveled road. The jury were instructed in accordance with the settled law in this state that, "if the accident was produced by the fright at the cows and also by a defect in the way by the combined action of both causes, the plaintiff could not recover." A verdict was returned in favor of the town, and, in overruling the exceptions, the court say in the last sentence of the opinion: "In this particular case it would be difficult to see that in any just and proper sense any defect in the way was even one of a combination of causes producing the accident."

The defendant insists that there is also a striking similarity between that case and the case at bar with respect to the fright of the horse and the real cause of the accident. It appears from the testimony of Mr. Clark, chairman of the selectmen, that the plaintiff's son-in-law Adelbert Small called to see him on Monday, August 21, 1905, two days after the accident, to inquire what action the town proposed to take in regard to the plaintiff's injury. Mr. Clark had not heard of the accident, and inquired how it happened. Small said: "It happened about half a mile from Charles Robinson's at the four corners where you go through by what is called the Sally Mack (?) road. They were going to Mosquito Mountain; and, when he got to those corners, a dog jumped out of the bushes on the opposite side, and the horse got scared and went on a rock and hove Mr. Cunningham out and broke his leg."

The same afternoon Mr. Clark went to the scene of the accident as located by Small. Reference has already been made to the two measurements made by Clark fixing the location of the rock in relation to the wheel tracks of the two roads. He states that he then found 20 inches back from the large rock nearest to the wheel track a smaller one from which the moss had been freshly scraped, and upon which were two fresh marks of carriage wheels. Both of these rocks are disclosed in the photographs. Mr. Clark also noted that the dry bush and twigs had been freshly broken on the east side of the rock. This testimony in regard to the rocks and brush is uncontradicted, and Small admits that in answer to Clark's inquiry, if he "saw anything that scared the horse," he told him he "saw the dog." He denies, however, that the horse was frightened by the dog, and "should say the horse was in the horse track." It is conclusively shown, however, by testimony and the photographs that, if the horse

had been traveling in the well-beaten horse path, the wheels of the carriage would not have gone within two feet of the large rock. From this evidence the defendant confidently claims the truth to be that from fright or some other cause the horse went out of the traveled road into the brush, and brought the wheels on the right side of the carriage in contact with the face of a rock 20 inches back from the face of the larger rock claimed to be "on the edge of the wheel track."

The defendant asserts that this is the only rational explanation of an accident which is alleged to have occurred, under the circumstances disclosed, at 11 o'clock in the forenoon of a fair day.

It is true that the jury visited the scene of the accident and saw the road and the rocks. But it is not questioned that the photographs are a correct representation of both. A view may render the testimony more intelligible, and otherwise afford valuable assistance, but it does not authorize the jury to ignore physical facts or disregard settled rules of law.

It is the opinion of the court that under the evidence in this case the way in question must be deemed reasonably safe and convenient "in view of such casualties as might reasonably be expected to happen" to travelers accommodated by it. This conclusion renders it unnecessary to consider further the question of proximate cause or the sufficiency of the notice.

Motion sustained.

Verdict set aside.

New trial granted.

(103 Me. 495)

# INHABITANTS OF ROCKPORT v. INHABITANTS OF SEARSMONT.

(Supreme Judicial Court of Maine. Feb. 25, 1908.)

## 1. PAUPERS—LIABILITY FOR SUPPORT—UNLAWFUL COMMITMENT—RECOMMITMENT—NOTICE—STATUTORY PROVISIONS.

The case at bar is an action, brought by plaintiff town to recover certain expenses, incurred by it in committing one Grace E. Farnham to the Insane Hospital, whose pauper settlement was alleged to be in the defendant town, also to recover the sums paid by the plaintiff town for the support of the said Farnham in said hospital. The case has once before been before the law court on questions involving the legality of the original commitment of said Farnham to said hospital, and the constitutionality of Rev. St. c. 144, § 42, providing for a recommitment in cases where the original commitment was unlawful. The law court held that the original commitment of the said Farnham was illegal, the recommitment legal, and the statute constitutional.

## 2. SAME.

The statute authorizing a recommitment in express terms provides for the recovery of all the expenses of the illegal commitment and support of the person so committed. This statute, when the same was declared constitutional, gave legal force to the plaintiff's account, and made it actionable precisely as it would have been if the original commitment had been legal, and brought it within the same rule, with respect to the effect of notice, as would have applied if it had been an ordinary account for pauper supplies.

## 3. SAME.

When a person, unlawfully committed to the Insane Hospital, has been legally recommitted, the expenditures under the illegal commitment are revived, and at once come within the application of Rev. St. c. 27, § 37, pertaining to notice and limitation of actions in pauper cases.

## 4. SAME—NOTICE TO TOWN OF SETTLEMENT—SUFFICIENCY.

When a person, unlawfully committed to the Insane Hospital, has been legally recommitted, the town committing has a right of action against the town liable for the support of such person, for the recovery of any of the expenditures, specified in Rev. St. c. 144, § 42, "incurred within three months before notice given to the town chargeable," whether such notice is given before the date of the recommitment or after, provided the suit is commenced within two years after the cause of action accrues.

The notice to be given by one town to another, under the provisions of Rev. St. c. 27, § 37, is not required to be of any particular form, and when such notice is accompanied by an explanatory letter, the notice and the letter should be construed together, and if they together contain the essential information required by the statute, they constitute a sufficient notice, if properly addressed and signed.

## 5. SAME.

In the case at bar, *held* that the notice and explanatory letter, when construed together, were sufficient in form and in substance, and must be regarded in law as having stated the facts.

(Official.)

Exceptions from Supreme Judicial Court, Knox County.

Action by the inhabitants of Rockport against the inhabitants of Searsmont. Verdict for plaintiffs, and defendants except. Exceptions overruled, and judgment for plaintiffs.

Writ dated March 2, 1905, plea, the general issue.

The case, as stated by the bill of exceptions, is as follows:

"This action is brought to recover the expense of commitment of one Grace E. Farnham to the Insane Hospital in Augusta, and for her support therein from January 20, 1904, to November 30, 1904, being \$153.18, and interest, amounting in all to \$176.13 at the time of the trial, for which sum a verdict was rendered in favor of the plaintiffs.

"At the September term, A. D. 1905, of said court, this case came on for trial, and by agreement of parties was sent to the law court on report of the evidence, and the decision of the law court is reported in 101 Me. 257, 63 Atl. 820.

"The case again came on for trial, at the September term, 1907, of said court, and was tried before a jury, together with another case, brought by the same plaintiffs against the same defendants, to recover the expense of all of the support of the same person in the Insane Hospital to November 30, 1906, on which they recovered \$280.50 and interest, being the amount not included in the account in the first suit.

"It was admitted that Grace E. Farnham was committed to the Insane Hospital at Augusta by the municipal officers of the town

of Rockport, on the 20th day of January, A. D. 1904, and that said commitment was illegal. It was further admitted that said Grace E. Farnham was recommitted to said Insane Hospital by the judge of the municipal court of the city of Augusta on the 14th day of January, A. D. 1905, and that said recommitment was legal.

"At the trial the plaintiffs by their counsel offered in evidence the following notice and letter, which were objected to by defendants' counsel:

"To the Overseers of the Poor of the Town of Searsmont, in the County of Waldo, in the State of Maine—

"Gentlemen: You are hereby notified that Grace E. Farnham, aged 21 years, daughter of Ansel D. Farnham, an inhabitant of your town, having fallen into distress, and in need of immediate relief in the town of Rockport, the same had been furnished by said town of Rockport on account and at the proper charge of the town of Searsmont, where said Grace E. Farnham has legal settlement. You are requested to remove said Grace E. Farnham, or otherwise provide for her, without delay, and to defray the expense of her support up to this date, which are ———.

"Dated at Rockport, this 25th day of Jan. A. D. 1904.

"Yours respectfully,

"Fred W. Andrews (Ch. Bd.),

"Overseer of the Poor of Rockport."

"Rockport, Jan. 25, 1904.

"Overseers of Poor, Searsmont—Gentlemen: Inclosed find notice account Grace E. Farnham, daughter of Ansel D. Farnham. The lady above referred to was committed to the Insane Hospital for this town last Thursday. At the time of her commitment she was residing with her sister Mrs. Lufkin, and upon examination, after calling evidence, we concluded that for her good and all others interested, we caused her to be committed to the Insane Hospital at Augusta, where we trust, after a short time, she may be returned to her friends.

"Respectfully, Fred W. Andrews.

"(Ch. Bd.) Selectmen."

"The presiding justice, against the objection of the defendants, admitted the foregoing notice and letter in evidence, to which ruling the defendants' counsel then and there excepted.

"The plaintiffs by their counsel also offered in evidence the following notice, which was objected to by the defendants' counsel:

"To the Overseers of the Poor of the Town of Searsmont, and to Said Town in the County of Waldo in the State of Maine:

"You are hereby notified that Grace E. Farnham, aged about twenty-one years, daughter of Ansel D. Farnham, a person having her legal settlement in said town of Searsmont, has fallen into distress in said town of Rockport, and upon complaint duly made,

has, by virtue of section 16 and following sections of chapter 144 of the Revised Statutes of Maine, been committed to the Insane Hospital at Augusta, Maine, and the same has been done, and the expense of examination, commitment, and support in said asylum, by virtue of the provisions of said statute, been furnished and paid by the town of Rockport, on the account and at the proper charge of said town of Searsmont, where said Grace E. Farnham has her legal settlement, and you are requested forthwith to reimburse said town of Rockport for the amount paid therefor, and to assume the board and expense of said Grace E. Farnham, at said hospital, or hereafter reimburse said town of Rockport, as they may be required to pay the same. The sum so expended to this date is one hundred twenty and forty-three one hundredths (\$120.43) dollars.

"Dated Rockport, Maine, this 28th day of December, 1904.

"Fred W. Andrews,

"Corydon S. York,

"Municipal Officers, Board of Examiners and Overseers of Poor of Said Town of Rockport."

"The presiding justice, against the objection of the defendants, admitted the foregoing notice in evidence, to which ruling the defendants by their counsel then and there excepted.

"It is admitted that both of these notices were received by the overseers of the poor of the town of Searsmont, and denials of pauper settlement on the usual printed blanks seasonably returned by them to the overseers of Rockport.

"No other notice was served on the defendant town prior to the commencement of this suit.

"The plaintiffs then introduced in evidence the following notice:

"To the Overseers of the Town of Searsmont, in the County of Waldo, State of Maine:

"You are hereby notified that Grace E. Farnham, aged about twenty-one years, daughter of Ansel D. Farnham, a person having her legal settlement in the town of Searsmont, has fallen into distress in the town of Rockport, and upon complaint duly made was committed to the Maine Insane Asylum at Augusta, Maine; that, said commitment being illegal, the said Grace E. Farnham was on the ——— day of January, 1905, recommitted to said hospital.

"That the expense of examination, commitment, and support at the Insane Hospital, both for the commitment and recommitment, has, under the provisions of the statutes of the state of Maine been furnished by the town of Rockport, as if incurred for the ordinary expenses of a pauper, on account and at the proper charge of said town of Searsmont, where the said Grace E. Farnham has her legal settlement, and you are requested forthwith to reimburse said town of Rockport

therefor, or hereafter reimburse said town of Rockport, as they may be required to pay the same.

"Dated Rockport, Me., this 27th day of February, 1905.

"Fred W. Andrews,

"Corydon S. York,

"Municipal Officers, Board of Examiners and Overseers of the Poor of said Town of Rockport."

"It is admitted that the last notice was not sent to the overseers of the poor of Searsmont until after the date of this writ, and in the second suit, under the instructions of the court, the plaintiffs were permitted to recover, and did recover, the expenses of support of said Grace E. Farnham for three months next prior to the giving of this notice, but not the item of \$32.75 paid January 7, 1905, charged in the first suit.

"It was admitted that the expenses of the original commitment of Grace E. Farnham to the Insane Hospital, and of her support in the hospital, charged in the account annexed to the writ, were paid by the plaintiffs.

"The presiding justice ruled that these notices were sufficient to enable the plaintiffs to recover all of the items charged in the account annexed to the writ, with interest, and instructed the jury to render a verdict for the plaintiffs for the sum of \$176.36, if they found that the legal pauper settlement of Grace E. Farnham was in the defendant town, to which ruling and instructions of the presiding justice the defendants by their counsel then and there, before the jury retired, excepted and still do except."

At the time of the filing of the bill of exceptions, the parties also stipulated as follows:

"It is agreed that if the court find that the action can be maintained, judgment shall be entered for such sum as the court find is legally recoverable, otherwise judgment shall be entered for defendants."

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, and SPEAR, JJ.

Arthur S. Littlefield, for plaintiffs. R. F. Dunton and J. E. Moore, for defendants.

SPEAR, J. This cause was before the court in 101 Me. 257, 63 Atl. 820, involving the legality of the original commitment of a person to the Maine Insane Hospital, and the constitutionality of Rev. St. c. 144, § 42, providing for a recommitment. This section reads: "When a person has unlawfully been committed to a hospital and recommitted under the three preceding sections, the person or town liable for the support of such person, had his original commitment been lawful, is liable for the expenses of the examination and commitment under such unlawful commitment, for the support of such person thereunder, for the expenses of the examination and recommitment under the three preceding sections, and for support thereafter furnished under such recommitment, and such

liability shall extend to the town of such person's settlement, and to any person ultimately liable for such patient's commitment and support under a lawful commitment."

The original commitment was held to be illegal, the recommitment legal, and the statute constitutional.

A question also arose as to what notice, if any, under this statute should be required to be given, by the town committing, to the town liable, for the support of the person committed, having a pauper settlement therein. Upon this point the court held: "While chapter 144 is silent as to the requirements of any pauper notices, either in the original or the recommitment proceedings we think the entire scheme of the chapter is based upon the theory that the expenses and support incurred under it are in the nature of pauper supplies.

"In fact section 24 expressly provides that these expenses shall be recovered 'as if incurred for the expense of a pauper.'

"We are therefore inclined to the opinion that the proceedings under Rev. St. c. 144, with respect to expenses and support of a person committed to the asylum by the town committing, and not the pauper residence of such person, comes within the purview of Rev. St. c. 27, with reference to the notice required by one town to another in case of furnishing pauper supplies." The opinion should have stopped here, but it did not, and in appending another sentence, by way of illustration of the rule, and not intending to limit the effect of the notice required, left the precise scope of its application ambiguous. By the use of the word "only" in this sentence the right of the plaintiff town to recover for expenses and support might be interpreted to be limited to a period of three months prior to the 27th of February, 1905. But such was not the logic or intention of the opinion, as will be clearly seen by reading it, nor should it now be so construed.

The statute authorizing a recommitment in express terms provides for the recovery of all the expenses of the illegal commitment and support of the person so committed. This statute when declared constitutional gave legal force to the account, and made it actionable precisely as it would have been if the original commitment had been legal, and brought it within the same rule, with respect to the effect of notice, as would have applied if it had been an ordinary account for pauper supplies.

As was said in the opinion, "a recommitment having been made, \* \* \* then the statute takes effect, and covers the whole proceeding as one transaction; the recommitment being but a continuation of the proceedings of the original commitment." In other words, by recommitment the expenditures under the illegal commitment were revived, and at once came within the application of Rev. St. c. 27, § 37, pertaining to notice and limitation of actions in pauper cases.

Now, applying this section with respect to notice, which is all the opinion intended to do, then it follows that the plaintiff town had a right of action for the recovery of any of the expenditures, specified in section 42, c. 144, "incurred within three months before notice given to the town chargeable," whether such notice was given before the date of the recommitment or after, provided the suit was "commenced within two years after the cause of action accrued."

This cause came before the court in the first instance, as already stated, to test the legality of the original commitment, and the constitutionality of Rev. St. c. 144, § 42, and, as stipulated, both these questions, having been decided in the affirmative, ordered to stand for trial.

At the subsequent trial at nisi the plaintiffs, in support of their claim, under the rule laid down in the opinion, that the cause came within the statute regulating the proceedings for the recovery of pauper supplies, offered in evidence a notice and letter, admitted to have been sent by the overseers of the plaintiff town, and to have been received by the overseers of the defendant town, dated the 25th day of January 1904, relating solely to the proceedings of the illegal commitment and of a date long prior to the time of the recommitment. The defendant objected to the admission of this notice and letter upon two grounds: First, because the notice was given and received, and the expenses sued for were all incurred and paid for, before the date of the recommitment proceedings, and at a time when the plaintiffs could not have maintained their action against the defendants. *Kittery v. Dixon*, 96 Me. 368, 52 Atl. 799. Second, because the notice, if otherwise admissible, was not sufficient in substance to meet the requirements of the statute. The presiding justice overruled both objections, admitted the evidence, and the cause comes here upon exceptions to that ruling.

The first ground of objection has already been disposed of. The notice was competent evidence. Was it sufficient? The statute requires that a notice to be sufficient shall state "the facts respecting the person chargeable." The notice and letter, to the admission of which the exceptions were taken, are as follows:

"To the Overseers of the Poor of the Town of Searsmont, in the County of Waldo, in the State of Maine—

"Gentlemen: You are hereby notified that Grace E. Farnham, aged 21 years, daughter of Ansel D. Farnham, an inhabitant of your town, having fallen into distress, and in need of immediate relief in the town of Rockport, the same has been furnished by said town of Rockport on account and at the proper charge of the town of Searsmont, where said Grace E. Farnham has legal settlement. You are requested to remove said Grace E. Farnham, or otherwise provide for her, without delay,

and to defray the expense of her support up to this date, which are ———.

"Dated at Rockport, this 25th day of Jan., A. D. 1904.

"Yours respectfully,

"Fred W. Andrews (Ch. Bd.),

"Overseer of the Poor of Rockport."

"Rockport, Jan. 25, 1904.

"Overseers of Poor, Searsmont—Gentlemen: Inclosed find notice account Grace E. Farnham, daughter of Ansel D. Farnham. The lady above referred to was committed to the Insane Hospital for this town last Thursday. At the time of her commitment she was residing with her sister, Mrs. Lufkin, and upon examination, after calling evidence, we concluded that for her good and all others interested, we caused her to be committed to the Insane Hospital at Augusta, where we trust, after a short time, she may be returned to her friends.

"Respectfully, Fred W. Andrews,  
"(Ch. Bd.) Selectmen."

It is not claimed by the plaintiffs that the notice alone is sufficient to charge the defendants, but it is contended that the notice and the explanatory letter which accompanied it are to be read together as one document, and when so construed, constitute a notice complying with all the requirements of the statute. It is well settled that the notice and letter should be construed together. No particular form of notice is required by the statute. A letter, not purporting to be a notice at all, which contains the essential information required by the statute is sufficient, if properly addressed and signed. "The notice should contain the substance of that which the statute requires, but no particular form is necessary." *Kennebunkport v. Buxton*, 26 Me. 66.

It seems to us that the letter did contain a statement of the facts respecting the person chargeable, as they appeared at the time to exist. But the defendant does not so much contend that the facts stated are not sufficient in themselves, but that "the very important fact respecting the commitment of Grace E. Farnham is not stated in either of the notices or the letter, and that is, the admitted fact that the commitment was illegal." Hence it appears that the chief objection to the sufficiency of the notice is, not that it contains an inadequate statement of

facts if true, but that the statements purporting to be facts are not true, the original commitment being admitted to be illegal, and therefore no commitment at all. But the very object of the remedial statute was to cure the defects of the illegal commitment by a legal recommitment, and thus make valid all the proceedings of the illegal commitment, and place them upon precisely the same ground as if they had been legal, with respect to the liability of the defendant town.

The fact of commitment was stated in the notice. The illegality of commitment was cured by invoking the aid of the remedial statute. The commitment thus cured was the one referred to in the letter. The notice, which includes the letter, must therefore be regarded in law as having stated the facts.

Some other technical defects appear upon the face of the notices, but they all seem to have been waived by the admission that "both these notices were received by the overseers of the poor of the town of Searsmont, and denials of pauper settlement on the usual printed blanks were seasonably returned to them by the overseers of Rockport." And the defendants' counsel has raised no point upon these informalities, and, as by the well-settled law they seem to have been cured by waiver, we deem it unnecessary to discuss them.

Our conclusion is that the notice and letter of January 25th, when construed together, are sufficient in form and substance to meet the requirements of the statute, and were properly admitted in evidence. A notice, dated December 28, 1904, was also admitted in evidence, subject to the same objection, interposed to the admission of the notice already discussed, and the same reasons dispose of it.

From the exceptions it appears that the two notices admitted cover all the items claimed by the plaintiffs in their account, and that the writ is dated within two years after the cause of action accrued; that is, within two years from the date of the first item charged in the plaintiff's account. Every item charged had also accrued before the date of the writ. The plaintiffs, therefore, regardless of the notice which was given after the date of the writ, are entitled to recover the full amount sued for. In accordance with the agreement, the entry must be:

Judgment for the plaintiff for \$176.36.

(81 Conn. 249)

## In re DALANDS.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

## 1. APPEAL AND ERROR—TIME FOR TAKING PROCEEDINGS—EXPIRATION—REVIVAL.

Where the time fixed by Gen. St. 1902, §§ 790, 793, for the filing of a notice of appeal from a judgment and for a request for a finding of facts has expired, a motion to reopen the judgment, entertained by the court no further than to immediately deny it, does not revive the lost rights to appeal and to make a request for a finding of facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1894.]

## 2. TRIAL—FINDINGS OF FACT.

A motion to reopen a judgment was made after the time had expired for filing a notice of appeal and for a request for a finding of facts. The motion was immediately heard and denied. The movant then filed a notice of appeal, and two weeks thereafter he filed a request for a finding of facts. The judge refused to make a finding of facts, and the movant applied for an order directing the judge to make a finding of facts. *Held* that, since the motion to reopen the judgment did not revive the rights to appeal and to file a request for a finding of facts, the trial judge was not required to make the finding of facts requested, and the application for an order to compel him to do so must be dismissed.

Application to Supreme Court of Errors by F. N. Dalands for an order requiring a judge of the city court of New Haven to make and file a finding of facts. Heard on a motion to dismiss the application. Dismissed.

Thomas Hooker, Jr., and Leonard M. Daggett, for receiver Edward F. Smith. Ernest L. Averill, for applicant F. N. Dalands.

HALL, J. This is an application similar to that considered in Clark's Application, 79 Conn. 136, 64 Atl. 12, made under section 792 of the General Statutes of 1902 as amended in 1905 (Pub. Acts 1905, p. 286, c. 58), which provides that in case a trial judge shall refuse or neglect to make a finding of facts in any action, as he is required to by said section, "the Supreme Court of Errors shall, upon the application of any party to said action, made in any judicial district in which said court may be in session, order said judge to make and file such finding within such time as said court shall fix." The application alleges these facts: On the 11th of February, 1908, the city court of New Haven, Mathewson, J., presiding, rendered judgment against this applicant in a proceeding pending in said court in connection with an action entitled "Harry V. Richards et al. v. The Edward F. Smith Co.," in which a receiver had been appointed. The proceeding was a hearing upon a claim presented by this applicant as a creditor of said Smith & Co., the allowance of which was opposed by the receiver, and during which many rulings upon evidence and upon other questions of law were made against this applicant. On the 20th of March, 1908, the applicant requested the court to reopen the judgment so rendered on the 11th of February, which motion was heard and denied by said judge on

said day. The applicant thereupon on said day filed a notice of appeal, and within two weeks thereafter a request for a finding of facts and a draft finding. The judge refused to make a finding of facts, and the applicant is therefore unable to take an appeal to this court for the purpose of obtaining a review of the rulings made by the court during the trial of said action. The defendant receiver has filed a motion to dismiss the application, alleging, as the grounds thereof, that it appears from the application itself that final judgment was rendered on the 11th of February, 1908, and that the applicant filed no notice of appeal or request for a finding within the time fixed by statute. This motion is in effect a demurrer to the application. It was so treated by counsel in the argument, and will be so regarded by us.

The argument of the applicant is that his motion to open the judgment on the 20th of March, and the action of the court thereon on that day, operated to extend the time for filing a notice of appeal and a request for a finding of facts until after that date (sections 790 and 793, Gen. St. of 1902, required the former to be filed within one week, and the latter within two weeks after the rendition of judgment), and in support of his claim he cites Beard's Appeal from County Commissioners, 64 Conn. 526, 30 Atl. 775, and Sanford v. Bacon, 75 Conn. 541, 54 Atl. 204. In both of those cases there were pleas in abatement to the appeals allowed by the trial court, upon the ground that they were not seasonably taken. In the former the facts were that, six days after the final judgment erasing the case from the docket, the appellant filed a written motion to restore it, which was heard and denied two days later, when the trial court extended the time for filing notice of appeal one week, and both the notice of appeal and the appeal itself were filed within the extended time. We held that the extension was properly granted, and said, further: "Where a motion or petition for a rehearing is deemed by the court to which it is presented of sufficient importance to be reserved for future argument, and is not disposed of within 10 days from the rendition of the original judgment, it would be unreasonable to require the moving party to proceed meanwhile to file a notice of appeal or an appeal in the ordinary course." In Sanford v. Bacon, the notice of appeal was filed the day after the final judgment erasing the case from the docket was rendered, May 27, 1902. The motion to restore, which, in view of the action of the court thereon, we held operated as an extension of the time for filing the appeal, was filed May 31st, and was denied June 23d, and the draft finding was filed June 25th. In both cases, it will be observed, the motions which were held to extend the time for taking a necessary step in perfecting an appeal were made before the statutory time for taking such step had expired, and were not decided until after it had expired.

In the present case neither the action of the court upon the motion to open the judgment, nor the filing of such motion, furnished any reason for the applicant's delay in filing his notice of appeal, or his request for a finding. The court apparently entertained the motion no further than to immediately deny it, and the applicant's right to file a notice of appeal and a request for a finding had expired several weeks before the motion to open the judgment was made. Had the motion been granted, the applicant might have appealed from a subsequent adverse judgment. While such a motion, and the consideration of it by the court, may operate even when denied to extend the time for the exercise of existing rights relating to the taking of an appeal, it will not in such case serve to revive rights which were lost before the motion was made.

The trial judge was not required to make the finding of facts requested, and the application is dismissed.

(81 Conn. 145)

**CONNECTICUT BREWERIES CO. v. MURPHY.**

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

**1. INTOXICATING LIQUORS—ILLEGAL SALES—STATUTES—CONSTRUCTION.**

Gen. St. 1902, § 2727, providing that a contract, any part of the consideration of which has been the illegal sale of liquors, shall be void, when considered in connection with sections 2638, 2641, 2643, 2684, and 2690, in title 16, entitled "Intoxicating Liquors," providing for the issuance of liquor licenses, and prohibiting the sale of liquor without a license, etc., includes every sale of liquor made by any person without a license therefor, and a sale made by one having a license issued in accordance with section 2643 is not an illegal sale.

**2. SAME—"LICENSE."**

The word "license," in Gen. St. 1902, tit. 16, entitled "Intoxicating Liquors," providing for the issuance of liquor licenses, and prohibiting the sale of liquor without a license, etc., signifies an intangible right granted to the licensee and signifies the writing signed by the county commissioners, which is the instrument, and evidence of that grant, but the grant of such right can only be had by writing signed by the county commissioners in which the town and the particular building in which the sales licensed are to be made and the person who is licensed to make them, as provided by sections 2669, 2672, 2675.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4133-4141; vol. 8, p. 7708.]

**3. SAME—LICENSES TO CORPORATIONS—"PERSONS."**

Under Gen. St. 1902, tit. 1, § 2712, providing that the word "person" may include a corporation, and title 16, sections 2669, 2672, and 2675, entitled "intoxicating liquors," providing for the issuance of liquor licenses to suitable persons, etc., a corporation organized to make and sell malt liquor may be licensed to sell liquors, though section 2712 of the title provides that every person convicted of a first violation of the act shall be punished by a fine, and that such person, on every subsequent conviction, may be punished by imprisonment, in addition

to the fine; the word "person" in the title including corporations.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

**4. SAME—REFUSAL TO ISSUE LICENSES—REMEDY OF APPLICANT.**

Where the county commissioners refused to grant a liquor license to a corporation either on the ground that they had no power to license a corporation, or on the ground that their power was to license some member of the corporation, or on the ground that, though the corporation was entitled to a license, yet it was more convenient and equally beneficial to the corporation to license some member thereof, the corporation had a complete remedy by application to the court to set aside the action of the commissioners as illegal or in excess of their powers.

**5. SAME—ILLEGAL SALES—LICENSES—"SALE WITHOUT A LICENSE."**

A corporation sold liquor on its premises without having a license therefor. The county commissioners had issued a liquor license to a member of the corporation authorizing a sale of liquor on such premises. The commissioners intended to enable the corporation to sell liquors at such place, but determined to issue the license to the individual member, instead of to the corporation, which was entitled to a license, and intended that the license should operate as a license to the corporation and enable it to sell liquor without violating the law. *Held*, that a sale of liquor by the corporation was a sale without a license, in violation of Gen. St. 1902, § 2690, prohibiting a sale of liquor without a license.

**6. SAME—LICENSES.**

A person who does not have a writing signed by the county commissioners in which they license him to sell intoxicating liquors does not have a license for the sale of liquors, and sales by him are illegal; the requirement of the statute that the license shall be in writing and shall state the name of the licensee being necessary and not formal merely.

**7. SAME—ILLEGAL SALES—CONTRACTS—VALIDITY.**

Where illegal sales of liquor constituted a part of the consideration of a contract, the contract was void under Gen. St. 1902, § 2727, providing that a contract any part of the consideration of which has been the illegal sale of liquors shall be void, and the courts must apply the statute, notwithstanding the apparent injustice of its operation in a particular case.

Appeal from Superior Court, New Haven County; Alberto T. Roraback, Judge.

Action on promissory notes by the Connecticut Breweries Company against Bernard W. Murphy. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The first count of the complaint alleges that on May 4, 1906, the defendant, by his note, promised to pay to the order of the plaintiff \$1,606.59, on demand, with interest at 5 per cent., for value received, and that the plaintiff still owns said note, and it has not been paid. The defendant's answer denies the allegations of the complaint, and contains a special defense, which alleges that the note sued upon is for liquors illegally sold by the plaintiff in the town of Meriden without legal license and in violation of the laws of the state, and that such sale so made by the plaintiff is the only consideration of the note. This special defense was denied by the plaintiff. The trial court

found these issues for the plaintiff and rendered judgment in its favor.

The finding for appeal states the facts found by the court, in substance, as follows:

(1) The plaintiff is a corporation engaged in the manufacture and sale of malt liquors upon the premises known as No. 137 South Colony street, in Meriden, and is duly organized as such corporation under the laws of the state.

(2) On May 4, 1905, the defendant owed the plaintiff for malt liquors sold by the plaintiff to the defendant during the years 1903, 1904, and 1905, and the note in suit was given in consideration of such sales. The plaintiff still owns the note, and it has not been paid.

(3) During the years mentioned, the plaintiff sought to have the county commissioners issue licenses to it in its corporate name, but the commissioners ruled that corporations making application for licenses must choose one member or officer of the corporation to receive the license in his name, and required all corporations to so accept and receive licenses.

(4) Each license purporting to authorize the sale of liquors at the plaintiff's said place of business issued during the years mentioned was in the form following: "We, the commissioners of the county of New Haven, whose names are hereunto subscribed, do license John H. McMahon to sell ale, lager beer, cider and Rhine wine only from the date hereof, etc., at No. 137 South Colony street in the town of Meriden; \$200 having been paid for this license. In testimony whereof we have subscribed our names, etc. Jacob D. Walter, Edward F. Thompson, County Commissioners."

(5) During the years mentioned, John H. McMahon was a member of the plaintiff corporation and its secretary, and by direction of the plaintiff he, as its secretary, in each year duly made an application in behalf of the plaintiff to the county commissioners that they issue a license to the plaintiff to sell its product at No. 137 South Colony street, Meriden; each such application being in the form following: "I hereby apply for a license to sell ale, etc., at 137 South Colony street, city of Meriden. My place of business is not located within 200 feet in a direct line of a church edifice or public schoolhouse or the premises pertaining thereto or any post office, etc. Dated," etc.—and was signed "John H. McMahon, Secretary, Applicant." This application was indorsed by five persons duly certified to be electors and taxpayers of Meriden; such indorsement stating that the undersigned do "hereby indorse the application of the above-named Conn. Breweries Co. for such license." To this application was annexed an affidavit signed by "John H. McMahon, Secretary, Applicant," stating that "I, John H. McMahon, Secretary, on oath do depose and say that the business under said license is to be conducted by myself,

that no disqualified person has any interest in said business, that I am not disqualified to receive said license, that there is now a license at said place," etc. One of the county commissioners adds to said application certificate that "John H. McMahon, signer of the foregoing application," personally appeared and made oath before me that no portion of the building in which it is proposed to sell liquors is used for a dwelling house. The document containing the application and other papers is indorsed "application of Conn. Breweries Co. No. 137-157 South Colony street to county commissioners for beer license."

(6) The legal fee for the license so applied for was paid by the plaintiff by its check payable to the order of the county commissioners.

(7) The county commissioners, with full knowledge that these licenses were issued for and that the payments therefor were made by the plaintiff, issued these licenses to John H. McMahon for the plaintiff.

(8) The plaintiff had no intention of violating any law in the sales made to the defendant for which the notes in suit were given, but followed all the directions of the county commissioners in obtaining the licenses, in an honest effort to meet the requirements of the law and of the county commissioners.

(9) The county commissioners, with full knowledge of the situation, issued these licenses, knowing that they were for the Connecticut Breweries Company, and that it had paid its money for the permits which the county commissioners required it to take in the name of John H. McMahon.

Upon the foregoing facts the court reached the conclusion that the note in suit is not invalid because the licenses to John H. McMahon were in fact issued for the plaintiff and paid for by it in good faith. The main reason of appeal assigns error in reaching the conclusion stated upon the facts found.

Cornelius J. Danaher, for appellant. Patrick T. O'Brien, for appellee.

HAMERSLEY, J. (after stating the facts as above). Section 2727 of the General Statutes of 1902 enacts that "all contracts \* \* \* any part of the consideration of which has been the illegal sale of spirituous and intoxicating liquors shall be void." This section is a part of title 16, entitled "Intoxicating Liquors." Title 16 provides: That each town shall determine by legal vote in town meeting whether or not any person shall be licensed to sell liquors in that town (section 2638); that any license granted in a town which has voted that no person shall be licensed shall be void (section 2641); that the county commissioners may license, by a writing signed by themselves, suitable persons to sell liquors in suitable places in towns in which such licenses can be legally granted



and upon written application in the manner prescribed (section 2643); that all spirituous liquors which are intended by the owner or keeper thereof to be sold in violation of law shall, with the vessels containing such liquors, be a nuisance (section 2684); that any person who, without a license therefor, shall sell any spirituous liquors, shall be punished as prescribed (section 2690). It is evident that the illegal sale mentioned in section 2727 includes every sale of spirituous liquor made by any person without a license therefor. It follows that if the plaintiff, at the time the sales by it were made, was licensed to sell by the county commissioners by a writing signed by themselves in accordance with the provisions of section 2643, then the conclusion of the trial court is correct, and, if it were not so licensed, the court's conclusion is erroneous. The word "license" is used in the statute to signify the intangible right granted to the licensee, as well as to signify the writing signed by the commissioners, which is the instrument and evidence of that grant. *Quinnipiac Brewing Co. v. Hackbarth*, 74 Conn. 392, 394, 50 Atl. 1023. But there is nothing in the statute to indicate the possibility of a grant of this intangible right by the commissioners, otherwise than by a writing signed by themselves, in which writing shall be specified the town and the particular building in which the sales licensed are to be made and the person who is licensed to make them. Gen. St. 1902, §§ 2669, 2672, 2673.

The statute authorizes a license to all "suitable persons." The word "person" includes a corporation. The first title of the act enacting this revision provides that the word "person" as used therein may extend and be applied to corporations. Section 1. It is the common practice of the state for corporations, as well as all other persons, to engage in the business of buying and selling. The buying and selling of liquors in accordance with the regulations of law is a lawful business. Under the provisions of its joint-stock law, the state charters corporations for the transaction of any lawful business, except that of a banking, insurance, surety, railroad, gas, electric light, or water company, and that of any company which requires the exercise of the right of eminent domain. Gen. St. 1902, § 3358. It appears from the record that this plaintiff was incorporated by the state for the purpose of engaging in the business of making and selling malt liquors. There is nothing in the title concerning "Intoxicating Liquors" necessarily inconsistent with the license of a corporation, unless it be section 2712, which provides that every person convicted of a first violation of any of the provisions of the act shall be punished by a fine, and that such person, on every subsequent conviction, shall be punished by a fine, or may be punished by imprisonment, instead of or in addition to the fine. Laws which are applicable alike

to natural and artificial persons may and do involve consequences which may, in some instances, differ in their manner of execution. We think that the word "person," as used in this title, extends to corporations, and that the mere fact that the statute gives to the court a discretion in imposing the penalty for a second offense to order imprisonment of the offender, instead of or in addition to the prescribed fine, does not furnish an implication of legislative intent sufficient to overcome the other consideration, which shows that, in authorizing the license of all persons engaged in the lawful business of selling liquors, the Legislature intended what that language naturally and lawfully expresses. *Enterprise Brewing Co. v. Grime*, 173 Mass. 252, 53 N. E. 855.

The plaintiff therefore was entitled to a license. If the county commissioners refused that license, either on the ground that they had no power to license a corporation or on the ground that their power and their only power in respect to licensing a corporation was to license some individual who was a member or officer of the corporation, or on the ground that, notwithstanding the plaintiff was entitled to a license, yet, in their opinion, it was more convenient and equally beneficial to the plaintiff to refuse a license to it and to license some individual who was one of its members or officers, the plaintiff had full and complete remedy by application to the court to set aside such action as illegal or in excess of the powers of the commissioners. The situation then, as presented by the finding of the court, is this: The plaintiff sold liquors upon its premises without a license therefor. It did have a license upon its premises from the county commissioners to John H. McMahon to sell liquors at that place. In licensing John H. McMahon, the county commissioners intended to enable the plaintiff to sell liquors at that place. There is no question of clerical mistake in writing the license. The commissioners intended just what they did write and signed, namely: "We do license John H. McMahon to sell," etc. And this the plaintiff fully understood. The substantial ruling of the court upon which its conclusion is based is this: The commissioners having refused to license the plaintiff, who is entitled to a license, and having licensed John H. McMahon, with the intent that such license should in law operate as a license to the plaintiff and enable the plaintiff to sell liquors without violating the statutes, and the plaintiff having in good faith, without intent to violate any law, sold liquors without any other authority therefor, such sales are not in violation of section 2690, which says that any person who, without a license therefor, shall sell any liquor, shall be punished.

We are constrained to hold this ruling incorrect. The language of the statute is too clear and certain to permit a gloss such as this ruling requires. The only license per-

mitted is one authorized by a writing signed by the commissioners, in which writing the person and place licensed are specified, and in no other way can the intangible right involved in a license be created. A person who does not have a writing signed by the commissioners in which they licensed that person to sell does not have a license for the sale of liquors, and sales by such person are illegal. The requirement that the license shall be in writing and shall state the name of the licensee is not a formal one, but one necessary to give effect to several of the important provisions of the act. The provisions of the act are arbitrary, in instances harsh, and liable to operate inequally and unjustly. Such liability seems to be a necessary incident to legislation of this character. In one or two instances the act provides a specific remedy against its harsh operation, but such specific provisions imply a prohibition, rather than a commission, to the court to alter on equitable considerations the queerly expressed operation of the act in other instances.

The sales by the plaintiff being prohibited and illegal and constituting a part of the consideration of the contract sued upon, that contract is, by the terms of section 2727, void. This section applies a well-established principle of common law, which the courts must apply, notwithstanding the apparent injustice of its operation in a particular case. The reasons for this are clearly stated in the opinion announced by Justice Loomis in *Funk v. Gallivan*, 49 Conn. 124, 128, 44 Am. Rep. 210.

There is error, the judgment of the superior court is reversed, and the cause remanded for further proceedings according to law. In this opinion the other Judges concurred.

(81 Conn. 152)

#### Appeal of WOODWARD.

(Supreme Court of Errors of Connecticut. Aug. 8, 1908.)

#### 1. COURTS—JURISDICTION—PROBATE JURISDICTION.

Probate jurisdiction is within the jurisdiction of the superior court, but can be invoked only on appeal from the court of probate invested with original jurisdiction, and on appeal the superior court acts as a probate court.

#### 2. DESCENT AND DISTRIBUTION—ORDER OF DISTRIBUTION—DUTY OF COURT OF PROBATE.

The court of probate, in the performance of the statutory duty of distributing the personality of an intestate in accordance with the statutes of distribution, must ascertain the distributees described by the statute, and, if by reason of an error in performing such duty the order of distribution does not distribute the estate, or any part of it, to a person to whom the statute says it shall be distributed, the court of probate errs.

#### 3. ADOPTION—INHERITANCE BY ADOPTED CHILDREN.

Under the statutes of distribution, the court, on the mere fact appearing that an intestate died leaving a widow and a sister, but no issue or parent, was required to distribute a

portion of the estate to the sister, but on it further appearing that the intestate had legally adopted a child surviving him, the child must be awarded such distributive share as if born a lawful child of the intestate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adoption, §§ 35-40.]

#### 4. PARENT AND CHILD—TERMINATION OF RELATION.

The legal rights and duties existing between parent and child under the common law exist only during the minority of the child, and, after that, the duties arising from the natural relation are not legal, but moral, unless by statute some specific legal duty is created.

#### 5. ADOPTION—STATUTORY PROVISIONS—CONSTRUCTION—"ROMAN ADOPTION."

The statutes of adoption, enacted to establish, between a minor and one not his parent, the legal obligations of the natural relation of parent and child, and conferring on any person the capacity to succeed to the property of one not his parent, must be understood and applied in accordance with the terms of each statute, in view of existing conditions, and their meaning and effect are not necessarily controlled by the analogies of a "Roman adoption," deriving its significance from the principle that a father's power extended, not only to his children, but to his other descendants.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 206-210; vol. 8, p. 7566.]

#### 6. APPEAL AND ERROR—MATTERS NOT APPARENT OF RECORD—EVIDENCE—JUDICIAL NOTICE—STATUTES OF SISTER STATE.

Under Gen. St. 1902, § 697, providing that the courts shall take judicial notice of the public statutes of the several states as printed by authority, the court on appeal must take judicial notice of the public statutes of a sister state, and consider the statutes of the sister state as printed by the authority of the state, notwithstanding any finding of the court below on the subject.

#### 7. ADOPTION—STATUTES.

The power to adopt minor children is a creation of the statute unknown to the common law, and the statutory mode prescribed is the measure of the power, so that an adoption is invalid unless made pursuant to the statute.

#### 8. SAME.

Rev. St. Wis. 1858, c. 49, as amended by the act of 1862, p. 153, c. 253, authorizes any inhabitant to petition the county judge for the adoption of a child, and provides that the parents, if in the state, shall consent to the adoption, otherwise the court shall appoint a person to act as next friend of the child, and give or withhold the consent. A petition to a county judge for the adoption of a child averred that the petitioners were and had been for four years inhabitants of the county; that the child, about two years old, had lived with petitioners for more than seven months; that the child was brought into the state and abandoned by her parents, who subsequently left the state, their whereabouts being wholly unknown, and that the child had no legal guardian. The court appointed a next friend, who consented to the adoption, and the court entered an order of adoption, reciting the filing of the petition, the appointment of the next friend and his consent, and that the petitioners were proper persons to adopt the child. *Held*, that the decree of adoption was within the jurisdiction of the court and was valid.

#### 9. PARENT AND CHILD—RELATION—CONTROL BY COURT.

The legal rights a parent has in respect to his children during minority are not absolute, and may be forfeited by his own conduct. They may be modified or suspended against his will by action of the court; and they may, to a certain extent, be transferred by agreement

to another, but they cannot be destroyed as between himself and his child, except by statute.

#### 10. ADOPTION — INHERITANCE BY ADOPTED CHILD.

A decree of adoption, rendered pursuant to a statute regulating the matter, and which gives to the adopted child the capacity to inherit, is not void because the parents of the child were not served with notice to appear, and did not appear nor consent to the adoption, for which cause the parents might contest the validity of the decree so far as it affected their legal rights as parents, and the child, after the death of the person adopting him, is entitled to a share in his personal estate under the statutes of distribution, as against the right of a sister of such person.

#### 11. SAME.

The state may create the status of adoption in the case of an infant actually within its limits, and for that purpose it is only necessary that the petition for adoption should be brought by a domiciled inhabitant of the state in which it is preferred, when the child is within its territorial limits and in need of protection, provided such protection can be reasonably afforded by transferring the child to the charge of him who seeks to adopt him; and Rev. St. Wis. 1868, c. 49, as amended by the act of 1862, p. 153, c. 253, authorizes the adoption of a child in the state, though neither the child nor its natural parents have a domicile therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adoption, § 16.]

#### 12. SAME.

The policy of the state of Connecticut, having a statute for the adoption of children, and recognizing the status of an adopted child, does not interfere with the courts of the state giving effect to a decree of adoption entered by the court of a sister state, as respects the rights of the petitioners for the adoption after they had transferred their domicile to Connecticut.

#### 13. SAME.

One who has legally adopted a child in the state of his domicile cannot shake off the relation created by the adoption by a change of domicile.

#### 14. SAME.

Where a decree of adoption, rendered more than 40 years ago, was entitled in and under the seal of the county court of a sister state, and was made on a petition addressed to the county judge, and was signed by him as such, it will be presumed that the county judge disposed of the cause in accordance with the law and practice of his state, and the decree will not be adjudged void on the ground that the statutes of the state authorize proceedings of adoption before a county judge, whereas the proceedings took place in the county court.

Appeal from Superior Court, New Haven County; Alberto T. Roraback, Judge.

Proceedings for the distribution of the estate of John O. Noxon, who died intestate. From orders of distribution made by the superior court, on appeal from orders of the court of probate making distribution, Mary L. Woodward, a sister of the intestate, appeals. Affirmed.

John O. Noxon, a resident of Meriden, in the probate district of Meriden, died at the city of New York November 28, 1905. Thereupon his widow, Martha C. Noxon, petitioned the court of probate for said district that letters of administration be granted to the Meriden Trust & Safe Deposit Company, representing, in her petition, that her husband, a resident of Meriden, died November 28,

1905, possessed of estate remaining to be administered, leaving her, his widow, and as his only heir at law and next of kin, his sister, Mary L. Woodward, a resident of Elizabeth, N. J., and leaving no will. Letters of administration were granted to said corporation. On May 6, 1907, the court of probate passed an order appointing distributors of said estate. The order recited that upon the settlement of the administration account there remained for distribution, in the hands of the administrator, \$14,958.77 in personal estate; that Martha C. Noxon, widow, then (at the date of the order) deceased, and Elizabeth E. B. Potter, of San Bernardino, Cal., were heirs at law, or their representatives; and "therefore ordered that said estate be distributed to and among said heirs according to law," and appointed three distributors to distribute said estate. On May 10, 1907, said distributors reported that they had distributed said estate, amounting to \$14,958.77, one-third to Martha C. Noxon, widow, late of Meriden, deceased, and two-thirds to Elizabeth E. B. Potter of San Bernardino, Cal. On the same day (May 10, 1907) the court passed an order accepting and approving said report. On June 26, 1907, the said Mary L. Woodward made application to the court of probate, alleging that she is heir at law and next of kin of said John O. Noxon, that she is a nonresident of the state, who was not present, and who did not have legal notice to be present, at the time when said orders were made, as of record will appear, that she was aggrieved thereby, and now, within 12 months next after said orders were passed, moves an appeal to the superior court from said orders. On the same day (June 26, 1907) the court of probate passed an order allowing said appeal, and directing a prescribed notice of said appeal to be given to said administrator and to each of the persons interested, namely, the said Elizabeth E. B. Potter, Mr. and Mrs. Velle, residents of New York, and W. R. Hervey, a resident of California. Upon the entry of said appeal the appellant, Mary L. Woodward, appeared, and the said administrator appeared as appellee.

The pleadings, in so far as they affect the questions decided upon the appeal, are substantially as follows: The reasons of appeal state that the appellant is a sister of John O. Noxon, the deceased, and that the deceased died intestate, leaving a widow but no children or the representatives of children. The attorneys for the appellees filed an answer to the reasons of appeal, admitting that the appellant is a sister of the intestate, admitting that the intestate died leaving a widow, and denying that the intestate left no children or representatives of children, and alleging, as a special defense, that on November 6, 1863, the said John O. Noxon and his wife, the said Martha C. Noxon, by proceedings duly had, and a decree of adoption duly made and entered in the county court in and for Milwaukee county, in the state of Wisconsin,

adopted a minor child, named Elizabeth E. Burton, and that the Elizabeth E. Burton so adopted is the Elizabeth E. B. Potter mentioned in the order of distribution, and that, by virtue of said decree of adoption and the law of Wisconsin, said Elizabeth E. B. Potter is, for the purposes of succession and inheritance, the child of John O. Noxon, and as such child entitled to inherit his property in this state under the laws of this state. The appellant filed a reply to the special defense, denying that Elizabeth E. B. Potter was, on November 6, 1863, adopted by said John O. and Martha C. Noxon by proceedings duly had in the Wisconsin court, and denying that by virtue of the decree of said court and the laws of Wisconsin she became, for the purposes of succession and inheritance, the child of the intestate, and further averring that said alleged adoption was and is wholly void, and that the Wisconsin court had no jurisdiction over the parties to said alleged adoption proceedings, and that under the laws of Wisconsin on November 6, 1863, said Wisconsin court had no jurisdiction over said alleged proceedings. The judgment of the trial court recites that, said Mary L. Woodward having filed her reasons of appeal, the parties were at issue to the court as on file, and the court, having heard the parties, finds the issues for the appellee, and thereupon adjudges that the orders of the court of probate appealed from are valid, and that the decree of said court be confirmed, and that the appellee, the said administrator, recover of the appellant its costs.

It appears from the finding for appeal to this court that the appellee, for the purpose of proving the alleged adoption, produced a copy of the record of the adoption proceedings in the Wisconsin court, duly exemplified, and produced no other evidence of the proceedings attending said adoption. This record consists of, first, the petition addressed to Hon. Albert Smith, county judge of the county of Milwaukee. The petition represents (1) that the petitioners are, and for four years last past have been, inhabitants of said Milwaukee; (2) that Elizabeth E. Burton, an infant two years of age, the child of Henry E. and Ellen J. Burton, his wife (the said Henry being a brother of the petitioner Martha C. Noxon), has resided with the petitioners for more than seven months last past, during which time the child has been wholly dependent on the petitioners for support and has received no support from its parents; (3) that the child was brought into Wisconsin by its parents some time before the month of March last, and both parents have now left the state, and have not resided in the state for more than six months last past; (4) that the petitioners are now wholly ignorant of the whereabouts of said Henry or Ellen Burton, and when last heard from they were living separate, and neither pretending to make any provision for said child; (5) that the child has no legal guardian and no kin-

dred within the state, except the petitioners; (6) that the petitioners are fit to bring up the child suitably, and deem it fit and proper that it should be adopted by them—they therefore petition for leave to adopt the child, and that an order may be made (upon proper consent being given) that such child be deemed, for all legal purposes, the child of the petitioners, and that some suitable person be appointed to act in the proceedings as the next friend of such child. This petition was verified by oath of the signers before a notary public. Second. The order appointing a next friend. The order recites that the parents of the said child reside without the state of Wisconsin, and that said child has no legal guardian and no kindred within the state except the petitioners, and thereupon orders that Oliver P. Wolcott of Milwaukee, be appointed to act as the next friend of Elizabeth E. Burton, and to give or withhold his consent to her adoption. The order is dated on the same day as the petition, and is signed, "Albert Smith, County Judge." Third. The order purporting to change the status. This order is as follows: "State of Wisconsin, Milwaukee County—ss.: County Court, in Probate. In the Matter of the Adoption of Elizabeth E. Burton, etc. On reading and filing the petition of John O. Noxon and Martha C. Noxon, his wife, of the city and county of Milwaukee, state of Wisconsin, praying for leave to adopt Elizabeth E. Burton, the child of Henry E. Burton and Ellen J. Burton, his wife, and Oliver P. Wolcott having been appointed by this court to act as the next friend of the said child, the parents of the said child, being nonresidents of the state of Wisconsin, and the said Wolcott having given his consent in writing to the said adoption, and this court having become satisfied of the identity and relationship of the said parties, and that the petitioners are of sufficient ability to bring up the child and furnish suitable nurture and education, having reference to the degree and condition of its parents, and that it is fit and proper that such adoption shall take effect: It is therefore ordered and decreed that, from and after the date of this order, such child shall be deemed and taken, to all legal intents and purposes, to be the child of the said petitioners, as by the statute in such case made and provided. In testimony whereof I have hereunto set my hand, and affixed the seal of the county court of said county this 6th day of November, A. D. 1863.

"Albert Smith, County Judge. [Seal.]"

Section 697 of the General Statutes of 1902 provides that the public statutes of the several states, as printed by authority of the state enacting the same, shall be legal evidence, and the courts shall take judicial notice of them. The following statute laws relating to adoption appear in the public statutes of Wisconsin as printed by authority of that state. Revision 1858, c. 49, "Adoption," provides as follows:

"Section 1. Any inhabitant of this state may petition the county judge, in the county he or she may reside, for leave to adopt a child not his or her own by birth.

"Sec. 2. If both or either of the parents of such child shall be living, they, or the survivor of them, as the case may be, shall consent to such adoption; if neither parent be living, such consent may be given by the legal guardian of such child; if there be no legal guardian, nor father nor mother, the next of kin of such child within the state may give such consent; and if there be no such next of kin, the county judge may appoint some discreet and suitable person to act in the proceedings as the next friend of such child, and give or withhold such consent. \* \* \*

"Sec. 5. If upon such petition, so presented and consented unto, as aforesaid, the county judge shall be satisfied of the identity and relations of the persons, and that of the petitioner, or in case of husband and wife, that the petitioners are of sufficient ability to bring up the child, and furnish suitable nurture and education, having reference to the degree and condition of its parents, and that it is fit and proper that such adoption shall take effect, he shall make an order setting forth the said facts, and ordering that from and after the date of the order, such child should be deemed and taken to all legal intents and purposes, the child of the petitioner or petitioners."

The other sections of the chapter forbid the adoption of a child of 14 years without its consent; require that the spouse of any petitioner, lawfully married, shall join in the petition; provide that a child "so adopted as aforesaid" shall be deemed, for the purposes of inheritance and succession, custody of the person, and right of obedience, and all other legal consequences and incidents of the natural relation of parents and children, the same as if born in lawful wedlock of the adopting parents; provide that the natural parents shall be deprived, by such order of adoption, of all legal rights whatsoever as respects such child, and such child shall be freed from all legal obligations as respects its natural parents; and provide that any petitioner, or child by its next friend, may appeal to the circuit court from such order of the county judge, in like manner as appeals may be taken from the order of the county court.

In 1862 section 2 of chapter 49 was amended so as to read as follows:

"If both or either of the parents of such child shall be living they or the survivor of them as the case may be, providing they live in this state, shall consent to such adoption; but if they do not live in this state or are gone to parts unknown or if neither parent be living then such consent may be given by the legal guardian of such child. If there be no legal guardian the next of kin of such child within the state may give such consent; and if there be no such next of kin the coun-

ty judge may appoint some discreet and suitable person to act in the proceedings as the next friend of such child and give or withhold such consent." Gen. Laws Wis. 1862, p. 153, c. 253.

In 1864, chapter 253 of the General Laws of 1862 was repealed, and it was enacted that:

"Section two of chapter forty-nine of the Revised Statutes, is hereby amended, so as to read as follows: 'Sec. 2. No such adoption shall be made without the consent, in writing, of such of the parents of said child as may be living, unless it shall appear to the judge that either of the parents has abandoned the child or gone to parts unknown, when such consent may be given by the parent having the charge and care of the child. And in case where neither of the parents is living, such consent may be given by the guardian, if such child has any, and if there be no guardian, such consent may then be given by any of the next of kin of such child, residing in this state, and if there be no such next of kin, or if such next of kin be unknown, such consent may be given by some suitable person to be appointed by such judge; and in case of a child not born in lawful wedlock, such consent may be given by the mother.' " Gen. Laws Wis. 1864, p. 351, c. 278.

In 1865 chapter 278, p. 379, Laws 1864, was amended by altering the amendment in that act of section 2 of chapter 49 of the Revision of 1858. Gen. Laws Wis. 1865, p. 115, c. 132.

The Revision of 1878 repeals the Revision of 1858, and expressly repeals chapter 253, p. 153, of the Laws of 1862, chapter 278, p. 351, of the Laws of 1864, and chapter 132, p. 115, of the Laws of 1865 (Rev. St. 1878, § 4978, pp. 1149, 1150). The law regulating adoption as enacted in this Revision is contained in sections 4021, 4022, et seq.

It further appears in the finding that the trial court, in the absence of any testimony that the adoption was ever questioned by any one, deemed it reasonable to assume that all the parties directly interested in the judgment of adoption acquiesced in and fully performed all their obligations under it. Upon this state of facts the trial court reached the conclusion that the decree of distribution appealed from is valid, stating in the finding, as one reason for reaching this conclusion, that "without taking time to discuss the adoption proceedings the court is satisfied that the appellant in this case is estopped from questioning the validity of those proceedings."

Cornelius J. Danaher, for appellant. George A. Fay and George A. Clark, for Meriden Trust & Safe Deposit Co., Adm'r, appellee.

HAMERSLEY, J. (after stating the facts as above). Probate jurisdiction is within the jurisdiction of the superior court, but can be invoked only upon appeal from the court of probate, in which court original jurisdiction

of this nature is vested. Upon such appeal the superior court acts as a probate court, exercising its powers and duties in respect to the matter defined in the appeal. In this case the matter before the court of probate, and the superior court upon appeal, was the duty, imposed by statute upon the court of probate, of distributing the personal estate of an intestate in accordance with the directions of our statutes of distributions. In the performance of that duty it is the duty of the court to ascertain who are the distributees prescribed by our statute. *Mack's Appeal*, 71 Conn. 122, 128, 41 Atl. 242. If, in this case, by reason of an error of the court in performing its statutory duty of ascertaining the statutory distributees, the order of distribution does not distribute the estate, or any portion of it, to a person to whom the statute says it shall be distributed, then the court of probate erred in making the order appealed from, and the superior court erred in confirming that order.

The statute directs the court, when the intestate dies leaving no children or any legal representatives of them, to distribute a prescribed portion of the estate to the widow, and the remainder to the parents of the intestate, if any, and if there be no parent, then equally to the brothers and sisters of the whole blood. It appeared to the court that the intestate died leaving a widow, leaving no issue, and no parents, and that the appellant was his sister of the whole blood. Upon these facts alone it was the duty of the court to distribute a portion of the estate to the appellant. But it further appeared to the court that, on November 6, 1863, a county judge of the county of Milwaukee, in the state of Wisconsin, upon the petition of the intestate and his wife, passed a decree purporting to give, by authority of the Wisconsin law, to Elizabeth E. Burton, then an infant two years and seven months of age (being the Elizabeth E. B. Potter to whom the court of probate made distribution), the same capacity of inheritance and succession she would have if she had been born the lawful child of the petitioners. This action of the Wisconsin court is called by the law of that state, and somewhat similar action authorized by the law of this state is called by our law, an "adoption." "Adoption" was never used to express the peculiar incidents of such action prior to 1846, when the states of the United States, in which the common law of England is followed, began to enact statutes similar to that of Wisconsin and to that of our own state. Before that time the meaning of adoption as expressing a legal status was that derived from the Roman law. The peculiar status or relationship arising from adoption known to Roman law is of a kind unknown to the law of England, and of a kind unknown to the law of this state, certainly until 1864, when the statute referred to was passed. *Dacey on Conflict of Laws*, p. 475. It may aid the consideration of ques-

tions arising under such statutes to note the distinction between adoption as a status existing under the Roman law and the statutory status which, since 1846, has been established by the Legislatures of this and some other states retaining the English common law.

Roman adoption, or the act by which the relations of paternity and filiation are recognized as legally existing between persons not so related by nature, derived its original significance mainly from the existence of the *patria potestas*, which was peculiar to Roman citizenship, and involved, as between parent and child, relations of paternity and filiation peculiar to Roman law. A child born in lawful marriage was in the power of its father. That power includes, not only the child born in wedlock, but also the child born to his son, and the one born to his son; that is, your son, grandson, great-grandson, and other descendants are equally in your power. Just. I, ix, §§ 1-3. Roman adoption, until the legislation of Justinian, was the act by which an ascendant transferred his descendant, who was in his power, to the power of another ascendant, and thereupon the person so transferred was in the power of the adopting ascendant, as well as his actual children. The act was accomplished through prescribed formalities, under authority of a magistrate. A person not in the power of an ascendant, but free from power, might be adopted by the form of adoption called "arrogation." In such case the adopter formally consented that the one to be adopted should become his lawful son, and the one to be adopted consented thereto. This change of relation was accomplished originally by the authority of the people assembled in the *Comitia*, and later was established by an imperial rescript. Under either form the person adopted became, in early Roman law, subject to the *patria potestas* which a Roman father possessed over his descendants. See Just. Inst. I, tit. 2; Code VIII, 48, 10:

The *patria potestas*, which controlled the original meaning of Roman adoption, does not exist in this state, nor in any state organized on the principles of the English law. It is inconsistent with our fundamental social conditions. With us every man who has reached his majority is free from power. A father's power extends to his children, but not to his other descendants, and extends to his children only during the minority of each. The difference between a society like ours, based on the principle that each member on reaching his majority is his own master, a responsible unit, with control of each of his own children until and only until the child becomes of age, and a society based on the principle of the *patria potestas* is organic. With us the legal rights and duties existing between parent and child exist only during the minority of the child. After that, the duties arising from the natural relation are not legal but moral, unless by force of statute some specific legal duty is created. An-

other peculiarity of the Roman law, materially affecting the meaning and operation of Roman adoption, was the principle which recognized, in children in the power of their father, a quasi interest or ownership in his property during his life. Just. II, xix, § 3. And so the mere fact of adoption made the adopted person, thus subjected to the power of the adopted father, an heir of the patrimony, and as such entitled to succeed to the inheritance in case of intestacy. Just. III, i, §§ 1, 2. With us a child has no interest in his father's property, which, in case of intestacy, is taken possession of by the law, and distributed among those related to the intestate by blood according to prescribed rules. The statutes, differing widely in their terms, which have been passed in recent years for the purpose of establishing between a minor and one not his parent the legal obligations and duties attached to the natural relation of parent and child, as well as for conferring upon any person a capacity, more or less limited, of succeeding to the property of one not his parent, must be understood and applied in accordance with the terms of each statute, in view of our own conditions, and their meaning and effect are not necessarily controlled by the analogies of a Roman adoption.

What the Wisconsin law was at the time of the decree in question is specially found by the superior court. This finding is not in accord with the fact; the act of 1862 having apparently been inadvertently overlooked, both by court and counsel. But, under Gen. St. 1902, § 697, all courts are to take judicial notice of the public statutes of the several states of the United States, as printed by authority, and it is therefore our duty to consider the statutes of Wisconsin as they really were. *Fourth National Bank v. Franklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825. Their provisions in 1862 were substantially as follows: Any inhabitant of the state could petition a county judge for leave to adopt a child not his own by birth (the petitioner and child residing in that county). Such petition must be accompanied or followed by a consent to the adoption (1) of the parent of the child, if alive and a resident of the state of Wisconsin; (2) if no parent be living, or, if the living parent is a nonresident of Wisconsin, of the child's legal guardian or next of kin in the state, or some suitable person appointed by the judge to act as next friend of the child, and give or withhold such consent. These jurisdictional facts existing, the county judge is empowered to judicially find that the petitioner is able to bring up and educate the child, and that it is fit and proper that such adoption shall take effect, and upon finding these facts, is empowered to decree the adoption of such child; that is, that such child shall be deemed and taken, to all legal intents and purposes, as the child of the petitioner. The meaning and effect of the statutory adoption

and decree is defined by the statute as follows: (1) As affecting the legal rights and duties of parent and child, the adopted child shall be deemed, for the purposes of custody of his person, of power to enforce obedience, and other legal consequences attached to the natural relation of parent and child, as a child of the adopting parent born in lawful wedlock; the natural parent of the child being, by such decree, deprived of all legal rights as respects such child and the child being freed from all legal obligations as respects his natural parent. (2) As affecting the laws of inheritance and distribution and the capacity of the child to take property in pursuance of such laws, the adopted child shall be deemed and taken, for the purposes of inheritance and succession by him, to be the child of his adopting parent.

It is true, as claimed, that courts, in applying statutes of this kind, have held that the power to so adopt minor children is a creation of the statute unknown to the common law, that the statutory mode prescribed is the measure of the power, and that an adoption is invalid unless made in pursuance of the essential requirements of the statute. In the *Matter of Thorne's Will*, 155 N. Y. 140, 49 N. E. 661; *In re Johnson*, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380; *Shearer v. Weaver*, 56 Iowa, 578, 9 N. W. 907; *Tyler v. Reynolds*, 53 Iowa, 146, 4 N. W. 902; *Long v. Hewitt*, 44 Iowa, 363; *In re Humphrey*, 137 Mass. 84; *In re Estate of McCormick*, 108 Wis. 234, 84 N. W. 148, 81 Am. St. Rep. 890; *Ferguson v. Jones*, 17 Or. 204, 20 Pac. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808; *Watts v. Dull*, 184 Ill. 86, 56 N. E. 308, 75 Am. St. Rep. 141; *Taber v. Douglass*, 101 Me. 363, 64 Atl. 653. But the claim that this principle applied to the present case—that the record of the Wisconsin court shows upon its face that in the act of adoption the court did not follow the requirements of the statute and did that which by the Wisconsin law it was not empowered to do—is not sustained. The Wisconsin law, namely, chapter 49 of the Revision of 1858, with its second section amended by the act of 1862, was in force scarcely two years when it was deemed by the Legislature inadequate, and was materially altered. Whether or not the alteration was made because the Legislature deemed that law too arbitrary, it was the law when this decree was passed, and the decree is plainly within the jurisdiction conferred by the law.

A further claim is made that, notwithstanding the Wisconsin court acted within its jurisdiction, yet it appears that the parents of the adopted child were living at the time of the decree, and that they had no notice, by personal service or otherwise, to appear to be heard, and therefore the decree is upon its face void, by force of the settled principle that a personal judgment cannot be enforced against a defendant who neither appeared nor had legal notice to appear in the action. We do not think that this principle can be ap-



plied so as to render the decree, in so far as it affects the capacity of the infant to share in the distribution of the estate of this intestate, void upon its face. A father or parent has certain legal rights in respect to his children during minority. But these rights are not absolute rights; they may be forfeited by his own conduct; they may be modified or suspended against his will by action of the court; they may, to a certain extent, be transferred by agreement to another—but they cannot be destroyed as between himself and his child, except by force of statute. *Johnson v. Terry*, 34 Conn. 259, 263. If the parents of Elizabeth Burton had a right to contest the validity of this decree in so far as it deprived them of their legal parental rights, it does not follow necessarily that, after those rights have terminated with the majority of their child, the decree giving to the infant a statutory capacity of inheritance from a stranger, made in pursuance of jurisdiction conferred, and in the manner prescribed by statute, must be held void because the child's parents were not served with notice to appear, and did not in fact appear, and did not in fact consent to the action of the court. We are unable to affirm, upon the case as presented, that the decree of the Wisconsin court, authorized by statute and rendered in pursuance of the requirements of the statute, giving to Elizabeth Burton the defined statutory status as an adopted child of the intestate for the purposes of inheritance and succession, is void because the parents of the child might have successfully contested the validity of the decree in so far as it affected their legal rights as parents.

A still further claim is made that, on general principles of jurisprudence, the court in Wisconsin was without jurisdiction to change the status of Elizabeth E. Burton, because neither her domicile, nor that of her natural parents, was in that state. The petition for her adoption stated that John O. Noxon and his wife were inhabitants of Wisconsin, that Elizabeth E. Burton was a child between two and three years of age, who had been brought into the state by her parents more than eight months before, and for the last preceding seven months had inhabited and resided in the family of the petitioner in Milwaukee, and that her parents had left the state more than six months previously, and not since resided therein, being at the date of the petition in parts unknown. Assuming, as we should, in support of the judgment, that these allegations were found true by the county judge, they fall short of showing that the child had gained for itself a Wisconsin domicile.

The state, however, may create the status of adoption in the case of an infant actually within its limits, and for that purpose it is only necessary that the petition of adoption should be brought by a domiciled inhabitant of the state in which it is preferred, when

the child is within its territorial limits and in need of its protection, provided this protection can be reasonably afforded by transferring the child to the charge of him who seeks to assume toward it the responsibilities of a parent. *Stearns v. Allen*, 183 Mass. 404, 67 N. E. 349, 97 Am. St. Rep. 441; *Minor on Conflict of Laws*, 322. Wisconsin had a statute authorizing such a proceeding, although neither the child nor its natural parents had a domicile there. The effect of an adoption decreed under its provisions, as respects the natural parents, it is not necessary, for the purposes of this cause, to consider. See *Schultz v. Roenitz*, 86 Wis. 31, 42, 56 N. W. 194, 21 L. R. A. 483, 39 Am. St. Rep. 873.

There is nothing in the policy of this state, in reference to the relation of parent and child, which could interfere with our giving effect to the Wisconsin decree, as respects the rights of the petitioners for the adoption, after they transferred their domicile to Connecticut, or of those claiming under them. We have statutes of a similar nature, and fully recognize the status of an adopted child. *Ross v. Ross*, 129 Mass. 248, 267, 37 Am. Rep. 321. Those who have once legally made such an adoption cannot shake off the relation by a change of domicile. Whether the child adopted, on reaching full age, could reclaim its original domicile is a question not raised by the facts before us. To John O. Noxon, therefore, after his removal to this state, as well as while an inhabitant of Wisconsin, Elizabeth E. Burton, now Mrs. Potter, stood in the position of a child born in lawful wedlock.

It is therefore unnecessary to consider whether the court erred in thinking the principles of equitable estoppel might have justified the court in ordering distribution to Mrs. Potter, even if the record of the Wisconsin court were an absolute nullity. The record was valid. The court so found by its judgment; and a judgment cannot be set aside because the court, in a finding for appeal, may state an insufficient reason for a sound conclusion.

It was further contended that the Wisconsin statute only authorizes proceedings of adoption before a county judge, whereas the reasons of appeal filed in the superior court state, and the court found thereon, that the proceedings under the statute took place in the county court. With respect to this claim it is enough to say that the record of these proceedings is made part of the findings, and that, while the decree was entitled in and under the seal of the county court, it was made on a petition addressed to the county judge, and is signed by him as such. It is to be presumed, after this lapse of time, that the county judge thus disposed of the cause in accordance with the law and practice of his state.

There is no error. In this opinion the other judges concurred.



(76 N. J. L. 482)

**DEFIANCE FRUIT CO. v. FOX.**(Court of Errors and Appeals of New Jersey.  
June 15, 1908.)**1. ACTION — CONSOLIDATION—DISCRETION OF COURT.**

In many cases, the question whether actions should be consolidated rests in the discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 631.]

**2. APPEAL AND ERROR—REVIEW—DISCRETION OF LOWER COURT—CONSOLIDATION OF ACTIONS.**

But an order consolidating local actions, the effect of which is to change the venue in one of the actions from that county where the lands in question are situate, or the cause of action arose, to another county, is not within the discretion of the court, affects the substantial rights of the party, and is reviewable on error.

**3. SAME—SCOPE—WRIT OF ERROR.**

In this state a writ of error is not confined to the review of proceedings in the course of the common law, but extends to decisions rendered in the exercise of the equitable powers of a court of law, or in the course of its statutory or summary jurisdiction, provided they result in a final disposition of the matter, and have not rested in the discretion of the court.

**4. SAME—DECISIONS REVIEWABLE.**

A final judgment, rendered in the course of the common law, may be reversed if it result from an erroneous decision of an interlocutory matter not in the course of the common law, provided such decision did not lie in discretion.

**5. SAME.**

An order consolidating local actions, which has the effect of changing the venue in one of the actions from that county in which the parties are entitled to have the trial proceed to another county, is the proper subject of an assignment of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 726.]

**6. EXCEPTIONS, BILL OF—FUNCTION OF.**

The function of a bill of exceptions is not confined to questions raised upon the trial of an action.

**7. JUDGES—DISQUALIFICATION.**

A justice of the Supreme Court, who acted for that court in granting an order for the consolidation of local actions, the result of which was to work a change of venue, and who allowed a bill of exceptions upon the making of the consolidation order, has, within the meaning of our Constitution (article 6, § 2, par. 6), given a judicial opinion in the cause, in favor of the alleged error complained of, and is disqualified from sitting as a member of the Court of Errors and Appeals, upon the review of the resulting judgment, where the consolidation order is assigned for error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, §§ 220, 221.]

**8. APPEAL AND ERROR — REVIEW—QUESTIONS OF FACT.**

An order consolidating local actions, based upon a determination, as matter of fact, that the two actions theretofore depending were based upon a single cause of action, that was properly triable in the county to which the cause was assigned for trial as a result of the consolidation, there being no ground for contending that the finding of fact was unsupported by evidence, held, not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3899-3913.]

**9. VENUE — WATERS AND WATER COURSES—DAMS—INJURIES—ACTIONS.**

Where there is a single injury by backwater, affecting, at the same time, lands that lie in two counties, or where, by the construction of a dam

in one county, water is backed upon lands lying in another county, the action is triable in either county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 9.]

Minturn, J., dissenting.

(Syllabus by the Court.)

**Error to Supreme Court.**

Action by the Defiance Fruit Company against Thomas C. Fox. Judgment for defendant, and plaintiff brings error. Affirmed.

George J. Bergen and John W. Westcott, for plaintiff in error. Henry S. Alvord, for defendant in error.

**PITNEY, Ch.** The record brought up by this writ of error discloses that two separate actions of tort were brought by the Defiance Fruit Company, now plaintiff in error, against Fox, the defendant in error, in the Supreme Court. In one action the venue was laid in the county of Cumberland, and the declaration averred that the plaintiff was lawfully possessed of certain lands situate in that county, near to a certain stream of water, and that the defendant wrongfully raised a certain dam in the stream, and thereby flooded the lands of the plaintiff with backwater. In the other action the venue was laid in the county of Salem, and the declaration averred that the plaintiff was possessed of certain lands in that county, near to a certain stream of water, and that the defendant wrongfully placed and raised a certain dam across this stream, and thereby flooded the last-mentioned lands of the plaintiff with backwater. So far as appears from the face of the declarations, the actions were based upon separate and distinct injuries to separate and distinct tracts of land; and, since the causes of action were local, the venue in each action was properly laid in the county wherein the respective lands were alleged to be situate. From the record it further appears that upon motion of the defendant, it being made to appear to the court that the two suits were founded upon the same cause of action, it was ordered that they be consolidated, by discontinuing the action in which the venue was laid in Salem county, and continuing that in which the venue was laid in Cumberland county, in the same manner, in all respects, as if the declaration were couched in proper language to cover the damage to the plaintiff in both of said counties, and with leave to amend the declaration if necessary. No amendment, however, was made. The defendant pleaded the general issue, and the consolidated suit was brought on for trial before a circuit court judge in the county of Cumberland, and resulted in a verdict in favor of the defendant, upon which judgment was entered.

All this appears by the strict record of the judgment, and by the same record it appears that the order consolidating the actions was made by Mr. Justice Trenchard for the Su-

preme Court. There is also a bill of exceptions, sealed by Justice Trenchard, to his ruling consolidating the actions. Error having been assigned upon the order of consolidation, the first question stirred upon the argument in this court was whether Mr. Justice Trenchard was, under the circumstances, disqualified from sitting. The Constitution, art. 6, § 2, par. 6, speaking of this court, provides that: "When a writ of error shall be brought no justice who has given a judicial opinion in the cause in favor of or against any error complained of, shall sit as a member, or have a voice on the hearing, or for its affirmance or reversal; but the reasons for such opinion shall be assigned to the court in writing." Since in the making of the order for consolidation Mr. Justice Trenchard sat and acted for the Supreme Court, and allowed the bill of exceptions, it is plain that he has, within the meaning of the Constitution, given a judicial opinion in the cause in favor of the alleged error complained of. He is therefore disqualified from sitting in this court, if the alleged error is in its nature reviewable.

In many, if not in most cases, the question whether actions should be consolidated rests in the discretion of the court. But in the present case the effect of consolidation was, with respect to one of the two actions, to change the venue. By section 202 of our practice act (P. L. 1908, p. 590) the change of venue, in transitory actions, is left to the discretion of the court. But by section 201 it is provided that "every local action shall be tried in the county where the lands in question are situate or the cause of action arose," except where there is a trial at the bar of the Supreme Court. An action for nuisance to lands by overflowing them with backwater is local, and must be tried in the county where the lands lie or the cause of action arose. *Deacon v. Shreve*, 23 N. J. Law, 204. As pointed out by Mr. Justice Dixon in *Hill v. Nelson*, 70 N. J. Law, 376, 378, 57 Atl. 411: "Originally the pleader was required to state truly the place where each fact asserted by him occurred, and if issue was joined thereon, the fact was tried by a jury summoned from that neighborhood or venue. Afterwards, when jurors were no longer expected to decide issues of fact upon their own knowledge, a fictitious venue was, in some actions, permitted, and the pleader assigned to his facts, under a *videlicet*, the place in which he desired the trial to be held. These actions were then styled 'transitory.' But this fiction was not allowed when the cause of action was so related to a certain piece of land that it must have arisen on or near the land. Actions for such causes were styled 'local,' and triable only in the vicinity where the land lay." He proceeded to show that this rule is of such substantial force in the common law that, if a local cause of action arise outside of the realm, the law courts have no jurisdiction over it. This decision was approved and followed by this court in *Doherty v. Catskill Cement*

Co., 72 N. J. Law, 315, 65 Atl. 508. Our Legislature, so far from changing this rule of the common law respecting local actions, has perpetuated it by distinct enactment. The right of the plaintiff to have an action of this character tried in the county where the lands are situate, or the cause of action arose, is a substantial right, of which he may not lawfully be deprived by the court. Assuming, therefore, that the plaintiff herein had two separate causes of action, arising in different counties, and affecting lands situate in different counties, as was averred in its several declarations, the Supreme Court erred in making an order for consolidating the actions, the necessary effect of which was to require the plaintiff to go to trial before a jury of the county of Cumberland, upon that action which arose in Salem county, and affected lands therein situate.

If, therefore, the error assigned in this behalf is not reviewable by this court, it must be either because the error is not sufficiently manifested by the record and bill of exceptions, or because it arose otherwise than according to the course of the common law. Of course, the judgment that eventuated in favor of the defendant is according to the course of the common law, and the question is whether an alleged error that entered into this judgment, the error arising in the exercise of the equitable power of the court in a matter not resting in discretion, taints the resulting common-law judgment. According to the English practice, a writ of error lay "where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit, in a court of record. \* \* \* And it is said that, whenever a new jurisdiction is erected by act of Parliament, and the court or judge that exercise this jurisdiction act as a court or judge of record, according to the course of the common law, a writ of error lies on their judgments; but, when they act in a summary way, or in a new course different from the common law, there a writ of error lies not, but a *certiorari*. To amend errors in a court not of record, a writ of false judgment is the proper remedy." 2 *Tidd's Prac.* (3d Am. from 9th London Ed.) 1134. But in this state, and notably in this court, from an early period this limitation of the common-law writ of error has been, to some extent, departed from, in favor of a more liberal review, and by a long line of cases it has become with us established law that the writ of error is not confined to the review of proceedings in the course of the common law, but extends to decisions rendered in the exercise of the equitable powers of a court of law, or in the course of its statutory or summary jurisdiction, provided they result in a final disposition of the matter, and have not rested in the discretion of the court.

In *Woodruff v. Chapin*, 23 N. J. Law, 555, after elaborate argument by able counsel, this court held, in an opinion by Chief Jus-

tice Green, that an order made by the Supreme Court, settling the priority among executions against the same defendant, and ordering one to be satisfied out of the proceeds of sale in preference to others, was reviewable on writ of error. The subject was again exhaustively reviewed by this court in *Eames v. Stiles*, 31 N. J. Law, 490, where there was a motion to dismiss a writ of error, brought to review a decision of the circuit court denying a motion to set aside an award of arbitrators, and in an opinion by Chief Justice Beasley, citing many cases, it was laid down that a writ of error will lie in all cases where the decision of the inferior court is final, and has not proceeded from a matter resting in discretion. In *Ennis v. Eden Mills Paper Co.*, 65 N. J. Law, 577, 48 Atl. 610, this court reviewed an order of the circuit court refusing to open and set aside a mechanic's lien judgment. In *Stratford v. Mallory*, 70 N. J. Law, 294, 58 Atl. 347, we reviewed a decision of the Supreme Court, rendered upon a summary investigation of an election of directors of a corporation. In these cases final decisions that were not according to the course of the common law were held reviewable. It results, a fortiori, that a final judgment, rendered in the course of the common law, may be reversed if it result from an erroneous decision of an interlocutory matter not in the course of the common law, provided such decision did not lie in discretion. Indeed, such seems to have been the practice even in England. In *Gilliland v. Rappleyea*, 15 N. J. Law, at page 145, Hornblower, C. J., said: "Although this court will not draw into discussion, upon writ of error, such orders as may have been made upon application to the mere discretion of the court below, yet error may be assigned on such intermediate proceedings in a cause, not apparent on record, as show the final judgment to be erroneous. The books of entries furnish almost innumerable precedents of assignments of errors on such matters"—citing Lilly's Ent. 221, 292. And in *Lucke v. Kiernan*, 68 N. J. Law, 281, 53 Atl. 566, this court reviewed and reversed a judgment of the circuit court, on the ground of error in the making of an interlocutory order without notice to the defendant, and without proof to show any ground for dispensing with such notice, the effect of the order being to revoke an extension of time for pleading previously granted. We are therefore clearly of the opinion that the order of the Supreme Court in the present case, entered upon the opinion of Justice Trenchard, and to which he sealed an exception, being an order not resting in discretion, but affecting the substantial rights of the plaintiff, is the proper subject of an assignment of error. We have no difficulty in finding in the record the evidence of the alleged error. The consolidation order is embodied in the strict record of the judgment as made up by the Supreme Court, and it appears, by the same record, to have been entered upon

the motion of defendant's attorney, and without consent of the plaintiff. And, as already pointed out, it further appears by bill of exceptions (if this were necessary) that objection was made by the plaintiff at the time the consolidation was ordered.

The function of a bill of exceptions is not confined to questions raised upon the trial of an action. By the ancient common law a writ of error lay only for an error in law apparent in the record, or for an error in fact, such as the death of a party before judgment. It lay not for an error in law not appearing in the record. But more than 600 years ago this was remedied by the statute of Westminster II (St. 13 Edw. I, c. 31; 1 Stat. at Large, p. 99; 1 Bac. Abridg. 527; 2 Inst. 428), whereby it was enacted that: "When one that is impeaded before any of the justices doth alledge an exception, praying that the justices will allow it, which if they will not allow, if he that alledged the exception do write the same exception, and require that the justices will put to their seals for a witness, the justices shall so do; and if one will not, another of the company shall. And if the king, upon complaint made of the justices, cause the record to come before him, and the same exception be found not in the roll, and the plaintiff shew the exception written, with the seal of a justice put to, the justice shall be commanded that he appear at a certain day, either to confess or deny his seal. And if the justice cannot deny his seal, they shall proceed to judgment according to the same exception, as it ought to be allowed or disallowed." There is nothing in this language, nor in the purpose of the enactment, to confine the bill of exceptions to questions of law, raised upon the trial of an action. As pointed out by Lord Coke (2 Inst. 427): "This extendeth not only to all pleas, dilatory and peremptory, etc., and (as hath been said) to prayers to be received, oyer of any record or deed, and the like, but also to all challenges of any jurors and any notarial evidence, given to any jury, which by the court is overruled."

The statute of Westminster II in its substance was enacted in this state as early as March 7, 1797 (Pat. Laws, p. 245; Rev. St. 1847, p. 980, c. 17). In the revision of the practice act in 1874 the act of 1797 was inserted in substance, omitting, however, the clause requiring the judges to appear and confess or deny their seals (Gen. St. 1895, p. 2573, § 242), and in a still more abbreviated form we find the enactment as section 211 of our present practice act (P. L. 1903, p. 592), which provides that: "In any action where a writ of error lies, if exceptions shall be taken, the justice or judge shall settle and seal the same, unless the time limited for bringing a writ of error shall have expired; the exceptions shall be returned with the writ of error." As long ago as the year 1797 it was held by our Supreme Court, in *Ford v. Potts*, 6 N. J. Law, 388, that the function of the bill of ex-

ceptions was not restricted to trials. Kinsey, C. J., said: "The design of the statute was to provide for examining errors which could not properly be inserted in the record, and allows an exception wherever a party is impleaded—that is, sued or prosecuted—and I see no reason for restricting it to trials. I recollect a case where a challenge to the array was made, and, being overruled, a bill of exceptions was taken, and the question carried before the Governor and council, by whom it was determined; and the right to except was never questioned. If the proceedings of the inferior court were illegal, and violated the rights of the party, this court would, in some form or another, come at the error, and see that justice was done." It having been thus determined that the order of consolidation in this case is reviewable, and that the alleged error therein is properly evidenced, it follows that Mr. Justice Trenchard is disqualified from participation in the decision of the cause, and he has taken no part therein.

Coming now to the merits of the error assigned upon the consolidation order, we observe that the order was based upon a determination, as matter of fact, that the two suits theretofore depending were based upon the same cause of action. It is not contended that this finding of fact was unsupported by evidence, and so it is not reviewable here, for our review by writ of error is confined to questions of law only. Since, therefore, the plaintiff, instead of having two separate and distinct causes of action, as would appear from the averments of the declarations, had in fact but a single cause of action, which affected lands lying in two counties, the consolidation of the actions was not only within the power of the Supreme Court, but was entirely lawful and proper. For where there is a single injury by backwater, affecting at the same time lands that lie in two counties, the action is triable in either county; or where, by the construction of a dam in one county, water is unlawfully backed upon lands lying in another county, the venue may be laid in either county. *Barden v. Crocker*, 10 Pick. (Mass.) 383, 390, and cases cited. It may be added that the evidence, returned with the bills of exceptions sealed at the trial, clearly shows that the cause of action was such as was properly triable in either Cumberland or Salem. The order for consolidation furnishes no ground for reversal.

The remaining assignments of error relate to the proceedings upon the trial before the circuit judge and jury.

The third assignment refers to six different exceptions sealed to the rulings of the trial judge, permitting as many different questions to be asked of the plaintiff's witness Rider upon his cross-examination. This assignment is multifarious, and for that reason might, perhaps, be properly ignored. See *Associates v. Davison*, 29 N. J. Law, 415, 418; *State v. Zellman* (N. J. Sup.) 68 Atl.

468, 470. Upon examining the testimony, however, that was admitted, over objection, while it appears that certain questions were irrelevant, the evidence adduced was not such as can be deemed to have materially prejudiced the plaintiff in error, especially since the trial judge, at plaintiff's request, gave to the jury instructions that eliminated it from consideration.

The next assignment of error that is relied upon relates to the refusal of the judge to charge, as requested by the plaintiff, as follows: "The defendant's own witnesses prove that the level of the water in the defendant's pond is 12 inches below the level of the water on the plaintiff's sheeting, and that at the same time the water was 19 inches deep on the sheeting. If you believe this evidence, it constitutes an actionable wrong on the part of the defendant, and the plaintiff is entitled to recover, unless some defense is established." We think the trial judge was justified in overruling this request, because from the mere facts stated therein it did not necessarily follow that the natural level of the water upon plaintiff's property had been raised by defendant. The trial judge charged upon this topic as follows: "If the defendant dammed the water back, so that it flooded the plaintiff's land beyond the ordinary confines of the stream upon its land, and the result of that was to injure its crops, it is entitled to a verdict at your hands for such damage as you think it has sustained, unless you find that it has suffered the defendant to pen up those waters, and hold them there during a period of 20 years." This instruction sufficiently laid before the jury the real matter in controversy. The only criticism that suggests itself to us is that the instruction as given did not call the jury's attention to the fact that there might be a liability for some damages (perhaps only nominal damages) for unlawful backwater, even though it did not injure the plaintiff's crops. But there was no efficient request that called to the judge's mind the liability of the defendant to respond in damages other than such as arose from injury to the plaintiff's crops. Nor was there any exception to the instruction as given.

Error is assigned because of the refusal of the third request (which referred to the defense of adverse user), and of the fourth request (which referred to the burden of sustaining this defense). But these points were included in certain other requests submitted by the plaintiff, which were charged by the trial judge.

The other questions raised in argument require no special mention.

The judgment under review should be affirmed.

GARRISON, J. (concurring). A word or two will explain my vote, which is with the majority upon the merits of the case, but is opposed to their decision as to the con-

stitutional disqualification of one of the members of this court, which turns upon and incidentally involves an important question of practice.

The situation is correctly described in the opinion of the Chancellor. The plaintiff in error, who was the plaintiff below, had brought two suits against the defendant for the same cause of action, one in Salem county, and one in Cumberland county. An application under section 164 of the practice act (P. L. 1903, p. 581) was made to Justice Trenchard at chambers, who, conceiving that the plaintiff's cause of action was entire, and could all be disposed of in the action in Cumberland county, ordered that the action in Salem county be discontinued. Subsequently the action in Cumberland county came on for trial before Judge Endicott and a jury, resulting in a verdict for the defendant, upon which judgment was entered against the plaintiff, who thereupon sued out this writ of error, in the return to which appears the order that had been made by Justice Trenchard at chambers.

My associates think that this order is properly before us on this writ of error, and that its effect is to disqualify Mr. Justice Trenchard from sitting as a member of this court, upon the review of the trial errors of Judge Endicott. I differ with the majority of the court upon each of these propositions, for reasons briefly to be stated.

I agree that the judgment brought up by this writ of error should be affirmed, and I concur in so much of the opinion of the Chancellor as deals with the bills of exception, sealed by Judge Endicott upon the trial of the action in which such judgment was recovered.

I do not agree that the order made by Justice Trenchard is brought here by this writ of error. Hence I do not agree that Justice Trenchard, by reason of his having made such order, is disqualified from sitting upon the review of the errors assigned upon this writ of error; neither do I share the views, expressed in the majority opinion, as to the practice upon error, on the strength of which the disqualification of Mr. Justice Trenchard is based. To be more explicit, I do not agree that the order made by Justice Trenchard, discontinuing the action that had been brought in Salem county, is any part of the record of the action brought in Cumberland county, which resulted in the judgment that is brought up by this writ of error, or that such order has any place in the return to such writ of error, or that such order in any wise appertains to or affects the judgment under review. The force of this last remark would be strikingly apparent had we concluded that Justice Trenchard erred in making the order complained of; for in that case we would be confronted with the more than dubious propriety of reversing a judgment for defendant because of an error, the sole effect of which was to increase the measure of damages the plaintiff

stood to recover. For it must be obvious to any one that the practical effect of the order discontinuing the plaintiff's action in Salem county was to double up the damages recoverable by the plaintiff in its Cumberland county action, so that, if such order was erroneous, it was injurious in no respect to the action whose final judgment is before us. The normal rules of correct practice imperatively required that the plaintiff, if it conceived itself aggrieved by the change of venue of its Salem county action, should appeal to the supreme court before asking double damages of the Cumberland county jury. Such experimentation is perilously near to waiver. If not waived, the error was in the Salem county action. That an error injurious in one action cannot lead to the reversal of the judgment recovered in another action would seem to require no argument.

Cases, presently to be cited, show conclusively that the order made by Justice Trenchard is no part of the record of the judgment recovered before Judge Endicott, and that it is not embraced in the return to the writ of error that constitutes the case before us.

It may, however, be urged that Justice Trenchard's order, even if not strictly embraced in the return to this writ of error, is before us by virtue of its essentially reviewable character. To this, however, I can no more assent than I can to the propriety of its place in the return. The order was made by a single justice at chambers. Such orders are either of a discretionary character, and on that account not subject to review, or else they are reviewable, in which latter case they are reviewed by the Supreme Court itself, under a common-law practice that is one of its inherited and established prerogatives. *Key v. Paul*, 61 N. J. Law, 133, 38 Atl. 823.

Inasmuch as this prerogative antedated the Constitution of 1844, it was one of those "powers" of the Supreme Court that were authoritatively continued by that instrument. So that, even should an act of the Legislature expressly authorize the bringing into this court, in the first instance, of orders thus susceptible of review by the Supreme Court, such statute would, under our decisions, be inefficacious and invalid, as an unconstitutional interference with the supervisory faculty of the Supreme Court over its own practice. *Central R. R. Co. v. Tunison*, 55 N. J. Law, 561, 27 Atl. 929; *East Orange v. Hussey*, 70 N. J. Law, 244, 57 Atl. 1086; *In re Branch*, 70 N. J. Law, 537, 57 Atl. 431.

Orders of a single judge striking out defective pleadings may now, by force of a statutory practice, be spread upon the record of the judgment recovered in the action, and be in that way returned to this court, because such orders are otherwise not of a reviewable nature; but this statutory practice is confined to the one class of cases mentioned, and only serves to emphasize the di-

lemma presented by a reviewable order such as that now under consideration. For if Justice Trenchard's order be not reviewable, it is not the subject of this writ of error; whereas if it be reviewable, it must be reviewed by the Supreme Court, a procedure that even statutory provision, still less mere irregularity of practice, is powerless to abrogate or impair.

The dilemma presented by the constitutional right of the Supreme Court to review the orders of one of its own justices is not disposed of by the assertion that the order of a single justice is the same thing as the order of the Supreme Court itself. Not only is such assertion manifestly unsound in point of fact, but it is also in direct contravention, both of our statutory law, and of the established practice of our courts. For if such identity in reality existed, the studied purpose of our practice act, in many of its sections, to treat the two as different things would be utterly meaningless, and the statement of Mr. Justice Dixon, in *Key v. Paul*, that "orders made by a single judge at chambers, even though made under the express authority of a statute, are generally subject to review by the court itself" would be a palpable absurdity.

More conclusive still are the provisions of the practice act in sections 251 and 252 (P. L. 1903, p. 601), the first of which states the condition upon which the decision of a single justice shall be deemed to be the decision of the Supreme Court, viz., when the matter has been so heard by consent of parties, and the second of which authorizes the single justice, to whom application is made, to refer the same to the Supreme Court—provisions that would be fatuous in the extreme if it were true that without such consent, and without such reference, an order of a single justice was, of itself, the order of the Supreme Court. The very section of the practice act under which the present motion was made before Justice Trenchard expressly provides that the application may be made to the court in which the action is pending, or may be made to a judge thereof. The application having been made to a judge, an appeal lay to the Supreme Court, which cannot be brought to us instead of to it. It is perhaps needless to say that a bill of exceptions, allowed by the judge who made the order, is entirely inefficacious to this end. That the order of Justice Trenchard is not really regarded as the order of the Supreme Court itself is conclusively shown by the decision that Justice Trenchard alone is disqualified to sit, whereas, had his order been in fact the order of the Supreme Court, the decision must have been that the Supreme Court, or at least some one of its branches, was disqualified. The fact, therefore, must be faced that we are dealing with the order of a single judge and that we are deciding whether such order is part of the record of the judgment brought here by this writ of error, or

is itself susceptible of being brought directly to this court for review. I have sufficiently stated that, in my opinion, in neither of these ways is the order of Justice Trenchard before us. If there is any other way in which such order is lawfully before us, I have to confess my entire ignorance of the legal method by which it has been brought here.

The practice of the Supreme Court of this state upon error prior to the Constitution of 1844 (article 6, § 1) was stated generally, as regards chambers orders and practice motions, by Chief Justice Ewing as early as 1828, in the case of *McCourry v. Doremus*, 10 N. J. Law, 245, where the practice of the Supreme Court of the United States, as laid down in *Wright v. Hollingsworth*, 1 Pet. (U. S.) 168, 7 L. Ed. 96, was approved and followed. After the organization of this court in 1845, and in the first volume in which its decisions were reported, this court, speaking through Mr. Justice Carpenter, in the case of *Rutherford v. Fen*, 21 N. J. Law, 703, laid down the rule that error was not assignable in this court on side bar rules where no judgment is made up, or ought to be made up, and entered of record and signed. In the opinion then delivered (*Evans v. Adams*, 15 N. J. Law, 373, and *Norcross v. Boulton*, 16 N. J. Law, 310), two Supreme Court decisions, in which Chief Justice Hornblower had inclined to a more lax practice, as he had also, at about the same period, in *Gilliland v. Rappleyea*, 15 N. J. Law, 145, were animadverted upon to the point of disparagement. This court has never, that I am aware, receded from this position with respect to side bar motions, and in the 60 years that have intervened no trace of a contrary practice is discoverable, still less, if that were possible, of a practice by which orders of a single judge could be brought directly to this court. If such a thing could be done, it would have been done, and our reports would teem with cases in which it had been done. The entire absence of all such decisions is the strongest possible argument for the entire absence of any such practice. The only case that at all looks that way is the recent one of *Lucke v. Kiernan*, 68 N. J. Law, 281, 53 Atl. 566, and that is not even sub silentio an authority for such a practice. *Lucke v. Kiernan*, was a case in which a judgment, brought up by writ of error and attacked by the plaintiff in error as irregularly entered, was sought to be justified, by the defendant in error, by force of a chambers order, that allowed such judgment to be entered. The decision was that the attempted justification failed. The question of practice upon error that we are considering was therefore not presented, and it is not pretended that it was passed upon.

On the other hand, as recently as 1898, it was held in the Supreme Court, by a decision participated in by Justices Depue and Van Syckel, the two most experienced practitioners on the bench, that the order of the court

of oyer and terminer for a struck jury, to try an indictment for murder, formed no part of the record of the judgment, which was murder in the first degree. The matter of practice thus expressly decided was directly raised by an application for a mandamus by the relator, who was under sentence of death, and sought to have his conviction by a struck jury appear on the record, in order that it might be returned with and reviewed by a writ of error. *Clifford v. Hudson County, Oyer and Terminer*, 61 N. J. Law, 493, 39 Atl. 909.

In 1901 Mr. Justice Dixon in this court, in the case of *Lewis v. Lewis*, 66 N. J. Law, 251, 49 Atl. 453, again stated the rule as to what is properly embraced in a return to a writ of error, citing the early decision of Chief Justice Ewing in *McCourry v. Doremus*.

It would seem as if the practice on the return to a writ of error was entirely settled, while, as to bringing chambers motions directly to this court, it may safely be said that no member of this court ever knew of a single instance in which it was done, and that no member of the bar ever for a moment supposed that such a course was open to him.

The cases cited in the opinion, in which sundry final determinations of the supreme and circuit courts have been brought into this court, and reviewed upon error, mark our departure from the English practice as regards the character of the final judgments that may be reviewed upon error, but they are devoid of any bearing upon the character of the tribunal to which our writ of error runs, which is the sole point of difference between my associates and myself. If I have succeeded in stating what that point of difference is, and why I vote with the majority, while dissenting from the views as to the practice on error expressed in the majority opinion, the object of this memorandum is attained. The conclusion of the matter, as far as my vote is concerned, is that the order of Justice Trenchard, being no part of the record of the judgment brought up by this writ of error, and not being the subject of direct and independent review by this court, is not before us for any purpose. This being so, I am constrained to dissent from the decision by which Mr. Justice Trenchard is debarred from sitting as a member of this court.

Finding no error in the return that comes up with the judgment recovered before Judge Endicott, which I conceive to be all that is properly before us, I vote with the majority of the court that such judgment be affirmed.

MINTURN, J., dissents.

#### PASSAIC MATCH CO. v. HELIO MATCH CO.

(Court of Chancery of New Jersey. May 15, 1908.)

#### 1. JUDGMENT — RES JUDICATA—MANNER OF PLEADING.

The defense of *res judicata* may be raised by answer or by plea.

#### 2. SAME.

The defense of *res judicata* when raised by answer should be first decided as a preliminary question.

#### 3. SAME—QUESTIONS CONCLUDED.

Where, in conversion, the court charged that if defendant, through a third person acting as its agent, sold goods of plaintiff, the latter was entitled to recover, and that the mere receipt of the money derived from the sale, with knowledge that the money was plaintiff's, was not a ground for recovery, a judgment for defendant conclusively established, as between the parties, that defendant did not convert the goods, and that it did not sell plaintiff's property; but it did not determine the question whether defendant was under any liability to account to plaintiff for the proceeds of the sale.

#### 4. SAME.

The rulings of the court determining the scope of the recovery in an action at law, and of the character of the defenses admissible therein, are the law of the case on the question of *res judicata*, relied on in a subsequent suit between the parties, and both parties are bound thereby.

#### 5. SAME.

A judgment for defendant, in conversion, based on a verdict rendered for it, under an instruction directing a recovery for plaintiff if a sale of plaintiff's goods was made by defendant, is a bar to a recovery in a suit by plaintiff against defendant, based on a sale of plaintiff's goods by defendant under a contract with a third person assumed by defendant, or under a contract directly made by defendant, or a wrongful sale without any contract, but it is not a bar to a recovery, by plaintiff from defendant, of the proceeds of the sale of plaintiff's property, received by defendant under circumstances entitling plaintiff to follow the proceeds on equitable grounds.

#### 6. ACCOUNT—PARTIES.

Where, in a suit for an accounting of the proceeds of the sale of complainant's property, it appeared that an action at law had determined, as between the parties, that a third person, in making a sale of plaintiff's property and originally receiving the proceeds, did not act for defendant, complainant, not willing to accept in settlement the sum the third person admitted to be due, was entitled to amend his bill, and prosecute in a single suit the third person and defendant for an accounting.

Suit by the Passaic Match Company against the Helio Match Company for an accounting. Heard on bill and answer. Cause directed to stand over for the purpose of allowing complainant to amend his bill.

Mr. Lovell and H. H. Williams, for complainant. A. D. Sullivan, for defendant.

EMERY, V. C. In this case I will state briefly the conclusions reached, leaving further statement with opinion to be hereafter filed, if deemed desirable.

First. The defense of *res adjudicata* may be raised by answer, as well as plea, and when raised by answer should, under our practice, be first decided as a preliminary question. *Isham v. Cooper*, 56 N. J. Eq. 398, 404, 37 Atl. 462 (Emery, V. C.), affirmed on appeal 56 N. J. Eq. 409, 411, 39 Atl. 760 (Err. & App. 1897).

Second. On carefully going over the record in the suit at law, claimed by the answer to settle the present issues as *res adjudicata*, I conclude that the verdict and judgment

suit at law, which was, in form and on the record, a suit for the wrongful conversion of plaintiff's property, did, as between the parties to this suit, conclusively settle and establish two facts, viz.: (1) That the defendant did not wrongfully convert the property; and (2) that the defendant did not, as a corporation, sell the plaintiff's property, being the property for the proceeds of sale of which an account is now sought by the bill. Whether this second issue was, as complainant's counsel urge, an issue which could properly be raised and tried in the suit for conversion, or in any other suit at law, is a matter which, as between the present parties to this suit, and as the law of the case, was settled by the suit at law, in which the judge trying the cause declared, as the law of the case, that if the defendant company, through Jex acting as its officer and agent (and not John Jex individually), sold the goods, the complainant was entitled to recover. See charge, p. 187. As to the scope of recovery in the suit at law, and of the character of defenses admissible in this suit at law, both parties are, so far as the question of *res adjudicata* is concerned, bound by the law of the case as settled in the case. *Isham v. Cooper*, 56 N. J. Eq. 405, 37 Atl. 462, 39 Atl. 760; *Borcherling v. Ruckelshaus*, 49 N. J. Eq. 340, 24 Atl. 547 (Err. & App. 1892).

Third. It was also expressly settled in the suit at law, as the law of the case, between the parties, that the mere receipt of the money derived from the sale of the goods, with the knowledge that the money, or any part of it, was the Passaic Match Company's goods, was not a ground for the recovery of any amount in the action for conversion. See the court's refusal to charge this point on request. Record, p. 193. This refusal to charge left the plaintiff's recovery in that suit to depend (1) on a wrongful conversion by the Helio Company of goods belonging to the company; or (2) on a sale by the Helio Company of the Passaic Company's goods. The verdict and judgment decided conclusively, as between these parties, that the goods in question were neither wrongfully converted by the Helio Company nor sold by them. The suit did not raise nor decide the question whether, by reason of the receipt by the Helio Company of the proceeds of sale of the company's goods which it did not, as a company, make, it was under any legal or equitable liability to account to the Passaic Company for the proceeds of sale, or any part thereof.

Fourth. The original bill in this case is based expressly upon a sale of the complainant's goods by the defendant, under an agreement to manufacture and sell the property, originally made with Jex, and subsequently assumed by defendant. An account of the proceeds of this sale is prayed. I think that under the charge of the judge, in the suit at law, directing a recovery, if the sale was made at all by the defendant, the liability

upon a sale of any kind made by the company was included, whether under a contract of Jex, assumed by the company, or a contract directly made by the company, or a wrongful sale without any contract, and a mere wrongful conversion. Whether defendant might have questioned, on error, so broad a statement of its liability in that action I am not to determine. If an error, it was an error in complainant's favor, and is now beyond question of either party as being the law of the case. See *Borcherling v. Ruckelshaus*, *supra*. So far, therefore, as relates to the recovery on the bill as framed, the accounting for the proceeds of a sale of complainant's property, under an agreement of sale originally made with Jex and assumed by the company, I conclude that this question, as between the present parties, is settled by the suit at law adversely to complainant, but that the judgment in the suit at law is not a bar to the recovery, by complainant from the defendant, of the proceeds of sale of its property, received by defendant under circumstances entitling it to follow the proceeds of sale upon equitable grounds.

Fifth. The sale of the goods in question having been admittedly made by Jex, and the suit at law having determined that, as between the present parties, Jex, in making the sale and originally receiving the proceeds thereof, did not act for the company, and it being also admitted in this case that Jex, who claims to have sold the property in his individual capacity only, sold the same under a liability to account therefor, and that Jex admits that a certain sum is due complainant on such account, the complainant, if he is not willing to accept this sum in settlement, is entitled, if he be so advised, to prosecute, in a single suit, Jex for an accounting, and the Helio Match Company, as having received the proceeds of sale under circumstances which entitle complainant to follow them in a court of equity. The only question as to the prosecution of such suit is one of form and procedure, viz., whether the present bill should be dismissed without prejudice to the filing of such bill, or whether the present bill should be amended, and be directed to stand over, to make Jex defendant as a necessary or proper party to an accounting for the proceeds of sale. In view of the fact that the question of *res adjudicata* was not raised by plea, as it might have been, but by answer, and that the case is one where the ultimate substantial rights of all the parties interested, including Jex, should be determined, with the least delay and expense consistent with the rules of substantial justice, I think an amendment should be allowed. In reference to this course, it must also be considered that the question of *res adjudicata* here raised is one not only of reasonable, but of serious, doubt, and my conclusion on it is based altogether on the scope of recovery of the action at law, as defined by the judge's charge to the jury. I consider this charge as



settling the special law of this case, and controlling the application of the answer as to res adjudicata. The view of complainant's counsel as to this question, based on the general scope of the action of tort for conversion, would ordinarily govern, and the bringing of this suit in the present shape, to recover against the Hello Company on equitable grounds, based on a rightful sale, was not unreasonable. Complainant, therefore, should not be dismissed from the benefit of this suit against the Hello Company, so far as it can be controlled by proper amendments, especially as the complainant has the benefit, in this suit, of a bond given by the Hello Company, in case of ultimate recovery against it, and should not be relieved of the bond upon a merely formal question not reaching to a final decision on the merits.

All the evidence within the control of either party appears to be now before the court, and in order that the defendant may not, as between itself and Jex, be subject to any other account for the money, and also that the defendant may not, as between it and complainant, be held liable on the receipt of the proceeds to any greater extent than Jex himself would be, it is necessary, or at any rate proper, that he be made a party to the bill, and to the suit, if he can be brought in.

On the whole case, therefore, I direct that an amendment to the bill be allowed, as complainant may be advised, making Jex a party defendant, and that the cause stand over for that purpose. Jex and defendant both have a right to be heard as to any decree based on the payment to it of the proceeds of sale for which Jex was primarily liable to account, and the extent of such accounting.

(74 N. J. E. 647)

**WORTHEN & ALDRICH v. WHITE  
SPRING PAPER CO.**

(Court of Chancery of New Jersey. June 10, 1908.)

**1. WATERS AND WATER COURSES—RIPARIAN RIGHTS — REASONABLE USE OF WATERS—POLLUTION.**

A riparian proprietor is entitled to a reasonable use of the waters of a stream, but the use must be lawful, and must be exercised with due regard to the lawful rights of a lower proprietor, and he cannot pollute the stream to the injury of a lower proprietor.

**2. SAME.**

An appreciable discharge, into a natural water course, of any noisome substance is within the law prohibiting a riparian proprietor from polluting a stream to the injury of another proprietor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 58-60.]

**3. SAME.**

A riparian proprietor, operating a paper mill, placed in a natural water course large quantities of waste cotton fiber. The deposit was in such quantities as to be visible to the eye in the discoloration of the water, etc. The material polluted the water, and seriously damaged a lower proprietor in the enjoyment of his

property. *Held*, that the use of the stream was neither reasonable nor lawful, warranting relief in equity at the suit of the lower proprietor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 59.]

**4. SAME.**

A riparian proprietor, being entitled to have the water of a natural stream come to him in an unpolluted condition, is not required to use any precautions to prevent the polluting of his materials used in his bleachery.

**5. SAME.**

A lower riparian proprietor, instituting a suit to enjoin an upper proprietor from polluting the waters of the stream, is entitled to the relief demanded, though the upper proprietor has installed appliances to prevent pollution, especially where such appliances are liable to give way, since without injunctive relief the upper proprietor may discontinue the use of the safety devices, and permit injury to the lower proprietor.

**6. SAME.**

A lower riparian proprietor is entitled to maintain a suit to enjoin an upper proprietor from polluting the waters of a stream, and he is not required to seek his remedy at law for damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 66.]

**7. SAME.**

Apart from interfering grants, riparian proprietors have correlative rights in the waters of a stream; such rights being usufructuary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 33, 34.]

**8. EASEMENTS—ACQUISITION.**

One can have no easement in his own lands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 2.]

**9. WATERS AND WATER COURSES — RIPARIAN RIGHTS—CONVEYANCES FROM COMMON GRANTOR.**

A riparian proprietor conveyed a part of the premises to a purchaser, retaining a tract lower down the stream, a natural water course. The conveyance contained no reservation of rights in the tract below. Subsequently the tract below was sold to a third person. *Held*, that no equity arose in favor of the earlier conveyance, though there was a more ancient structure on the property so conveyed than on the tract conveyed to the third person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 167-173.]

Suit by Worthen & Aldrich against the White Spring Paper Company to enjoin defendant from polluting the waters of a stream and pond. Heard on bill, answer, replication, and proofs. Decree for complainant advised.

The bill in this case is filed for the purpose of enjoining the defendant from polluting the waters of the Yantacaw river and pond. The parties claim one common source of title, the lands having belonged, prior to 1892, to one Kingsland, who on August 13, 1892, made conveyance of the defendant's property to a corporation under which the defendant now claims title, and on May 20, 1895, conveyed to the complainant the land which it now occupies. The Yantacaw river runs through the lands of both parties, and forms the pond on or near to the complainant's property, known as "Yantacaw Pond." The complainant is engaged in the

business of bleaching, dyeing, and finishing cotton cloths. It has erected a large bleachery on its property, and has expended, in buildings and machinery, approximately \$500,000. It employs about 600 men. It requires a large supply of pure water, about 3,000,000 to 6,000,000 gallons daily, and it originally located its plant on the stream in question for the reason that it was capable of supplying a large amount of uncontaminated water daily. The defendant is an upper riparian proprietor, and is engaged in the manufacture of paper from pure cotton and linen rags, in a mill which is very ancient, situated about a quarter of a mile up the stream from the works of the complainant, on the north side of a public highway known as "Kingsland's Lane." The river flows through the defendant's property in a northerly direction, thence turns to the east, and then to the south, forming, in its southerly course, the Yantacaw pond, whence it passes directly alongside of the complainant's bleachery. The defendant obtains water for its mill by means of a headrace, starting from Kingsland's pond, situated on the south side of Kingsland's lane, which headrace runs parallel to the course of the river, and empties into it about 900 feet north of and below the defendant's mill. Nearly opposite the point where the tailrace joins the river, there begins a canal, which carries water, on a level somewhat higher than that of the river, to a point near the complainant's mill, and is there discharged from the canal into a pipe line, which carries the supply across the road and into the premises of the complainant. The head of the water in the canal is somewhat higher than the head of the water in the Yantacaw pond, but it flows from each by gravity into the complainant's premises, which are on a lower level than either.

The source of the complainant's water supply is therefore twofold, one from the canal, the other from the pond, but both the canal and the pond deriving their supply from the river. The complainant erected its plant, and began the operation of it shortly after it was constructed, in 1895. The defendant began its operations in the paper mill up the stream about 10 years later. After the defendant's mill went into operation, the complainant almost immediately experienced a difficulty in the bleaching, dyeing, and finishing of its goods, and upon examination discovered that the difficulty arose from the close adherence, to the fabrics which it was manipulating, of small particles of cotton fiber, which showed themselves, with more or less distinctness, at different times on the surface of the cloth. It interfered with the processes to which the cloths were subjected, and rendered it necessary to subject the fabrics to other, new, and distinct operations, in order to remove the same. On making an examination into the cause of it, and upon inspection of the canal, and the waters of the river, they found

that there were large quantities of cotton fiber floating in both sources of their water supply, and they finally traced it, within a very short time, to the mill of the defendant. An examination of the cotton cloths reveals the fact that some of the specimens, which were produced as exhibits, were soiled with small spots of mud. Without at this time going into the details thereof, it may be said that there was no proof of the cause of the mud spots. It is highly probable, however, that they were produced at a time when the waters of the stream or canal were being agitated, but by whom, or for what purpose, the evidence does not show. In the operation of the defendant's mill large quantities of pure spring water were used, which came from a large natural spring located a little to the westward of the defendant's mill. This water was used in large quantities, and there was, at all times while the mill was in operation, an unbroken flow of water from the paper mill, which was impregnated with cotton fiber that overflowed into the tailrace, and thence into the waters of the river, whence the same was taken up by the canal and in the pond, and so delivered with the water into complainant's washing machines. Complaint was made to the defendant and its officers. They acknowledged the pollution, and promised to do what they could to remedy the fault.

The complainant, being dissatisfied with the efforts made by the defendant to keep the stream unpolluted, on February 8, 1906, filed its bill of complaint against the defendant, alleging the facts indicated by the foregoing statement, claiming that the pollution complained of had been carried on, to the complainant's damage for upwards of three months prior to the filing of the bill; that a large amount of the waste material from the paper mill had accumulated along the banks and in the bed of the river and canal; that the situation was continually growing worse, and claiming that it was entitled to have the waters of the river flow past and through its lands unimpaired in quality and in quantity, except by the reasonable and lawful use of the same by the defendant, and praying that the defendant might be restrained from the further pollution of the waters of the river, canal, and pond, and from the discharge, into the river, of the said waste material, or other foreign substances. Upon the filing of the bill an order was made, requiring the defendant to show cause, on February 19, 1906, why an injunction should not issue according to the prayer of the bill, and in the meantime the defendant was enjoined from further discharging into the waters of the river, by way of its tailrace or otherwise, waste material, or foreign substances of any kind, calculated to pollute or contaminate the waters of the river beyond what is reasonable and lawful use of the same. On March 3, 1906, this restraint was continued till the further order of the court. I

do not find that this order has been vacated or varied. Shortly after it was served, proceedings were taken to punish the defendant for contempt in disobeying the order, which proceedings continued for a month or more, and were finally ended in the month of April, 1906. The defendant had apparently taken steps to obliterate the cause of complaint. The complainant likewise made corresponding efforts on its own property, by the use of screens composed of wire having a very fine mesh, and other screens filled with excelsior; and, although the complainant's witnesses testify that the efforts did not entirely succeed, it is quite manifest that they did succeed to some extent, and the suit was allowed to lie, without further prosecution or defense, until the early part of 1907.

In the spring of that year, on account of what the defendant claims was an accident in its mill, there was quite a large amount of cotton fiber deposited in the tailrace, which found its way to the complainant's washing and bleaching machines. Defendant, in the meantime, had not answered the bill, although its time to do so had expired in the month of April, 1906, about a year before. An answer was filed on May 3, 1907, in which the defendant denies the pollution complained of, and the damage to the complainant which is charged in the bill, and states that, after the bill was filed, the defendant made zealous and earnest efforts, not only to prevent the discharge of any more fiber into the stream beyond what was a reasonable and lawful use of the same, but directed its efforts to preventing the discharge of any fiber whatsoever into the stream, and, for the accomplishment of this end, that it had established settling tanks, and had installed a machine called a "Saveall Machine," the purpose of which was to extract the greatest possible amount of fiber from the spring water discharged by the defendant into the tailrace, and that the defendant had then (May 3, 1907) established, in connection with the said machine, an extensive sump, into which all the waters passing from the mill were discharged, and from which sump the waters were discharged into the river after filtration, through filters constructed of coal ashes, and that these devices had prevented the discharge of any deleterious matter into the river. A replication was filed to this answer, and the cause came on for hearing January 6, 1908. On that day the complainant obtained leave to amend its bill by alleging that the contrivances which had been established by the defendant to prevent the discharge of any and all fiber into the stream, were inefficient to prevent such discharge, to which the defendant filed a supplementary answer, not denying the allegations of the amended bill, but merely alleging that it had greatly extended the sump system, referred to in its answer, and that it had then four separate but connected sumps, of the same character as the one

mentioned in the answer, which were then in full operation. The hearing was continued, for the purpose of allowing these amendments, and it finally came on for final hearing, on amended pleadings and proofs, in the early part of 1908.

William I. Lewis and Henry C. Whitehead, for complainant. Albert C. Wall, for defendant.

HOWELL, V. C. (after stating the facts as above). During the hearing and upon the argument, the defendant's counsel laid much stress upon the manner in which the complainant had set out the measure and extent of its rights in the stream, holding that it had limited them by claiming merely that it was entitled to have the waters of the stream flow through and past its premises unimpaired in quantity and in quality, except by the reasonable and lawful use of the same by the upper riparian owners, and that the use which the defendant had made of the stream, permitting small quantities of cotton fiber to pollute it, was consistent with a reasonable and lawful use, and that thus the complainant had stated itself out of court. This contention, however, is not entitled to any force as a defense to the fact of pollution. The defendant is, of course, entitled to a reasonable use of the waters of the stream, but that use must be lawful, and must be exercised with a due regard to the lawful rights of lower proprietors, and especially is this true with regard to the charge of pollution. In *Holsman v. Bolling Spring Bleaching Company* (1862) 14 N. J. Eq. 335, complaint was made of the pollution of a small stream, which ran through the complainant's land and emptied into the Passaic river only a short distance above the mouth of the Yantacaw river. The complaint was that the defendant had permitted large quantities of chemical matter, and other impurities, to be discharged from its works into the stream, above the land of the complainants, and that the water was thereby filled with offensive matter, was discolored and polluted, and rendered unfit for all domestic purposes, for procuring ice or watering cattle; that it killed the fish, and produced offensive odors which invaded the air of the neighborhood, and penetrated the complainant's dwelling, so that the complainants had been compelled to refrain from all use of the water for family or other purposes. Chancellor Green says: "The defendants have a right to use the water upon their own soil in such manner as they may deem for their interest, provided they discharge it upon the soil of the complainants, in its accustomed channel, pure and unpolluted." And he held that the complainants were entitled to an injunction to restrain defendants from discharging offensive matter into the stream, and thereby polluting the waters which flowed upon the complainant's land.

In *Acquackanonk Water Company v. Wat-*

son (1878) 29 N. J. Eq. 366, an attempt was made, by a private water company, to take water from a stream, which supplied the defendant's bleachery, as a source of water supply for the city of Passaic; it undertaking to furnish to the complainant another source of supply from another stream. The court (Hon. Amzi Dodd, Special Master, writing the opinion) granted the injunction prayed for, upon the ground that no proprietor has a right to use the water of a running stream to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment, that he has no property in the water itself, but a simple usufruct while it passes along, and that he must so use and apply the water as to work no material injury or annoyance to his neighbor below him, who has an equal right to the subsequent use of the same water. The decree in this case was affirmed by the Court of Appeals. The same doctrine was laid down by Vice Chancellor Pitney, in *Beach v. Sterling Iron & Zinc Co.* (1895) 54 N. J. Eq. 65, 35 Atl. 286 (affirmed 55 N. J. Eq. 824, 41 Atl. 1117), in the opinion in which he cites all the leading English and American cases on the subject, and in *Attorney General v. Paterson* (1899) 58 N. J. Eq. 9, 42 Atl. 749, *Simmons v. Paterson* (1899) 60 N. J. Eq. 390, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642, and in a masterly opinion by Judge Vann, in *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 58 N. E. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643, in which the New York Court of Appeals followed Vice Chancellor Pitney's ruling in the *Beach* Case, and refused to recognize the Pennsylvania doctrine, which relaxes the ordinary rules governing the rights of riparian owners, in favor of great industries, engaged in developing the natural resources of the country.

An appreciable discharge, into a natural water course, of any noisome substance, is within the prohibition of the law. In the case at bar the pollution consisting of placing in the stream large quantities of waste cotton fiber, the particles of which varied in length from one-thirty-second to three-eighths of an inch in length, and at times the deposit was in such quantities as to be actually visible to the eye in the discoloration of the water of the canal and river, and in the deposit of quantities of the same material on the ground forming the banks and beds of these waterways. And at other times it was deposited in such large quantities as to be visible in the tailrace and in the stream, in floating flocks or lumps; and at other times it was deposited in large quantities upon the screens and other apparatus and devices, which were placed by the complainant in the canal for the purpose of screening the water before it went to the complainant's bleachery. There is no question on the evidence of the deleterious character of the polluting material, nor of the fact that it appeared, in the waterways above described, in such quantities as to seri-

ously damage the complainant in the enjoyment of its property, nor of the further fact that it appeared in the washing machine in the works of the complainant, in damaging quantities, and at times to such extent as to compel the complainant to shut down portions of its machinery, and discontinue portions of its work. This was not, and is not, either a reasonable or a lawful use of the waters of the river; and, at the time the bill was filed, in my opinion the facts and circumstances warranted the complaint which the complainant made in the court.

Pending the suit, the defendant introduced several devices to prevent the pollution of the stream by its waste water charged with cotton fiber, and in its answer tenders to the complainant the issue whether these devices are efficient. Their efficiency is denied by the amended bill. The first device that was installed, after trials of apparatus which was of no advantage whatever, was a machine called a "Saveall Machine." This seems not to have been sufficient, in itself, to stop the pollution of the stream, and subsequently large settling basins were constructed, into which the waste water from the paper mill was conducted; the design being that the waste water should remain in the settling basins for a sufficient length of time to allow the fibrous matter to precipitate. While the complainant vigorously denies the efficiency of this device, it does appear that there has not been so much cause of complaint as there was before they were constructed, and that the efforts of the defendant, aided by those of the complainant, have to an extent stopped the introduction of the cotton fiber into the bleachery of the complainant; but, if the law is as it is above stated, there seems to be no reason why the complainant should be put to any expense whatever in fending against the polluting material in the stream and canal, or be under an obligation to make any suggestions, or give any advice, as to proper methods to be adopted. If it is entitled to have the water come to it in an unpolluted condition, it ought not to be compelled to use any precautions to prevent the polluting material from entering its bleachery; but if it were proved that the settling basins or sumps as they are now arranged were entirely sufficient to restrain the polluting material from flowing into the stream, yet the complainant is, under the circumstances, still entitled to a continuance of the injunction which is now in force against the defendant. There was much evidence in the case relating to the character of the construction of these settling basins. They were described and illustrated by diagrams, by a surveyor, from actual measurements made by him. They were further described by expert engineers, and criticised because of their flimsy and unsubstantial character. They consist of logs piled up against stakes, which are driven in the ground, and are lined with coal ashes.

They are liable to give way by reason of the breaking of the stakes, or by the action of the frost, and from other causes, which are described by the witnesses. If they are efficient to restrain the cotton fiber from entering the stream, they ought to be kept in repair or made permanent constructions so as to prevent deleterious matter from ever getting to the complainant's property. The case is, in this aspect, controlled by *Beach v. Sterling Iron & Zinc Co.*, 54 N. J. Eq. 65, 83 Atl. 286. There similar settling basins had been constructed, but the Vice Chancellor determined that it was impossible to say that there would be no further incursions of the muddy water; that without a decree and injunction the defendant would be at liberty to discontinue the use of these safety devices, and permit muddy water again to flow into the complainant's supply as it had done. There is an additional argument to the same effect in this case, and that is the unstable construction of the settling basins. Without a decree and an injunction the defendants would not only be at liberty to discontinue the use of the settling basins, but would also be at liberty to allow them to become absolutely inefficient for the purpose for which they were designed. The claim made by the defendant that the complainant's remedy for the injury is by common-law action for damages is effectually disposed of by the *Beach Case*.

Lastly, the defendant claims that, inasmuch as its mill is an ancient mill, and was severed from the common ownership by the common proprietor, at an earlier date than the conveyance by him of the property of the complainant, an equity arises in favor of the more ancient structure and the earlier conveyance. It must be remembered that the stream in question is a natural water course, and that, apart from interfering grants, riparian proprietors have correlative rights in the waters of the stream; these rights being usufructuary. The fact that Kingsland made the earlier conveyance of the paper mill, retaining the tract lower down the stream, now belonging to the complainant, cannot interfere with the rule of law, nor indeed could anything interfere with it, except a positive reservation by Kingsland, in the earlier conveyance, of rights in the tract of land below. This question was settled in this state in 1854, in *Brakely v. Sharp*, 10 N. J. Eq. 206, upon a state of facts, touching the relations between upper and lower proprietors, resembling very much the facts in this case. There the earlier conveyance from the common proprietor covered the tract furthest up stream. In the opinion Chancellor Williamson lays down the rule, as follows: "There is a difference between a natural water course and an artificial construction for the conveyance of water. A is the owner of two farms, through which runs a natural stream. He sells to B. the farm upon which the water course has its or-

igin. A is entitled to have the water flow upon the farm, which he reserves, the same as he enjoyed it when he severed his title, because the water course did not begin by the consent or act of the parties, but *ex jure nature*;"—citing *Hazard v. Robinson*, 3 Mason, 272, Fed. Cas. No. 6,281. Kingsland might have reserved a right which would have created an easement in favor of the upper proprietor, but it cannot be said that the situation now, in the present state of affairs, is governed by the law of easements. A man can have no easement in his own lands. The owner of the Kingsland paper mill could not have an easement in the property now owned by the complainant, as long as the title was in himself. There is no prescriptive right claimed, nor indeed is there any evidence of a prescriptive right before the court.

The case differs from *McConnell v. American Bronze Powder Company*, 41 N. J. Eq. 449, 5 Atl. 785, affirmed 44 N. J. Eq. 603, 17 Atl. 1104. There the nuisance complained of was the raising of a dam. Pending the litigation, the dam was cut down to its accustomed height, and thus the objection was wholly removed; and, this having been established, the case resolved itself into a mere question of costs. It will be perceived that the difference between the two cases is essential and fundamental. In the *McConnell Case* the cause of action was abated. In the present case it is clearly in a position to work harm to the complainant by simple inattention to or negligence of the conditions surrounding the situation.

I will advise a decree declaring that the complainant has a right to have the water of the river, and its subsidiary waterway, the canal, flow to and upon the premises in its natural and unpolluted state and condition, and that, as to the pollution by the defendant, it be restrained from further discharging into the waters of the river waste material, or foreign substance of any kind, calculated to pollute or contaminate the waters thereof.

(74 N. J. E. 49)

**MAYOR, ETC., OF CITY OF PATERSON v.  
EAST JERSEY WATER CO.**

(Court of Chancery of New Jersey. May 14, 1903.)

**1. INJUNCTION — DETERMINATION OF LEGAL RIGHTS.**

Where defendant, in a suit to restrain the diversion of the water of a stream to the injury of plaintiff's riparian rights, does not present by its answer the necessity of a preliminary settlement of the question of plaintiff's title to the riparian lands, the court may determine such question as one of law, where the facts as to title are undisputed and the determination rests on the construction of deeds.

**2. SAME—RIGHTS DETERMINED BY OTHER JUDICIAL PROCEEDINGS.**

In a suit to restrain the diversion of the water of a stream to the injury of plaintiff's riparian rights, the question whether the unlawfulness of the diversion depends on proof of

actual perceptible damage, if the diversion is made permanent and for purpose of sale, is one the solution of which depends on the decisions of the courts of this state which control it, and therefore complainant, as a preliminary condition for equitable relief, will not be required to bring an action at law to reaffirm a right already settled as matter of general law.

### 3. SAME—ESTABLISHMENT OF TITLE AT LAW—WAIVER.

A complainant seeking injunctive relief will not be compelled to first resort to a court of law to establish a preliminary question of title to land and of damage thereto, where defendant has not raised the question in his answer and the parties have argued and submitted such questions of legal right to the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 85.]

### 4. EVIDENCE—JUDICIAL NOTICE.

A question of title to land may be considered as a historical fact of general public interest, though not formally proved, where such fact is stated to the court by counsel without objection, and the question of such title has been determined by the court in collateral litigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 15.]

### 5. NAVIGABLE WATERS—RIPARIAN OWNERS—CENTER OF STREAM.

A conveyance of land on a river above a dam described one tract of the land conveyed as beginning at a certain point and running "to the high-water mark on the northwesterly side" of such river, and running thence "along said high-water mark." Another tract was described as bounded on three sides by named monuments and on the other side "by high-water mark" of such river. The conveyance contained an express exception from the land conveyed of all parts thereof that are overflowed by the stream. It also provided that the term "high-water mark" should be construed as the edge of the water in the river when the water is flowing at a height of six inches over the dam. *Held*, that the conveyance did not convey the land under water to the center of the stream, so as to constitute the grantee a riparian owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 241, 286; vol. 8, Boundaries, § 111.]

### 6. SAME—"RIPARIAN OWNER."

A municipal corporation, to whom land above high-water mark of a river had been conveyed for use as a park, received from the owners of the bed of the stream below high-water mark a conveyance of "such use as is customary and legal for riparian owners," and to that end the right of access and crossing as to "any intervening lands between high-water mark and the water" of the river, and also the right to ornament such intervening land, but provided that the grantee should not divert the water of the stream or interfere with the use of such water by the grantor in its maintenance of a dam at a lower point on the stream. *Held*, that the deed did not, as far as upper riparian owners were concerned, convey a mere easement; but it granted a right of exclusive possession and occupation, and constituted the grantee a "riparian owner," entitled as such to prevent an unlawful diversion of the water of the stream by such upper riparian owners.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7791.]

### 7. SAME—BED AND BANKS OF STREAM—CONVEYANCE OF RIPARIAN RIGHTS.

The owner of the bed of a stream, who also owns the riparian lands adjoining, may, as between himself and his grantee, sever the title and rights of the bed and ripa, and the right of contracting as to the use or control of the rights which, in the absence of express con-

tract, would pass to the grantee of the ripa as natural riparian rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 283-285.]

### 8. EASEMENTS—EXTINGUISHMENT BY UNITY OF TITLE—EXCEPTION TO RULE.

The rule that an owner of land cannot also possess an easement in such land is not applicable to the case of rights arising by operation of law from a condition fixed by the laws and forces of nature, such as riparian rights.

### 9. NAVIGABLE WATERS—CONVEYANCES—CENTER OF STREAM.

A conveyance of land on a fresh-water river, which contains a call "to the river," makes the river the boundary, and conveys the land to the center of the stream.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 211-216, 286-289.]

### 10. SAME—COURSES AND DISTANCES—OMISSION OF CALL.

A conveyance, describing the land as commencing at a certain point, and running thence southerly "to the river," thence "northerly parallel with the first course," and thence to the beginning, is not inoperative to render the grantee a riparian owner, in that the call along the river is omitted; but, to obviate the defect, the calls will be run backward, and the grantee will be given such a frontage on the river as will result from a paralleling of the side lines of the tract described.

### 11. ADVERSE POSSESSION—PROPERTY SUBJECT TO PRESCRIPTION—RIPARIAN RIGHTS—"RIPARIAN OWNER."

Title by adverse possession for over 30 years up to the edge of a river and to the river bank creates the occupant a "riparian owner," entitled as such to protect his rights against the acts of upper riparian owners.

### 12. NAVIGABLE WATERS—CONVEYANCES—CENTER OF STREAM.

A deed describing the land conveyed as beginning at a river, and running thence to the river, and thence down the stream, conveys to the center of the river.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 211-216, 286-289; vol. 8, Boundaries, § 111.]

### 13. ACTION—GROUNDS OF ACTION—NECESSITY OF SHOWING DAMAGE.

Actual, perceptible damage is not indispensable as the foundation of an action, and it is sufficient to show the violation of a right, in which case the law will presume damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 7.]

### 14. WATERS AND WATER COURSES—DIVERSION OF WATER—GROUNDS FOR INJUNCTION—EXTENT OF INJURY.

A lower riparian owner is entitled to restrain an unlawful diversion of the water of a stream by a water company, though he fails to show actual perceptible injury from diminution of the quantity of the water, where a continuance of the diversion may ripen into a right of appropriation by prescription, and the water company has made contracts with various persons and municipalities to supply water for long terms of years, with right of renewal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 85.]

### 15. COURTS—RULES OF DECISION—EFFECT OF AFFIRMANCE ON DIFFERENT GROUNDS.

A decision of the United States Supreme Court, putting the affirmance of the decree of a state appellate court on a ground different from that taken by the state court in its opinion, does not affect the binding authority of the decision of the state court as a judicial precedent on the questions covered by the affirmance.

# 16. WATERS AND WATER COURSES—DIVERSION OF WATER—UNREASONABLE USE.

The uses of water of a flowing stream must, in order to be reasonable, be consistent with the occupation and enjoyment of the riparian lands; and, where a water company diverts such a perceptible quantity of the water as to exclude the application of the maxim, "*de minimis non curat lex*," and such water is used to supply its customers, some of whom are located in a different watershed, such use is unreasonable, and entitles a lower riparian owner to relief by injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 84, 85.]

# 17. SAME—GROUNDS FOR INJUNCTION—"DE MINIMIS NON CURAT LEX."

While the maxim, "*De minimis non curat lex*," may not be applied to prevent the issuance of an injunction against the diversion of the water of a stream by a water company at a time when the water is at its lowest flow and there is a perceptible diminution in the quantity of water, the maxim may be applied to prevent injunctive relief, where the use is at a flood stage and the utilization consists in appropriating the surplus or waste water.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 85.]

# 18. SAME.

In determining whether the maxim, "*De minimis non curat lex*," shall be applied to prevent injunctive relief against the diversion of the water of a stream, the condition of the stream at the time of its lowest stage must be considered, and not the average flow, arrived at by taking all the stages of the water.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 85.]

# 19. SAME—EVIDENCE.

In an action by a municipal corporation to restrain the diversion of the water of a river by a water company to the injury of riparian lands owned by the city, part of which was used as a park and a part for an engine house, evidence considered, and held sufficient to show an actual and perceptible diminution of the water to complainant's injury as a riparian owner.

# 20. SAME—RIPARIAN OWNERS—MUNICIPAL CORPORATIONS—SEWERS AND WATER COURSES—DISCHARGE OF SEWAGE IN RIVER—RIGHTS AS RIPARIAN OWNER.

Authority given by statute to a municipal corporation to establish a sewer system and to use a river as an outlet thereof does not put the municipal corporation in the position of a riparian owner, entitled as such to restrain a diversion of the water of the stream by an upper riparian owner, on the ground that the diminution in the quantity of the water causes the sewage to accumulate in the bed of the river and to subject the city to liability to lower riparian owners.

# 21. INJUNCTION—DETERMINATION OF RIGHTS AT LAW.

The claim of a municipal corporation that by reason of authority given it by statute to maintain a sewer system and to use a river as an outlet thereof, it is entitled to restrain an unlawful appropriation of the water of the river by an upper riparian owner, is an assertion of a right so novel in our jurisprudence that a court of equity will decline to grant injunctive relief until complainant establishes such right at law.

# 22. NAVIGABLE WATERS—RIPARIAN RIGHTS—MUNICIPAL CORPORATIONS—SEWERS—DIVERSION OF WATERS OF RIVER—RIGHT OF MUNICIPALITY TO EQUITABLE RELIEF.

Where a municipal corporation claims the right by statute to pollute the water of a river by the discharge of its sewage, equity will deny it relief by injunction against the diversion of

the water of the river by a water company for the purpose of supplying pure water to municipalities and private companies, and will remit complainant to any remedy it may have at law.

# 23. WATERS AND WATER COURSES—DIVERSION OF WATER—ESTOPPEL—NOTICE OF OBJECTIONS.

The assertion of defendant water company that complainant city, seeking to protect its rights as a lower riparian owner, was estopped to complain of a diversion of the water of a river by its failure to object while the water company was constructing costly works to effect the diversion, is not sustained, where it appears that a notice of objection was served by complainant on an assistant civil engineer in charge of the work of construction, though it is not shown that the notice was ever received by defendant's officers.

# 24. SAME.

A lower riparian owner is not estopped to complain of a diversion of the waters of a river by a water company by the fact that he makes no objection while the company is constructing costly works to effect the diversion.

# 25. EQUITY—LACHES.

An equitable remedy in aid of a legal right is not ordinarily barred by mere acquiescence for a period less than 20 years, independent of any circumstances raising special equities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 204-209.]

# 26. WATERS AND WATER COURSES—DIVERSION OF WATER OF RIVER—ESTOPPEL.

After a city, possessing the rights of a riparian owner on a river, has served notice on a water company, while it was constructing costly works to effect a diversion of the water of the river, that the city would insist on an unimpaired flow of the water, the city was not bound to immediately follow up such notice by a resort to legal proceedings to prevent the continuance of the construction, but might delay such proceedings until the diversion was accomplished.

# 27. SAME—PARTIES.

In a suit by a city having the rights of a riparian owner on a river to restrain a water company from diverting the water of the river an injunction, the effect of which will reduce the quantity of water appropriated, will not be awarded, where other water companies supplying municipalities with water obtain their supply from defendant's reservoirs, and such companies are not made parties to the suit.

# 28. EQUITY—DETERMINATION OF LEGAL RIGHTS—INCIDENT TO EQUITABLE RELIEF.

While relief in equity should extend to a declaration of complainant's legal rights, such declaration can be made only as an incident to and the basis of some equitable relief.

# 29. EMINENT DOMAIN—REMEDIES OF OWNERS—AWARD OF DAMAGES IN LIEU OF INJUNCTION.

The rule that the taking and injuring of private property for a public use will not be restrained, if compensation in damages can be made and defendant is willing to make such compensation, and a serious and manifest public injury would result from the issuance of an injunction, is confined in its application to the taking or injuring of property by agencies or public service corporations possessing the power of eminent domain.

# 30. INJUNCTION—RELIEF AWARDED—DAMAGES IN LIEU OF INJUNCTION

An award of damages for an unreasonable diversion of the waters of a river to supply municipalities with pure water may be made in lieu of an injunction in a suit against a water company possessing the power of eminent domain, though the water taken from the river is



sold to defendant company by another water company not possessing the power of eminent domain.

Suit by the mayor and aldermen of the city of Paterson against the East Jersey Water Company. Decree for complainant.

The object of this bill, filed by the city of Paterson against the East Jersey Water Company, is to restrain the water company from the further diversion of any of the waters of the Passaic river, which flows through the city. The water company in the year 1899 acquired a dam and reservoir at Little Falls, on the Passaic, about four miles above Paterson, and constructed there a large and expensive filter plant. In the same year it also constructed at the Great Notch on Hook Mountain, near Paterson, a large reservoir, and from the latter part of the year 1899 it has taken from the river at Little Falls very large quantities of water for the purpose of supplying potable water to various municipalities of the state, including the city of Paterson itself. From December, 1899, to May 23, 1904, Jersey City was one of the municipalities thus supplied, and during this interval the amount pumped from the river at Little Falls was about 50,000,000 gallons daily. Since the latter date Jersey City has received its water supply from the Rockaway river, a tributary of the Passaic above Little Falls, and the average amount drawn daily from the river at Little Falls by the defendant, from this date up to the time of the filing of the bill (May, 1905) and of the hearing, was about 22,000,000 gallons. Of this amount about 10,000,000 are supplied to the city of Paterson and 3,500,000 to the city of Passaic. These cities are supplied from the low-pressure reservoir at Little Falls, and these waters are also filtered. The balance of the water diverted, about 8,500,000 gallons daily, is drawn for the supply of smaller municipalities in Hudson and Essex counties, and of Little Falls, in Passaic county. Paterson and Passaic have been supplied with water from this source since the year 1899 by virtue of contracts of the East Jersey Company, made, respectively, with the Passaic Water Company, incorporated in 1849, and the Aquackanonck Water Company, in 1867, for the purpose of supplying these cities, respectively, with water from the Passaic. Little Falls itself has been supplied since 1895 with the filtered water. The city of Bayonne and the town of Nutley have been supplied from the reservoir at Great Notch, since November, 1899, and from May, 1904, water has also been supplied from this reservoir to the New York & New Jersey Water Company for Kearney, Harrison, and East Newark, to the Montclair Water Company for Montclair, Bloomfield, Glen Ridge, and West Orange, and to the Essex county freeholders, for public institutions at Caldwell. Neither of the municipalities drawing their supplies, nor the water companies directly supplying them, are made parties to the suit; the East

Jersey Water Company, as the company originally diverting the water, being the sole defendant.

The right of the complainant to enjoin this diversion by the East Jersey Company is specially rested by the bill upon two different grounds. The first is its right as a lower riparian owner of lands to the flow of the river along and in front of its riparian lands, undiminished by such diversion; and the second claim is based on an alleged statutory authority to establish a sewer system, with a discharge into the river. It is claimed that the amount of water diverted from the river at Little Falls by the defendant company and which is not returned subsequently to it (through the supply to Paterson itself) has so substantially and materially affected the amount of water into which the sewage of the city is discharged that the waters of the river within and below the city have become largely charged with sewage, making the river noxious and a menace to the health, damaging its parks, and subjecting it to large claims of lower riparian owners for injuries resulting from the discharge of sewage.

The answer denies the right of the complainant to maintain the suit upon either ground. As to the claim based on riparian ownership, it insists that the complainant's title does not (as alleged in the bill) extend to the center of the river, and at the hearing it was further insisted that, even if complainant is a riparian owner, no lower riparian owner can maintain any action for diversion against an upper riparian owner diverting for any purpose, or enjoin such diversion, without proof of an actual, perceptible injury to such lower riparian lands, and that in this case it appears by the evidence that no such injury has arisen. As to the claim based on the city's right to the unobstructed flow of the water for sewer purposes, the defendant, in the first place, denies the existence of any such authority or right; secondly, it insists that such right, even if conferred by statute on the complainant, could not and did not impose on the defendant, who is an upper riparian owner or occupant, any burden or obligation, in reference to its diversion of water, additional to the right to the use or flow of the water to which a lower riparian owner is by nature entitled purely as an owner of riparian lands, and could not as to such upper riparian owner give the city, in a capacity other than that of riparian owner, any rights to the use of the water additional to those inherent in a lower riparian owner, or more burdensome to the upper owner; and, thirdly, as an answer to this claim, upon the facts of the case it is insisted that the amount of sewage discharged into the river by the city of Paterson is so great that the entire natural flow of the river, if unobstructed, would be insufficient to carry it off, and that the amount diverted by defendant is so small a proportion of the entire flow that it has no material conse-



quence on the efficacy of the river for sewer purposes.

In addition to these defenses, which contest, either upon grounds of law or fact, the existence of any rights in complainant which are entitled to protection by injunction, the defendant in its answer and at the hearing asserts certain special equitable defenses against the remedy by injunction, even if a legal right of action be established. These are, first, an estoppel of the complainant, arising from the fact that the complainant was apprised of the construction of its works, and of the laying of mains for the supply of the different municipalities, that it has sanctioned their construction and use, and has so acquiesced therein as to deprive it of any equity for injunction. As to the water supplied to the city of Paterson itself and to Passaic, there is further set up a special estoppel or bar to an injunction on the ground that the water companies were incorporated for the special purpose of furnishing water for Paterson and Passaic from the Passaic river, and before the authority to use the water for sewer purposes, and that by reason of this subsequent use these companies have been obliged to discontinue their drawing of water within and below the city, and have been obliged to resort to a water supply for the cities above the waters polluted by the city; and, further, that the city of Paterson itself is now, and since 1899, when the mains were laid through its streets for that purpose, has been, supplied with all its water for domestic and fire purposes by the Passaic Water Company, which discontinued its former plant and laid down several miles of mains for the purpose of procuring this supply of pure water.

In addition to these grounds for estoppel or bar to injunction which concern or relate exclusively to the property rights or to the status of the defendant, the defendant, at the hearing and in the answer, as a reason for not granting an injunction, also sets up and relies on another aspect of the case, which affects public rights or uses of the river, considered as a source of potable water supply. It is claimed that by reason of the pollution of the Passaic river below the city of Paterson, for which the city itself is mainly responsible, the use of the river as a source of potable water supply to the inhabitants of the watershed and its vicinity has been destroyed, and that the municipalities below the city of Paterson, which were formerly supplied either directly or indirectly from the lower Passaic, are now obliged to seek other sources, and that the only available source for all these municipalities now supplied by defendant is the upper Passaic. It is further claimed that the potable use of pure running streams is necessarily the paramount use, and one to which the mere riparian right should in equity be subject, at least so far as to disentitle the riparian owner, who shows no special damage

different from that of other riparian owners, to an injunction, and to remit him to compensation for the damage; and the defendant offers, both in the answer and at the hearing, to make such compensation, if it be determined by the court that the complainant has established such invasion of its rights to the undiminished flow of the waters as would in ordinary cases entitle it to an injunction for the protection of its right.

On that branch of the case relating to complainant's status as riparian owner, the special issues raised arise first from the special character of its deeds, and next from the dispute as to the real basis of a lower riparian owner's right of action for diversion of the flow of water by an upper owner. Complainant asserts riparian rights in respect to three tracts of land, two of them extensive tracts, known, respectively, as the West Side Park, located above the Great Falls, and East Side Park, below the falls, and the third, a small lot, about 22 feet in width, located on the river a short distance below the falls. The bill alleges that as to each of these three tracts complainant's title extends to the center of the river, and that as to each of them it is of right entitled to the full and unobstructed flow of all the water that naturally does and would flow through the river from its various sources and tributaries above Paterson; that defendant's diversion of water from the river for use at other places, without returning it to the river, has greatly reduced the quantity of water flowing by complainant's lands, and has caused the lands to become noxious, unhealthy, and unsightly, and practically ruined for park purposes, and that the continuance of the diversion, which is threatened, will greatly reduce the value and usefulness of the lands and constitute an irreparable injury to its rights as riparian owner.

The defendant's answer denies that as to either of the three tracts the complainant's title extends to the center of the river, or that it is entitled to the full and unobstructed flow of all the water that naturally flows through the river from its sources above Paterson. In reference to the extent and effect of its diversion of water at Little Falls, defendant denies that the water taken, or which could be taken, up to the full capacity of its mains, has constituted, or can constitute, a material diminution of the flow of the river, or can in any perceptible degree impair the value or usefulness of the public parks, or any of the lands adjoining the river, and that the injury to complainant is only fanciful and nominal. In reference to complainant's riparian rights, the ground taken at the hearing is that even if complainant, as the owner of the parks, makes out title as riparian owner to either of them, yet as such owner no right of action against diversion by an upper riparian owner or occupant exists, unless the diversion creates an actual, perceptible injury to the lower riparian lands. Complainant,

on the other hand, claims that, as against a lower riparian owner, the diversion of water by an upper riparian owner, not for use upon riparian lands and return to the river, subject to or after such use, but for permanent abstraction from the river, and for purposes of sale, is not a reasonable use of the waters, and is of itself an infringement of the right of the lower riparian owner, irrespective of any question of actual or perceptible damage, and that for its protection against such unauthorized use, and to prevent the use from growing into an adverse right by appropriation, complainant is entitled to an injunction on the basis solely of its natural rights as riparian owner to the flow of the water, irrespective of the question of damage. Such damage, however, complainant claims to have proved, if it should be considered a necessary element of the right of action or relief.

This branch of the case, as to complainant's rights as riparian owner, embraces, therefore, three inquiries: First, the question whether complainant is, under its deeds, such an owner of lands as to be entitled to riparian rights against diversion of the water; and, if it be such owner, then, second, whether as against the diversion of the water by defendant for the purposes of sale, and not for use on riparian lands, actual or perceptible damage from the diversion must be proved, in order to establish an impairment of the rights of a lower riparian owner; and, if this be necessary, then, third, whether such damage has been proved.

John W. Griggs, William B. Gourley, T. C. Simonton, and E. G. Stalter, for complainant. William H. Corbin and Michael T. Dunn (Collins & Corbin, of counsel), for defendant.

EMERY, V. C. (after stating the facts as above). Taking up the first branch of the case, that relating to complainant's status as riparian owner, the first question whether complainant's deeds make it such owner, and the second, whether actual damage must be proved to establish the right of action, a preliminary question as to the necessity of settlement of title at law is proper to be considered. Had the defendant by its answer raised the question of such preliminary settlement of the question of legal title at law, that course might, perhaps, have been directed at the hearing, if the proofs disclosed such dispute in reference to the facts on which the question of the nature of the legal title depended as to either require a settlement by a jury or entitle the defendant to such trial. But, on the whole proofs as presented, the question of the nature of complainant's title as riparian owner, and the impairment of its right, by diversion for purposes of sale, arises, I think, as a question of law upon facts not disputed, and upon the construction of the deeds conveying title to complainant and claimed to constitute it a riparian owner. Assuming that the complainant, under its

deeds and the undisputed facts, is, as riparian owner, entitled to protection as such against unlawful diversion, the further question, whether the unlawfulness of the diversion depends upon proof of actual, perceptible damage, if the diversion is made permanently and for purposes of sale, is a question the solution of which depends, as I think, on decisions of our own courts which control it, and therefore that complainant, as a preliminary condition for equitable relief, should not be required to bring a suit at law merely for the purpose of reaffirming in a suit *inter partes* a right already settled as matter of general law. This matter of procedure requiring settlement of title at law was considered by me at length in *Oppenheim v. Brand*, referred to in *Oppenheim v. Loftus* (N. J. Ch.) 50 Atl. 795 (1901).

The third question, that of damage proved, involves the extent and effect of the diversion on complainant's lands along the river, and also on the river itself, as a solvent for the sewage of the city, a long and expensive inquiry into the conditions of the river for a period of years; and it was to this point that the voluminous evidence upon both sides was mainly directed. This thorough investigation of the facts upon both sides was not only contemplated and concurred in by both parties; but the cause, on all these points involving questions of legal title, has been fully argued and submitted by counsel, without any objection or request that the question of legal right be settled at law. Under these circumstances the rule in reference to cases where the objection is not raised by the answer, as laid down by Vice Chancellor Reed in *Coast Company v. Spring Lake*, 56 N. J. Eq. 615, 626, 627, 36 Atl. 21 (1898), affirmed on appeal 58 N. J. Eq. 586, 47 Atl. 1131, 51 L. R. A. 657 (1899), should be applied, and in the absence of any objection, either at the answer or on the hearing, the primary question of legal title or right should be examined and determined by this court. I proceed, therefore, with the first inquiry, relating to complainant's standing as riparian owner. Such standing, as to any of the lots owned by it, is denied, and, as different questions arise in respect to the complainant's title to each of the three tracts of land, these will be taken up separately.

The tract known as "West Side Park" is located on the north bank of the river about three-eighths of a mile above the Great Falls at Paterson, contains about 30 acres, and has a frontage on the river of about 2,550 feet. This frontage, however, is not continuous; the park being composed of two tracts of land, separated by a stream called "Oldham brook," which flows into the Passaic above the falls and between the two tracts. The tract, below the brook and towards the falls, constitutes the main portion of the park, and it is connected with the smaller tract across the brook by a bridge. This smaller or upper tract also borders on the river. The location

of the park tracts with reference to Oldham brook and the river is important with reference to an arbitrary boundary line of high water, fixed by the conveyance to the city as one of the boundary lines of its lands. Below these lands conveyed for a park, the Society for Useful Manufactures had erected a dam, just above the brink of the Great Falls, for the purpose of supplying water for manufacturing purposes. This society appears to have originally owned the whole property at this locality, including the bed of the river, and also the lands above, including the park lands of complainant. This fact, although not formally proved, was stated by counsel and accepted without objection, and, in view of the litigations in this court in which this ownership was shown, may properly be accepted, in the litigation between these parties, as a historical fact of general public interest relating to the rights in the river at this locality. *Society, etc., v. Morris Canal Co.*, 1 N. J. Eq. 157, 21 Am. Dec. 41 (1830). The dam extended across the river and flowed the lands above, and the Society for Useful Manufactures in parting with title to these lands adjoining the river, fixed their boundary line with reference to the height of water at the dam. The West Side Park lands were part of these lands originally belonging to the Society for Useful Manufactures, and were conveyed to the city by a corporation called the Society's Land Company, which took over lands of the Society for Useful Manufactures. The conveyance to complainant describes the first (or large) tract as running, for its first course, from the corner of Totowa and Preakness avenue, along the southwesterly line of Preakness avenue, "to the high-water mark on the northwesterly side of the Passaic river; thence (2) southwesterly, westerly, and northwesterly along said high-water mark of said river and of Oldham brook their several courses to the southeasterly line of Totowa avenue." From this point the description follows the line inland and away from the brook several courses to the beginning, and this part of the description has no bearing on the questions raised. The second tract (across Oldham brook and on the west side of it) is described as follows: "All that tract of land bounded on the east by high-water mark of the Oldham brook; on the north by Totowa avenue; on the west by lands of the estate of Richard Van Houten, deceased; on the south by high-water mark of the Passaic river." From these tracts was made an exception, followed by a definition of what line was intended by high-water mark in the description, and in the following words: "Excepting, however, from the said tracts, and not conveyed, all parts thereof that are overflowed by the river and brook at the present height of the dam at high-water mark. It is understood and agreed that the term 'high-water mark' is the edge of the water in said river and brook when

the water is flowing at a height of six inches over the dam of the Society for Establishing Useful Manufactures above the falls at the present height of the dam." The deed also contained a covenant "that the party of the first part [the Society's Land Company] shall not be liable for any damages caused by the overflow of said river and brook at the present height of said dam," and also covenants of general warranty as to all the land and premises conveyed.

In connection with this deed, which bounded the complainant's title toward the river by the line of "high-water mark" thus arbitrarily or rather artificially fixed, the city received a deed from the Society for Useful Manufactures itself, bearing the same date, conveying rights, privileges, and easements in relation to the use of waters of the Passaic river and Oldham brook and the lands between this high-water mark and the water of the river and brook, upon certain conditions as to the diversion of the water of the Passaic, and its use by the Society for Useful Manufactures, and as to the liability of the Society for Useful Manufactures for the overflow of the river and brook. By this deed, which it is important to set out at length, the Society for Useful Manufactures gave, granted, bargained, and sold to the complainant, its successors and assigns, "the right, privilege, and easement to make use of the waters of the Passaic river and of the Oldham brook in front of and bordering on the lands conveyed to the party of the second part hereto by the Society's Land Company by deed of even date herewith as is customary and legal for riparian owners, and for such purpose to have access and right to cross over any intervening lands between high-water mark and the water of the Passaic river and Oldham brook, and also the use of any such intervening lands for the purpose of ornamentation; but it is distinctly understood and agreed, and this grant is made upon this distinct condition and agreement, that such access and use shall not, and shall not in any way be construed to, give to the city of Paterson the right to divert the water of the Passaic river or interfere with its use by the party of the first part hereto, or to make any erection that would cause pollution of said waters, and that the party of the first part hereto shall not be held liable for any damages caused by the overflow of said river and brook at the present height of said dam. To have and to hold the said easement, right, and privilege unto the said party of the second part, its successors and assigns, to its and their sole use, benefit, and behoof, forever. And it is further understood and agreed that the said conveyance by the Society's Land Company to the party of the second part hereto above referred to, to high-water mark of the Passaic river and the Oldham brook, carries the title of the party hereto of the second part to the edge of the water in said river and brook when the water

therein is flowing at a height of six inches over the dam of the society above the Falls at the present height of the dam." The deed contained no other covenants, and was a deed of grant, bargain, and sale for the expressed consideration of one dollar.

Under these deeds for West Side Park the complainant's title does not, as its bill alleges, go to the center of the river; but its absolute title in fee is limited by an artificial or arbitrary boundary line beyond or above even the ordinary high-water mark of the river in its natural condition (unaffected by the dam), and this location of the line of title above the natural ripa is fixed with reference to the continuance in the Society for Useful Manufactures (which was the owner of the bed of the river) of the title up to a fixed boundary of the lands above its dam adjoining the natural ripa, with a right to overflow even above this limit if the existing dam caused such overflow. The title to the lands below this artificial or arbitrary line, and lying between this line and a line designated in the second deed as "the water of the Passaic river and Oldham brook," was reserved, or rather not conveyed, by the Society for Useful Manufactures, who thus continued to be the riparian owner of the lands on the banks of the natural stream. As such riparian owner it gave to the complainant certain rights to the use of the waters of the river and brook in connection with the lands conveyed. The use thus conveyed was described to be "such use as is customary and legal for riparian owners," and the waters of the river and brook, as to which these rights in the nature of riparian rights were granted, were the waters "in front of and bordering on the lands conveyed by the society's deed"; that is, if the boundary line fixed by that deed be intended, "the waters in front of the high-water line fixed by the deed." As between the Society for Useful Manufactures and the city, the effect of this clause of the deed, therefore, was to grant the customary and legal riparian use of the waters from this high-water mark line to the center of the river at least. Besides the riparian use of these waters, the deed further gave to the complainant, as to "any intervening lands between high-water mark and the water of the Passaic river and Oldham brook," the right of access and crossing for the purpose of making such use of the waters of the river and brook in front of and bordering on the lands conveyed by the society; and, what is important to notice, it granted also the use of these intervening lands for ornamentation. Such use was necessarily exclusive, and included such alteration or removal of the soil itself as requires this part of the grant to be considered, not as an easement, but as passing at least an unlimited right of possession, with a profit à prendre, or perhaps an absolute fee for this limited use. In either aspect, the city by this deed becomes entitled to the possession of the land constituting the

natural ripa, subject, only, to the rights thereon reserved by grantor. The right to divert the water of the Passaic for its use, riparian or other, was expressly withheld, as also the right to interfere (by riparian use or other) with the society's own use of the water.

Riparian rights, strictly and technically so called, are rights not originating in grants, but arise by operation of law, and are called "natural rights," because they arise by reason of the ownership of lands upon or along streams of water, which are furnished by nature, and the lands to which these natural rights are attached are called in law "riparian lands." Riparian lands, in the language of the cases and treatises, include by nature as well the lands over as those along which the stream flows, and riparian rights are incident to lands on the bank, as well as those forming the bed of the stream. 28 A. & E. Ency. (1st Ed.) 947; 2 Farnham, Waters, § 463. A right to the use of flowing water does not necessarily depend on the ownership of the soil covered by the water. Lord v. Sydenham City, 12 Moo. P. C. 473. In this case the Society for Useful Manufactures, the owner of the bed of the stream, being at the same time owner of the riparian lands adjoining, had, as between itself and its grantee, the right of severing the title and rights of the bed and ripa, and the right of contracting with reference to the use or control of the rights which, in the absence of express contract, would pass to the grantee of the ripa as natural riparian rights. In 3 Kent's Com. \*434, it is said the riparian proprietor may sell his upland to the top or edge of the bank and reserve the stream, and also that he may convey the bed of the stream, separate from the land which bounds it. Riparian rights, as natural rights, and being incidents annexed solely by operation of law to the lands under and along the stream, differ in respect to the effect of contracts upon them, from those ordinary easements in lands whose only source is a grant (actual or presumed), and, by reason of this difference of the origin and character of the right, are not subject to that general rule relating to easements by force of which unity of ownership of the dominant and servient lands extinguishes the easement. This distinction is pointed out in the leading case of Wood v. Waugh, 3 Exch. 748 (1849), Pollock, C. B., at page 775, and cases cited.

The reason on which the rule is founded, viz., that no owner can have an easement in his own lands, is not applicable to rights arising by operation of law from a condition fixed by the laws and forces of nature. As to rights in running streams thus arising, the incidents are annexed by operation of law, with the view of regulating an equal and continuous right of use in succession, and these continue to regulate the rights of riparian owners to access and use of the water, and its course was determined by nature, irrespective of any unity or division of own-

ership of the lands below and along the stream. These rights, therefore, attaching to the bed and bank of the stream and its waters as it was accustomed to flow by nature, are, as between upper and lower riparian owners, extinguished or affected only by the express agreement or grants of the riparian owners, or by what, as against such owner, may become equivalent thereto—adverse user or appropriation. If this view is correct, then by the boundary fixed by the deed of the Society for Useful Manufactures to complainant as “the waters of the Passaic river and Oldham brook” must be intended the water line of the river and brook as they were accustomed to flow in the natural condition and without regard to the effect of the Society for Useful Manufactures’ dam on the water line; and it must further result that the restrictions of the use of those riparian rights naturally incident to the ownership of lands so bounded is operative only as against the grantor and by virtue of the express restrictions and reservations contained in the deed. As between the grantor retaining the bed of the stream and the grantee of the ripa, with restrictions or limitations by contract as to boundaries or other express limitations of the natural riparian rights, the rights conveyed may perhaps be strictly called “easements” or “privileges,” and not “riparian rights.” But as between the grantee of these rights from the riparian owner, who retains title to the bed of the stream and to lands overflowed, and an upper riparian owner or occupant, as to whom the grantor and those claiming under him are only riparian owners of lower riparian lands with their incidents, the grantee, as deriving title to certain riparian rights from such lower riparian owner, may be, by reason of such grant, a riparian owner, and entitled as against upper riparian owners or diverters to all the rights of a riparian owner conferred upon him by his grantor, the true riparian owner. Technically and legally, perhaps, such rights, which are described to be of the character of riparian owner’s rights, may be most accurately designated as “easements,” because they arise by grant, and do not, like true riparian rights, arise by nature, by reason of the ownership of riparian lands; but they are easements which, as against upper riparian owners, are effective only to the extent that their exercise comes within the limits of the natural riparian rights of the lower owner.

This seems to have been the legal theory upon which the deed from the Society for Useful Manufactures to the city of Paterson rested, and I think it is the correct theory. This deed, as I construe it, in effect conveyed to the city the right of exclusive possession and occupation, for the purpose of ornamentation, of the lands on the “waters of the Passaic river and Oldham brook,” intervening between the waters of the river

and brook and the high-water line of the deeds, and also granted the right of access and crossing over these intervening lands to the waters of the river and brook for the purpose of making that use of them which was characterized as a riparian owner’s use of the waters of the river and brook, with the express agreement, however, that the right to divert the waters of the river (which is a natural riparian right) should not be construed to be conveyed by the deed, and that the Society for Useful Manufactures’ own right of diversion of water or overflow, which otherwise was limited to natural riparian rights, should not be affected. These express limitations excluded the exercise, as against the grantor, of rights which otherwise would have been within the description of riparian rights: but as between the city, thus claiming under a lower riparian owner, and an upper riparian owner or occupant diverting the stream, the effect of the deed, as I construe it, was to give to the city such right to the continued flow of the river along and past the lands occupied under the deed from the Society for Useful Manufactures, and extending as far as the natural ripa of the river, as the Society for Useful Manufactures itself, or any other lower riparian, would have. The city under this deed has not, it is true, derived any right, as against an upper riparian owner, to divert, for use as riparian owner or otherwise, the water as it passes its lands; but its present claim in reference to the West Side Park is based on the right to the flow past the park lands, and the injury alleged is a diversion of this water which would naturally flow past its lands, and from which diversion serious injury and damage to the park results. While, therefore, I find that the claim of title to the center of the river opposite the West Side Park is not made out as alleged in the bill, I conclude that as to these lands the complainant, under its deeds, has, on facts not disputed, established the right of a riparian owner to the flow of the water of the river along and past the park lands, or at least so much of them as is occupied under the deed from the Society for Useful Manufactures, undiminished by the diversion of any person other than of its own grantor, for its use as reserved by the deed, and is entitled to assert such right as a basis of relief in this suit, as against the defendant, an upper riparian owner or occupant, who diverts the water.

The second dispute as to riparian ownership arises out of the description contained in the deed to the complainant for the small tract, about 22 feet in width, fronting on Water street and called the “Engine House Lot.” This lot was conveyed to the city by deed dated August 5, 1860, and the description is apparently defective; the second course of the deed (which conveys by metes and bounds) being omitted. The description

is "all that tract of land and premises hereinafter particularly described, situate," etc., "in the city of Paterson," etc., "beginning on the southeasterly side of Water street at a point 5 feet 3½ inches westerly from the westerly side of the house of the heirs of Adrian B. Van Houten, deceased, running thence (1) southerly at right angles to Water street as the same has been laid out," etc., "to the Passaic river; thence (3) northerly parallel with the first course to the southerly side of Water street; thence," etc. (by two courses, 4 and 5), "still along Water street 21 feet 11 inches to the place of beginning." The second course, that toward the river, is omitted; and it is insisted that, as the deed does not give any river frontage, complainant is not as to this lot a riparian owner, and its title does not, as alleged in the bill, extend to the center of the river. In addition to the deed, complainant proves, in reference to the engine house lot, that from at least as far back as 1871 the city occupied the entire lot from Water street to the river for the purpose of an engine house, and that along the river front there was a brick wall about 14 feet high and standing on the edge of the water, which wall was used in connection with the occupation and use of the lot and the use of the river in front of it. Adverse possession for over 20 years of the lot, as extending to the edge of the river and including the whole river bank, has been proved, and the question is whether, either by the deed itself (notwithstanding the omission of the second course), or by this deed in connection with the proof of adverse possession of the ripa, complainant has, as to this lot, established a title which gives it the right of a riparian owner to the flow of the river along and past it. My conclusion is in the affirmative on both grounds, and for these reasons:

As to the lot conveyed by the description in the first course, running "to the river," it must be considered that "the river" is designated a boundary, and prima facie such designation takes the course to the center of the river; the rule being that, where a fresh-water river is designated as a boundary, the center line of the river, the "medium fluminae," is the boundary line. *Arnold v. Mundy*, 6 N. J. Law 1, 10 Am. Dec. 356 (Sup. Ct. 1821), *Kirkpatrick, C. J.*, at page 67; *Atty. Gen. v. Del. & B. B. R. Co.* 27 N. J. Eq. 631 (Err. & App. 1876), *Dixon, J.*, at page 636. And a line running "to the river" generally, and without subsequent qualification or restriction, extends by settled rules of construction to the center of the river—of the "fluminae," or thread of the stream. *Starr v. Child*, 20 Wend. (N. Y.) 149, 152, on error 4 Hill (N. Y.) 369, 377, 380; note to *Ex parte Jennings*, 6 Cow. (N. Y.) 549. An owner "to the bank of the river" owns to the center of the river. Next, it is impossible to run the third course at all, commencing from the terminating point of the first course and parallel

with the first course; but the location of this third course can be fixed, by running the courses backward from the last course. Running these fifth, fourth, and third courses from the beginning and terminating point, a point from which the third course is to commence is fixed as a point in a line commencing on Water street 22 feet 11 inches from the place of beginning (the beginning of the fourth course as given in the deed), and running parallel with the first course on a line to or toward the river. In the absence of any limitation by distance of this line, it can be thus limited only by the description that it is parallel to the first line, which by construction of law ends in the center of the river. The line, therefore, as matter of construction and application of the description, will, I think, toward the river side, be terminated at the single point where it is parallel to the termination of the first line on that side, and beyond which mere construction cannot carry the title, viz., the center of the river. The description as to the third course may therefore, on the face of it, be construed and applied as if it read: "Thence (3) from the center of the river," etc. If so read, then, notwithstanding the omission of the second course, the description has effect as the conveyance of a lot or tract of land fronting 21 feet 11 inches on Water street, and running between parallel lines that distance apart and at right angles to Water street to the center of the river. This construction should, in my judgment, be adopted as giving effect to the conveyance, and as making it in fact the conveyance of a lot or tract of land, and in preference to a construction that would make the deed wholly ineffective, because of a faulty description by boundaries which do not include all sides of a lot. In other words, if the description in the deed itself, when applied to the land, conveys any lot at all, it must be a lot running to the center of the river; for, when the river as a boundary is mentioned, it requires express words to restrict the conveyance to the side of the river, and the principle stated by Pothier applies—that, "where the grant to a riparian proprietor has no other boundary on the side thereof which is adjacent to the river, the legal presumption is that his grantor intended to convey to the middle of the stream." 4 Hill (N. Y.) 373. Title by adverse possession for over 30 years up to the edge of the river and to the river bank is established beyond doubt, and this also is sufficient to establish title to riparian lands along which the river flows. On both grounds, therefore, I conclude that complainant is entitled to assert against defendant, as a diverter of the upper waters, such rights as a riparian owner may have in reference to this engine house lot.

In reference to the third tract, the East Side Park, situate on the other side of the river below the falls, and fronting about 1,500 feet on the river, the deeds conveying the portion of the park along the river, and

referring to it as a boundary or monument, expressly describe the property as beginning at the Passaic river and as running to the river and down the river its several courses. The description in its deed undoubtedly conveys title to complainant to the center of the river so far as this park is concerned, and constitutes it a riparian owner in respect to these lands.

The defendant does not claim that this is not the legal effect of the deeds; but inasmuch as these riparian lands were, by the deeds to the city or its grantors, made subject to a right of flowage by the maintenance of a dam by a lower riparian owner, the Dundee Manufacturing Company, and as this flowage of the lands has continued for over 40 years, it is claimed that defendant's diversion of water does not in any respect injure the complainant as owner of this park, and, in the absence of such injury, complainant has, as to this park, no legal or other right to be protected by injunction. But this objection manifestly relates, not to the question of whether complainant is a riparian owner of these lands and entitled to assert the title and right of a riparian owner, but whether the complainant as riparian owner, asserting such right, must establish injury or damage as a foundation for relief, either at law or equity. This is an important question relating to riparian rights, but very different from the question as to whether the complainant, claiming such right, is in law a riparian owner. On the first branch of the case, I conclude that complainant, as to all of the lands in question, the two parks and the engine house lot, is entitled to assert against the defendant the rights of a riparian owner.

The second inquiry on this branch of the case (complainant's riparian rights) is whether the proof of actual, perceptible damage, resulting from the diversion of water by the defendant, is essential in order to establish the existence of a right to be protected by injunction. The diversion by the defendant is not for the purpose of use upon or in connection with the enjoyment of upper riparian lands owned or occupied by it, and to be returned to the river after such use, but for permanent diminution of the supply of the river, made for the purpose of sale of the water for the ultimate supply to municipalities, all of which, except Paterson and Passaic, are distant from the river, and some of which are not within the watershed of the river. This circumstance, permanent diversion for the purposes of sale, is claimed to have a material bearing on the question of the relative rights of upper and lower riparian owners, and the necessity of proving actual, perceptible damages as an essential element of a suit at law or right to an injunction.

The general rule upon the subject of the necessity of proving actual damage where a right is violated, and one applying to every description of right, was clearly stated by Baron Parke in *Embrey v. Owen*, 6 Exch.

353, 368 (1851), a leading case involving a suit for diversion for the purposes of irrigation. He says: "Actual, perceptible damage is not indispensable as the foundation of an action, and it is sufficient to show the violation of a right, in which case the law will presume damage. *Injuria sine damno* is actionable, as was laid down by Lord Holt in *Ashby v. White*, and in many subsequent cases, all referred to in the very able judgment of Mr. Justice Story in *Webb v. Portland Manufacturing Co.*, 3 Sumn. (U. S.) 189 (1839) 29 Fed. Cas. 506, where the truth of this proposition is powerfully enforced." This latter leading case was a bill for injunction to restrain diversion by an upper riparian owner or occupant, and Mr. Justice Story, after a full examination of the cases, concludes (29 Fed. Cas. 509) that, whenever there is a clear violation of a right, it is not necessary in an action of the sort there brought to show actual damage, but that every violation imports damage, and if no other be proved the plaintiff is entitled to a verdict for nominal damages, and a fortiori that this doctrine applied whenever the act done is of such a nature that by repetition or continuance it may become the foundation or evidence of an adverse right. He also holds that, were the doctrine otherwise at law, if the diversion of the water is a violation of the plaintiff's right, and may permanently injure that right, and become by lapse of time the foundation of an adverse right in the defendant, no case is more fit for the interposition of a court of equity, by way of injunction to restrain defendants from such an injurious act. This claim to an injunction, on the ground that otherwise the present appropriation by defendant may, by adverse exercise, ripen into a right and destroy complainant's right as riparian owner, is perhaps its strongest claim to the interference of the court for the ascertainment and declaration of complainant's present rights.

This results from the fact that the defendant from 1889 to 1904 diverted permanently from flowing into the river at Paterson about 40,000,000 gallons daily, and since May, 1904, has permanently diverted from the river between Little Falls and Paterson about 22,000,000 gallons daily, and (taking the water diverted from Paterson, 8,000,000 or 9,000,000 gallons daily, above the falls, to be returned within the city limits below the falls) is now diverting between 12,000,000 and 13,000,000 gallons daily from the flow of the river below the falls and the outlet of the Society for Useful Manufactures' raceway. This diversion, if continued, may give rise to an adverse right by appropriation to the extent now made; and it also appears, by the contracts of the defendant which have been put in evidence, that the water which it supplies or has agreed to supply to the municipalities, either directly or through water companies, is not limited in amount, and that the contracts run for terms of years. It has contracted



with the New York & New Jersey Water Company (Exhibit C 24) to furnish "an ample supply" in such quantity as required by the latter company's contract with the city of Bayonne, and for fulfilling any contract it (the New York & New Jersey Water Company) may acquire to supply water for use on Staten Island, and this contract is to continue till September, 1915, with a right of perpetual renewal with the same company. With the New Jersey Suburban Water Company it has contracted (Exhibit C 25) to supply all the water required for their present and future uses in that part of Hudson county lying west of the Hackensack river and including the township of Kearny. With the Montclair Water Company (Exhibit C 26) it has contracted to furnish an ample supply of water, sufficient for the contracts the Montclair Company has already made with the West Orange Company and the Orange Water Company, or contracts which may be made by it during the term of the agreement (1920), with right to perpetual renewal. No contracts, however, are to be made, except for water to Montclair, West Orange, and Orange, without the East Jersey Water Company's consent. With the Little Falls Company it agrees (Exhibit C 27) to deliver all the water sold by the latter company to Little Falls township, and until 1923. To the Aquackanonck Water Company (Exhibit C 28) it agrees to deliver the water needed for its supply, the company being authorized to supply the city of Passaic and the township of Aquackanonck; but this contract may be canceled by either party on six months' notice. With the Passaic Water Company it agrees (Exhibit C 29) to receive from it at Little Falls all the water needed by the Passaic Company (which has the right to supply Paterson and Manchester township), and, after pumping and filtering it, to deliver it to the Passaic Water Company at a conduit near Little Falls. By this contract the Passaic Company agreed to take from the Passaic river at Little Falls and deliver into the headgates of defendant "so much water as may be needed for its purposes." This contract is also terminable on six months' notice by either party. The agreement with the town of Nutley (Exhibit C 30) provides for the delivery of "all water needed by the town or its inhabitants for private or public uses," and continues until December, 1914.

When we consider the extent of the territory now included in these contracts, and its rapidly increasing population, with consequent demands for pure water supply, and the long terms of all the contracts, except with the Passaic and Aquackanonck Companies, and the fact that the defendant by its answer and at the hearing insists that there has as yet been no violation of any legal right of the complainant, and asks dismissal of the bill upon that ground, there would seem to be no escape from the conclusion that complainants have shown a case where they are entitled to have the question of their legal

right as riparian owners decided, and, if that right is found to be violated, then in order to protect the acquirement of an adverse right, to have the right declared and protected by the court. In view of these denials of right by defendant and its contracts for long-continued and necessarily increasing future diversion, the maxim, "*De minimis non curat lex*," can have no application to complainant's suit for present declaration and protection of its right, even if it should be concluded that up to this time the diversion, compared with the flow of the river, has been so slight as to bring the case within the maxim. My own conclusion on this point, as will hereafter appear, is that the present diversion relatively to the lowest flow of the river is material, and that defendant's basis of comparing the diversion with the average flow cannot be admitted.

On the assumption, however, that this general rule protecting against the violation of legal right applies to the case of rights of riparian owners to running waters, and that the maxim, "*de minimis*," does not apply, the nature of those rights must now be considered, for the reason that the present contention between the parties involves the question whether there is any violation of right, unless the diversion by an upper owner or occupant results in actual perceptible damage, even if the diversion of the water is permanent and for the purpose of sale. The claim of the defendants is that a lower riparian owner's rights in the water are not violated or infringed by a diversion (for whatever purpose) of water which would otherwise reach him, unless the diversion occasions actual, perceptible damage. Under this view, the right of the lower proprietor to have the flow of the water continue past his land is not an absolute right to the entire flow, subject only to a reasonable use upon or in connection with upper riparian lands, but is the right only to have the flow continue subject to any diversion by an upper riparian owner, or under his authority, which does not perceptibly damage the lower owner. The complainant, on the other hand, claims that the lower riparian owner has the right to the full flow of the river over and along his lands, without diminution or diversion by an upper riparian owner, except to the extent of a reasonable use of the flowing water upon or in connection with his lands, and that, subject to such reasonable use, the water is to be returned to its accustomed channel on leaving the upper lands. On the latter theory, any right of diversion is restricted to reasonable uses, and any diversion (not so slight as to come within the "*de minimis*" rule) for unreasonable or unauthorized purposes is a violation of the lower proprietor's right to the natural flow of the waters. If reasonable use by the upper owner is the test, then as the rights of diversion must be equal and common in all riparian owners,



except so far as they are affected by the necessity of the use being in succession and not simultaneous, the rule by which this reasonable use is to be gauged is the use and enjoyment of the flow of the water subject to the similar rights of all the proprietors. The statement in 3 Kent's Com. 439, is constantly referred to in all leading cases on this question of the character of the right in running waters as being perspicuous and authoritative, and so far as it bears on the point now under examination (whether permanent diversion for sale is a reasonable use) is as follows: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. '*Aqua currit et debet currere*' is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below. \* \* \*

This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below him, who has an equal right to the subsequent use of the same water. \* \* \*

Streams of water are intended for use and comfort of man, and it would be unreasonable and contrary to the universal sense of mankind to debar every riparian proprietor from the application to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and these will no doubt inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But '*de minimis non curat lex*,' and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury and the manner of using the water. All that the law requires of the party by or over whose lands a stream passes is that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect, the application of the water by the proprietors above or below on the stream."

That diversion for use upon riparian lands and for domestic and agricultural or manufacturing purposes is in its nature a rea-

sonable use is the settled law of this state, and diversion for irrigation has also been held to be a reasonable use in accordance with the general American doctrine and the English authority. *Embrey v. Owen*, supra; *Farrell v. Richards*, 30 N. J. Eq. 511 (1879, Ch. Runyon). At the time of the filing of the present bill there had been no decision in any of our higher courts directly upon the question whether a diversion of water for purposes other than use upon or in connection with riparian lands, and in the absence of actual perceptible damage, was in itself actionable as a violation of the lower riparian owner's right to the natural flow of the water. Chief Justice Kinney in a nisi prius case—*Merritt v. Parker, Coxe*, 460 (1795)—with the concurrence of Smith, J., charged the jury that either an illegal diversion of the water of a running stream or the increase of its flow was actionable, whether productive of injury or benefit. This charge proceeded on the general view that the water should be permitted to run in its accustomed course, in order that all through whose land the stream pursued its natural course might continue to enjoy the privilege of using it for their own purposes, and it could not be legally diverted from its course without the consent of all who have an interest in it. In *Campbell v. Smith*, 8 N. J. Law, 140, 14 Am. Rep. 400 (Sup. Ct., 1825), this statement of the law was approved, and it was held that a lower riparian proprietor, having built a mill for which use of the stream was required, had the legal right to tear down a dam erected on the stream above him for the purpose of diverting the waters of the stream to a mill operated on nonriparian lands, and a verdict directed in his favor was sustained. In *Hutchinson v. Coleman*, 10 N. J. Law, 74 (Sup. Ct., 1828), the defendant, a lower riparian owner, erected on his lands, across the stream, a dam, which backed water on plaintiff's lands and thus deprived him of the advantage of the full flow of the water. Plaintiff claimed that it affected the running of his mill; but the jury found that the dam was no detriment to his mill, and rendered a verdict for defendant. The court directed a new trial; one ground being (page 78) that each owner in succession was entitled to the full benefit of the flow and fall of the stream on his lands, and that a proprietor, claiming the right to diminish the quantity of water to descend below, must either prove an actual grant from the proprietor affected by his operations or must prove an uninterrupted enjoyment of 20 years. Chancellor Pennington, in *Hulme v. Shreve*, 4 N. J. Eq. 116 (1827), enjoined by preliminary injunction the interference with the flow of a stream, where serious and irreparable injury was threatened, reserving his opinion on whether the complainant could be compelled to submit to any change in the flow to which he was entitled, even if no injury resulted (pages 125, 126). Chancellor

Vroom, in the important case of *Soc. U. M. v. Morris Canal Co.*, 1 N. J. Eq. 157, 21 Am. Dec. 41 (1830), denied a preliminary injunction where the defendant diverted waters of a stream to which complainants had a superior right under their charter, but claimed that they restored to the stream, before it reached complainant, water from another stream of as great an amount, and it did not appear that complainants were injured by this alteration in the supply. The learned Chancellor was of opinion that the right to the flow without diminution or alteration was not a right to the flow of the very identical substance issuing from the original source, as this would be tantamount to the ownership of the particular water, which was impossible; the right being only in the use. In *Ten Eyck v. Del. & Rar. Canal Co.*, 18 N. J. Law, 200, 37 Am. Dec. 233 (1841), the right of an upper riparian owner to the ordinary and natural flow of the stream was asserted against the lower owner, who by embankments and a dam narrowed the stream and obstructed its flow; but as the case was heard on demurrer, and the destruction of complainant's crops and soil was alleged, the question of right of action without proof of damage was not here directly involved. In *Farrell v. Richards*, 30 N. J. Eq. 511 (1879), Chancellor Runyon enjoined a riparian owner from diverting water for irrigation in a case where it appeared that so much water was withdrawn from the stream as to seriously affect complainant's water power and do there irreparable injury. The use for the purpose of irrigation, he declared (page 515), must be such as not essentially to interfere with the natural flow of the stream, or essentially and to the material injury of the proprietors below to diminish the quantity of water that goes to them.

These are the only New Jersey decisions bearing upon the necessity of proving damage or perceptible injury, in order to establish a right in the flow of streams, prior to the important case of *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538 (Err. & App., 1883). As counsel on both sides rely on this case to support their opposite contentions upon this point, it must be examined at some length. In this case an upper riparian owner had granted the right to draw water from the stream to a water company which was supplying a village with water and for the purpose of supplementing their usual supply in times of drought. A bill filed by a lower millowner to restrain the diversion was dismissed by Advisory Master Dodd, no opinion being reported. On appeal it was held (Beasley, C. J., delivering the opinion) that as the quantum of water abstracted, though not great, would be so large as to work a sensible and essential detriment to complainants, it could not be discharged under the maxim "*de minimis*" as contended by the water company (page 541). Whether the right of the riparian owner is shown to be violated by a

diversion of this kind without proof of palpable damage the opinion does not undertake to expressly decide, and in the statement of the circumstances which showed a violation of the riparian owner's right the actual and perceptible damage caused by the diversion is included (pages 541, 543, 544). The general principles as to the use of the water are thus stated: "It is settled that the right of flowing is an incident to the proprietorship of the lands along or over which such stream flows, that such right is common among all such proprietors, that each of them is entitled to its reasonable use, and that so long as such use be reasonable a co-proprietor cannot complain of the consequences of such appropriation. Thus, beyond all question, a riparian proprietor may use the passing stream in a reasonable manner for domestic uses, or for the irrigation of his lands, or doubtless for other purposes, under the same restriction."

In *Elliott v. Fitchburg R. R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85 (1852) referred to and approved in the *Higgins* Case, a riparian owner on a small brook granted to a railroad company the right to build a dam and reservoir on his lands to supply (by pipe) water to a depot for engines, etc. On this point in the case (which also involved others) the judge declined to charge that if the water was diverted for this purpose plaintiff was entitled to a verdict for nominal damage without proof of actual damage, and charged that unless plaintiff had suffered actual perceptible damage in consequence of the diversion the defendants were not liable. On review it was held (Shaw, C. J., delivering opinion) that this direction was right, and he says (page 193 of 10 Cush. [57 Am. Dec. 85]) that the right to flowing water is a right public juris of such a character that while it is common and equal to all through whose land it runs, yet each proprietor has a right to a just and reasonable use of it as it passes through his land, and "so long as it is not wholly obstructed or diverted, or no larger appropriation is made of the water running through than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often," he says, "be a difficult question, depending on various circumstances." By the opinion (pages 193, 197 of 10 Cush. [57 Am. Dec. 85]) it was further declared that if the diversion was not a reasonable use, or if it caused substantial damage, it was an encroachment for which an action would lie, and that the question in the case was whether, in the mode of taking, the quantity taken, or the purpose for which it was taken, there was a reasonable and justifiable use of the water by the riparian owner; his grantee being entitled to claim his rights. And it was declared that the use in question, being lawful and beneficial, must be deemed reasonable, and not of itself an infringement of the plaintiff's rights, if it did

no actual and perceptible damage. In *Gardner v. Village Trustees*, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526, also cited and relied on by Chief Justice Beasley in the Higgins Case, the damage to the lower riparian owner was so clear that a preliminary injunction was granted against continuing the diversion for the purpose of supplying a village with water.

So far, therefore, as the decision in the Higgins Case is to be considered a controlling authority upon the present controversy, whether a diversion of water for sale to non-riparian owners is of itself an unreasonable use without proof of damage, it appears that the element of actual, perceptible damage to the lower riparian owner was proved in the case, and that this circumstance was expressly relied on as an incident going to make up complainant's case for injunction. The case cannot, therefore, in my judgment, be taken as deciding that diversion for purposes of sale is not in itself a reasonable or lawful use, and that if this diversion be so substantial as not to be discharged under the maxim "de minimis," the right of the riparian owner is violated. There are, however, expressions in the opinion which point to this view. The statement of the Chief Justice, on page 541 of 38 N. J. Eq., that at the times of drought, when the water was drawn from the stream by the water company, the natural stream, even if undiminished, was insufficient for complainant's purposes, and that under these circumstances it was found that the abstraction worked a sensible and essential detriment to the complainant, might perhaps be taken to mean that the damage was caused, not by interfering with the actual working of complainant's mill, but by the abstraction of a quantity of water so large as to be apparent and appreciable, and therefore not beneath the protection of any court; and he further says (page 544) that the abstraction, being made under a claim of right and likely to increase, entitled complainant to present redress in order to prevent the acquisition of a legal right of diversion.

But, subsequent to the filing of the present bill, the subject of diversion of water for sale in substantial quantities and for municipal water supply has been distinctly and directly raised and decided by the same court and in a case of great importance, which involved, not only the question whether such use was a lawful and reasonable use, but also the question as to the nature of the riparian owners' rights in the flow of fresh-water streams running to tide water, with reference to or in connection with the rights of the state itself, as the ultimate and lowest riparian owner under or along the streams. *McCarter, Atty. Gen., v. Hudson Co. Water Co.*, 70 N. J. Eq. 525, 61 Atl. 710; (Bergen, V. C.; Aug., 1905), on appeal 70 N. J. Eq. 695, 65 Atl. 489 (Nov., 1906). The Legislature by an act of May 11, 1905, prohibited the transportation through pipes, etc., of the waters of any fresh-water river, etc., of this

state, into any other state, and authorized the Attorney General to prevent such transportation by application for injunction. The New York & New Jersey Water Company, which (as appears by its contract with defendant, proved in this case) was to receive from the East Jersey Water Company, this defendant, its supply for Staten Island, contracted with the Hudson Water Company for such supply. The quantity proposed to be withdrawn daily seems to have been not over 10,000,000 gallons (page 721 of 70 N. J. Eq., page 499 of 65 Atl.). On an application by the Attorney General for an injunction against the Hudson Water Company's removal out of the state of the water drawn or proposed to be thus drawn from the Passaic, it was objected, among other points, that the act violated both the federal and state Constitution in restricting interstate commerce. Vice Chancellor Bergen, while holding that the law was not unconstitutional, rested his decision of the case upon the right of the state as riparian owner, and independent of the statute, to enjoin the diversion of the waters of the rivers running to tide water without its consent. The right to an injunction was expressly based (page 535 of 70 N. J. Eq., page 714 of 61 Atl.) on the sovereign right of the state, as the owner of the bed of all tidal streams, and therefore the owner of all the fresh water flowing upon its land, to prevent by injunction any interference with the proper flow of such water, resulting in a diminution of its natural quantity, unless it has authorized such withdrawal.

On appeal the decree for injunction was affirmed, but the right of the state to the injunction was based upon the statute alone, and any expression of opinion was expressly withheld in reference to the grounds on which the Vice Chancellor based his opinion, outside of the act of 1905. 70 N. J. Eq. 721, 722, 65 Atl. 499, 500. The rights of the state to running water, and its rights as the lowest and ultimate riparian proprietor, by reason of its ownership of the bed of tidal fresh-water streams, were, however, examined carefully at length in the learned opinion of the court delivered by Mr. Justice Pitney, as bearing on the validity of the act of 1905. This examination necessarily included also a general inquiry into the nature of the riparian owners' rights to the diversion of waters for sale, for the reason that it was claimed by the defendants that under the common law of the state, as settled by previous decisions, the riparian owners had such property or right of property in the water flowing over or along their lands as to entitle them to divert the same for the purpose of permanent abstraction from the stream and for sale as property and the subjects of interstate commerce. This right was claimed to be an absolute right of diversion for such purpose, subject only to the qualification that the diversion must be reasonable and one which did not inflict actual or perceptible

damage upon a lower proprietor. This claim, if sustained, placed the riparian owner's right of permanent diversion for sale upon the same basis as his right to use the flow for extraordinary purposes upon or in connection with the riparian lands, viz., manufacturing, irrigation, and the like. The Court of Errors and Appeals denied such natural and absolute right of a riparian owner to acquire ownership as property of the waters of the running stream for the purpose of sale and held that the decision mainly relied on to establish such right—*Cobb v. Davenport*, 32 N. J. Law, 369 (1867)—did not support the contention. It was further declared (70 N. J. Eq. 708, 65 Atl. 494): "That the ownership of the running waters is limited to a usufructuary interest, without right to divert any from its natural course, saving for the limited uses that naturally and of necessity pertain to the riparian owner, such as the supply of his domestic needs, the watering of his cattle, the irrigation of his fields, the supplying of power to his mill, and the like. This right of user is limited to so much as shall be reasonably necessary, and is qualified by the obligation to leave the stream otherwise undiminished in quantity and unimpaired in quality." And, further (Id.): "That riparian owners, as such, have not any such right in or ownership of the waters that flow upon or past their lands as will entitle them to divert portion of the flow and convey it elsewhere for the use of other than riparian owners. \* \* \* Excluding the customary and lawful uses by means of which a riparian owner may properly diminish the flow of a stream, his right of ownership in the residue is the right simply to have the flow continue, \* \* \* a valuable right, but partaking solely of the nature of realty, being, from the nature of things, inseparably annexed to the land itself."

The permanent diversion of the water for sale to nonriparian owners was, as I understand this opinion, held to be an unlawful and unreasonable use of the waters by a riparian owner, and the validity of the act was sustained upon two grounds: First, that the state, as the trustee for the public, had a residuum of common and public ownership in the running stream, subject to the exercise of all rights of private riparian owners, which rights, however, include only lawful uses in connection with the riparian land itself and exclude diversion for sale, and that this public ownership of the residuum of interest entitled the state, in the common interest, to forbid by statute the transportation out of the state of water drawn from its fresh-water streams. The second ground upon which the act was sustained was placed upon the right of the state, as itself a riparian owner, by reason of ownership of the bed of the stream below the tidal flow. This right was affirmed by the Court of Appeals; the court in this respect unanimously agreeing with the view of Vice Chancellor Ber-

gen as to the state's riparian rights. This was said to be (70 N. J. Eq. 720, 65 Atl. 499) "a proprietary right to the continued flow of the stream, which is paramount to the rights of the upper riparian owners to withdraw water for purposes other than those incident to riparian ownership," and this riparian right of the state was declared by the Court of Appeals to be an additional reason for sustaining the act of 1905; it being considered to be an act in conservation of its property right.

On the appeal of the decree to the United States Supreme Court the question of the nature of the riparian owners' rights in the water of running streams, under the common law of New Jersey previous to the passage of this act and under the decision of the Court of Errors and Appeals, was also directly raised by the appellants. It was contended (as appears by the briefs of counsel, which have been courteously sent to me) that the rights of the state in the running waters of fresh-water streams, either as the owner in trust of the "residuum" or as the ultimate riparian owner, as declared and established by the Court of Errors and Appeals, had the effect of changing by judicial decision the common law of the state, as it was established by decisions made previous to this contract in question, and that because of this change by a subsequent decision of the state court the obligation of the contract was impaired, in violation of the federal Constitution. This question, however, was not decided, nor was any examination made as to the status of the riparian rights of the state. The decree for injunction was affirmed solely on the ground of the police power of the state, and its sovereign right to keep within its own possession and control the waters of its streams flowing to the sea, so long as they are within its borders, and to forbid the diversion of these waters from within its borders. In the opinion of the Court of Appeals it was suggested that if the right to an injunction under the act was based only on its being considered as an exercise of the police power, and it interfered with any property rights of the defendant, it might be necessary to show a substantial present necessity for the interference, and the right to consider future conditions and necessities in support of the act of 1905 was put on its aspect as a regulation by law in reference to subjects where the state's ownership as trustee or riparian proprietor entitled it to act. But the United States Supreme Court put the authority for the passage of the act on a broader view of the extent of police power of the state relating to its great streams and declared it to be independent of the title or property right the state might be said to possess. In doing so, however, it is expressly declared in the opinion of Mr. Justice Holmes that the court do not say that the conclusions reached by the state courts in reference to the state's property rights or title did not warrant their con-

clusion as sustaining the act, nor would they attempt to revise the opinion of the court on the local law, even if that be assumed to be open to review.

This decision of the United States Supreme Court, putting the affirmance of the decree upon a ground different from that taken by the opinion in our Court of Appeals, did not affect the binding authority of that decision upon the point now considered, viz., whether the diversion of water by a riparian owner for purpose of sale is a reasonable use of his riparian right. The decision of the Court of Appeals I take to be final and controlling upon the points that the state is a lower riparian owner, and that as such riparian owner it is entitled to the full flow of the stream in quantity and quality, subject only to the lawful and reasonable uses of the stream by upper riparian owners, and upon the further point that this lawful and reasonable use is limited to a use or in connection with the riparian lands themselves, and does not extend to a diversion of the waters for purposes of sale. This point was presented and decided in the regular course of the consideration of the cause, and was specially considered. The case is therefore authority on this point, and, while it may be open to the appellate court itself to limit the application of the case on a future review, it is now binding on subordinate tribunals, although the cause was finally disposed of by the United States Supreme Court on another point, which was also involved and presented in the court below. This is the settled rule in reference to the application of the principle of stare decisis, where more than one question is expressly considered and decided. *Railroad Securities v. Schutte*, 103 U. S. 119, 143, 26 L. Ed. 327 (1880); *Union Pacific R. Co. v. Mason City, etc., R. Co.*, 128 Fed. 230, 64 C. C. A. 348 (1904), and cases cited on appeal 199 U. S. 160, 166, 26 Sup. Ct. 19, 50 L. Ed. 134 (1905).

The rule declared in this later decision of the Court of Appeals, that the uses of the water of a flowing stream, both ordinary and extraordinary, by the riparian owner, must, in order to be reasonable, be connected with the occupation and enjoyment of the riparian lands themselves, and as an incident to such enjoyment, and that the permanent diversion of the waters for nonriparian user and for sale is an unlawful use, is the one now generally, if not universally, adopted; and the courts taking this view also agree that, in order to obtain relief against such unlawful or unreasonable use, it is not necessary that the lower riparian owner show any actual damage. Where such diversion is not admitted to be unlawful, but is claimed as of right, and its continuance is threatened, the prevention of the acquisition of an adverse right to divert is of itself sufficient ground for protection by the Court of Chancery. It was so finally settled by the House of Lords in *England in Swindon Water Co. v. Wilts & Berks Canal*, L. R. 7 H. L. (Eng. & Ir. App.) 697.

"Such use (a diversion by a water company for purposes of sale) and a claim of a right to make it," said Lord Chancellor Cairns, "in this case, is a use which virtually amounts to a complete diversion of the stream, as great a diversion as if they had changed the watershed of the country, \* \* \* and is not a use of the stream which could be called a reasonable use by the upper owner. It is a confiscation of the rights of the lower owner. It is an annihilation, so far as he is concerned, of that portion of the stream which is used for those purposes, and is done not for the sake of the tenement of the upper owner, but that the upper owner may make gains by alienating the water to other parties who have no connection with any part of the stream. It is a matter quite immaterial whether any injury has now been sustained, or has not been sustained by the lower riparian owner. If the appellants (the diverters of the water) are right, they would at the end of 20 years, by the exercise of this claim of diversion, entirely defeat the incident of property, the riparian right of the lower owner. That is a consequence which the owner has a right to come into the Court of Chancery to get restrained at once, by injunction or declaration as the case may be." And this right to protection by the Court of Chancery, in order to prevent the acquisition of an adverse right, is recognized, I think, by Chancellor Vroom in the S. U. M. Case, supra, and by Chief Justice Beasley in the Higgins Case, 36 N. J. Eq. 544. Among other leading authorities on this point, these may be added: *Webb v. Portland Manufacturing Co.*, 3 Sumn. (U. S.) 189, 29 Fed. Cas. 506 (Story, Circuit Judge, 1838); *N. Y. R. Co. v. Rothery*, 132 N. Y. 293, 30 N. E. 841, 28 Am. St. Rep. 575 (1892).

On this branch of the case, therefore, I reached the conclusion that the diversion of the water by the defendant for purposes of sale is an infringement of the complainant's right as a lower riparian owner to the continued flow of the stream, and that without proof of any actual or perceptible damage, so far as the establishment of its legal right is concerned, if the diversion is of such a perceptible and sensible amount as not to be excluded under the maxim "de minimis," complainant is entitled to resort to this court for protection, in view of the fact, against defendant's claim of the right to divert and to continue the diversion. If this view be correct, the examination in detail of the evidence bearing upon the matter of actual damage, and the extent to which the diversion has so far affected the use and enjoyment of the complainant's riparian lands, becomes unnecessary for the purpose of settling the complainant's right; but it is of importance in other aspects of the case, viz., as affecting either the right to an injunction or the terms and conditions upon which any injunction should be issued. Voluminous testimony was taken on both sides relating to

the general flow of the water in the river, and its decrease within the five or ten years previous to the filing of the bill, and, as connected with these, the actual damage to the use of the parks. And the mass of testimony on both sides on this subject, being mainly that of nearly a hundred witnesses claimed to be familiar with the stream, was, as I have above pointed out, relevant at the time of the hearing on the question of the infringement of complainant's riparian right, if proof of actual damage was necessary to establish this right. Complainant claims that the result of this evidence is to show that sensible and material injury has been caused, while defendant claims that there has been no such injury and that the damage is nominal or fanciful. On the view of the nature of complainant's right which I have reached, the question of damage is of importance only on the question of the application of the maxim "*de minimis*." And while this maxim may, in view of defendant's claim of right to divert and in increasing quantity, be inapplicable, so far as it is relied on to deprive complainant of a right to present protection by injunction or otherwise, it may be applicable when we come to consider the terms and conditions upon which any injunction should issue. For the protection of the right, the lowest flow of the river must, as was pointed out in the Hudson Co. Water Co. Case, 70 N. J. Eq. 721, 65 Atl. 489, be taken to be flow which the unlawful diversion may affect; but an injunction protecting this right might not be equitable, if it prevented during times of flood or waste the utilization of the surplus water of the stream, and at times when the maxim "*de minimis*" would be applicable.

The defendant produces a comparison of the average amount daily diverted with the average daily flow of the river, including high water and floods, and contends that the right of complainant to be protected at all by injunction must be considered as depending on or affected by this comparison, but for this purpose the average flow would be an erroneous standard. For the purpose of ascertaining the flow of the river, its lowest as well as its average flow, in relation to the proportion thereof diverted permanently by the defendants, nearly all of the evidence of witnesses called to give their recollection, either general or special, of the appearance or flow of the stream at different times within the past 10 or 15 years, presents one feature which deprives it of much weight in settling this question. This is the circumstance that most of this evidence does not afford any basis for specially comparing the flow since May, 1904, with that previous thereto, and therefore necessarily includes the diversion for Jersey City between the years 1899 and 1904, and when the diversion of the water by the defendant itself was more than double that of the subsequent period. This evidence also necessarily includes any decrease in

the flow due to the large diversions, not by the defendant, but by Newark and Jersey City, from the tributaries of the Passaic above Little Falls, which amount to the large aggregate of about 60,000,000 gallons daily—nearly three times the amount diverted by defendant at or since filing the bill. And while this general evidence as to the continued and increasing diversion from the river and its tributaries may have a bearing on the right to restrain further or increased diversion, it may, for present purposes, be properly subordinated to the class of evidence in the cause by which the flow of the river and the amounts diverted by the defendant can be estimated by measurements taken at the Society for Useful Manufactures' dam. From these measurements given in detail for every day during the years 1903, 1904, and 1905, I think we may reach a comparison of the diversion with the low flow of the river, approximating reasonable accuracy.

The flow past the West Side Park above the falls is at low water substantially different at times from that below the falls, for the reason that the flow of the entire river is to some extent controlled by the dam of the Society for Useful Manufactures erected above the falls. This dam, extending across the river a short distance above the brink of the falls, is now about 5 feet in height and about 300 feet in length. It was originally constructed in the early part of the last century for the purpose of utilizing the great water power of the falls for manufacturing purposes, and about 1880 the height of the dam increased and flush boards or temporary crib work constructed on the dam, and about 18 inches high are used during low water. By this dam the water is impounded, and when the water is near the top of the dam the back flow reaches about to the lower boundary of West Side Park, three-eighths of a mile above. On the side of the river opposite the park, and just above the dam, is constructed the great raceway of the Society for Useful Manufactures, a system by which the water and at times the entire flow of the river is carried on three successive levels for the use of the mills and is then discharged into the river below the falls. Each level is about 21 feet below the level above it. The amount of water from the river required by the Society for Useful Manufactures in ordinary weather and conditions for running all the mills is about 475 cubic feet per second during the day, and 250 cubic feet per second during the night, when only a portion of the mills run; an average for the 24 hours of about 362 cubic feet per second. These quantities, reduced to gallons, are approximately 316,000,000 during the day and 166,000,000 at night. This makes the daily average flow needed for the Society for Useful Manufactures about 240,000,000 gallons. The ordinary flow of the river during any of the times for which measurements have been given does

not appear to have been sufficient for this supply, and during all that time the Society for Useful Manufactures from Saturday night until Monday morning shut down the raceway almost entirely, and therefore, unless the water is running over the dam at the falls, almost the entire ordinary flow of the river at the falls is stopped over Sunday, and reaches none of the riparian lands below the falls. A glance at the tables (C 22) giving the measurements of the waters flowing through the raceway, from January, 1903, to December, 1905, shows the general effect of this stoppage of the flow during Sunday, especially when read in connection with another table, showing the longest period in consecutive days when the water was below the crest of the dam. During the three years these consecutive days were—1903, 6 days; 1904, 7 days; and 1905, 20 days. This comparatively large number in 1905 is explained to be due to extreme drought. The total number of days in these three years when the water was not running over the dam was 17 days in 1903, 25 days in 1904, and 36 days in 1905. In order to approximate the flow of water in the river above the falls in times of scarcity of water, we may take the flow at the Society for Useful Manufactures' dam during some of the summer months. In July, 1904, there were 16 days (other than Sundays) in which the flow through the raceway was less than 167,000,000 gallons per day. On 2 of these 16 days the flow seems to have been cut off for special reasons. On 10 of these 16 days the flow was below 133,000,000 gallons, and on 6 below 117,000,000 gallons. In September, 1904, on 13 days (other than Sundays) the flow was below 167,000,000, on 12 of these 13 it was below 132,000,000 on 10 below 117,000,000, and on 5 below 100,000,000, gallons. In June, 1905, there were 18 days (other than Sundays) on which the flow was less than 167,000,000, on 4 of the 18 less than 133,000,000 on 10 less than 117,000,000, and on 5 less than 100,000,000. In July there were 24 days (other than Sundays) on which less than 167,000,000 gallons ran, on 23 of the 24 less than 133,000,000, on 19 less than 117,000,000, and on 18 less than 100,000,000. During these months in 1905 there was a scarcity of water, and in November of the same year there was also extremely low water in the river, and a period of 16 consecutive days (including two Sundays) when the flow was less than 133,000,000 per day, and on 10 of these 16 it was less than 117,000,000.

The amount given by defendants as their present average diversion, about 22,000,000, is thus a material and sensible diminution of the entire flow above the falls and passing the West Side Park in times of lowest water, if these figures can be taken as affording a basis for making a reasonably approximate estimate of the amount and proportion of water diverted at such times; and I think they can, for, although any estimate as to the amount diverted daily should take into ac-

count the reservoir storage capacity as specially affecting it in times of drought, and allowance should also be made to some extent for low flows through the raceway, due to exceptional circumstances, yet there has been no evidence produced by the defendants to show that the allowance fairly made on these accounts would substantially affect the comparison. Taking them into account, these data as to the flow of the river through the raceway during these extremely dry periods of low water in the river show that the amount diverted from the stream passing West Side Park above the falls at these periods bears a substantial and material proportion to the whole flow of the river at those times, apparently not less on the average than one-tenth of the entire flow. That this estimate of the amount of diversion above the falls is not unfair to defendant further appears from the tables defendant had submitted (D 19) showing the estimated flow of water below the falls during these three years. In making these tables, there is added to the flow of water through the raceway an estimate of the amount going over the falls, and also the amount diverted above the falls for the use of Paterson, about 8,000,000 per day, which is calculated to be returned to the river below the falls and above the East Side Park. The estimates of this entire flow past Paterson below the falls during the dry months of 1904 and 1905, above referred to, show that on the days in those months when the water was low the proportion of the entire flow diverted by defendants was in June, July, and September, 1904, from one-tenth to one-twelfth, and in July and November, 1905, somewhat larger. Manifestly this proportion, or anything like it, is too great to be considered as an immaterial diminution of the flow of the river during these low periods, and so far as the amount of it is concerned it is an actual and perceptible diminution of the city's right as riparian owner to the flow of the water either past West Side Park above the falls or the engine house lot and the East Side Park below the falls.

On the use and enjoyment of the West Side Park the diversion of the water has some effect; but the character of the improvements made by the city since its purchase upon the strip of riparian land included in the Society for Useful Manufactures' deed has been such as to reduce this effect very materially. This riparian strip was originally low land along the bank of the river and at the lower end toward the falls about 80 feet in width. The bank curves at this locality, and the strip narrows rapidly toward Oldham brook, and at the bridge across the brook where the bank of the river nearly coincides with the "high-water mark" of the deeds. There was considerable low land, also, on the opposite side of Oldham brook and along the river between the high-water line of the deeds and the bank of the river at low water. The city after its purchase built



a wall, about 3 feet wide at the bottom, along the line of the river at low water, and this wall extended along the entire shore line of the park, both on the river and on both sides of Oldham brook, except about 200 feet of the end of the park which is toward the falls. This wall is constructed of loose stone, is about 3 feet in width at the bottom, and 3 feet high. For nearly all of its length it is at some distance from the high-water line boundary of the deeds, and the quantity of ground between this boundary all the way round and the wall is computed to be about  $5\frac{1}{2}$  acres, or about one-sixth of the whole area of the park. This low land in this riparian strip behind the wall has been filled in and included within the park lands by laying out walks and ornamentation. When the water is 6 inches over the dam, it rises about a foot above the bottom of this wall, and when the water is very low in the river the bed of the river below and beyond the wall is exposed. This bed, when exposed, is muddy and unsightly. This exposure of the bed of the stream, with perhaps some slight effect the diversion by defendant may have on the use of the river for boating, is a sensible or perceptible effect or damage, and in view of the claim of right to divert, and in increasing quantities, made by defendant, this actual, sensible damage gives complainant, as to the West Side Park, additional grounds for equitable protection.

The use and enjoyment of the East Side Park does not, however, appear to be in any way directly, sensibly, or perceptibly affected by the diversion. This park along its whole shore line is subject to the backwater from the Dundee dam, erected some distance below, and it has never been improved along or near the shore line. This failure to improve has not been due to the diversion by defendant, but to other causes; one of them being the pollution of the stream. The height of water along this shore line of East Side Park is controlled by the height of water at the Dundee dam, and the diversion by defendant has at this point, and under these circumstances, no sensible, practical effect on the supply or flow of water along the shore, or in making any sensible, perceptible change in its shore line. So far, therefore, as relates to this park, the complainant's right to protection as riparian owner must stand simply on the protection against defendant's acquisition of an adverse right under claim of right. The same situation exists as to the engine house lot; for the evidence does not show that, as to this lot, its use or enjoyment has been as yet affected in any sensible or material way by the diversion of water made by defendant at or since the filing of the bill.

In view of the conclusion I have reached in reference to the right of the complainant as riparian owner to the flow of the river past its lands, it is not necessary, perhaps, to decide the question whether the alleged authority to construct a sewer system to be

discharged into the river confers upon it any different or other right to the continuance of an undiminished flow than a riparian owner would have. But as the matters have been fully gone into, both on the proofs and arguments, a brief statement of the view I take of this branch of the case may be given. This claim of right, as I understand it, is that statutory authority was expressly given to construct a sewer system according to a plan to be adopted; that such plan was adopted and included a system of sewers through the streets of the city, finally discharging into the river. From this authority to construct a system discharging into the river, the city claims by implication only, and not by express provisions, legislative authority or right, as against an upper riparian owner (or occupant claiming under him), to pollute the river by the sewers, and for this purpose to have an undiminished flow of the water for diluting the sewage; and as a special damage resulting from a diminution of the flow it is claimed that, still being liable to lower riparian owners for pollution of the stream by sewage (notwithstanding the supposed legislative authority to pollute), the damages which it has been or may be obliged to pay have been materially increased, by reason of defendant's diversion of water that would to some extent have diluted the sewage and thus lessened the claim for damage. This claim of right has been strenuously urged by counsel; but I am unable to see that complainant has in this respect any legal or equitable standing in the case. On the basis of legal right, there is, as it seems to me, no burden or obligation which can be legally imposed upon an upper riparian owner, as such, by statute or otherwise, except in favor of a person standing in relation of a co-owner or lower riparian proprietor. This duty and its extent arises and is defined by operation of law, and exists only in favor of those also entitled as riparian owners to the use of the water in succession. To one not claiming as a riparian owner, and for the uses of a riparian owner, there is, in the absence of statute, no duty or obligation whatever in relation to the flow of water, nor, as it seems to me, can a statute (without compensation) give, as against an upper owner, any right to the flow or to use of it to any other than riparian owners, or to any extent or for any purpose, except for the use to which riparian owners are as such entitled to use it.

The city of Paterson, outside of the three tracts of land, none of which are connected with the sewer system, is not a riparian owner, and if, as a municipality, it has been authorized to discharge its sewers into the river, no additional burden or obligation in reference to the flow of the waters can be imposed on upper riparian owners by statute, by reason of this use of the waters below them. In *Doremus v. Paterson*, 65 N. J. Eq. 711, 713, 55 Atl. 304 (Err. & App., 1903), this prin-



ciple was applied in favor of complainant in reference to the pollution of the stream on the complaint of a nonriparian owner who received water from a lower riparian owner. It was held that no additional burden in relation to the use of the water could be imposed. Such claim of right or special damage against an upper owner is entirely novel in our jurisprudence, and before being made the basis of equitable relief should, under the ordinary rule, be first established at law; and on this claim of right or damage the complainant's status for equitable relief is very different from that of its claim merely as riparian owner, for on this aspect of the case it will be observed that equitable aid is asked, with the view of further continuance of its pollution of the river, and for this purpose a court of equity is asked to cut off the supply of pure water from several municipalities or companies which had previously derived their supply from the lower Passaic under authority of law, and have been compelled to abandon this supply largely because of this pollution of the river by complainant. As to these municipalities (or the defendant which supplies them) the complainant, making its claim of right as a polluter of the river, would, as it seems to me, have no standing whatever for any equitable relief, and should be left to any legal remedy it might have. So far as this claim is concerned, no case for equitable relief is made out, and complainant must be left to any remedy it may have at law.

I come, now, to that branch of the case which relates to the equitable defenses to any injunction or other relief, admitting complainant's riparian right, as above defined, to be established. The single equitable defense reaching to the whole claim for injunction and to the defendant's diversion for all purposes is that of estoppel. This is based on the claim that the complainant was apprised of defendant's construction of its extensive works, including the laying of mains for the different municipalities, that it has sanctioned their construction and use, and has so acquiesced in them as to deprive it of any equity for injunction. The complainant proves that in April, 1898, the mayor of the city of Paterson called the attention of the common council to the operations of the defendant going on at Little Falls, and advised that it be notified not to diminish the flow of water through the city. A resolution of the council was adopted, directing the city counsel to take the necessary steps for this purpose, and the city council prepared a notice to be served on the defendant, relating to the diversion of the water. This notice was signed by the mayor, and on May 18, 1898, was served by a clerk in the city counsel's office. The service was made at Little Falls, where the work of construction was then going on, and the person upon whom it was served was the person to whom, after inquiring of persons working on the ground and superintendents

of the workmen, he was directed as the person representing the East Jersey Water Company. This person was a Mr. Cattley, who, in answer to the inquiry made for the purpose of serving the notice, said that he was an assistant civil engineer for the company, and he received the notice, apparently with objection. The defendants show at the hearing in 1906 that no such notice was ever received by them; but their proof on this subject is, first, that of Mr. Gardner, who was at the time of the service a comptroller and director of that company, daily in attendance at the company's office in New York, of which he was in charge. He says that the correspondence of the company came to him, and he never heard of this notice until it was proved in court, and that Herchel was the engineer in charge. That the notice never came to the custody of the secretary of that company is further proved by this officer. No proof, however, is offered that Mr. Cattley, upon whom the notice was served, was not in charge of the works at the time it was said to have been served. In my judgment, service of a notice of this character at the place where the work was actually going on was a proper place for service, and the person in actual charge at the time was a proper person to be served, and, further, that the answers made at the time by persons apparently so engaged in and about the work as to point out or indicate the person in charge are *prima facie*, at least, sufficient proof of authority to receive such notice for the purpose of communicating to defendant, and that so far as the mere legality of the service of notice goes it was sufficient.

But, whether served or not, there is, in my judgment, no estoppel against complainant's protection of its rights as riparian owner by mere silence or failure either to give notice or to bring suit immediately. In *Simmons v. Paterson*, 60 N. J. Eq. 385, 392, 45 Atl. 995 (Err. & App., 1899) it was held that the acquiescence of the riparian owners, continued for years, did not deprive them of their right of property in the stream, although it might affect the right to injunction. This legal right of the riparian owner is barred only by an actual grant or uninterrupted enjoyment for 20 years. *Hutchinson v. Coleman*, 10 N. J. Law, 74, 78 (1828); *Campbell v. Smith*, 8 N. J. Law, 140, 14 Am. Rep. 400. And an equitable remedy in aid of the legal right is not ordinarily barred by mere acquiescence in a less period, independent of any circumstances raising special equities. None such appear in this case. The complainant here did not by any act or conduct on its part induce the expenditures of defendant on its own land and for its own purposes, and defendant proceeded with them at its own risk. Complainant, having given the notice, was not bound to proceed at once, either at law or in equity, in order to preserve its rights, but was at liberty to delay such proceedings until the extent of diver-

sion was apparent, if defendant chose to proceed. This claim of estoppel, so far as it is set up as a bar to equity relief by way of injunction against any part of the diversion, must therefore be overruled.

There is, however, a special estoppel bearing on the diversion of water for the supply of Paterson and Passaic through the respective companies, the Passaic and Aquackanonck Water Companies. There is an obstacle to disposing of this question, arising from the fact that neither of these companies is a party to this suit. The Passaic Water Company is authorized by its charter, passed before the purchase of the parks, to supply water to the city from the Passaic, and up to 1899 did supply it with water taken at the Great Falls. This becoming polluted, and apparently to such an extent that serious epidemics of typhoid fever resulted, the water company, being under contract to supply the city with water, changed its source of supply to Little Falls, and laid down mains through the city streets for that purpose. Manifestly this change made by the company gives it the right to be heard and its day in court before the present and only supply of pure water for the entire city can be cut off; and it may be that, when its whole case is heard, no injunction should be granted for this diversion, but the city should be left to its remedy for damages. I certainly am not disposed now, and without hearing these water companies, if they desire to be heard, on the question of the right to the injunction, to proceed, as may be done in the case of the other municipalities, to consider the terms and conditions upon which an injunction should issue; for while complainant, for the protection of its riparian right, may be entitled to a declaration or determination of its right, and ultimately to an injunction for its protection, yet where this protection of a right of this inferior character and importance affects great public interests and necessities, like those of a pure water supply, such modification or control of the injunction, as to the time it shall issue or its terms and conditions, should be exercised as may be called for the public interest, while at the same time the private rights of property are fully conserved. *Gray v. Cambridge*, 189 Mass. 405, 418, 76 N. E. 195, 2 L. R. A. (N. S.) 976 (1905).

Assuming complainant's right to the protection of this court to be established, the question of greatest difficulty in the case relates to the manner in which the protection shall be given, and the terms and conditions if any, which should be imposed. Relief in equity should certainly extend, I think, to a declaration of complainant's right; but under the general practice of the court, and independent of statute, such declaration can be made only as incidental to and the basis of some equitable relief. 3 *Dan. Ch. Prac.* (6th Am. Ed.) \*2181, note. This power has

been given to the Court of Chancery by statute in England, and in a leading case (*Swindon Water Co. v. W. & B. Canal Co.*, *supra*) was followed in directing the injunction. See 1 *Seton, Decrees*, p. 214.

Complainant, having established its right, is entitled, if the general course of practice be followed, to the equitable relief by which alone the right can be protected, an injunction against its violation. The defendant, however, contends that the case comes within an exception to this general rule protecting property rights by injunction, and under which courts of equity, where the property in question is actually taken for a public use, and serious public injury would result from the injunction, without corresponding benefit or advantage to the public, will decline to issue an injunction, if it is a case where compensation can reasonably be made and defendant is willing to make it. And the defendant here by its answer offers to make compensation, under the direction of the court, for damages resulting from the taking of the water "up to the full capacity of its mains." This course of directing an injunction only in case defendant fails to make compensation in damages has been taken in several cases in this state referred to by defendant's counsel, but, with one exception, has only been taken against complainant's consent in cases where the defendant had the statutory right to appropriate on making compensation, but had taken possession without proceedings for compensation. This was the situation in *Trenton Water Power Co. v. Chambers*, 9 N. J. Eq. 471 (*Williamson, Ch.*; 1853), and *Paterson, etc., R. Co. v. Kamlah*, 42 N. J. Eq. 93, 6 *Atl.* 444 (*Runyon, Ch.*; 1886). In both these cases the entry on property was made with the consent or knowledge of the owner, and acquiesced in for long periods of time, during which the company, relying on the consent, or supposed consent, had improved the property. The principle on which compensation was allowed in lieu of injunction in these cases does not reach the present case. In *Ingersoll v. Newton*, 57 N. J. Eq. 367, 41 *Atl.* 385 (*Pitney, V. C.*; 1898), another case cited, both parties consented that the compensation to the riparian owner should be fixed by the court, if his right was established. See pages 392, 393, of 57 N. J. Eq.; pages 394, 395, of 41 *Atl.*

In *Attorney General v. Paterson*, 58 N. J. Eq. 1, 42 *Atl.* 749 (1899), on an application, on the relation of riparian owners, to restrain the pollution of the Passaic river by defendant's discharge of sewage, an interlocutory injunction was ordered, restraining the increase of the quantity of sewage pending final hearing; but the question of further relief was ordered to await the final hearing, in order to provide, if necessary, for other means of disposition of the sewage. On appeal this order for injunction was reversed, Mr. Justice Van Syckel delivering the

opinion of the court. *Simmons v. Paterson*, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642 (1899). The portions bearing on the point whether complainant is entitled to the exercise of the injunction power are as follows (page 392 of 60 N. J. Eq., page 997 of 45 Atl. [48 L. R. A. 717, 83 Am. St. Rep. 642]): "Ordinarily, where the riparian owner is injured by an unlawful diminution of the quantity of water, or by its excessive pollution, when his legal right is established, he is entitled to the exercise of this power of injunction. Whether in this case it should be interposed must be solved by determining whether in the situation of the parties here there are such circumstances and such equities as may justify the court in withholding its restraining arm." Against granting the injunction, were considered to be the facts that Paterson had, at enormous expense and under legislative authority, put in operation and used a sewerage system accommodating a population of over 100,000 people, and that by the restraint prayed for this system would be suddenly destroyed, and the homes of this multitude of people rendered perilous to health and life and unfit for occupancy, and that in view of the magnitude of the injury which would fall on the public by prohibiting the use of the sewers it would be inequitable to enjoin, if relief could otherwise be afforded, and that the substituted remedy of adequate compensation would be just and equitable under all these circumstances. The complainants were allowed to amend their bill, or file a new bill for injunction, unless the city made compensation, to be determined by the court, with leave to elect to bring suits at law for damages.

The city of Paterson has no express statutory authority to pollute the river by its sewage system, or any authority at all to condemn riparian or other property rights for that purpose, and the case is therefore a direct authority to the point that a court of equity will, when the circumstances and equities require it, withhold the writ of injunction ordinarily issued for the protection of property rights, on the condition that compensation in damages be made. But it is clear, I think, that the circumstances must be exceptional, that the public injury must be great and manifest, and that there is no other method of preventing a great public injury, while protecting the individual property right by the ordinary lawful process. In such cases of plain and irreconcilable conflict, individual right of protection must yield, or be varied, to some extent, within the limits of substantial relief. But I do not think this opinion was intended to establish a general exception to the ordinary right of injunction in all cases of riparian rights where the violation was for the purpose of serving the public or some municipality; for in the earlier case (*Higgins v. Flemington Water Co.*, supra) the same court had ex-

pressly held that the fact that the water was diverted for the purpose of supplying a municipality with water was of itself no bar to the injunction, and an injunction was directed. In *Aquackanonck Water Co. v. Watson*, 29 N. J. Eq. 366 (Err. & App., 1878), an injunction was also ordered on the application of a riparian owner, restraining a water company from diverting the water of a stream, in violation of his right, for the purpose of supplying a village with water; but no question other than that of right seems to have been considered, nor did the company which denied the right offer to make compensation. In a later case—*Beach v. Sterling Iron & Zinc Co.*, 54 N. J. Eq. 65, 33 Atl. 286 (1895)—Vice Chancellor Pitney held that a riparian owner was entitled to an injunction against the pollution of a stream, and should not be left to his action for damages, as this would amount to compelling him to sell his rights for what a court might ascertain its value to be. The decree was affirmed on his opinion. This appropriation, however, was, it will be observed, by a private person and for private uses, in which the public had no interest; and this is one feature which mainly differentiates this case from the *Simmons* Cases and from the cases decided in other jurisdictions, and so strongly urged by counsel as authorities for limiting complainant's relief to compensation for damages, either at law or in equity, rather than an injunction. In every one of these cases, the diversion or injury complained of was by a municipal corporation, or a quasi public corporation, such as a railroad or canal, diverting for public use, and almost without exception they were cases where the corporation had the ultimate right to do the act sought to be enjoined, upon conditions which were imposed by law as conditions precedent for taking property for public uses. *McElroy v. Kansas City* (C. C.) 21 Fed. 257 (Brewer, J.), approved by the United States Supreme Court in *Osborne v. Railroad Co.*, 147 U. S. 258, 13 Sup. Ct. 299, 37 L. Ed. 155, and *N. Y. City v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, is one illustration of this class of cases. In *N. Y. City v. Pine* power of condemnation could not exist, because the diversion of a stream was made by a dam in the state of New York, which affected the flow of the river in the state of Connecticut, where complainant's lands were located, and this exceptional course of compensation in the federal equity court was the only practical method of working out the power of condemnation for public use.

The East Jersey Water Company, the defendant here, is a private corporation only, incorporated under the general corporation law, and has itself no power of condemning or appropriating the water rights in question against the will of the owner. Neither is it by law obligated to supply to the public, or any portion of it, any water diverted by it, and such supply is purely voluntary and a

matter of contract on its part. Water companies or municipalities, which by their charters or general laws are vested with power of condemnation for water supply, have this power only for public use, and are under legal obligation to supply the public, or the portion of it included within the scope of their statutory control. *Olmsted v. Morris Aqueduct Co.*, 47 N. J. Law, 311. The fact that the defendant company voluntarily supplies to public bodies the water diverted may show that the diversion of the water, or the bulk of it, ultimately inures to the public benefit; but in the absence of any legal obligation to supply the water for public use, and perhaps for such use only, the diversion by the East Jersey Water Company is not such an appropriation of private property for public use as may, under our Constitution, be made upon compensation. For the purpose of this constitutional provision the true criterion by which to judge of the character of the use is whether the public may enjoy it of right or by permission only. *Olmsted v. Morris Aqueduct Co.*, 47 N. J. Law, 332. This plain distinction between the public use for which private property may be taken upon compensation and a public benefit which may ultimately result from the original appropriation of property to private uses is well stated in *Avery v. Vermont Electric Co.*, 75 Vt. 235, 54 Atl. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818 (1903). If any of the water companies or municipalities supplied by defendant have the ultimate power of condemning the water rights in question, there would seem to be no reason why they should not be allowed to do so upon compensation in aid of the defendant's diversion, making it to that extent strictly a diversion for public use; for while such water company or municipality cannot, by contract or otherwise, delegate to the defendant its power of condemnation, it may itself exercise its own rights of condemnation in connection with a contract with the defendant water company. The decision in *Slingerland v. Newark*, 54 N. J. Law, 62, 23 Atl. 129 (Sup. Ct., 1891) seems to cover this point.

For these reasons I conclude that, so far as relates to any increase in the quantity of water diverted, the complainant, for the protection of its rights, is entitled to an injunction restraining such increase, except to the extent indicated in the memorandum I have already sent to counsel. As to the equitable terms or conditions on which the present diversion should be enjoined, including the time when an injunction should be directed to issue, I have already in the same memorandum indicated to counsel the points upon which I desire to hear them, and the decree will be settled after further hearing.

#### Conclusions.

The following statement of conclusions reached in the cause is filed and sent to

counsel, leaving a fuller statement and opinion to be filed hereafter.

First. Complainant is a riparian owner of all of the lands in question—the West Side Park, East Side Park, and the engine house lot—and has the rights of a riparian owner to the flow of the stream along or over its lands. This riparian right to the flow of a nontidal stream is incident to the lands along which the stream flows, as well as to lands under the stream and constituting its bed. Title to any part of the bed of the stream, or to its center, is not essential to the right, and complainant is therefore a riparian owner as to lands at West Side Park occupied by it under the deed from the Society for Useful Manufactures, and as to the engine house lot, along both of which the river flows, as well as to East Side Park, where its title goes to the center of the river. On the disputed question as to the engine house lot title, I also conclude that title goes to the center of the river.

Second. As such riparian owner complainant has a right to the full flow of the stream along or over its lands, subject only to the diminution thereof by the lawful and reasonable uses of the stream by upper riparian owners, or those claiming under them. These lawful and reasonable uses are limited to uses upon or in connection with the use and enjoyment of riparian lands, and do not extend to a diversion of the waters away from the riparian lands for purposes of sale. The decision of the Court of Errors and Appeals in *McCarter, Atty. Gen., v. Hudson Water Co.*, 70 N. J. Eq. 695, 65 Atl. 489, pending at the time of the hearing and now finally determined, settles this question so far as this court is concerned.

Third. Such diversion for purposes of sale is of itself a violation of the right of the riparian owner, without proof of any actual perceptible damage; and where such right of diversion is claimed, as in this case, and for long periods of time and in considerable quantities, the complainant is entitled to equitable relief for the purpose of preventing the acquisition by the defendant of any adverse right of appropriation, independent of any question of present damage.

Fourth. The effect of the diversion and threatened diversion upon the riparian lands must be determined by the comparison of its amount with the low flow of the river, and not with its ordinary or its average flow, including floods and high water; and on this basis the quantity diverted is, at times of low water, an appreciable diminution of the stream, and is so considerable that equitable relief cannot be denied under the application of the maxim, "*De minimis non curat lex.*"

Fifth. Complainant's right to any equitable relief rests only on its standing as a riparian owner, and it has no standing on the claim as a municipality, set up in the bill, of a right to construct a sewer system discharging

undiluted sewage into the river, and to the undiminished flow of the river for the purpose of diluting the sewage. No duty or obligation in reference to such use of the stream can (without compensation) be imposed on an upper riparian owner or occupant, in favor of any other than a riparian owner, or giving to any person, riparian owner or other, the right to the flow of the stream for any purpose, except for the use to which riparian owners are naturally and independent of statute entitled to use it. This claim of right of damage is entirely novel to our jurisprudence, and before being made in any case the basis of equitable relief, either by way of alleged special damage or otherwise, should be established at law. In the present aspect of the case, complainant has no standing to enforce this claim of right or damage in a court of equity. Its aid is asked with the view of further continuance of the pollution of the river, and to cut off the supply of pure water from several municipalities which previously derived their supply from the lower Passaic under authority of law, and have been compelled to abandon this supply largely because of the pollution of the river by complainant. On this claim complainant has no standing for equitable relief of any kind, but, if it has any claim, must be left to its action at law for damages.

Sixth. Complainant is not precluded from asking equitable protection of its riparian rights by any supposed estoppel, or by acquiescence in their infringement.

Seventh. Ordinarily, and under the general rule, the protection against violation of a riparian owner's right by an unlawful diversion of the stream, when his right is established, is by an injunction against further diversion. The substituted remedy of compensation has been directed in an exceptional class of cases, where great or serious public injury or inconvenience would result from an injunction, and this could not be obviated by fixing terms or conditions of issuing the injunction to protect the owner's right. In this case, so far as it now appears, the interests and safety of the public in the municipalities now supplied by the defendant may be safeguarded, and the rights of the complainant also protected, by fixing equitable terms and conditions of issuing the injunction.

Eighth. So far as relates to any increase in the quantity of water diverted, the complainant, for its future protection, is entitled to an injunction restraining such increase, except to the extent hereafter referred to. The fixing of the equitable terms and conditions of enjoining the present diversion, including the time when it should be directed, involves special inquiries, both as to law and fact, on which the parties should be further heard.

Ninth. I call the attention of counsel to the following matters, which, as it now appears to me, have a bearing on these terms and conditions, and on which I desire their views in connection with any suggestions of their own:

(1) Whether any diversion during the times of low water in the river should not now be enjoined, the minimum of flowage for this purpose to be fixed on the evidence in the cause, or by further inquiry, if necessary.

(2) Whether any of the municipalities or companies supplied by the defendant have the power of condemning the water rights in question, in aid of the defendants' diversion, and, if so, then whether the issue of any injunction as to the supply of such company or municipality should not be withheld for a reasonable time to take condemnation proceedings.

(3) Whether, as to the municipalities not now having such right of condemnation, the injunction should not be withheld until after the termination of the next session of the Legislature, in order to give them an opportunity to apply for such right. This course has been adopted where an immediate injunction would destroy the sole supply and imperil public health.

(4) If the injunction against the supply of water for the city of Paterson itself (which is included in the general prayer of the bill) is still asked, then: (1) Whether this can be granted unless the Passaic Water Company is a party to the suit and has an opportunity to be heard. By the contract between the Passaic Water Company and the defendant it would seem that the water is taken from the river by the Passaic Water Company and delivered to the East Jersey Company for filtering and return to the Passaic Company. (2) Whether the inhabitants of the city of Paterson, or the city itself, are now supplied with water under any contract between the city and the Passaic Water Company still in force, and how far the operation of this contract should be affected by any injunction.

(5) Whether as to any diversion for the supply of the municipalities which formerly obtained their supply from the Passaic below Paterson, and which have been obliged to abandon this because of the pollution of the river, the injunction should not be directed to issue only after complainant ceases to pollute the river, and upon that condition.

(6) Whether any injunction now issued against increase of quantity diverted should not allow any increase necessary (from growth of population or otherwise) during the time for which the injunction against diversion of present supply may be suspended.

The case will be set down for further hearing on these matters and the settlement of the decree on day to be fixed or on notice.

(74 N. J. E. 104)

**MAYOR, ETC., OF JERSEY CITY v. FLYNN**  
et al.

(Court of Chancery of New Jersey. May 2, 1908.)

**1. WATERS AND WATER COURSES—MUNICIPAL WATER SUPPLY CONTRACT—CONSTRUCTION.**

A city water supply contract bound the city to take and use the water when the works were completed for a term of 25 years, and to pay therefor on a graduated scale by the million gallons, required the works to be so constructed and maintained by the contractor that the water should be free from pollution during the time the city should take it by the million gallons, contained an option to the city to purchase, and declared that, on notice of a popular vote of acceptance of the works by the city and the payment of the price, the contractor would sell to the city, provided the city should give notice within one year from the date of the contract of its intention to purchase, gave the city a reasonable time in which to test the works after completion and before acceptance thereof, and declared that so long as the city should continue to take water by the million gallons without purchasing the works the contractor should sell to no one else. A supplemental contract extended the time for completing the works and for testing the supply, and payment after completion and before acceptance thereof, and bound the contractor to begin to furnish water immediately on completing the work. *Held* that, under the original contract, the effect of a popular vote of acceptance and notice to the contractor was not to abrogate the provisions of the contract as to supplying water for the 25-year term by the million gallons, and to put the city in the position of one who had merely agreed to purchase, but that the city was required to pay for the water by the million gallons until it actually took title and paid the price, and that this was not changed by the supplemental contract.

**2. SAME—PERFORMANCE BY MUNICIPALITY.**

A bill filed by a city praying that defendants might be decreed, on payment by the city of such part of the price as might be ascertained to be due, to convey to it waterworks constructed by defendants under a contract, whereby the city was to take and use the water for a 25-year term with an option to purchase, was not the equivalent of a tender of the price, and did not alter the contract rights of the parties and confer on the city the right to possession, which the contract only gave on payment or tender of the price.

**3. SPECIFIC PERFORMANCE—RELIEF AWARDED.**

Where specific performance, if decreed, is decreed on equitable terms, the letter of the contract will not be permitted to stand in the way of an equitable adjustment as to interest on the one hand and rents and profits on the other.

**4. INTEREST—RATE—ABSENCE OF AGREEMENT.**

The rate chargeable for the forbearance of money is, in the absence of agreement, the legal rate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Interest, § 64.]

**5. WATERS AND WATER COURSES—MUNICIPAL SUPPLY — ACQUISITION OF WORKS—WATER SUPPLY CONTRACT—CONSTRUCTION.**

Where a city failed to perform a water supply contract binding it to take and use the water by the million gallons for a 25-year term, but with an option to purchase, and in such event giving it an opportunity to test the water supply works before acceptance, in that it did not tender so much of the price as was payable, the obligation to pay for the water by the million gallons did not terminate on the last day named for test and acceptance before purchase, but on the day of a decree on a bill by it to compel specific performance.

**6. SAME.**

A company which had been furnishing a city with water joined with others who had contracted to furnish the city a new water supply in an agreement with the city to continue to furnish it water until the city should obtain its new supply, but not beyond a designated date, and guaranteed that the new water supply works would be completed to such an extent that the water could be turned on by a designated date, and undertook that, if not sufficiently completed, it would continue to deliver water until completed, but not beyond such designated date. The rate at which water was to be furnished was different from that at which it was to be furnished from the new supply. *Held*, that the agreement to furnish water at the rate named was the agreement of the company which had been furnishing it alone, and could not be converted into an agreement obliging those who had contracted for the new supply to continue to furnish water at the same rate.

**7. DAMAGES—LIQUIDATED DAMAGES AND PENALTIES.**

A stipulation that for each day's delay beyond the time for completing a water supply works the contractor should pay \$500 as liquidated damages, and not as a penalty, was not in fact a penalty, and not liquidated damages, where, by failure to complete the water supply works, the city would be deprived of the right of selling its surplus water to municipalities and other persons outside its corporate limits, and the damages which it would thereby suffer were altogether uncertain in amount and not readily susceptible of proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 154-175.]

**8. CONTRACTS—CONSTRUCTION.**

The construction to be put on a contract is the same, both in a court of law and of equity.

**9. WATERS AND WATER COURSES—MUNICIPAL WATER SUPPLY CONTRACT—BREACH—DAMAGES.**

A city water supply contract, giving the contractor a certain time "to complete the work and furnish the water," may reasonably be read to give him that time "to complete the work so as to furnish the water," and the contractor would only be liable up to the day it began to furnish the water and the works were capable of delivering the required amount, less the time that delivery was retarded by legal proceedings by the city, irrespective of the works being completed in every detail.

**10. CONTRACTS—REASONABLE CONSTRUCTION.**

Contracts must have a reasonable construction and be read in the light of surrounding circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 735, 752.]

**11. WATER AND WATER COURSES — MUNICIPAL WATER SUPPLY—PURITY.**

A stipulation in a city water supply contract that the supply was to be free from pollution does not require that a river, which is a part of the supply, shall be free from pollution from its source to the point where it flows into the reservoirs, but means that the supply at the time it reaches the city shall be free from pollution.

**12. SAME.**

A stipulation in a city water supply contract that the water shall be pure and wholesome, and free from pollution deleterious for drinking and domestic purposes, does not require that the water shall be absolutely pure, of such purity as could be obtained in a laboratory; but all that is required is that it shall be "free from pollution deleterious for drinking and domestic purposes."

**13. SAME.**

A city water supply contract, declaring that the water proposed to be furnished was pure and wholesome and that the plan had been prepared

so as to prevent all contamination thereof from any source, in accordance with the specifications, which were that the water to be furnished must be pure and wholesome for drinking and domestic purposes, requires water supply works capable of preventing contamination from any source at any time under any conditions likely to occur, and works that may be effective under favorable conditions for a part of the year, but ineffective at other times, are not in compliance therewith.

#### 14. SAME.

Under a city water supply contract, declaring that the water proposed to be furnished was pure and wholesome, and that the plan had been prepared so as to prevent all contamination from any source, in accordance with specifications, which were that the water to be furnished must be pure and wholesome for drinking and domestic purposes, the contractor was not bound to provide against future conditions; but the city would have to provide against them as occasion might require.

#### 15. SAME—EVIDENCE—SUFFICIENCY.

Evidence examined, and *held* to show that water supply works constructed under a contract with a city were not of such a character as that they could be relied on constantly to furnish pure and wholesome water.

#### 16. SPECIFIC PERFORMANCE—RELIEF AWARDED—ABATEMENT IN PRICE.

It is within the power of the court to decree specific performance, with an abatement in the price for that part of the thing bargained for which the vendor is unable to convey.

#### 17. WATERS AND WATER COURSES—MUNICIPAL WATER SUPPLY—PURITY—EVIDENCE—SUFFICIENCY.

Evidence examined, and *held* not to show that a filter plant was indispensably necessary to a complete performance of a contract to furnish a city with pure and wholesome water for drinking and domestic purposes.

#### 18. SAME—INSTRUMENTS CONSTITUTING PART OF CONTRACT.

Under a city water supply contract expressly declaring that the specifications and proposals were made a part thereof, which specifications contained the clause that the advertisement, the specifications, the "accepted proposals," all maps, plans, and drawings accompanying, attached to, or described therein, the specific contract, and the contractor's bond were to be considered essential portions of the complete contract, and undertaking to remove a rag mill, which was a possible source of pollution of the water supply, contained in a letter written by the contractor's attorney, and which was signed by the contractor on the city's refusal to execute the contract unless he did so, was a proposal of the contractor, accepted by the city, and binding on the contractor.

#### 19. SAME.

Failure to "remove" a rag mill, in compliance with a city water supply contract binding the contractor to do so, does not entitle the city to have the price or value of the mill deducted from the price of the water supply works, where the removal of the mill was stipulated for only that the purity of the water supply might be conserved, and the city gets a supply free from pollution caused by operation of the mill in an objectionable manner.

#### 20. SAME—MUNICIPAL SUPPLY—POLLUTION.

The prohibition against polluting a stream which is a water supply is against putting any polluting matter into a stream or tributary which furnishes a water supply at any point whatever above the point at which the supply is taken, and without any reference to the question whether the stream appears to be or is in fact polluted at the point of intake.

#### 21. MUNICIPAL CORPORATIONS—WATER SUPPLY CONTRACT—CONSTRUCTION.

A specification, made a part of a water supply contract, provided that where a tunnel was in rock, if the bottom was sound and solid

rock, it "may" be leveled up and smoothed with cement concrete, and that where the tunnel was in earth or unsound rock a brick invert "shall" be laid at the bottom. Another clause required care to be taken to leave the interior surface of the tunnel smooth and free from projections, and another clause provided that the tunnel should be brick-lined. *Held*, that the only permissible departure from a brick lining throughout was where the bottom consisted of sound and solid rock, in which event it might be leveled up and smoothed with cement concrete, and that a gravel construction was excluded.

#### 22. WATERS AND WATER COURSES—ACQUISITION OF WORKS BY MUNICIPALITY.

Where a city elected to take a water supply works, the bottom of a tunnel of which was not constructed according to the contract, the rule applies that where a contractor has substantially performed his contract, though he has failed to do so in some minor particulars, he is entitled to the contract price less a fair allowance to make good the defects.

#### 23. MUNICIPAL CORPORATIONS—WATER SUPPLY CONTRACT—CONSTRUCTION.

A specification, made a part of a city water supply contract, provided that bidders must state a price at which the city could buy and own the works of a capacity of 50,000,000 gallons daily, together with the water supply, water rights, lands, reservoir sites, rights of way, and all assessments necessary to fulfill the requirements of that specification, and to the extent of 70,000,000 gallons daily. In compliance with this specification the proposal was for waterworks and all appurtenances necessary to fulfill the requirements to the extent of 50,000,000 gallons daily, together with the water supply, water rights, etc., necessary to fulfill the requirements and to the extent of 70,000,000 gallons daily. *Held*, that the contractor was not obliged to do anything more than construct a dam which would hold back a 50,000,000-gallon supply, and that he was not required to so construct the dam that by simply building on its top it could be raised so as to provide for a supply of 70,000,000 gallons.

#### 24. SPECIFIC PERFORMANCE—PARTIAL PERFORMANCE.

A city is not entitled to insist that a water supply contract shall be specifically enforced by a conveyance of the waterworks to it, and at the same time to repudiate an agreement that, in the event of the completion of the waterworks before the claim of another to a part of the water supply had been released or extinguished, the city should be entitled to retain out of the purchase price a certain sum until a decision of the highest state court adverse to such claim, or the delivery of a release thereof, or an abandonment of a canal by the one claiming the right to the water, and demand an additional deduction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 20.]

Bill by the mayor and aldermen of Jersey City against Patrick H. Flynn and another. Decree for complainant.

George L. Record and James B. Vredenburg, for complainant. William D. Edwards, William H. Corbin, and Charles L. Corbin, for defendants.

STEVENS, V. C. On August 1, 1905, the complainant filed its bill against the defendants, Patrick H. Flynn and the Jersey City Water Supply Company, praying that they might be decreed to convey to it the waterworks constructed by them, or so much of them as they were able to convey, upon payment by the city of such part of the consideration (\$7,595,000) as might be ascertained



to be due. The bill further prayed that the suits at law to recover the price of water that was being furnished by the million gallons should be restrained. The suits were restrained on equitable terms, pending the decision on the merits.

Prior to October 12, 1895, Jersey City had obtained its water supply from the Passaic river, near Belleville. As the river water below Paterson had by that time become unfit for domestic purposes, Jersey City on that day contracted for a temporary supply to be furnished by the East Jersey Water Company. By this contract and by supplementary ones this supply was continued until May 23, 1904, when the new supply obtained from the defendants' works was turned on. The original contract looking to such a supply was made between the city and Flynn on February 28, 1899. Flynn thereby agreed "to construct a new system of waterworks for Jersey City and to supply said city therefrom with pure and wholesome water" in  $2\frac{1}{2}$  years thereafter; i. e., by August 28, 1901. After doing some work he assigned the contract to the Jersey City Water Supply Company. By a supplementary contract, made on March 31, 1902, the time for completion was extended to December 25, 1903. It was not, in fact, completed to such an extent that the water could be turned on until May 23, 1904. Since that time the city has received its water supply from the new works, which are still in the possession of the water supply company.

The water is taken from the Rockaway watershed,  $122\frac{1}{2}$  square miles in extent above the intake, or reservoir, at Boonton. Its principal sources are Green Pond, Denmark Lake, Split Rock Lake, Dixon's Pond, Shongum Lake, and other smaller ponds and brooks. Rising in the Longwood valley, the Rockaway flows in a circuitous course past the towns of Port Oram, Dover, Rockaway, and Boonton, and it finally empties into the Passaic at a point about  $7\frac{1}{2}$  miles (in an air line) above Little Falls, and about 12 miles (in an air line) above Paterson. The plan adopted was to construct a reservoir, just below Boonton, which would be both an intake and a storage reservoir, capable of containing above the effluent pipes 7,362,000,000 gallons, and capable of supplying 50,000,000 gallons a day. Jersey City, at the time of the writing of this opinion, uses about 40,000,000 gallons daily. From this reservoir the water is conducted through a steel pipe, and through tunnels to Jersey City by gravity. The old Belleville mains have been abandoned.

The case involves a variety of questions, nearly all of them depending upon the proper construction of the contract of February 28, 1899, and of three other contracts supplemental thereto. Some of these questions are, by no means, easy of solution. The contract of February 28, 1899, is based upon the act of 1888 (P. L. 1888, p. 366). This act reads

as follows: "That it shall be lawful for the board of aldermen, common council, city council, aqueduct board, board of public works, water commissioners, township committee, town committee or other board, body or department of any municipal corporation in this state, having the charge or control of the water supply of any such municipal corporation, to make and enter into a contract or agreement with any water company or other company, contractor or contractors, for one year, or for a term of years, for the obtaining and furnishing of the supply, or a further or other supply of water to such municipal corporation, for the purpose of extinguishing fires and for such other lawful uses and purposes as may be deemed necessary or convenient; and any such contract and agreement, when so made, shall be the valid and lawful contract of such municipal corporation, as well as of any such water company or other company, contractor or contractors, according to the tenor thereof; and the sum or sums of money in such contract agreed to be paid in each year by any such municipal corporation, or by any board, body or department thereof, or so much thereof as may be necessary, after appropriating to the payment thereof the water rents or proceeds of sales of water collected by such municipal corporation applicable to that purpose, shall be annually appropriated, levied, assessed and collected as a tax upon the real and personal estate within such municipal corporation and liable to taxation for other municipal purposes, and the said real and personal property is hereby made liable to and for the assessment and collection of such tax: provided, however, and it is hereby expressly enacted, that no such agreement and contract shall be made for a period longer than twenty-five years in any one term: and provided, further, that in any municipal corporation having a board of public works and a board of finance and taxation, if the contract and agreement be made and entered into by any such board of public works, it shall not be binding upon such municipal corporation until the same shall have been approved by such board of finance and taxation; and provided, further, that such contract may contain an option for the acquiring by such municipal corporation of the land, water and water rights for such supply, on terms to be fixed in said contract."

This act, it will be seen, authorizes two things: First, a contract for a water supply, to be furnished by the owner of the works for a term of not more than 25 years; second, a contract for an option for the purchase of the land, water, and water rights (including, of course, the works erected in connection therewith). The validity and efficacy of this act was affirmed in *Slingerland v. City of Newark*, 54 N. J. Law, 62, 23 Atl. 129, and in *Van Reipen v. Jersey City*, 58 N. J. Law, 262, 33 Atl. 740. The contract in question provides for a 25-year supply, and



It also contains an option. It is admitted by both sides that the original contract as made conforms to the provisions of the act. By act of 1895 (P. L. p. 775) it was provided that the question of purchase, according to the option, should be submitted to a vote of the people of the city. This was done. The voters voted to accept, and formal notice of the result was given to the water company. Now, counsel differ widely as to the effect of this vote and notice upon the status of the parties. Counsel for the city contend that its effect was to abrogate or nullify the provisions of the contract in reference to the supply of water for a term of years, and to put the city in the position of one who had merely agreed to purchase, while counsel for the water company contend that the provisions relative to the quarter yearly payments of water continued in force until the price of the works (\$7,595,000) was actually paid or tendered by the city. Obviously, this question can only be solved by considering the terms of the agreement.

The agreement of February 28, 1899, provides that the specification prepared by the city, on which the bidding took place, and the accepted proposal, are to be regarded as a part of it. The specification declares that the mayor and aldermen of Jersey City will receive proposals for a supply of pure and wholesome water under the following plan. Then follows the plan. At the sacrifice of brevity, it will be necessary to set forth such of its provisions as throw light upon the point at issue. They are the following: "The water must be delivered by gravity at Bergen reservoirs." These were the old reservoirs in Jersey City, into which the Passaic water had been conducted from the intake at Belleville. "The first works must be constructed with storage and intake reservoirs of sufficient capacity and so located as to be capable of collecting and delivering 50,000,000 gallons daily at all times." "Whenever during the term of the contract, but prior to the exercise of the city's option to purchase, the city shall notify the contractor to increase the capacity of his waterworks, then the contractor shall immediately proceed to construct such additional storage and intake reservoirs as may be necessary, so located and of such capacity as to be capable, together with those previously constructed, of collecting and delivering 70,000,000 gallons at all times." "Bidders must state a price per million gallons for a supply of 25,000,000 gallons daily, and a price per million gallons for all in excess of 25,000,000 gallons daily up to 30,000,000 gallons daily," etc. "Bidders must also state a price for which the city can buy and own the waterworks of a capacity of 50,000,000 gallons daily, together with the water supply, water rights, lands, reservoir sites, rights of way, and all easements necessary to fulfill the requirements of this specification and to the extent of 70,000,000 gallons of water daily; said purchase

to take effect on completion and acceptance of the works, if the city shall give notice of its intention to purchase within one year after date of contract." "The city will pay quarterly the sum due to the contractor at such depositaries as the contractor may designate and at such times as are agreed upon in the contract." "If a contract is entered into, it will run for 25 years from the date of the contract, unless sooner terminated by a purchase of the waterworks by the city as herein provided for." On this specification Flynn's proposal was as follows: "I hereby propose to provide a new supply of water for the following prices: For each million gallons of water furnished up to 25,000,000 gallons daily, \$36 per million gallons; for each million gallons in excess of 25,000,000 gallons daily, \$34 per million gallons daily," etc. (up to limit of capacity of works); for the waterworks and all appurtenances thereof necessary to fulfill the requirements of these specifications to the extent of 50,000,000 gallons daily, together with the water supply, water rights, lands, reservoir sites, rights of way, and all easements necessary to fulfill the requirements of these specifications, and to the extent of 70,000,000 gallons daily, forever, which purchase can be made by the city when the waterworks are completed and accepted hereunder, provided that the city shall give notice of its intention to purchase within one year after the date of contract, the sum of \$7,595,000."

On this specification and proposal the contract was drawn. After binding the contractor to construct the works in strict conformity with the above specification and proposal, it continues: "Such works shall be constructed and maintained by the contractor that the water delivered therefrom shall be pure and wholesome and free from pollution deleterious for drinking and domestic purposes, during the time that Jersey City shall take water by the million gallons. If such works and supply are purchased by Jersey City, they shall be delivered to said city as a completed operating plant free from pollution as aforesaid." In its third section it expressly provides for payment for each million gallons as mentioned in the proposal. Its fifth section reads as follows: "The said contractor hereby covenants and agrees that he will, upon the receipt of notice as provided in the specifications and the payment of the purchase price, sell and convey said water supply, with the appurtenances, upon any of the following options." Then follow the options mentioned in the specifications. The sixth and ninth sections also bear upon the present inquiry:

"Sixth. It is understood and agreed, in case the city shall give notice within one year from the date of this contract of its intention to purchase said water supply and waterworks under said specifications, when the waterworks are completed and accepted, that then the city shall have such reasonable

time to test said works and the water supply after completion and before the acceptance thereof for purchase as Jersey City may deem necessary and reasonable for that purpose, provided such test shall not extend beyond a period of 4 years and 11 months from the date of this contract."

"Ninth. It is further understood and agreed that, so long as Jersey City shall continue to take the water by the million gallons without purchasing the water supply and works under the options aforesaid, no water shall be sold or furnished to any person," etc.

It seems to me that these clauses, read consecutively, show a very clear and definite scheme—a scheme that may be stated in the words of the specification: "If a contract [i. e., a contract for the supply of water by the million gallons and containing an option] is entered into, it will run for 25 years from the date of the contract, unless sooner terminated by a purchase of the waterworks by the city as herein provided for." What is the meaning of the word "purchase"? Is it used, inaccurately, as synonymous with "agreement to purchase," or is it used in its proper signification of actual acquisition of full title for a valuable consideration? The contract itself gives the answer. It reads, in clause 5: The contractor hereby covenants that he will, "upon the receipt of notice [i. e., notice of the popular vote of acceptance] and the payment of the purchase price, sell and convey said water supply, with the appurtenances, to Jersey City." And in clause 6: "In case the city shall give notice within one year from the date of this contract of its intention to purchase, \* \* \* when the waterworks are completed and accepted, then the city shall have such reasonable time to test said works and water supply after completion and before acceptance thereof for purchase as Jersey City may deem necessary and reasonable for that purpose, provided such test shall not extend beyond a period of 4 years and 11 months from the date of this contract." This clause only follows and amplifies similar language in the specification: "Said purchase to take effect on completion and acceptance of the works if the city shall give notice of its intention to purchase within one year after the date of the contract."

Here, then, is an express declaration that the notice is not to be treated as a present purchase, but as a notice of intention to purchase at a future time, after completion and after test. The contract is to be performed in 2½ years after its date, but the test may be made at any time within 4 years and 11 months. In other words, 2 years and 5 months may intervene between the completion and the test that is to precede the purchase. But during all this interval Jersey City must take the water by the million gallons, for here again the contract provides as follows: "Second. Jersey City agrees to take the water aforesaid and use the same for its water supply when said works are completed

in accordance with the specification and plan No. 1, as soon as said contractor is ready to deliver pure and wholesome water from such supply. Third. Jersey City agrees to pay for such water when delivered as follows." Then follows the price per million gallons on a graduated scale. It is hard to imagine how language could have been more explicit. Counsel for the city, when pressed to say what would be the city's obligation in case it actually took and used the water during the interval of 2 years and 5 months, made two suggestions: (1) That the city was not obliged to pay anything, that the test that the city had the right to make was the receipt and use of the water, and that such test might be extended over the entire period; and (2) that the express provisions of the contract were suspended during the 2 years and 5 months, and that the city was only obliged to pay as much as the water was reasonably worth, the assumption, without proof, being that it was reasonably worth less than the price fixed.

Neither of these suggestions finds any support in the language of the contract. They are directly opposed to the express stipulation that the city agrees to take and use the water as soon as the contractor is ready to deliver it and to pay for it according to the schedule prices. Nothing is more obvious or more reasonable than the scheme as thus defined. Jersey City could no longer use its old supply. It wanted a new one. It was for its advantage not to assume the cost of construction until it had given the works a trial—until it was demonstrated that the plan and supply were good; in other words, the risk was thrown upon the contractor. It is inconceivable that he, under these circumstances, would be willing not only to construct works costing over \$7,000,000, from which he bound himself not to deliver water to any one except Jersey City, but also to supply, either gratis, or without fixing any price, for a period of 2 years and 5 months, water worth over \$800,000. The Jersey City officials had no such idea in the first instance, for they paid without objection for two quarters at the schedule rate.

But it is further argued that equity looks upon things agreed to be done as actually performed, and that, consequently, equity considers the vendee as the purchaser of the estate sold, and the purchaser as a trustee for the vendor of the price. Counsel for the city contends that as a consequence of this doctrine (I quote from his brief) "the city's rights reverted to the date of the contract, and thereby the smaller and inconsistent contract to purchase water from this plant for 25 years was discharged, and thereafter the contract to purchase alone remained." This statement will not stand examination. It is true that, speaking generally, equity regards the vendee as a purchaser for whom the vendor holds the legal title in trust; but the doctrine is not carried to an unwarrantable extreme. It is kept within reasonable

limits by the perfectly well settled rule that in the absence of express stipulation the purchaser takes the rents and profits and pays interest on the purchase money only from the time fixed for the completion of the contract; not from the time of its execution (Fry, *Sp. Perform.* § 891; *King v. Ruckman*, 24 N. J. Eq. 298; *De Visme v. De Visme*, 1 McN. & Gor. 336), and, as I shall show hereafter, not always as early as that. And, again, the court never applies the doctrine in such a way as to override the express stipulation of the parties. I have already shown that this requires the water to be paid for by the million gallons until the time of the completion of the purchase by the transfer of the title and payment of the price. And so the express stipulation is in conformity with the rule of equity which would prevail in the absence of express stipulation on the subject. Looking, therefore, at the original agreement alone, it is quite plain that the city was required to pay for the water by the million gallons at the schedule rates until it actually took the title and paid the price.

But the works were not completed within the time agreed upon, and supplemental agreements were made. Do they lend countenance to the city's contention? By contract of March 31, 1902, the time for the completion of the works was extended to December 25, 1903, and the time for the testing of the works was extended to October 1, 1905. There is nothing in this supplemental contract that lends added force to the argument of counsel for the city. It contains this provision: "It is further agreed that the limit of the time for the testing of the works and water supply and the payment therefor by the city after completion and before the acceptance thereof for purchase shall be extended, if desired by Jersey City, to a period not beyond October 1, 1905." Here, again, we see that the distinction between the time allowed for completing the works and the acceptance thereof for purchase is sharply indicated. That the contractor was bound to begin to furnish the water immediately upon completing the works appears from the clause following: "The mayor and aldermen of Jersey City do hereby agree that the time to complete the work and furnish the water specified in said contract of February 28, 1899, shall be, and hereby is, extended until December 25, 1903." The water to be furnished was necessarily the water which Jersey City had agreed to take and use, and pay for as therein provided. In deference to counsel's earnest argument, I have spent perhaps more time upon this question than it may seem to deserve.

The next question is whether the position of the parties in reference to payments was altered by the filing of the bill. The water, as I have said, was turned on on May 23, 1904. The bill was filed August 1, 1905;

that is, before the time for testing and acceptance (October 1, 1905) had expired. The bill does not contain an offer to pay the whole price, but only such part of it as may be decreed to be due. It does not aver a willingness to pay any definite sum, and it does not charge that any particular sum is justly payable. It has never tendered any part of the price. This being so, can the mere filing of the bill be regarded as the equivalent of a completion of the contract? The question seems to answer itself. The mere filing of the bill is, certainly, not the equivalent of a tender of the price. It bears more resemblance to an application to this court to postpone payment until such time as this court may determine how much is justly due. The allegation is as follows: "The voters of Jersey City having voted to purchase said waterworks, and the waterworks having thereafter been constructed for your orator under said contract, your orator became and is the owner thereof in equity and entitled to the possession thereof. Your orator is compelled for the reasons aforesaid to accept said waterworks, notwithstanding they are not completed in accordance with said contract. It desires to pay therefor, but it should not be compelled to pay to the defendants said sum of \$7,595,000, for the following reasons." Then follow the reasons. The prayer is that this court may ascertain "how much and what part of said waterworks system the said defendants can convey to your orator, and what part of the said consideration of \$7,595,000 should be paid by your orator," and that Flynn and the water company "may be ordered by decree of this court to convey to your orator said waterworks, or so much thereof as they are able to convey, upon payment by your orator of such part of said consideration as may be so ascertained."

The position of the city is therefore this: "I am not willing to take the works as you have constructed them and pay the contract price. I am willing to accept and take them as far as constructed for such part of the contract price as the court shall decide that I ought to pay." It had the legislative authority to raise money by an issue of bonds bearing interest at 5 per cent., which, however, it is not authorized to sell below par (*P. L.* 1895, p. 768). Its water board has not as yet authorized an issue. Defendants' counsel say they cannot be sold. Whether they can or cannot, it is admitted that there has never actually been in the treasury money available for the payment. If the city had before suit, tendered the purchase money, or so much as was really due, or if, after bill filed, it had paid the money into court, its position with reference to the question now under consideration would have been very different. But it has not. I do not see how, under these circumstances, the mere filing of the bill could be said to have altered the contract rights of the parties and to have

conferred upon the city that right to the possession which the contract only gave upon payment or tender.

In *Reddish v. Miller's Executor*, 27 N. J. Eq. 514, the facts were these: An intestate had agreed to convey by a time fixed. Before that time he died. The vendee's assignees tendered the purchase money on the day; but the widow and sole heir, having quarreled, refused to join in a conveyance, and the purchasers refused to take a conveyance from one alone. Then the vendor's administrator filed a bill. The Chancellor decreed a specific performance and gave interest on the purchase money from the date of the filing. This the Court of Errors said was wrong. Justice Van Syckel said: "Conceding that on the day the bill was filed R. and O. [the purchasers] should have accepted a good title if it had been offered, and that they were bound to perform on that day if the other party was ready to execute the contract, it is obvious that by no fault of their own, but on account of the default of the other party, they could not have obtained a title. If they had offered to consummate the contract on the day the bill was filed, or at any time before final decree, their offer would not have been accepted. It is not equitable, therefore, to regard the filing of the bill as the offer of a deed, because the parties who should have conveyed would not do so on that day, or at any time before, and equity could not compel a conveyance until the case was ripe for final decree. The filing of the bill did not enable the purchasers to obtain possession of the land, nor give them any control whatever over it for the purposes of the plan they had adopted to dispose of it. \* \* \* The filing of the bill cannot be regarded in any just sense as an offer to make the title." The principle upon which Justice Van Syckel decided the above case is directly applicable to this.

But if the contractual obligation to pay for the water by the million gallons did not terminate when the city notified the company of the popular vote, and if it did not terminate upon the filing of the bill, when did it terminate? There are two, and only two, possible periods—either the last day named for test and acceptance (October 1, 1905), or the date of the decree. As I have already said, *prima facie*, in the absence of stipulation to the contrary the time fixed for the completion of the contract is the time from which the purchaser is entitled to the rents and liable for the payment of interest. But this rule has its exceptions, and the principle of one of them is, I think, applicable to the case in hand. It is this: Where the bill is filed by the vendor, and his title is first made out (that is, shown to be good) in the master's office, the day when the title is made out is the day from which the purchase money begins to bear interest. The case is one, of course, where, under the English system of conveyancing, the vendor is in fault

for not having produced a good title prior to or at the time set for performance, and the vendee has refused to perform on that ground. Lord Cottenham thus states the matter in *De Visme v. De Visme*, 1 McN. & G. 352: "The vendors, being in default, the delay having been occasioned by their not performing their part of the contract, are not to exact from the purchaser the payment of interest until the time they show good title on their abstract. The effect of that is to postpone the day agreed on for the completion of the contract until the time when the vendors put themselves right and show their title to be good." The case in hand is much more complicated than that just cited. The complainant's failure to perform consists in not having tendered so much of the price as was really payable. Its excuse is that it did not know how much to tender. Not only has it neglected to pay the price, but it has advanced several claims that it has not made good by proof—claims, therefore, that the defendant was not bound to submit to. On the other hand, the defendant has insisted that it was entitled to the full purchase price. It has never indicated that it would take less. But the court finds that it was entitled to considerably less. The exact sum payable has, therefore, remained a matter of doubt until decree.

The matter may be viewed in another way. The water was turned on in May, 1904. The city had, therefore, a year and a half in which to make the final test and to determine for itself the sum which it thought itself at liberty to deduct for deficient performance, and it might have tendered the sum which it considered to have been due at its peril. It did not take that course. It chose rather to make its tests during the progress of the cause and to let the court decide whether those tests showed complete performance by the water company, and what, in equity, it was bound to pay. Having thus sought, as far as it could, to postpone performance until decree, and having thus refused to take the responsibility of tendering the money actually due, or of paying it into court, it is hardly in a position to say that it should have the same benefit that it would have had, had it performed by the time prescribed by the contract.

There are many cases in which the question has come up. They show that in dealing with the subject the court does that which on the particular facts is equitable, unless it feels itself controlled by some stipulation so clear and positive as to preclude all discretionary action. *Williams v. Glenton*, L. R. 1 Ch. App. 200, and *Mayor of London and Tubbs Contract*, [1894] 2 Ch. Div. 524, are recent illustrations of such preclusion. On the other hand, *Sherwin v. Shakespeare*, 5 De G., McN. & Gor. 517, shows how the court does equity notwithstanding the strict letter of the contract. An extended review of the cases would be superfluous, be-

cause we have a leading case in our own courts. In *King v. Ruckman*, 24 N. J. Eq. 556, the law was settled by the Court of Appeals. There King sued Ruckman for a specific performance of an agreement to convey several tracts of land, to some of which he had title and to some of which he had not. A part of the purchase money was to be paid on June 1, 1868; the rest, so far as it was to be paid in cash, on July 1st; the balance of the price to be then secured by a mortgage. The money was not paid on June 1, 1868. Whether it was properly tendered was one of the questions in dispute. The Chancellor thought it was not, and that time was of the essence of the contract. The Court of Appeals thought it was, and that time was not of the essence of the contract. It accordingly directed a specific performance, as far as performance was possible, with an abatement, if equitable, of the price. The case came back to this court (24 N. J. Eq. 298), and *Dodd, V. C.*, gave a specific performance with variations. It appeared that the vendor had remained in possession and that the rents were not more than equal to the taxes. One of the questions was whether Ruckman was entitled to interest on the purchase money from the day fixed for the completion of the contract. It was held that he was not. *Dodd, V. C.*, said: "It seems to me clear that Ruckman is not entitled to the interest, and that the complainant is entitled to give the mortgage for the balance for the time it would have to run (five years) and on the terms it would have had, if given on the 1st of July, 1868, in pursuance of the contract." It will thus be seen that at the instance of the purchaser the contract was varied in two particulars. Interest was to run from the date of the decree, and not from the time set for completion, and the mortgage given was to contain the same terms as to future payment of installments of the principal as it would have contained had it been executed at that time. The decree was affirmed on appeal. *Beasley, C. J.*, quoting from *Lord St. Leonard*, thus stated the rule: "Where interest is more in amount than rents and profits, and it is clearly made out that the delay was occasioned by the vendor, \* \* \* the court gives the vendor no interest, but leaves him in the possession of the interim rents and profits." Then he says: "It has been intimated that in order to put the rule in force it was necessary that the vendor should not only be in fault but that such fault should be willful. I think there is not the least foundation for such a contention. Indeed, the rule has been almost universally applied in those instances where there was no suggestion of anything intentionally wrong in the conduct of the sale of the property. It has received its most frequent exemplifications in cases in which the delay in completing the contract has arisen from the discovery of latent defects in the title. On such occasions the vendor was no

further in fault than every one is in fault who undertakes to do what he afterwards discovers he is not prepared to do. In such cases the vendor is simply blamable for having, perhaps, omitted to have his title looked into with sufficient care. These illustrations make it demonstrably clear that the point as to the degree of the culpability of the vendor has not in the least affected the course of equity in the particular in question."

The above cases show very clearly that where a specific performance is sought, and where, if decreed, it is decreed, on equitable terms, the letter of the contract is not allowed to stand in the way of an equitable adjustment as to interest on the one hand and rents and profits on the other. Had the city on this bill taken the position that it was not obliged to pay interest on the purchase money from October 1, 1905, but only from the time of the decree, the above case of *King v. Ruckman* would have been directly in point. But it takes no such position. On the contrary, it takes the position that it should not be obliged to pay for the water by the million gallons at the schedule rates; that it should be obliged to pay interest on the purchase money from the time of the popular vote—not, indeed, interest upon the sum named in the contract, but upon such sum as this court shall find to be due; and, further, that this interest should not be interest at the legal rate of 6 per cent., but at some lesser rate, to be determined arbitrarily by the court. Singularly enough, the water company, on the other hand, against its apparent interest, insists that water rents at the schedule rate should continue to be paid until decree; that not until then should interest upon purchase money begin. The following table will show how the matter stands. The amounts are computed at the schedule rates:

Quarter ending August 23, 1904.....	\$105,069
" " November 23, 1904..	106,846
" " February 23, 1905...	115,744
" " May 23, 1905.....	105,733
Total for the first year.....	\$433,412
Quarter ending August 23, 1905....	\$106,548
" " November 23, 1905..	107,995
" " February 23, 1906...	111,659
" " May 23, 1906.....	106,791
Total .....	\$432,993
Quarter ending August 23, 1906....	\$114,937
" " November 23, 1906..	117,321
" " February 23, 1907...	123,043
" " May 23, 1907.....	117,085
Total .....	\$472,406
Interest at 6 per cent. on \$7,595,000..	\$455,700
Cost of operation (as agreed by parties) .....	50,000
Total .....	\$505,700

The cost of operation is, of course, added to the interest, because, on the assumption that the city is to be regarded as in possession, it would be paying what the company is

now paying to make that possession effective and useful. The above table shows that, if Jersey City should pay interest at 6 per cent. and be charged with a sum equal to the cost of maintenance, it would pay more than it would if it paid for the water by the million gallons. The interest is computed, in the table, upon the whole contract price; but, with the allowances made, the result is the same.

If the payment is not to be made by the million gallons at the contract rate, can it be made in any other way or at any other rate? Counsel's suggestion is that Jersey City should only pay what the water is fairly worth. There is no evidence that, even if this proposition is sound, the contract rate is not reasonable. The contract rate is, for each million gallons up to 25,000,000, \$36 per million gallons; for each million gallons in excess, up to 30,000,000, \$34; for each million gallons in excess of 30,000,000, up to 35,000,000, \$32; for each million gallons in excess of 35,000,000, up to 45,000,000, \$24; and for all beyond, \$20. Judging by the evidence and by the reported cases, this price is reasonable. There is, at least, no evidence to the contrary. That the company would, in any event, be chargeable with interest at the legal rate, is, I think, perfectly plain. The rate chargeable for the forbearance of money is, in the absence of agreement to the contrary, the legal rate. *Jersey City v. O'Callaghan*, 41 N. J. Law, 349, is in point. It was there held by the Court of Errors that where damages for breach of contract are to be assessed, or where an equivalent is to be given for the use of money forborne, the statutory rate is the rate to be computed. If, then, interest be given at all, it would be given at the rate of 6 per cent. The matter, then, stands thus: It is for the interest or Jersey City that she should be charged with water rents, and not with interest, up to the time of decree. The particular equities of the case and the principle of *King v. Ruckman* require such a charge, and the defendants concur in demanding it.

I will notice, very briefly, one other point made. It appears that prior to March 31, 1902, the East Jersey Water Company was furnishing Jersey City with water at the rate of \$35 per million gallons. On that day it joined with Flynn and the Jersey City Water Supply Company in an agreement with Jersey City to continue to furnish it at that price until the city should have obtained and put in use the new supply, but not beyond March 1, 1907. It was stipulated that it (the East Jersey Company) would guarantee that the supply company would construct and complete the waterworks to such an extent that the water could be turned on from the new source on or before March 1, 1904, and that, if the works were not sufficiently completed and the water so turned on by that date, the East Jersey Company would continue to deliver the temporary supply of water from March 1, 1904, "until such new supply was so turned on, at the rate of \$353,800 per an-

num, until March 1, 1907." As I have already said, the water was actually turned on on May 24, 1904, and Jersey City paid at the rate so stipulated for only 2 months and 24 days. The city argues that, if it must pay under the provisions of the contract, it should only be required to pay this fixed item of \$353,800 per annum. But it seems to me very clear that the agreement to furnish the water at these figures was the agreement of the East Jersey Company alone. It was to last for a perfectly definite time viz., until the Jersey City Supply Company had so far constructed its own works as to be able to turn on its own water. I am quite unable to understand how an agreement by the East Jersey Company can be converted into an agreement obliging the water supply company to continue to furnish water at the same price; more especially when, as I have shown, there was an express agreement between Jersey City and the water supply company for a different rate. The figures named by the East Jersey Company laid the foundation for a temporary order, made pendente lite in a case where everything was in dispute. They cannot be used as a substitute for the contract right of the parties.

#### Liquidated Damages.

The question next to be considered arises in respect of the city's claim for liquidated damages. In the specification, which, as I have said, is made part of the contract, there are the following clauses: "The contractor will be allowed two years and six months from the date of contract to complete the work and furnish the water specified." "For every day's delay beyond the term of contract the contractor shall pay the city of Jersey City the sum of \$500 per day as liquidated damages, and not by way of penalty." The contract was not completed within the time specified, and the work begun by Flynn was continued by the Jersey City Water Supply Company. By agreement dated July 8, 1901, reciting that Flynn had assigned his contract to that company, the contractors, who are stated to be Flynn and the Jersey City Water Supply Company, state that it is and remains their duty to furnish Jersey City with the water supply originally contracted for, and that the modifications contained in the second contract shall not relieve Flynn or his sureties from furnishing and delivering to Jersey City the quantity and quality of water required by the original contract, nor from constructing it in accordance with the original contract as thereby modified. The modifications do not affect the present question; but a further contract, dated March 31, 1902, contains, among other things, the following clauses: "Whereas, the waterworks provided for in said contracts have not yet been completed, and it is apparent that the same cannot be completed for a long time to come, and the said party of the second part [who are stated to be Flynn and

the Jersey City Water Supply Company] desire the party of the first part [the city] to extend the time for the completion of said works and the fulfillment of said contracts as hereinafter provided, and to waive any claim for liquidated or unliquidated damages for delays, until the expiration of such extended time: \* \* \* Now, therefore, in consideration of the premises and of one dollar to them in hand paid by the party of the second part, the mayor and aldermen of Jersey City do hereby agree that the time to complete the work and furnish the water specified in said contract of February 28, 1899, shall be and hereby is extended until December 25, 1903, and that the payment of \$500 per day as liquidated damages for delay under said contracts and specifications shall be incurred or reckoned only from and after December 25, 1903." It is so clear that the Jersey City Water Supply Company, as well as Flynn, is, under these stipulations, answerable for such liquidated damages as may be awarded, that no argument is attempted on that head.

The contention is that, notwithstanding the explicit language employed, "The sum of \$500 per day as liquidated damages, and not by way of penalty," the sum named was in fact a penalty, and not liquidated damages. It would be quite impossible for the parties to have expressed themselves with greater clearness. They not only say that the sum named is liquidated damages, but they also say that it is not a penalty. The argument must, therefore, be that the parties are prevented by some rule of law or equity from so stipulating. I know of no such rule, nor have I been referred to any. The cases on the subject are very numerous. Certain rules have been laid down, some of which have been doubted, and others of which are perfectly well settled. I shall refer to them only in so far as they illustrate the present question. They are elaborately considered by the Appellate Division in *Wallis v. Smith*, 29 Ch. Div. 243, where Jessel, M. R., classifies them as follows: (1) Cases in which a sum of money is stated to be payable, either by way of liquidated damages or by way of penalty, for a breach of several stipulations, one of which, at least is, for the payment of a sum of money of less amount. In this case the sum is regarded as a penalty for a breach of any and all of such stipulations, and only the actual damages can be recovered in respect of any of them. *Astley v. Weldon*, 2 B. & P. 346, and *Kemble v. Farren*, 6 Bing. 148, are leading cases. (2) Cases in which a sum of money is stated to be payable by way of liquidated damages for defaults or breaches of covenants other than for the payment of money. With respect to such there is or may be a distinction founded upon the trifling character of one of the breaches. If the contract contains a variety of stipulations, and they are all of equal or nearly equal importance, the sum stated is regarded as liquidated

damages, and the whole of it is recoverable for a breach of any one of them. This was the precise point decided in *Wallis v. Smith*. If, on the other hand, the contract contains a variety of stipulations, and they vary substantially in importance, or relate to very trifling matters, whether certainly ascertainable or not, then it appears to be unsettled, so far as the English cases are concerned, whether the sum named is to be regarded as a penalty, properly so called, or as liquidated damages, properly so called. The dicta on this point are conflicting, and they do not require consideration here. (3) Cases in which the sum is called "liquidated damages" and is given for a single breach. Here again, we have to distinguish. The breach may consist in the nonpayment of a smaller sum of money. In this case there is no conflict of authority. The sum named, however designated, is a penalty. Then, again, the stipulation, if broken, may result in damages uncertain in amount, and necessarily very insignificant—in the words of Lord Eldon (*Astley v. Weldon*, 2 B. & P. 351), "so gross that a man would start at the bare mention of it." Here, too, the sum, however designated, is undoubtedly a penalty. Jessel mentions another class, which I need not refer to because it does not bear upon the matter in hand.

The class to which the present case belongs has been the subject of consideration by the Court of Errors. The rule applicable to it is thus expressed by Justice Dixon in *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. Law, 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626: "When damages are to be sustained by the breach of a single stipulation, and they are uncertain in amount and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages." This is a very guarded statement; more so, I think, than may be found in many of the judicial utterances on the subject, and as favorable to the water supply company as it would be possible to phrase it. It is stated, in somewhat different terms, in a subsequent case in the same court by Judge Vroom (*Robinson v. Centenary Fund*, 68 N. J. Law, 723, 54 Atl. 416): "The rule may then be fairly stated to be that when the term 'penalty' is used in the agreement, and a single act is forbidden, if upon breach it is not possible to ascertain the damages, then the sum named as penalty may be recovered, if on any reasonable view of the case the damages might equal that sum." In this latter case, notwithstanding the fact that the parties used the word "penalty," it was construed to mean "liquidated damages." The case is the more noteworthy for that reason; for if, in this class of cases, as in every other, the object be to ascertain the intention,



some regard must be paid to the words used. The word "penalty" is generally used in contradistinction to "liquidated damages." Says Lord Escher in *Law v. Local Board of Redditch*, [1892] 1 Q. B. 127: "The contract goes on to say that the sums so forfeited may be recovered 'as and for liquidated damages.' I do not think much reliance ought to be placed on those words; for, even if the sums were called penalties, the same considerations might be applicable, but I do not think that they ought to be left out of account altogether."

The two New Jersey cases cited were cases at law, and not in equity; but that cannot make any difference. The construction to be put upon the language of contracts is the same in both courts. As to the matter of consideration, "the rule," says Pomeroy (Eq. Jur. § 926), "is entirely settled that mere inadequacy—that is, inequality in value between the subject-matter and the price—is not ground for refusing the remedy of specific performance. In order to be a defense, the inadequacy must either be accompanied by other inequitable incidents or must be so gross as to show fraud." Judged by the foregoing rules, I do not see why the sum named as liquidated damages for delay of completion should not be payable. There are three aspects in the matter. In two of them there was no injury; in the third, there was. First. There was no pecuniary injury because of the city's being obliged to get its water from the East Jersey Company. It was consuming, in December, 1903, less than 35,000,000 of gallons a day (the exact amount does not appear), and in July, 1905, about 32,500,000. If it paid for this water at the schedule rates (\$36 up to 25,000,000 gallons, \$34 for the excess up to 30,000,000, and \$32 for the excess over 30,000,000 up to 35,000,000) it would have paid more than it was paying for the water received from the East Jersey Company, viz., \$35 per million gallons for all amounts. It would have paid considerably more than it was paying after March 1, 1904, and until the Rockaway supply was turned on, viz., at the rate of \$353,800 per annum. The city can claim no actual damage on this score. Second, no real injury resulted from the fact that the water supplied from December, 1903, to May, 1904, was taken from the East Jersey works above Little Falls, and not from the Rockaway. The proof does not show that the East Jersey Company's water was not as pure and wholesome as the Rockaway water. It was water that came, in part, from the Rockaway lower down and from other unpolluted sources. The injury on this head is hardly more than fanciful. The third ground of injury is, I think, substantial. It is that by the delay in completing the works Jersey City was deprived of the right of selling its surplus water to municipalities and other persons outside of its corporate limits.

In *East Newark v. N. J. Water Supply Co.*

et al., 67 N. J. Eq. 265, 57 Atl. 1051, an interpleader suit to which Jersey City was a party, I came to the conclusion that, while Jersey City could not first buy and then sell water by the million gallons—in other words, could not buy merely for the purpose of selling—yet that, if it had a water supply of its own more than sufficient for its needs, it could sell the surplus water within the limits of the counties of Hudson and Bergen. My opinion was concurred in by the Court of Errors on appeal. 68 N. J. Eq. 783, 64 Atl. 1132. Both this and other reported cases show, not only that Jersey City had statutory authority thus to dispose of its surplus water, but that while it was using its former supply, obtained from the Passaic above Belleville, it exercised its privilege and sold that surplus to various towns. It appears, therefore, that Jersey City would have had no authority to sell such water as it was receiving from the East Jersey Water Company to persons or towns outside of its limits, even if, as is not likely, the East Jersey Company would have been willing to furnish it for that purpose; but if the water supply company had completed its contract by December 25, 1903, it could have at once paid the price and taken over the works and been in a position to compete with the East Jersey Company for the patronage of persons and corporations in the counties mentioned. The reported cases show that in some instances Jersey City had been getting as high as \$90 per million gallons for the water thus supplied. Now Jersey City would have had at least 15,000,000 gallons of surplus water to thus dispose of. If she had been able to dispose of it at even a \$35 advance per million gallons, she would have received for it \$525 per day; the liquidated damages being \$500 per day. I do not, of course, wish to be understood as asserting that it is likely that she would have at once found purchasers for this amount of water, or for anything like as much. But I do say that it was quite within the bounds of possibility that she might have found purchasers for a considerable amount of it and at prices higher than she was herself then paying. It will, of course, be argued that, judging from her indisposition to take any steps towards raising and tendering the price before she commenced this suit, it is unlikely that she would have reaped any substantial benefit from her mere legal right to pay and take immediate possession. But it can hardly be said with any show of plausibility that, because Jersey City failed or refused to accept and pay for works that were not, in fact, complete—I mean complete in the sense of providing against those sources of pollution which I find she was bound to provide against—therefore I am to assume that, if the contract had been fully and completely performed, she would have been equally dilatory. It would have been for her interest, avoiding captious objections, if she could



have found customers for her water, to have taken the works at once.

It cannot be doubted that the parties contracted together in view of a known situation. Jersey City was, and for many years had been, a competitor of the East Jersey and of its subsidiary companies. The damages which Jersey City would suffer by delay from this or any other cause were altogether uncertain in amount, and not, in the words of Justice Dixon, "readily susceptible of proof under the rules of evidence." It was the very situation in which the courts have allowed the parties to assess their own damages in advance. The original contracts stipulating for these damages were prepared by counsel of great experience. That it was intended to assess these damages in advance there can be no manner of doubt, for it is expressly provided that the sum agreed upon shall be paid "as liquidated damages, and not by way of penalty." But the case does not rest here; for, the works not being completed within the time limited, the parties in their supplemental contract of March 31, 1902, took cognizance of the fact that liquidated damages might be insisted upon for past delays, and so they use this language: "Whereas, for the purpose of inducing the city to grant the extension of time hereinafter mentioned and to waive all claims for liquidated or unliquidated damages for delay during such extended time and as a consideration therefor," they have secured the consent of the East Jersey Company to continue the temporary supply, etc., and then they go and expressly provide "that the payment of \$500 per day as liquidated damages for delay under said contracts and specifications shall be incurred and reckoned only from and after December 25, 1903." The parties were dealing at arms' length. They had competent advice. They were peculiarly well informed in respect to the matters they were contracting about, and they were dealing with a subject incapable of being reduced to a certainty by any legal rule for the assessment of damages. No oppression, no unconscionable circumstances, are shown; no inequality such as to shock the conscience of the Chancellor. It cannot be asserted with certainty that the damages named might not, under certain contingencies, have equaled the damages that might have been actually sustained. Under these circumstances it seems to me that it is the duty of a court of equity to specifically enforce the contract and not to nullify it.

One other question remains: For what period shall the damages be assessed? The main object was to get the 50,000,000 gallon supply. For this purpose it was not very material that the last stone should have been put in place, the last bank sodded, and the last nuisance removed. In view of the paramount object to be attained, I think that the words "the contractor will be allowed two years and six months from the date of contract to complete the work and furnish

the water" may reasonably be read "to complete the work so as to furnish the water." The company began to furnish it on May 23, 1904. The works were then capable of delivering 50,000,000 gallons per day, and so the damages would be computed from December 25, 1903, to that date, were it not for the fact that the city, by reason of legal proceedings taken in respect of the tunnel, retarded delivery five or six days. These, I think, should be deducted. I may add that the abstract question how much water Jersey City will as conveyance acquire the right to subtract, either by reason of its riparian ownership of the land conveyed or of any legislative grant, licenses, or authority, is not raised by the pleadings and has not been argued or considered.

#### Efficiency of Reservoir as Sedimentation Basin.

I now come to what is, undoubtedly, from a sanitary standpoint, the most important question in the cause, and that is whether the water company has provided Jersey City with a water supply such as the contract calls for. As to the amount of the supply there can be no question. It is not disputed that the works are capable of furnishing 50,000,000 of gallons a day, and that, if enlarged, they will be capable of furnishing 70,000,000. It is the quality of the supply, under certain conditions, that is disputed. Are the works of such a character as that they can be relied upon constantly to furnish pure and wholesome water? It is the evidence with relation to this question that has filled most of the 4,000 printed pages of testimony. Much of that part of it, however, relating to certain minor nuisances existing on the watershed at the time the witnesses testified, has become irrelevant, for the nuisances have now been removed. On the scientific questions involved the expert witnesses on both sides agree in their views to an extent that is all the more surprising, because the science of bacteriology, originating in the wonderful discoveries of Pasteur and Koch, dates its origin from a period within the last 30 years.

The Rockaway watershed is 122 square miles in extent. The river rises in the Longwood valley to the east of Lake Hopatcong. It flows past Wharton, Dover, Rockaway, and Boonton before it reaches the reservoir. The population per square mile above Boonton is 169, regarded as a very large population for a watershed used to furnish a water supply. In addition to the towns named, there is the mining camp of Hibernia, which lies upon a brook that empties into the Rockway six or seven miles above the reservoir. There are also many large factories along the river. In its natural state the shed is capable of furnishing water of excellent quality. As it is, the water as it enters the reservoir is much contaminated. The reservoir itself, a little over two miles long and a mile wide, is an artificial structure, damming up the river

just below Boonton, and its greatest depth is about 85 or 90 feet. It contains above the lowest gate from which water can be delivered, 7,800,000,000 gallons. This is a supply for 146 days if 50,000,000 of gallons a day be taken, or a supply for 104 days if 70,000,000 be taken, assuming that during those periods nothing flows in. But this is an impossible assumption; for, even if no rain should fall during all those days, the ground would still, in gradually diminishing quantities, continue to drain first into the river and then into the reservoir, and thus add to the water supply stored up. The water is conducted from the reservoir to Jersey City, part of the way through a single steel pipe 6 feet in diameter, and part of the way through a conduit and tunnel 8 feet 6 inches in diameter; the distance being 22.6 miles. Reaching Jersey City, it flows in part into two small reservoirs, and in part, for the use of Jersey City Heights, directly into the city pipes. There is no pumping; the entire supply being delivered by gravity. The height of the reservoir spillway above high tide is 305½ feet, and the bottom of the lowest gate or effluent pipe 256.6 feet. It takes 17 hours for water, at the present rate of consumption, to flow from the reservoir to Jersey City. It is a fact admitted by all the witnesses on both sides that the water of the river as it enters the reservoir is polluted to such an extent as not to be potable. The defendants' insistent is, however, that the reservoir acts as an sedimentation basin, and that the water when it reaches Jersey City is free from all objectionable impurities and of excellent quality. It is not denied by the city that the water when it reaches Jersey City is ordinarily good. It is, however, insisted that it is not always so; that the sedimentation to which it is subjected is at times imperfect; and that in certain conditions of wind, temperature and flow, particularly in times of freshet, the water passes so rapidly from the river, across the reservoir, to the effluent pipes, that it has not time to settle, and that it reaches Jersey City with many of its impurities still in it. The insistent is, therefore, that the reservoir, as a mechanism for purification, is unreliable and not such as stipulated for by the contract.

I shall consider, first, what the contract requires. The first clause provides as follows: "The contractor agrees to construct a new system of waterworks for Jersey City, and to supply said city therefrom with pure and wholesome water in strict conformity with said specifications and his proposal under plan No. 1. \* \* \* Such works shall be so constructed and maintained by the contractor that the water delivered therefrom shall be pure and wholesome and free from pollution deleterious for drinking and domestic purposes, during the time that Jersey City shall take water by the million gallons. If such works and supply are purchased by Jersey City, they shall be delivered to Jersey

City as a completed operating plant, free from pollution as aforesaid." The contractor thus refers the matter to his proposals under plan No. 1. Referring to this plan (made part of the contract) we read as follows: "There will be tributary to the storage reservoir the whole flow of the Rockaway river, having a watershed and gathering grounds of 122¼ square miles. \* \* \* The water proposed to be furnished is pure and wholesome. The plan has been prepared so as to prevent all contamination thereof from any source in accordance with the specifications." The specifications provide as follows: "The water to be furnished must be pure and wholesome for drinking and domestic purposes." "The city will agree to exercise, on demand of the contractors, all its legal powers to prevent pollution of waters tributary to the proposed works; but all expenses attendant upon the prevention of such pollution shall be borne by the contractor." The contract further provides as follows: "Eighth. It is further understood and agreed that all sewers and sewage disposal works constructed or arranged for by the contractors to prevent pollution or to carry off pollution existing in the watershed, shall under said specifications and plans be so constructed and arranged for by them that, in the event of the purchase of the water supply and plant by Jersey City under any of the options aforesaid, the operation and maintenance of such sewers and sewage disposal works for the purposes aforesaid shall not be a charge upon and expense to Jersey City." Finally the specifications provide: "All powers possessed by the city shall be exercised in aiding such prevention. The city shall not be obliged to accept any plant or water therefrom until the supply is free from pollution." These are the principal provisions on the subject. There are others of minor importance, which do not in any wise lessen the obligation of the contractor; if anything, they tend rather to emphasize it.

Contracts must have a reasonable construction, and must be read in the light of the surrounding circumstances. The evidence shows that before the contract in question was executed the city authorities visited the watershed and actually saw what the conditions were. They knew that the river flowed through a thickly populated region and that some pollution at the points where the population was thickest was inevitable. I think it is quite plain that the contention of counsel for the city that, because it is provided that the supply is to be free from pollution and because the river is a part of that supply, therefore the river must be free from pollution from its source to the point where it flows into the Boonton reservoir, is untenable. In view of the evidence, the city would be demanding an impossibility. I think the contract means that the supply, at the time it reaches Jersey City and is delivered into the reservoir or pipes there, must be free

from pollution. For example, if, after the water should leave the Boonton reservoir but partially purified, it should be subjected to the action of a filter plant established at any point along the route, and be there freed from pollution, I have no doubt the terms of the contract would be fully complied with. Again, the requirement that the water must be pure and wholesome does not mean that it shall be absolutely pure—of such purity as could be obtained in a laboratory. All that is required is that it be “free from pollution deleterious for drinking and domestic purposes.”

There is still another observation that I must make on the argument addressed to me by counsel for the water company, and that is this: It is, in the event of a purchase by the city, the supply that is required to be free from pollution, and not the water that has from day to day been thus far delivered. In the words of the contract: “If such works and supply are purchased by Jersey City, they shall be delivered to Jersey City as a completed operating plant, free from pollution as aforesaid.” This supply must be delivered free from pollution, not half the year, or three-quarters of the year, but all the year; not in times of low water or moderate flow, when the reservoir is still and sedimentation uninterrupted, but also in times of high wind and freshet. If the evidence shows that the works are, as they stand, adapted to the delivery of pure and wholesome water only during part of the year, no matter how large a part, then the contract has not been completely performed. Suppose, for instance, it were shown that on two or three days of the year the water at the Jersey City intake contained typhoid germs in such number as to cause epidemic, and that this condition of things was not the result of accident, but of a lack of precaution, such as reasonable engineering and sanitary practice required, then I apprehend the language of the contract would not have been satisfied; for it says: “The water proposed to be furnished is pure and wholesome”—“is” being here used in the sense of “will be.” It was not the affirmation of a then existing fact; for the fact, as both parties knew, was otherwise. The water of the river was then grossly polluted. The contract continues: “The plan has been prepared so as to prevent all contamination thereof from any source in accordance with the specifications,” which were that “the water to be furnished must be pure and wholesome for drinking and domestic purposes.”

Now, it was argued for the water company that the contract should be construed in the light of conditions then existing, and that Jersey City must have known that, if it accepted the Rockaway, it would get water somewhat polluted. This argument would be unanswerable if the contract had been only that the contractor would impound the water on a large reservoir and deliver it to

Jersey City. If Jersey City got polluted water, it would get just what it had bargained for. But both parties knew that the Rockaway at and below Dover was highly polluted. The contractor knew it better than the city. The evidence is that the stream as it flowed past Dover was then little better than an open sewer. It was in view of these known conditions that the parties contracted, and what the contractor expressly contracted to do was to deliver pure and wholesome water from a polluted stream. “The plan,” he says, “has been prepared so as to prevent all contamination from any source.” The company proceeded on the theory that it must furnish pure, not on the theory that it could furnish polluted, water. It did not wait to see whether the pollution at Dover and other places would make itself apparent at Jersey City. It began at once to remove many of the sources of pollution, and the only question is whether it has gone far enough.

There is one other remark that, in order to avoid misapprehension, I wish to make before considering the evidence. The company is not bound to provide against that which may arise in the future; in other words, against future conditions. Jersey City will have to provide against them as occasion may require. For example, if the present population of the watershed does not create a situation calling for the installation of a filter plant, the company is not obliged to furnish it, merely because, when the population increases, such a plant may be a necessity. To sum up: The contract requires that the plant (using that word in its broadest sense) shall at all times and on all occasions (barring accidents and occurrences that could not by the exercise of reasonable foresight and care be provided against) be constructed or adapted to use so as, in the words of the contract, “to prevent all contamination from any source.” The thing to be delivered is a plant capable of preventing contamination from any source, at any time, under any conditions likely to occur, and not a plant that may be effective under favorable conditions for a part of the year, but ineffective at other times. As this is a very important part of the case, I may be permitted to illustrate further. Drought in summer is no uncommon occurrence; heavy rain, following drought, is no uncommon occurrence; high wind, accompanying rain, is no uncommon occurrence. If the plant be capable of delivering pure and wholesome water in ordinary weather, but not on the happening of the occurrences mentioned, either separate or together, then I take it that the plant would not be so completed as to meet the requirements of the contract.

With this view of the legal aspects of the case, I proceed to a consideration of the evidence. It is so voluminous that it will not be possible, within the limits of an opinion, to do more than summarize its more important

features. No fault is found with the construction of the reservoir as a piece of masonry. It is admitted to have been extremely well built. It contains as much water as was bargained for. It is hardly conceivable that up to the limit of 50,000,000 gallons a day it could ever, under any circumstances of drought, be exhausted. The proof shows, too, that, in general, the reservoir does act effectively as a sedimentation basin, and that when the water reaches Jersey City it is of excellent quality. It has been on trial since May 23, 1904, and up to the close of the evidence last June (1907) the plant has, for much the greater part of the time, delivered water satisfactory in quality. The statistics show that since Jersey City has ceased to take its water from the lower Passaic there has been a great decrease in the number of typhoid cases and that the yearly average of deaths from that disease has, for the last four years, compared favorably with that of those cities the purity of whose water supply is undoubted. This, at first blush, seems to be pretty satisfactory evidence of the effective working of the plant. For the reasons that I am about to state it is not conclusive. It does not necessarily follow that, because the works may be capable of furnishing from 35,000,000 to 38,000,000 gallons of pure and wholesome water, therefore it is capable of furnishing 50,000,000; nor does it necessarily follow that, because the water has been pure and wholesome in the practical absence of water-borne diseases on the watershed, therefore the water might not be contaminated if such diseases prevailed.

Within the last 30 years science and experience have revolutionized the idea of sanitary experts on the subject of water supply. Repeated instances here and in Europe have shown that water admirable in appearance may contain the germs of typhoid and of other water-borne diseases in such numbers as to cause epidemic. It used to be a favorite theory of sanitary and hydraulic experts that running water purified itself. Experience has shown that it is not running water, but still water, that tends to do this. It is agreed by the experts on both sides that, if water be allowed to stand for a sufficient length of time, whatever pathogenic germs may be contained in it will die or disappear. None of these experts put the time under 40 or 50 days, and several of them do not regard 6 months as too long. Disease germs have been carefully studied by bacteriologists, who have, among others, been able to isolate the typhoid germ, cultivate it, and study its peculiarities. Its proper habitat is found to be only in the human intestine. There it thrives and multiplies, as nowhere else, except under artificial culture. Millions of these germs may be discharged by a single patient, and some of them, the hardest, will survive in water for weeks and months. Consequently, if the feces of a patient be allowed to go into a stream from which a water supply is

taken, they may be carried to the consumer; and, if taken through the mouth, may, in their passage through the intestine, attach themselves to it and multiply, and after a period of incubation (about 10 days) the patient begins to exhibit those symptoms which are characteristic of the disease. This is no theory. It is an established fact, admitted by all sanitary experts. The Plymouth Case, mentioned several times in the course of the testimony, is a remarkable illustration. The feces of a single patient, thrown upon the ground during the late fall and frozen there, were in the spring washed into a brook which contributed to a water supply, and one-tenth of the entire population contracted the disease. In this case enough of the germs to produce the result survived in the ice for a period of 4 months. Several other striking instances are mentioned in the evidence. Dr. Leal, one of the officers of the defendant corporation, himself an eminent sanitary expert, testifying to the time the germs will survive outside the human body, says: "I think within the first 5 days 50 per cent. would die; I think within 10 days 90 per cent. would die; I think within 3 weeks 99 per cent. would die; and the other per cent. might live for several months." This statement is not dissented from by the experts for the city. Thus Mr. Whipple says: "If we assumed a certain number of germs put into the Rockaway river water, they would die somewhat rapidly at first. I mean, many of them would die out rapidly and some would live longer, and others would live still longer, and a few might live for a number of months; but the number that did so remain would be small compared with the number that was put in." The experts for the city, however, point out that where it concerns a matter of millions in each stool the residuum surviving would be by no means insignificant. Mr. Whipple says that he has seen urine that contained a billion germs in a single discharge.

The theory is that, when these germs escape from their natural habitat in the intestine, their environment becomes unfavorable, and hence they tend to die off. Prof. Sedgwick, of the Boston Institute of Technology, thus states the matter: "Once they begin to travel through soil pipes and sewers, their food becomes scarcer and less available, and when finally they mingle with the waters of the lake, which are relatively pure and destitute of organic matters, their pabulum must be distinctly scanty. At the same time, in sewage and in the lake, they are subject to the influence of gravity, which tends to draw them down into the deeper, quieter layers, and finally into the mud at the bottom, while predatory infusoria, running through the water, may devour them altogether. Lastly, if they tend to float or linger on the surface, they may there suffer from the germicidal action of the rays of light and perish." In addition to what is here stated, several of the witnesses are of

opinion that, the longer they remain out of the intestine, the weaker and less virulent they become, and therefore the less likely to cause disease. Now it is on this theory that still water is seen to be a better purifier than running water; but, in order that still water may, so to speak, do its work, it must have time. A running mountain stream may carry the germ and be the vehicle of disease 50 miles below the point at which it was discharged into the water. Hence the theory of sedimentation. It may be asked why, if the entire body of water be infected, every one who drinks it is not made sick. The answer is that some subjects are more susceptible than others; that the majority of healthy persons appear to have the power to resist the attacks of the micro-organisms or to neutralize their poisons.

There is no doubt that in a certain sense and to a certain extent running water does tend to purify itself. It is a matter of common observation that if foreign matters, whether factory waste, sewage, or surface water, be discharged into a stream, that stream will gradually clear. The heavier particles, held in suspension, tend to sink because of their greater specific gravity. The substances held in solution may undergo chemical reactions among themselves and be precipitated. The sunlight and the oxygen of the air exert their influence, and so it comes to pass that after water, not too highly polluted, has flowed for a considerable distance, it is, to all appearances, clear and pure. Now, what bacteriology has added to our stock of knowledge is this: That water apparently pure may be infected with germs that, introduced into the system, produce disease and death, and that running water will not kill them. It will rather serve as a vehicle to transport them long distances. How many diseases are thus water-borne is not as yet definitely known. The more recent investigations seem rather to add to their number than diminish it. Prof. Sedgwick says: "We have had a good deal of new light in the last two or three years, and, as I said in my direct testimony, from the diarrhoeal group, including typhoid, cholera, gastro-enteritis, dysentery, etc., we have got considerable evidence that perhaps nearly all infectious diseases, the germs of which might find their way into sewage, and so into water, may be to a little extent carried by water." Prof. Winslow thinks that the germ of para typhoid may be carried by water and that epidemics of diarrhoeal disease may be traced to it. Dr. Leal admits that cholera, no less than typhoid, is a water-borne disease. He thinks that diarrhoea may be caused by water, though not a water-borne disease, and he says that he cannot say whether dysentery is a water-borne disease or not, and he does not believe that any one else can.

Throughout the testimony will be found constant reference to the presence of *b. (ba-*

*cilli)* coli in the water. These exist in large numbers in the intestines of warm-blooded animals, including man. They, or most of them, do not cause disease. One of the bacteriological methods of determining the purity of a water supply is to determine the number of these *b. coli* in a cubic centimeter (c. c.) of the water, or in some decimal part thereof. If the number is found to be large, it indicates the presence to an undesirable extent of animal matter discharged from the intestines. It does not necessarily, or even usually, prove the presence of disease germs. It merely shows that if the animal, including man, that gave off the *b. coli* happened to have some water-borne disease, then the same water which conveyed the *b. coli* would probably bring the dangerous germ; or, putting it in another way, it would show that the method of purification employed had not freed the water from intestinal products—that they had neither settled nor been destroyed in their progress toward the consumer. These *b. coli* are exceedingly minute. The typhoid bacillus is  $\frac{1}{25,000}$  of an inch in diameter, but several times longer than it is wide. It and the *b. coli* cannot be seen by the naked eye until they are—in bacteriological phrase—cultivated. The cultivation consists in putting a measured portion of the suspected water on a plate containing some substance upon which they will thrive and increase. If present, they will multiply with great rapidity. Each bacillus will divide and grow and subdivide until a "colony" appears on the plate, easily discernible by the naked eye. The number of colonies counted on the plate indicates the number of bacilli in the given quantity of water. By this method alone the typhoid bacillus could not be differentiated from the other and harmless bacilli. Such differentiation is made by further tests unnecessary to describe. Reference will also be made to bacteria. These, as I understand the evidence, are microscopic organisms, some harmful, most of them harmless, found in water, and whose count affords an indication of its purity. The term includes *b. coli*, but is much more comprehensive.

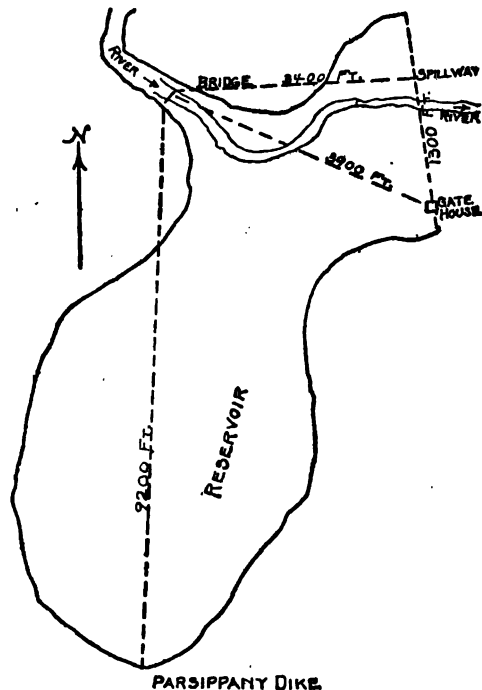
We have now reached a point when the precise question at issue can be understood. The contention on the part of Jersey City is that the conformation of the reservoir is such that in times of freshet polluted water will pass so rapidly from the river to the reservoir outlet that there will be no time for proper sedimentation; that, if there are pathogenic germs in the river when it enters the reservoir, they will be carried across it in 2 or 3 days, and be borne to Jersey City within 17 hours after they leave the reservoir gate. It will be proper, in the first place, to consider more particularly the character of the water to be purified. The Rockaway is a comparatively small stream, with enormous variations of flow. Its lowest flow, as shown on the Cook chart for the year 1905-06

was 32,000,000, and its highest 899,000,000, gallons per diem. Of the four towns that it passes, the most considerable is Dover, with a population of ———. Dover is built up on both sides of the stream, and in places the ground slopes rapidly toward it. It has no sewer system, and the contents of the cess-pools, uncemented, leech into the adjacent soil. Boonton, built upon the side of a high hill, with its natural drainage toward the river and its factories on the Copper-Lord property almost overhanging, are within a mile or two of the reservoir. Smaller towns and factories are found along the stream and its tributaries. The droppings of animals on the numerous roads throughout the watershed, and the water flowing off the manured fields, are likewise sources of pollution. There is comparatively little forest, and except in the Longwood valley not much unused land. These conditions are in contrast with those obtaining on the Pequannock. In view of this situation, it will not be difficult to understand why the experts on both sides agree that the water as it enters the reservoir is not potable.

The experts tell us just how the water is contaminated. Mr. Whipple, the city's expert, says: "I should say the water was contaminated to a considerable extent, for the reason that the number of bacilli was very large for a river of this character, and that the number of coli present was very large, and incidentally that the amount of chlorine was above normal for that region, and also because the water has continuously a moldy odor." Dr. McLaughlin was the bacteriologist constantly employed by the water company to test the quality of the water, both where it flowed into the reservoir and at the tap at Jersey City. His analyses do not differ materially from those of Mr. Whipple. On his direct examination, counsel asked the question: "Q. Would it be safe, in your opinion, Doctor, to deliver water from the Rockaway river at any point below the town of Dover and above the headquarters of the Boonton reservoir—that is, from the plain river—and send it to consumers without purification? A. It would not be possible. It would be dangerous." Dr. Leal, testifying on behalf of the water company, says in answer to the question: "Q. Doctor, in your opinion, is the flowing water of any river in a populated district proper to be taken for a potable water supply, without first being brought into a reservoir or in some other way treated? A. No, it would be utterly unsafe and unjust to do it. To take water from a running stream, draining a populated watershed, and delivering it directly to the consumer, that would be dangerous and inexcusable." Profs. Winslow and Sedgwick and Mr. Kuichling testify substantially to the same effect.

We start out, then, with the admitted fact that the water of the Rockaway as it enters the reservoir contains germs that, if taken

into the system, are a menace to health. The question, then, is whether the reservoir itself is an effective instrumentality for getting rid of them. The company has provided no other. As I have already said, it takes only 17 hours for the water to flow through the pipes from the gatehouse or outlet of the reservoir to Jersey City. Now, it is manifest that if the river water, in considerable quantities, can pass from the river to the gatehouse in two or three days, or even a week or two, it can carry with it living germs, dangerous to life and health, if those germs have been discharged into the stream. The city has sought in various ways to show that the water does so pass. I will first advert to the shape of the reservoir and to the points at which the water enters and leaves it. The following sketch, taken from the sanitary map, sufficiently depicts the situation:



The bridge across the river is about 9,200 feet from the Parsippany dam end. It is about 3,900 feet from the gatehouse and 3,400 feet from the spillway or overflow. The distance from the gatehouse to the spillway is about 1,300 feet. From a bacteriological standpoint it is unfortunate that the exit of the water is not at or near the Parsippany dike. It would then have flowed through the whole length of the reservoir, and more time, necessarily, would have been had for sedimentation. But at the Parsippany end it is shallow, and, if the water were discharged there, Jersey City would not have the benefit of the water stored for times of drought. Whether the water will flow from the mouth of the river to the gatehouse in a longer or

shorter time will depend largely upon conditions. It might occur to any one, at first blush, that because the water is being constantly discharged at the gatehouse there would be a constant current between the two points mentioned. But the aperture through which it is discharged is only three feet long by six inches wide. The current created in so considerable a body of water by such an aperture would necessarily be very small. The water, of course would flow along the line of least resistance. Some of it, for that reason, would, when the reservoir was full, flow toward the spillway. The greater the volume of water in the river the greater would be this flow. From an inspection of the Cook diagram of the flow of the river for the year 1906, I should judge that its mean flow throughout the year was over 100,000 gallons per day. But the river varies greatly. On nine occasions in that year, for a period of several days at a time, its flow exceeded 350,000,000, and on two occasions 800,000,000. From 35,000,000 to 38,000,000 are taken by the pipe, and so on such occasions the greater current would be toward the spillway. It is at least certain that the water that enters the river would, because of this situation, tend rather to flow toward the northeasterly end of the reservoir than toward the Parsippany dike, and this tendency would be aided by the contour of the bottom. The foregoing diagram shows in a rude way the ancient bed of the stream, and so the deepest part of the reservoir. It is between the spillway and the gatehouse, but nearer the spillway. The contour lines shown on one of the maps indicate the existence of comparatively high ground to the right of the ancient river bed, shortly after it flows into the reservoir; and this, too, would tend to divert all but the upper stratum of the water from the Parsippany end. It is to be borne in mind, however, that, even when the river is discharging into the reservoir 100,000,000 gallons a day, it encounters a volume of over 7,000,000,000 gallons, or 70 times its own bulk. When a very large volume of water is flowing in the river, there would be a tendency to run down hill, so to speak, and spread out in every direction. But this tendency, too, might be counteracted by the wind. A difference of temperature between the upper end and the lower strata of the water would originate local currents, and the wind would cause others.

It will thus be seen that the problem presented is exceedingly complex—so complex that Mr. Hering, a noted hydraulic engineer, called by the company, declared himself unable to solve it. It was attempted by means of floats of varying length, sunk beneath the water at different points, to determine how the currents chiefly ran. These experiments were not carried on for such a length of time and under such conditions as to prove anything very definitely. Mr. Hering said it was his firm conviction that float ex-

periments do not give a true idea of currents. Counsel did not attempt to obtain from him, except in this general way, his opinion of the result of the experiments of Mr. Bardner, who made them for the company, and of Mr. Watson, who made them for the city; but Mr. Kuichling, the city's engineering expert said: "The experiments of January 16th [Mr. Watson's], of which there were two, and the first six experiments of December 5, 1906 [Mr. Bardner's], show conclusively that there was a persistent subsurface current from the mouth of the river, where it enters the reservoir, down stream and across the reservoir, and thence down the reservoir to the dam and gatehouse. In both of these cases the direction of the wind was opposite, or nearly opposite, to that of the float. \* \* \* The figures show an enormously wide difference between these actual observed facts and the opinion expressed by Mr. Hering on purely theoretical grounds as to the rate of speeds of currents in the reservoir." The allusion here is to Mr. Hering's statement that under certain hypothetical conditions (which, however, he admitted would not be likely to exist in fact) the water, if in a condition of quiescence, would take 80 days to pass from the river to the gatehouse. The value of this statement by Mr. Hering, as proof for the company, is greatly lessened by his further statement: "In times of flood the conditions would be quite different. \* \* \* I have not been able to satisfy myself just how many days it would take the water to flow from the mouth of the river to the intake under these freshet conditions, because it is an extremely complicated problem; but I would say it would take a number of days,—just how many, I could not say. Q. More than a week? A. I cannot change my answer. I don't know whether it would be more or less than a week. That, of course, only applies to those times when freshet water goes into the reservoir in large flows." All the experiments made by Bardner, except the last series taken on December 14th, were made when the wind was light and but little water flowing in the river. On December 14th, however, the volume of water flowing in the river was much greater (134,000,000 gallons) and there was a steady breeze blowing all day from the east-northeast; that is, directly from the dam to the river. It is unfortunate that he did not then put his floats into the water between the river and the gatehouse or spillway, as Mr. Watson did later. He merely contented himself with putting them in the middle of the lake, where they went with the wind and proved practically nothing.

This much would seem to be certain: That the current, such as it is, on the principle that the water goes along the line of least resistance, necessarily tends to flow from the mouth of the river toward the gatehouse and spillway. If more water is flow-

ing over the spillway than through the gatehouse, then the current would be more pronounced in that direction. If the wind is blowing hard from the northwest, this tendency would be augmented. The larger the volume of water flowing in the river, the stronger the current. It nowhere appears in the testimony how far down these currents would extend, so far as they are set in motion by the passage of the water toward the spillway. It is at least probable that the friction of the upper currents upon the lower, created either by a considerable wind or by a freshet, would tend to set the lower currents in motion in the same direction, in accordance with the result of Mr. Knichling's observations in Lake Michigan, and that these currents would be directed toward the gatehouse, rather than toward the Parsippany dam. There is another fact which seems to me to possess some significance. Mr. Cook, a hydraulic engineer by profession, a gentleman of much experience, having the actual superintendence of the reservoir, and more familiar with the conditions existing there than any one else, did not testify on this important subject, although he was called more than once on other subjects. Nor did Mr. Gardner, the president of the defendant company, also an engineer. What Dr. Leal and Dr. McLaughlin, neither of them experts so far as this matter is concerned, said, I shall consider later on, when I contrast their evidence with that of the bacteriologists called by the city.

There is a fact in this connection which seems to me to be very strong indeed. I called the attention to its significance on the argument, and counsel for the water company could not, so far as I could see, explain it away. In the freshet of 1893 and during 108 consecutive hours, or nearly 4½ days, there was discharged at Boonton 9,885,000,000 gallons. The reservoir contains, above the lowest effluent pipe, 7,300,000,000 gallons. What would have become of the water in the reservoir, had it then been full? It is absurd to suppose that this immense volume of water would have flowed over the top of the water already there and left it undisturbed. It would undoubtedly have mingled with it and very largely displaced it. There can be no question that in two or three days some of the inflowing water would have reached Jersey City. It will, no doubt, be said that this was an exceptional flow; but the fact is that a very similar freshet occurred only a year or two before. I will take, however, what was admittedly a normal year; in fact, a year of very moderate and very even flow. The flow for 1906 is illustrated by Mr. Cook on a diagram. It appears therefrom that on March 4th and 5th it was about 900,000,000 gallons per day, on March 6th 600,000,000, and on March 7th 400,000,000. In other words, nearly 2,800,000,000 gallons flowed into the reser-

voir during those four days. This was considerably more than one-third the contents of the reservoir above the lowest point of discharge. Now, considering with what velocity the freshet must have entered the stream, and how the contour of the bottom must have given direction to its currents, how the friction of the upper strata would have acted upon the lower, is it conceivable that a considerable portion of the river water would not have found its way to the gatehouse within a few days? This freshet occurred in the early part of March. If coincident with a thaw, then the water would have contained the animal matters which had accumulated on the surface during the freezing weather.

The question will at once suggest itself whether the observed facts accord with this a priori conclusion. I think it clear that they do. In the first place, the results of examinations of the water after it reached Jersey City, both Mr. Whipple's results and Dr. McLaughlin's, show the number of bacteria to be very variable. Mr. Whipple, the principal expert witness for the city, made analyses of the water during 1904 and 1905. He says that the number of bacteria at the point of discharge in the small aqueduct on Jersey City Heights varied from 120 to 2,500 per cubic centimeter, and, being asked by the water company's counsel for the average, he said it was 642; that 53 per cent. of the samples gave positive tests for colon bacillus in one cubic centimeter; and that 20 per cent. of the samples gave positive tests for b. coli with one-tenth of a cubic centimeter. In 1905 the results were better. The bacteria varied from 210 to 2,400; the average being 700. Four and a half per cent. of the samples gave positive tests for b. coli, both when one cubic centimeter and when one-tenth of a cubic centimeter were used. Dr. McLaughlin's tables show like differences. From the printed tables, it appears that between May 24, 1904, and January 1, 1905 (omitting the months of July and August, when no examinations were made), the number of bacteria varied from 50 on December 26th to 3,700 on June 27th. On no two successive weeks were they the same. In 1905, omitting three weeks in July and all of August, the numbers varied from 30 in July to 1,300 in January. In 1907 they varied from 10 in June to 400 in December. B. coli were discovered in one cubic centimeter three times in 1904, twice in 1905, and four times in 1906. The last test by Dr. McLaughlin in 1906 was on December 23d. He then found 240 bacteria present in one cubic centimeter, and b. coli present in ten cubic centimeters. Within three days thereafter (December 26th) Prof. Winslow analyzed the water. He found 200 bacteria present in one of the small reservoirs (reservoir 2) on Jersey City Heights and 300 in the other (reservoir 3). On the same day he found b.



coll present in both, in a single cubic centimeter. In March, 1907, he made two analyses on two successive days. On March 19th he found in reservoir 2 in the morning 1,000 bacteria, and in the afternoon 1,200; in the other, 700 and 600. On March 20th he found, in reservoir 2, 700 in the morning and 800 in the afternoon; in the other, 300 and 900. On March 19th, in reservoir 2, he found b. coll present in one cubic centimeter in two samples and in one-tenth of one cubic centimeter in another sample. In reservoir 3, he obtained a similar result. These analyses show that when the water reaches Jersey City it contains many more bacteria on some days than it does on others; in other words, that the sedimentation is not always complete. The full significance of these variations will be more apparent when we consider them in connection with Dr. Leal's statement with respect to the bacteria that are found in the filtered water after it passes through the filter plant at Little Falls. "We don't care so much about the rate of efficiency, but we want less than 100 bacteria. If it is more than a hundred, we add a little more sulphate of aluminum." Dr. Leal's evidence on this point will be given more at length in another connection.

There being, then, considerable variations in the number of bacteria found in the water at the tap in Jersey City and in the small reservoirs there, the question that next suggests itself is whether there is any observed connection between increase in the number of b. coll and bacteria there and freshet flow. This increase does in fact appear to be marked, and diagrams have been prepared to illustrate it. It is unfortunate that our data are somewhat defective, for two reasons: First, because Dr. McLaughlin made his tests from water drawn from the tap at Christ Hospital, and not from the Jersey City reservoirs. I have already said that as a matter of law the water company was bound to deliver water that was pure and wholesome at these reservoirs, or, so far as it did not pass through them, at the point where it passed from the pipes of the water company into the service pipes of Jersey City. The evidence indicates that the water is a little better after it flows through the city's pipes. This would be especially true of the water flowing out of the Jersey City reservoirs, for in that case there would be some little additional sedimentation. Consequently Dr. McLaughlin's results are a little too favorable for the water company. The data are, secondly, defective because not made by Dr. McLaughlin oftener than once a week. Suppose a heavy rain on the 1st day of the month and no analysis until the 7th. If the water does in fact pass from the mouth of the river to Jersey City in two or three days, the analysis would not necessarily show an increase in bacteria. The storm water might have had four days in which to settle or to

become more diluted with the waters already in the reservoir. Hence Dr. McLaughlin's analyses might not, and on the assumption I have made often would not, indicate the full extent of the pollution.

Keeping these things in mind, let us look at the data such as we find them. At the beginning and end of the entire period we are assisted by the analyses of Mr. Whipple and Prof. Winslow. One other preliminary observation may be made: When a rainfall succeeds a period of dry weather, it finds the air itself full of dust, and the ground contaminated to a greater or less extent with faecal matter and garbage; the amount of contamination depending, of course, upon the length of the drought and upon the density of the population. I exclude from view altogether the case of sewers constructed to carry off sewage, for upon this watershed there are none. The first rain, if at all heavy, carries a large proportion of these impurities into the stream. If it continues to rain, the river water, while it may be colored by the vegetation of peaty bogs, etc., gradually becomes purer. It is the first heavy rain succeeding a period of drought that is, from a bacteriological standpoint, most to be feared. If the drought has been sufficiently prolonged and the reservoir drawn down in consequence, then the mouth of the Rockaway is nearer the dam, and the water entering it has a lesser volume of settled water with which to intermingle. This condition of affairs was remarkably illustrated by what occurred in September, 1904, when the reservoir had not yet filled. Here we have Mr. Whipple's figures to supplement Dr. McLaughlin's. On September 15th there occurred a very heavy rainfall of five inches. On the day previous Mr. Whipple found in the Jersey City reservoir 520 bacteria per c. c., and on that day 850. On September 16th the number rose to 1,700, and on September 17th to 2,060. The following day (September 18th) was Sunday and no test was made. On Monday, September 19th, the bacteria had fallen to 690 in the small reservoir. But Dr. McLaughlin also made a test of the water at Christ Hospital on that day, and whereas, on September 14th, his analysis showed at the tap only 275 (against Mr. Whipple's 520 at the reservoir), on September 19th his test showed 750 and the presence of b. coll in one c. c. Notwithstanding, therefore, the additional purification, if any, that the water had undergone in the Jersey City pipes, the rise in the number of bacteria was very marked. It is difficult to draw any other inference from these facts than that the influence of the storm began to be felt in the Jersey City reservoir the day after it began, and that two days after it began it was still more marked, and that two days after that it was clearly perceptible at Christ Hospital. Of course, we would have had still more light thrown upon the matter if Dr. McLaughlin had tested the water between Sep-

tember 14th and September 21st. The next heavy rain ( $3\frac{1}{2}$  inches) occurred on October 21st. Mr. Whipple's table does not extend beyond September; but Dr. McLaughlin's analysis, made October 25th, shows that, whereas on October 19th there were only 110 bacteria found, on October 25th, four days after the rain, the number had increased to 800, and again *b. coli* were present in one c. c. On November 1st it fell to 120. These were the two heaviest rainfalls of the year.

In the following year there was a rainfall of  $2\frac{1}{2}$  inches on January 7th, and the number of bacteria rose to the unusual number of 1,300. The rainfall may have been accompanied with a thaw. There was another rain on January 12th, and on January 17th the number still stood at 1,300. How they stood in the interval we can only guess. In February and March the numbers varied. The precipitation was not great, and some of it was probably snow. The number of bacteria was considerably higher in March, when the melting snow caused the river to rise, than it was in February. It is quite in accord with the previous results that five days after the river was highest in the reservoir the number of bacteria was slightly greater than at any other test time in either of these two months. The rains for the rest of the year were not very heavy; the heaviest ( $2\frac{1}{2}$  inches) being on September 4th and 12th. On September 7th the bacteria were 130, September 12th 120, and September 18th 190. The rise on September 18th occurred four or five days after the water in the reservoir was at its highest; but the difference in the number of bacteria is too slight to afford ground for any reasonable inference.

The year 1906 was characterized by very moderate rainfalls—I should say unusually so, for on only two occasions throughout the year did they amount to  $2\frac{1}{2}$  inches. There was less variation in the number of bacteria than in the two years prior. It is in this year that Mr. Cook, on behalf of defendants, has furnished us a diagram in which he compares the flow of water in the reservoir with the number of bacteria found at the tap. His comparison terminates in November. In December, 1906, we have for the first time Prof. Winslow's figures. In consequence, apparently, of the melting of the snow that had fallen during the month, the reservoir was at its highest, according to the diagrams both of Mr. Cook and Mr. Whipple, on December 22d. On December 26th Prof. Winslow found, in reservoir 2, 200 in the morning and 150 in the afternoon. On December 27th he found 200 in the morning and 150 in the afternoon. On December 27th he found 200 in the morning and 650 in the afternoon. Very similar results were found in the other reservoir (300 and 200 on December 26th, and 400 and 600 on December 27th). On December 23d Dr. McLaughlin found at the tap 240, as against 75 on December 17th, and on December 31st 600. There was a heavy

rain on December 30th or 31st, and the water again rose very rapidly in the reservoir, reaching its highest point on January 1 and 2, 1907. On January 6th the number of bacteria at the tap still remained high (550). In March, 1907, as shown by the Whipple diagram, the water rose rapidly on March 13th and 14th, and was high in the reservoir up to March 30th. On March 19th Prof. Winslow's analyses show the presence in the morning of 1,000 bacteria in reservoir No. 2 and in the afternoon of 1,200, as against 700 and 600 in reservoir No. 3. On March 20th the numbers were 700 and 800, as against 300 and 900 in reservoir No. 3. I have already said that these analyses showed, in three of the tests, *b. coli* present in one-tenth of a c. c.

There appears to be one rather marked case in which higher water in the reservoir was not followed by an increase of bacteria at the tap. In July, 1906, there was a considerable rain, and about the 1st of August the water rose in the reservoir in consequence. The bacteria appear to have decreased. But it appears from the diagram that between June 15th and July 31st no less than 12 inches of rain fell. This large amount fell throughout that period in very moderate quantities, but on a good many days. The greatest fall ( $1\frac{1}{4}$  inches) occurred on July 27th. These numerous rains occurring with much uniformity throughout this entire period would have been, *a priori*, likely to have produced the very result that happened. The earlier rains would have gradually washed off the impurities found upon the surface of the earth, and the latter rains would have gone into the stream comparatively pure. The contention of complainant is not that rain per se, even in considerable quantities, is favorable to an increase of bacteria, but that heavy storms are—storms which wash the earth and carry the impurities that have accumulated upon it in periods of drought, in a concentrated form, into the river. This apparent exception, therefore, would seem, if anything, to prove the rule.

Mr. Whipple also testifies to certain color tests made in 1904, while the reservoir was unfinished. As far as they go, they lead to the same conclusion that the bacterial counts do; but I do not care to rely upon them, for other causes might have conducted to the results obtained.

I am, on the whole, obliged to conclude that all the evidence favors the theory that water, under certain combinations of circumstances, occurring, perhaps, on an average two or three times a year, will pass from the mouth of the river to the Jersey City reservoirs in two or three days. Every fact is favorable to this view, and no fact, so far as I can discover, is opposed to it. So strong is the evidence that no expert has been found willing to assert the contrary. Mr. Hering, a gentleman of great experience, would not, as I have already shown, commit himself on the subject, and, what is still more noteworthy

thy, Mr. Cook, the engineer in charge of the works, was not asked to testify about it. Under these circumstances, I accept the opinion of Mr. Kulchling, an expert of wide experience, based, as it is, upon grounds that seem to be unanswerable, and fortified, as it is, by the other proven facts.

Now, this appears to be the difficulty with the defendants' case on this branch of it. The reservoir does its purifying work imperfectly at the time when that work is most needed. To meet the force of this objection, the water company resorts to proof of averages and to opinion evidence. It uses averages in two ways: First, it compares what it calls the average efficiency of the reservoir as a sedimentation basin with the standard prescribed by the expert witnesses of the city; second, it compares its average efficiency with that of filter plants. I may say that, in view of the evidence, I regard averages, thus used, as altogether misleading. The water company's expert, Dr. McLaughlin, says: "Water which does not contain b. coli in one cubic centimeter, judging from my work on this subject, more than 50 per cent. of the times of examination of this particular water of the Rockaway, would indicate good, wholesome water, in my opinion." He says, further, speaking of the result of his tables, in 1904, b. coli in one centimeter were present 7 per cent. of the time; in 1905, 7 per cent. of the time; in 1906, 8 per cent. of the time. "I deduce from that that the water is good water."

This method of deducing his conclusion is attacked by the city's experts. They assert that he cannot examine the water once a week for a year, and then judge of the excellence of the supply by taking an average of the tests for that year; that the only way in which he can use averages is by applying them to the results of several examinations made of samples taken at the same time from the same place. To illustrate: If 50 samples were taken from the same place on the same day, and it were found that b. coli were not present in one cubic centimeter in more than 50 per cent. of the samples, then the water would be considered good; but if one sample were taken on one day in each week of the year, and it were found that on 45 days b. coli were not present and on 7 days they were, all that that would indicate would be that on 45 days the water was good and on 7 days it was either bad or at least open to suspicion. We certainly would not be justified in concluding that it was unobjectionable during 7 weeks (if a day is to stand for a week) only because it was good for 45 weeks, if in point of fact it were found that for those 7 weeks it was bad. Prof. Winslow's attention being directed, on cross-examination, to a statement made by him in a discussion published in the Journal of the New England Water Works Association to the effect that the commonly

accepted standard is that water good to drink should not give a positive test for the coli bacillus in one cubic centimeter, certainly not over 50 per cent. of the time, said: "What I meant by that, as I explained a few minutes ago, is that, if samples [be] taken from the same source under the same conditions, not more than 50 per cent. should show b. coli. When they are taken at different times, with varying conditions, that conclusion does not apply." This statement, as applied to the reservoir, seems to me so obvious that nothing but its bare annunciation would seem necessary; and yet the defendant's entire case is built up on the opposite theory. In fact, so strong and positive has been the testimony of defendants' experts on this subject that I should feel hesitation in presuming to differ from them, were it not that at least an equal weight of names is on the other side. I think that perhaps the witnesses for the company were unconsciously construing the contract in a sense advantageous to that side. They may have assumed that, when the contract called for pure and wholesome water, it really meant that the general average of the water throughout the entire year should not be below the standard; in other words, that if the 52 samples tested, taken in 52 different days, were all blended together, and the blend were up to the standard, the contract would be satisfied. If the inhabitants of Jersey City could drink this blend every day, the position would be more plausible.

The company endeavored to demonstrate the efficiency of the reservoir as a purifier in another way. Their witnesses compared the number of bacteria in the water of the river, where it flowed into the reservoir, with the number of bacteria in the water both at the gatehouse and after it reached Jersey City. Dr. Leal, on this basis, for the whole period between June 13, 1904, and December 10, 1906, computed the average efficiency at the dam to be 97½ per cent., and at the tap in Jersey City to be 99.2 per cent. He compared this average efficiency with the average efficiency of the Little Falls filter, which he himself superintended. This, he says, was from September 1, 1903, to September 1, 1904, 97.8 per cent.; September 1, 1904, to September 1, 1905, 96.4 per cent.; September 1, 1905, to September 1, 1906, 96.1 per cent. Comparing the two, it would seem that in 1905 and 1906, so far as bacteria were concerned, the reservoir showed a higher percentage of efficiency than the filter. But the question is not whether, on an average, the water was good, or whether, on an average, it compared favorably with the average of some other water, but whether there were times when it was polluted. Such a comparison shows nothing on this head. Dr. Leal is obliged to admit, on cross-examination, that according to Dr. McLaughlin's tables, in June, 1904, the ef-

iciency of the reservoir was only 73 per cent. He does not pretend that this was a good showing, or that such variations are to be found in the filter plant; and the reason is obvious, if we consider how the work of filtering is accomplished. This is Dr. Leal's description of the process: "The system of purification at Little Falls is this: As the water enters the filter plant, sulphate of aluminum, from half a grain or a quarter of a grain up to a grain and a half or two grains to a gallon, is added to the water. The sulphate of aluminum, on being added to the water, splits up into hydrate of aluminum, which is a floccy, precipitating mass. It is the same principle as the settling of coffee grounds with white of an egg. This gelatinous matter is spread all through the mass of water, and it sinks down to the bottom, carrying with it and tangling in its meshes carrying into it all suspended matter, including bacteria. This process takes place in a large sedimentation basin, which holds 1,800,000 gallons of water, and the water stays in that about two hours. \* \* \* The free sulphuric acid is left when the hydrate (of aluminum) is split off, and unites with the lime base—carbonates of lime and soda (in the water in its natural state). The water flows back and forth in this sedimentation basin, and finally flows onto the surface of the (sand) filters. What little is left of the coagulating mass, and what few bacteria are left, are almost entirely removed on the surface of the filter." From this description it is evident that the amount of alumina introduced depends upon the condition of the water. It is so regulated, says Dr. Leal, that "the order to the man in charge is to keep within 100 bacteria. We don't care so much about the rate of efficiency; but we want less than 100 bacteria. \* \* \* If it is more than a hundred, we add a little more sulphate of aluminum."

This, no doubt, is a perfectly accurate statement of the matter. It agrees with what is testified to by all the experts; but, so far from bearing out Dr. Leal's theory of the reservoir as a purification basin, it shows very clearly that the important thing is, not so much high percentage of efficiency as it is absolute results. If 500 bacteria are left in the water, no matter how high the percentage of efficiency, the result obtained is unsatisfactory. "We want less than 100 bacteria. If it is more than 100, we add a little more sulphate." Many striking illustrations could be drawn from Dr. McLaughlin's tables. Thus in March, 1905, the number of bacteria per c. c. is, in the river, 9,100. The number at the gatehouse is 600. The percentage of efficiency, calculated according to the method employed by Dr. McLaughlin (page 3221, of printed case), is 93 per cent. I use the gatehouse figures, because the reservoir as a purifier is compared with the filter plant as a purifier. In the case of this latter, the figures relate to the water as it

passes out of the filter, not to the water as it is delivered to Bayonne, or other suburban towns. In December of the same year the number of bacteria in the river was 7,200; the number at the gatehouse 1,000; the percentage of efficiency, therefore, 63 per cent. In January, 1906, the number of bacteria in the river 1,500; at the gatehouse 900; the percentage of efficiency, 40 per cent. If this mode of computing the efficiency could be relied upon, it would condemn the reservoir, regarded as a purification agency, as inefficient and almost useless. The fact is, however, that it is entitled to no such condemnation. The method adopted appears to be absolutely worthless for the following reason: What Dr. McLaughlin did was to take samples of water out of the river, and out of the reservoir at the gatehouse, and at the tap in Jersey City on the same day, and each sample was taken at about the same, or nearly the same, time on that day. Now, according to all the evidence, it must, except under such extraordinary conditions as the water company would not be obliged to provide against—for instance, an unprecedented drought lasting so long that all the water in the reservoir was exhausted, followed by an unprecedented freshet—it must, I say, take a day, or, more likely, two or three days, for the water to pass from the mouth of the river to the gatehouse, and it takes just 17 hours for the water to travel from the gatehouse to Jersey City. To take, therefore, figures showing the bacteria in the water at these three different places at the same time is not the slightest evidence of reservoir efficiency. To find out the efficiency, we must know how the water flowing into the reservoir has been affected by its passage through the reservoir. This of course, we cannot know absolutely, for the reasons heretofore adverted to; and, besides, the water of the river would, under any circumstances, be diluted with the water already in the reservoir. But, if we had had a daily test at the gatehouse and at Jersey City, it could, I think, have been approximated.

Another illustration is a reductio ad absurdum of the method employed: On January 12, 1905, the bacteria in the river per c. c. amounted to 2,700; the bacteria at the gatehouse 5,400. If we could draw any inference, it would be that the reservoir had increased the pollution. When Dr. McLaughlin's attention was called to this, he suggested that in the long run the figures given would correct themselves. I doubt if we have enough instances, even for this purpose; but the fundamental difficulty would remain. We would still have average efficiency, and not the efficiency of the reservoir in times of freshet or drought, followed by heavy down-pour. It is very easy to see that, by taking averages, very good water—water above the standard—delivered at one time may be used to cover up the faults of polluted water delivered at another time.

There is another, and, as it seems to me, important, observation to be made with respect to the table showing the efficiency of the filter plant. This table shows monthly averages only, although daily tests were made at the filter works; and this table deals only with bacteria and not with *b. coli*. It is hardly possible that the East Jersey Water Company made no analyses for *b. coli*, and yet these are not shown with a view of comparing them with the analyses for *b. coli* made by Dr. McLaughlin. However, taking the table as we find it, it appears that the greatest number of bacteria present in the filtered water in any month is 300, as the average for February, 1906. On only two other occasions did the bacteria rise above 200. In far the larger number of cases it was much below 100. It is not likely, in view of Dr. Leal's statement about adding alumina, that these averages were much exceeded on the several days of those several months. The showing thus made is a far better one than is afforded by Dr. McLaughlin's monthly showings of the water at the gatehouse. On January 12, 1905, there were 5,400 bacteria per c. c.; On three days of three other months in the same year, 1,000 or more. In the three years covered by his monthly report once they numbered 900, once 750, six times they ranged between 500 and 700, and only four times did they fall below 100.

So much for Dr. McLaughlin's results at the gatehouse. Let us look at his results at the hospital. It must be remembered that, owing to a lack of other data, we are obliged to compare the bacteria found at the hospital with those found at exit of the filter. To make a fair comparison, we should compare the water at the tap in Jersey City with the filtered water at the tap—say in Bayonne. If the water is additionally purified by passing through pipes, as it appears to be, then the filtered water at Bayonne would make a better showing than the same water at Little Falls. Here, too, Dr. McLaughlin gives us an average, and this average, from June, 1904, to December, 1906 (inclusive), is 175 bacteria. This is more than Dr. Leal thinks ought to be allowed to pass through the filter. But when we come to analyze Dr. McLaughlin's figures for individual days we find this: That in 1894, out of 45 tests, the bacterial count was, on 22 occasions, 300 or over; on 10 occasions, 600 or over; once, 1,000; once, 1,700, and once, 3,700. In this year, however, as I have already said, the reservoir was still under construction. In 1905 there were 41 tests. The result was that on 12 occasions the bacteria amounted to, or exceeded, 300; on 1 occasion they amounted to 750; and on 2 occasions, to 1,300. In 1906, in 51 tests, there were only 15 occasions when the count exceeded 100, 4 when it exceeded 200, once it was 325, once 375, and once 400, to which we ought to add Prof. Winslow's 150, 200, and 300 on December 26th in the Jersey City reservoir; 200, 400, 600, and 650 on December

27th; 600, 700, 1000, 1200 on March 19, 1907; 500, 700, 800, 900, on March 20, 1907. From such a small number of data in 1907 we should scarcely be warranted in drawing any conclusion, except this: Either that conditions were unusually favorable in 1906, or that the water at the tap was better than the water as it was delivered into the small reservoirs; for Prof. Winslow's results show that for two days in March, 1907, the water contained considerably more bacteria than it had contained at any time in 1906. The general result is that, taking the best year, in 17 instances (counting Prof. Winslow's 8 analyses as only 2, because made on only 2 days), the number of bacteria exceeded at the tap what Dr. Leal thought was not a satisfactory number even at the exit of the filter.

The bacteria do not necessarily come from the intestine of either man or beast. The *b. coli* do. I do not find any table that indicates the number of *b. coli* present after the water has been filtered. We will therefore have to judge of these by a different rule. I do not understand that the water company's experts quarrel with the rule stated by Mr. Whipple. That rule is this: "If the water regularly shows the presence of *b. coli* in ten cubic centimeters, and not in one cubic centimeter, it may be safe for use. If it contains *b. coli* in one cubic centimeter, and not in one-tenth cubic centimeter, it may be considered as of doubtful quality. If it contains *b. coli* in one-tenth, but not in one-hundredth, cubic centimeter, it may be considered to be too much polluted to be safely used. If it contains *b. coli* in one-hundredth cubic centimeter, the water is quite certain to be seriously polluted."

Now, testing the water by this rule, we have the following results derived from Dr. McLaughlin's tables: In 1904, on three occasions, *b. coli* were found at the Christ Hospital tap, both in 1 c. c. and in 10 c. c., and on 8 occasions in 10 c. c. In 1905, *b. coli* were found twice, both in 1 c. c. and in 10 c. c., and 24 times in 10 c. c. In 1906, *b. coli* were found 4 times both in 1 c. c. and in 10 c. c., and 32 times in 10 c. c. This result is rather noteworthy. It shows that, while the number of bacteria was smaller in 1906 than it was in 1904, the number of *b. coli* was greater, on the whole, in 1905 than it was in 1904, and greater in 1906 than it was in 1905. *B. coli*, as I understand the evidence, are more indicative of undesirable pollution than are bacteria. The conclusion from this evidence would be that, applying the Whipple rule, in 1904, the water was of doubtful quality 7 per cent. of the time; in 1905, 5 per cent. of the time; and in 1906, 8 per cent. This, in days, would be, in 1904, 25½ days; in 1905, 18 days; and in 1906, 29 days—or, if we include Prof. Winslow's analysis, 31 days.

I now come to the opinion evidence, and, first, the evidence of Dr. Johnson. He and Dr. McLaughlin made, independently, analyses of the water at the tap in Christ Hospital on March 28 and 29, 1907. His tests showed

the presence in one cubic centimeter of bacteria whose numbers in the different tests varied from 240 and 300 in one c. c. to 220 in one-half of one c. c. It is rather singular that he is not called upon to say whether he regards this number as satisfactory; but he is referred to Mr. Whipple's rule, and says that Dr. McLaughlin's results show water within Mr. Whipple's standard. He, too, evidently has in mind averages; for he could not assert that according to Mr. Whipple's rule, as Mr. Whipple himself interprets it, water is good which contains *b. coli* in one c. c. Then he is asked to compare the average efficiency of the Boonton reservoir with the average efficiency of the filter plants at Little Falls, Washington, Albany, etc., and he says it compares very favorably with the results obtained in those works. Here, again, we have the same fallacy. What we want to know is, not about the averages, but whether the reservoir can be depended upon, in all seasons of the year, to provide pure and wholesome water. If the filter works uniformly furnish such water, and the reservoir does not, then, even though the reservoir may for the greater part of the time give better results than the filter, if at some time it gives unsatisfactory results, then it is not as efficient or as safe a purifying agency as the filter is. Dr. Johnson gives his evidence lucidly and carefully, and I fail to find in any statement that he makes anything at variance with what is said by defendants' experts. Thus, he is asked to express his opinion whether it would ever be possible for an epidemic of typhoid fever, due to the water supply, to break out in Jersey City, and this is his answer: "If there is, a complete, or even approximately complete, displacement of the water in the Boonton reservoir, and no direct current from the Rockaway river to the outlet of the Boonton dam, I think it is extremely improbable that an epidemic would ever occur in Jersey City due to the water supply from the Boonton reservoir." Every witness in the cause admits that, if the water in the reservoir stays there long enough, it will become purified. Dr. Johnson's evidence presupposes that it does. He expressly says that the river water is unfit to drink. He gives some figures in reference to the three reservoirs which supply Washington, D. C. The water passes successively through all of them, and is then filtered. He says that the period of storage in the first two is from one to two days each, and in the third from two to four days. In the first, the percentage of removal is 70 per cent.; in the first and second together, 86 per cent.; in all three, in a period of from four to eight days, 93 per cent. Then he is asked the question, "Are any of these places [Washington, Lawrence, etc.] comparable with that of Boonton for efficiency of storage?" and his answer is, "No, sir." Here, too, he assumes, for he necessarily must assume, that it takes longer than eight days for the water to pass, from the

river to the dam; for, if it did not, then, on his own figures, assuming that the river water was not much diluted, the efficiency would be, or might be, only 93 per cent., and no one pretends that this would indicate satisfactory work. Finally counsel asks this question; "Now, Dr. Johnson, what have you to say as to the result showing an average at the tap of bacteria to be only 239 per c. c.—what have you to say as to the quality of that?" He replies: "I consider it a very good result." Here, again, we have averages. If his attention had been directed to the results obtained by Prof. Winslow in March, 1907, in the Jersey City reservoirs, viz., 1,000 and 1,200 bacteria and *b. coli* present in one cubic centimeter in one sample, and one-tenth of one cubic centimeter in another, the whole trend of his evidence shows that he would have expressed, as to that water, a different opinion.

Then we have the testimony of Mr. Hering. He says that the results of Dr. McLaughlin's reports show that the quality of the water as now (that is, at the time he testified) delivered to Jersey City is of good quality—safe and potable. This is a stronger statement than Dr. Johnson's. Unfortunately, he does not state the reasons upon which this opinion is based. As he does not quarrel with the figures given by the other witnesses as to the length of time during which sedimentation must continue in order to eliminate pollution, I suppose that his opinion is founded upon the assumption that the water has time to purify itself. He subsequently stated, as I have already said, that he would not undertake to say how many days it would take the water, under freshet conditions, to flow across the reservoir.

Mr. Edloe Harrison also testifies on this subject. His testimony is based upon the results of Dr. McLaughlin's analyses. He says: "The fact is that this reservoir is reducing the bacteria to as great an extent as the most improved modern filters." He must, of course, be referring to averages. He thinks that a reservoir which works automatically is superior to a filter plant, because filtration depends upon human agency, and, if the work be not intelligently performed, the water will run through without being adequately purified. He says that in his reading he has not met with an instance in which infection has taken place from a large storage reservoir, and that the published reports as to other cities show the water coming from the Boonton reservoir to be better than that of other cities. Undoubtedly it is much better than the water of a large number of the cities of this country. The argument would be stronger, if it were not for the fact that it appears very clearly that the water of these cities is polluted, and that where cities having a polluted water supply have adopted precautions the death rate has been greatly reduced. In the case in hand Jersey City bargained, not for water less polluted than that of some other cities, but

for pure and wholesome water. There is considerable force in the suggestion that a system which works automatically is better than one which depends upon human agency; but this, of course, presupposes that the automatic system is doing effective work. If it is not, then it must be supplemented by human agencies. The very point is whether the automatic system here under examination is producing uniformly good results, or whether, to insure them, sedimentation must not be supplemented by something else. But to this phase of the controversy Mr. Harrison's attention was not particularly directed.

Prof. Sedgwick says that the serious objection to a reservoir, such as the Boonton reservoir, as compared with a filter, is that, if it works badly, as he believes this one does from time to time, there is nothing that can be done, easily, or conveniently, or quickly, to remedy the trouble; whereas in a filter, rightly supervised, changes can be made to correct any defects which may be discovered. He considers a reservoir like the Boonton far inferior as a sanitary safeguard or purifying mechanism, to a filter.

Referring to Mr. Harrison's evidence Mr. Kuichling says: "I do not believe that Mr. Harrison's statement is correct, for the reason that he does not consider the possibility of a freshet, or a high wind, or the action of the reservoir when covered with ice in times of freshet. He also ignores entirely the demonstration of the existence of persistent and marked currents in the reservoir, as shown by the float experiments, and also by the number of bacteria in the river, and at the upper gatehouse, and at the tap in Jersey City. He also stated that he knew of no case of typhoid fever produced by the use of water from a large storage reservoir, whereas we have the fact that there was at Scranton, Pa., a very serious epidemic of typhoid fever last December and January from the use of infected matter from a very large storage reservoir."

Dr. Herold, the president of the Newark board of health, also testifies on the behalf of the water company. He is asked a hypothetical question, based upon the capacity of the river and of the reservoir, and expresses the opinion that he regards the works as affording a safe method of purification. He says that Dr. McLaughlin's report shows the water to be of good quality and the water supply safe. But on cross-examination it is evident that he thinks there must be time for sedimentation. He says it would be better if the water were given 100 days to settle, but that the minimum limit would be 15 or 20 days—time enough, as he says, for the destruction of pathogenic germs. These, he thinks, would die in that period. He is not a bacteriologist, and if he thinks that pathogenic germs will perish in 20 days he disagrees with bacteriologists on both sides. If pathogenic germs were not present, he thinks perhaps the water could be used in 24 hours. His testimony rests upon the assumption that

the water does not pass from the river to the gatehouse in less than 15 or 20 days.

Dr. Leal expresses the opinion that the water delivered to Jersey City is pure and wholesome, because, in addition to the argument from averages, it appears that the death rate shows that during the past three years there has been no infection; and so does Dr. McLaughlin. The argument from the death rate seems to me to be the strongest that the water supply company advances. But inasmuch as there has been no epidemic of water-borne diseases in the watershed, and few cases of typhoid fever—one of the two testified to at a distance from the river, and the other properly cared for—the argument derived from an absence of epidemic in Jersey City is somewhat weakened. The reservoir as a safe instrumentality of purification has not been put to the test. Indeed, one of the controverted questions in the case is whether an apparently slight increase in the death rate in 1906 is not attributable, at least, to one of those cases, they being nearly coincident in point of time.

There is nothing in Mr. Sherrerd's evidence that throws additional light upon the controverted points. He merely says, what no one denies, that long-time storage tends to improve the quality of the water and is an effective way of improving it. He also says that some tables prepared by Dr. McLaughlin, which he had seen, but which are not identified, indicate a low bacterial count and show a water of uniform quality, with, as a rule, less than 100 bacteria per c. c. What the tables produced in evidence show has already been considered. Such of his evidence as is based upon tables, if any, not put in evidence, cannot be regarded as satisfactory proof.

I now come to the testimony given on behalf of complainants. Mr. Whipple says that his tests show that the water as delivered to Jersey City is to some extent contaminated, but in a lesser degree than it is in the river; that, judging from all he knows of the situation, it is not at all times pure and wholesome. Of all the experts in the case, with the exception of Dr. Leal, Mr. Whipple made the most exhaustive examination of the conditions surrounding the supply. He visited all parts of the watershed and advised as to the abatement of many of the sources of pollution.

Prof. Winslow is another witness. He says: "From my analyses (made in December, 1906, and March, 1907) of the water entering the reservoirs at Jersey City (the two small ones on Jersey City Heights), from my knowledge of the watershed of the Rockaway river, and from my previous experience in water analyses and in the study of watersheds, I conclude that the water at the inlet of the reservoirs (i. e., in Jersey City) at the time at which I examined it varied considerably in quality; that at times it showed no evidence of pollution, but that at other times it showed distinct and conclusive evidence of



pollution. At certain of those times it was not pure and wholesome, \* \* \* free from pollution deleterious for drinking and domestic purposes. I base that opinion, first, on the presence of an excessive number of bacteria on gelatine, which probably indicates the presence of sewage pollution; and, second, on the presence of large numbers of colon bacilli, which, in my judgment and under the circumstances, indicated with certainty the presence of excreta in the water. \* \* \* In my examination I found, for example, in the afternoon of December 26th, that there were less than 200 bacteria per cubic centimeter, and I got b. coli from neither reservoir at one cubic centimeter, and I believe that the water at that moment was of good quality. But on the morning of March 20th I got more bacteria, and I found b. coli in both reservoirs in one-tenth of a cubic centimeter, which was conclusive evidence to my mind that at that time there was pollution in the water." This evidence strongly illustrates the danger of resorting to averages. Neither Dr. Leal, nor Dr. McLaughlin, nor Dr. Johnson would pretend, assuming Prof. Winslow's analyses to have been accurately made—and there is absolutely no attack made either upon his methods or his competency—that those of his analyses which showed 700 bacteria (in other instances 1,000 and 1,200) and b. coli present in one-tenth of a cubic centimeter, indicated water of good quality. Hence the necessity of taking refuge in averages.

Prof. Sedgwick made no analyses himself. His attention was directed to those of Dr. McLaughlin. He is asked to express his opinion upon their result. He says: "I don't feel competent from these alone to give a positive opinion as to the quality of the water at all times and in all seasons, because I do not think there are enough of them; but, so far as they go, they show that a good deal of the time the water was in fair sanitary condition. The number of bacteria at large are frequently larger than is desirable in a good water supply, and the occasional occurrence of bacillus coli in one cubic centimeter is to be regarded as throwing suspicion on the water. But, to return to what I said at the beginning of my answer, I do not feel that these are either frequent enough or numerous enough to enable one to speak with certainty as to the good quality of the water and as far as they seem to me rather to throw suspicion on the quality of the water." This is his inference drawn from the McLaughlin analyses alone. Then he goes on to say that he would rely upon four things in order to determine the quality of the water: First, upon the state of the watershed, in order to see whether the water is or is not contaminated; second, upon a consideration of any means of purification, partial or complete, to which it may be subjected before reaching the consumer; third, upon its sanitary effect upon the people using it; fourth, upon analytical

data. "I believe that an opinion as to the quality of the water ought to be founded upon all these data taken together." He then states that he considers the water as it flows into the Boonton reservoir to be at times highly impure and unwholesome. After testifying that he had seen and examined the Whipple report, as well as the McLaughlin and Winslow analyses, he is asked this question: "Q. From all those data, and from your own knowledge of the watershed, and from the typhoid records, what do you say as to the water as delivered at that point (the aqueduct at Jersey City) being at all times pure and wholesome? A. Taking into account my knowledge of conditions on the watershed of the Boonton reservoir and of the analytical results obtained at various points on the system and in Jersey City, as well as the records of deaths from typhoid fever, I believe that the water as delivered into the reservoirs at Jersey City is not at all times pure and wholesome, but sometimes deleterious for drinking and domestic purposes." After stating that he has studied the subject of sedimentation, and of the efficiency of the Boonton reservoir as a sedimentation basin, he says: "Taking into consideration the contours of the reservoir bottom, as shown on the map of Mr. Ferris (the city engineer), and also taking into consideration the float experiments, the distance from the mouth of the Rockaway river to the outlet, and my general knowledge of the behavior of water in reservoirs, I have no doubt that at times impure water may be carried from the mouth of the Rockaway river, where it empties into the Boonton reservoir, to the reservoir in Jersey City."

Mr. Kulchling is another expert witness. He says he does not regard the Boonton reservoir as a reliable and efficient purifying mechanism; that its efficiency will be greatly reduced in times of freshet, accompanied by winds tending to accelerate the motion of the water from the mouth of the river toward the dam and gatehouse; that it will be less efficient when 50,000,000 gallons are drawn out than it is now, when 35,000,000 or 36,000,000 are being drawn; and that in times of drought and consequent low water, followed by freshet, its efficiency would be at its minimum.

Such is the evidence of the principal witnesses on the question whether the contractor has complied with his contract obligation to so construct the works that "they shall be delivered to Jersey City as a completed operating plant, free from pollution" and "so prepared as to prevent all contamination from any source" of "the pure and wholesome water" to be furnished. I think the weight of the evidence is that, while much has been done toward securing the end in view, the works are not yet "so prepared as to prevent all contamination from any source." What, then, is the position of Jersey City? Notwithstanding its contention on this branch of



the case, it asks a specific performance of the contract. While its allegation is that "the defendants cannot convey and deliver to your orator a completed operating plant free from pollution, because polluted matter passed into the water supply from the following places: \* \* \* From the Hibernian mines; (e) from the Hibernian village; \* \* \* (j) from the town of Dover"—and that "no intercepting sewer has been built at Boonton and no sewage disposal plant has been built at Dover," yet the relief that it prays is that defendants may be decreed to convey, on payment of such part of the consideration contracted for, as this court may ascertain to be due. It is quite within the power of the court to decree performance, with an abatement in the price for that part of thing bargained for which the vendor is unable to convey, and so its prayer is not inconsistent with its allegations.

The purification of the water could be effected by means of a filter plant. To construct it and to convey the filtered water at Jersey City, at the head contracted for, would involve great expense. It would have been so important a part of the scheme that, had it been contemplated, it would naturally have been mentioned in the agreement. The bill does not pray for any deduction grounded upon its absence. It may, therefore, be dismissed from consideration, unless the evidence shows that it is indispensably necessary to a complete performance of defendants' contract obligation. I do not think it does. Some of the pollution complained of has been stopped. A very considerable improvement in the case of the Lyndale Print Works and of Mt. Tabor has taken place. Conditions have been improved at Dover and Hibernia, and in the factories on the Cooper-Lord estate at Boonton. The position of these factories in the gorge, at and below the falls of the Rockaway, is unfortunate; but the city contracted in full view of the situation and is not in a position to complain of it. It is a situation that will call for constant vigilance in the future.

#### Dover.

Dover and Hibernia seem to present the greatest difficulties. There is this provision in the contract: "Eighth. It is further understood and agreed that all sewers and sewage disposal works constructed or arranged for by the contractor to prevent pollution or to carry off pollution existing in the watershed shall, under said specification and plans, be so constructed and arranged for by him that, in the event of the purchase of the water supply and plant by Jersey City under any of the options aforesaid, the operation and maintenance of such sewers and sewage disposal works for the purposes aforesaid shall not be a charge upon or expense to Jersey City." This clause is so worded that there is no express agreement to build

sewage disposal works; but under the provisions of the first paragraph, which provide that the contractor shall so construct and maintain the works that the water delivered therefrom shall be pure and wholesome, and that if such works and supply are purchased they shall be delivered to the city "as a completed operating plant free from pollution as aforesaid," I think it is clear that the company must construct disposal works if they are necessary to insure the purity of the water supply. It cannot be said of them, as it can be of a filter plant, that they were not within the contemplation of the parties. They are expressly mentioned in the contract itself as works that may have to be built.

There can be no doubt, under the evidence, that it was represented to officials of the city that such works would be constructed. Mr. Ringle, one of the board of finance, says that during the progress of the negotiations he and other members of the board of finance and of the board of street and water commissioners went to Dover on a tour of inspection, and that they were informed by Flynn's agent that if the contract was awarded to him they were going to build sewers and sewage disposal works at Dover. Mr. Hoos, then mayor of the city, testifies to the same effect. Mr. Midlge, a member of the bar, and at that time a member of the board of finance, says that he stated to Mr. Edwards, Flynn's counsel, and to Mr. Connelly, that under no circumstances would he, as a member of the board, vote for a contract that did not provide in an absolutely complete measure for the pollution that would arise in the towns of Dover and Powerville, and through that section of country from which the supply would be taken, and that Mr. Edwards and Mr. Connelly both stated that a sewage disposal works was to be constructed and cared for by the towns that lay within its territory. Mr. Nolan says that on one of his tours as a member of the street and water board he was told that "there would be a disposal works at Dover carried on a level plain outside of Dover, and the solids to be used for manure, and the liquid to be run into the river clear and pure." While these extracts from the evidence show that no definite plan had then been agreed upon, or even matured, they at least indicate that disposal works of some sort were promised. The evidence, of course, does not extend the contract obligation; but it certainly shows that the clause was inserted after due consideration and at a time when the contractor himself thought that the works would have to be built.

Many witnesses were called on both sides to show the condition of affairs in Dover. While the trial was progressing the diligence of the city's witnesses led to the discovery of several cesspools and polluted drains which discharged their contents into the river. Where the proof was clear, the evil was corrected by the agents of the water company.

Much of the evidence has, for this reason, become unimportant, except in so far as it shows the extreme difficulty of adequately protecting the river as it flows through Dover under existing conditions. There are no sewers there. Each house is provided with a cesspool. Many of these cesspools are built up with boulder stones, uncemented. Their contents leach into the surrounding soil, which is, in large part, a low, gravelly plain, characterized by Mr. Jenkins as glacial and easily permeable with water. The gravel goes down to a depth of 10 feet or more, until it strikes a hard pan "made up very thickly with gravel and boulders." In this gravel the water rises and falls as the river rises and falls. Mr. Sickley, a contractor, says he has noticed this rise and fall 700 feet from the river. He says, moreover, that the cesspools that he built clean themselves. Some of the land is flooded in times of freshet. There are drains in different parts of the town, generally covered, which occupy the site of ancient brooks and still receive some of their waters.

Now, one of the controverted questions in the cause is as to the extent to which, and under what circumstances, water is purified by flowing through soil. It is agreed that sand is a better purifier than coarse gravel. In a situation such as exists at Dover, Prof. Winslow says it would be a miracle if some of the fecal matter did not reach the river. In the case of a much closer grained soil than in Dover, Mr. Kulchling says that the New York state board of health requires cesspools to be maintained at a distance of at least 50 feet from the stream. In this soil he thinks they should not be permitted at less than a distance of 100 feet. He says there are a number of cases on record where the public water supply has caused an epidemic of typhoid due to infected matter passing through permeable soil. Prof. Sedgwick says that 50 feet is the distance demanded by the state board of health of Massachusetts in the case of all streams which there contribute to a water supply. Many cesspools in Dover are less than this distance from the stream. Considering the situation, I should say that, with the exercise of even unusual vigilance, it would be practically impossible to keep all the sewage of Dover out of the river. Not only will it percolate through the coarse gravel, or be carried to the river over low-lying land in times of flood, but there will be a constant temptation to get rid of it by means of secret drain connections. If proof of this were needed, it would be found in the testimony already alluded to relating to the discovery of pipes connecting cesspools with the river or with drains leading into it, and this after Dr. Leal had been exerting all his vigilance to stop it for several years. The report of Mr. Whipple shows that in the water above Dover he found an average of 1,825 bacteria, while in the water below he found an average of 29,614. Of course, much of

this may have been street wash. The construction of a disposal works would require the co-operation of the municipality of Dover. Neither the water company nor Jersey City itself would have the right to enter upon its streets and lay pipes therein. Much less would they have authority to compel the householders to connect their closets and cesspools with those pipes. But it does not appear that the water company has sought the co-operation of Dover in this matter. On the contrary, their position now is that such a work is not necessary. I am unable to concur in this view, unless such works would do more harm than good.

This brings me to defendants' next contention. They say that to concentrate the sewage of Dover and to discharge it into the river at a single point, only partially purified, would result in a greater amount of pollution than now exists. Their position is this: As matters now stand, each house has its own cesspool. The fluid matters which find their way out of the cesspool are quickly purified by the natural soil acting as a filter. Very little, either by occasional surface inundation in times of freshet or by percolation, finds its way into the river. If any water coming from the cesspools reaches the stream, it has become purified on its passage thither. Consequently the pollution, if any, thereby resulting, is less than that that would result from the discharge of partly purified water coming from sewage disposal works. Dr. Johnson, on behalf of the company, thus testifies on this subject: "Q. In your opinion, would the building of sewers in unsewered towns such as Dover in such a watershed effectually prevent pollution or infection of the water? A. That would depend on the point of discharge. Q. Supposing they discharged above the reservoir? A. Then it would most certainly not prevent pollution. On the other hand, it would increase the danger, because of the concentration of the polluting matter at one point." It will be noticed that Dr. Johnson is asked only whether the present system would not be preferable to one which would cast the entire sewage of Dover, unpurified, into the stream below the town. There could be but one answer to such a question. It is significant that counsel for the company did not see fit to ask this witness as to the effect of a sewage disposal works, although he was an expert on the subject.

Dr. Leal expresses an opinion upon the very question in the following words: "In my opinion there would be more danger of infection of the water supply with the sewage system and purification plant than under present conditions, for this reason: There is a certain amount— I believe the principal pollution to-day of the Rockaway river comes from the streets of towns, country roads, and manured fields. \* \* \* You are going to have that just the same if you have your sewage system, because no sane

man to-day would put in the combined system. \* \* \* To the best of my knowledge and belief to-day there is no direct faecal pollution of the river; that is, I don't believe there is any pipe carrying faecal matter, or I don't believe any faecal matter gets into the Rockaway river, unless somebody uses the banks, which cannot be prevented, and the only possible faecal matter which can get into the river to-day is either through percolation or through flowing over the ground. Now that is a very small proportion of the total faecal sewage of Dover—a very small proportion. \* \* \* Now, you are going to bring in all this matter altogether to one point; that is, you are going to connect houses which cannot pollute the river or its tributaries, bring their sewage right to one point, and you are going to keep it all there. You are going to purify it. Well, if you purify it up to 95 per cent. you are doing pretty well, and you will be lucky to get that. It will be nearer 90. That means that there is 10 per cent. that goes into the river. Now I believe that 10 per cent. is a great deal more than goes into the river to-day. I don't believe that there is one or a half per cent. that goes into the river to-day." Now, this is a very strong presentation of the case. If the premises were well founded, it would be difficult to resist Dr. Leal's conclusion. I am inclined to think that Dr. Leal takes too favorable a view of the conditions prevailing in Dover. He overlooks, or rather does not give sufficient weight to, the consideration that people sometimes neglect to empty their cesspools when full; that they dump their contents in places where they ought not to; that freshets may occur in this low valley which will overflow the cesspools in parts of the town; that the soil, being a coarse gravel, is easily permeable by water; that there will be a constant temptation to connect, secretly, the closets and cesspools with the covered drains that carry off the surface water; and that, even with vigilant outside supervision, the agents of Jersey City will not be allowed to enter private dwellings and other buildings merely with a view to secure evidence. In theory, resort may be had to the injunction process of this court. In practice, this resort would, perhaps, be ineffective, because of the difficulty and delay in obtaining proof such as the court could act upon.

Dr. Herold in a qualified way agrees with Dr. Leal. He says, with a properly supervised system, privies would be less likely to pollute the water supply than a disposal works. He says, however, that sewage disposal works are satisfactory where the soil is proper, and that the percentage of purification ordinarily obtained by these works is not over 90 per cent. Then he indicates what he means by a properly supervised system: "I mean that it must be policed, and there must be some one to go over the shed

at all times and see that there are no privy vaults that are flowing, no cesspools that are overflowing, and the condition of the property on the banks of the river must be kept free of polluting organic material." If Dover itself were being supplied with the water for drinking purposes, and its citizens, therefore, interested in having their supply pure, it is easy to suppose that effective ordinances would be passed to regulate the use of cesspools, drains, and sewers, and that its police and health agents would be vigilant in enforcing them, and that they would have the good will of the entire community in doing so. This, I imagine, is the sort of supervision that Dr. Herold would think necessary. It can hardly be supposed that the agents of a distant municipality, particularly if they should perform their duties with any degree of vigor, would stand on a similar vantage ground. Friction, and even hostility, would be the natural results of any attempted interference by one municipality with the internal arrangements of another. "A properly supervised system," to use Dr. Herold's words, "could hardly be expected."

On the other hand, the complainant's experts say that within a very few years sewer pollution works have been so far perfected that the polluted water passing through them is or may be so completely purified that it can even be drunk with impunity. Prof. Winslow says: "Practice in sewage disposal has reached such a stage in the last few years that we can obtain any result that we choose. If it is desired to produce an effluent organically pure, but not purified from bacteria, that can be done chiefly. If, on the other hand, it is designed to produce an effluent of such a quality that it can be turned into a drinking water supply with impunity, that can also be done." Prof. Sedgwick testifies that he observed some evidences of attention to privies, but no arrangements for cemented ones carefully emptied by those in charge of the water supply, such as are found on the Metropolitan water supply of Boston, nor any placards forbidding the pollution of the stream. He says, further: "I do not observe any sewage disposal plant such as in my judgment ought to exist in the city of Dover, if the water of the Rockaway river is to be used as a source of supply for the Boonton reservoir. \* \* \* I believe that the sewage disposal plant is vastly preferable [to the situation as it there is], and that it would be a much safer arrangement." Mr. Kulchling says that it is possible to prevent substantially the Dover contamination from entering the Rockaway, and he estimates the cost of a sewage disposal works at \$105,000.

Taking into account all the testimony, it seems to resolve itself into a matter of expense. The purification effected by the disposal works to which Dr. Leal referred was, no doubt, partial. There is nothing in the case to throw doubt upon the evidence of

Prof. Winslow to the effect that if the proper methods be adopted the water can be purified to such an extent as to render the effluent harmless. Naturally, the company does not wish to incur this expense; but if it be necessary, in order to conform to the terms of their contract to furnish pure and wholesome water, the matter of expense is, from a legal standpoint, irrelevant. I think that the weight of the evidence is that the river as it passes through Dover is very considerably polluted, that freshets may increase the danger and that a properly constructed disposal works, properly managed, would be a considerable safeguard. It is no answer to this to assert that the works might be carelessly managed and that the risk of pollution would then be greater. If it can be assumed that in a matter so vital to the health of the city there would be mismanagement of the works, the same assumption would have to be made in reference to the supervision of Dover by Jersey City officials under present conditions. Such an assumption would be fatal to Dr. Leal's contention, for he admits that the situation, as it is to-day, is one requiring ceaseless vigilance. Only because of that vigilance, which he says is now being exercised by himself and his subordinates, is the water supply, in his estimation, safe. Assuming that the same degree of vigilance would be exercised by the city with reference to its disposal works that is now being exercised by the water company, whose management is itself the subject of criticism by Prof. Sedgwick in the extract from his testimony that I have before quoted, then I think the weight of the evidence shows that disposal works would afford added protection. If I had thought that the evidence did not support that view, I should have been forced to the conclusion that a filter plant should be provided in order to satisfy the paramount contract obligation to furnish pure and wholesome water.

#### Hibernia.

I now come to Hibernia. Here, too, I think conditions are unsatisfactory. The hamlet is thus described by Mr. Kuichling: "The village or settlement of Hibernia is essentially a mining camp. It contains numerous small houses occupied by the miners, and there are about 1,200 to 1,500 people there. Of that number, from 1,000 to 1,200 work underground in the mines during the day. While they are underground their wastes mingle with the mine drainage water, which is pumped to the surface and flows into the brook that runs through this little settlement or village. This village is in a narrow valley, with steep hillsides. These houses are not of a high class of construction. They have, many of them, privies adjacent to runways for water—what would be called a water course or depression in the ground not containing running water. Some are only running brooks and rivulets. Pigeons

and hencoops and stable yards generally are located so that the drainage flows off readily. The water in the Hibernia brook is discolored and visibly and palpably polluted, both from what surface water there is as well as from the mine drainage. One of the mines delivers water that is as discolored and opaque as almost any city sewage. From another the water comes out clear. In this latter case the water is used for condensing the steam of the mine engine, the hoisting engine at the surface. In the other case it cannot be so used, because it is too dirty for that purpose. I am informed by the superintendent at the time, access to the same having been refused, that there are no sanitary conveniences for the miners underground." The brook here spoken of flows into Beaver brook, which flows into the river just below Rockaway village, at a point about 8 miles above the reservoir, if measured along the stream, or about  $4\frac{1}{2}$  miles in an air line.

The description of the village as above given is not controverted. The defendants called Mr. Munson, the mine superintendent. He admits that there is a moderate descent from all the houses toward the brook. Of the surface, he says "it is a rather rocky surface; very rocky surface, in fact." The privy vaults are formed by digging down in the soil, which, in the valley, is loose stone. He says that at the suggestion of Dr. Leal and Dr. Herold, and by direction of the mine owners, he took down an old mining house, and that where the vaults were filled, or nearly so, they dug new ones, built of loose stone, uncemented; that, as to the mines themselves, the men use as a substitute for privies old abandoned levels, and that if the men are known to go elsewhere they are discharged. He also says the men drink the mine water, and that he has never known of a case of typhoid fever there. Commenting on the condition of affairs, Dr. Leal says that the superintendent described the conditions exactly; that he would only state that there is no direct contamination of the brook; that where the privies were too near they were moved back (he does not say how far); and that some of the houses have been pulled down. He adds: "I regard it in as good a condition as it is possible to get such a place. It is only a mining camp, and there is no pollution. The only pollution that there can be is by washing over the surface." Being asked why, if an epidemic should break out, the germs would not be washed over the surface down into the brook, and from thence into the reservoir, he says: "That is possible; and it is possible of any place in the watershed, or any single house in the watershed. I would state that a case of typhoid fever has never been known in Hibernia, and that the privy vaults are in fair condition, so that, even if there was a case, or two, or three, there would be no practical danger. Such a thing is not likely

to happen, but the possibility cannot be denied for a moment." As to this Mr. Whipple says: "If a case of typhoid fever should occur, and the discharge of the basins enter the privy, it would be somewhat surprising if, through the agency of flies, the infection was not transferred to some other house, or some other patients, or some other of the population there, and it would be a very easy matter for a severe epidemic to sweep through such a settlement as there exists. The conditions would be somewhat analogous to the conditions in some of the military camps of our soldiers during the Spanish War, where typhoid fever did break out."

Nqw, taking into consideration the class of persons inhabiting this camp, their utter ignorance of sanitary rules, the absence of police and sanitary supervision, the lay of the land and the character of the soil through or over which polluted liquids might flow into the brook, and the admitted fact that the waters of the brook are to some extent polluted at all times, it seems to me plain that if even a slight epidemic of water-borne disease should break out, and some of the germs of disease be, as they would be likely to be, washed into the brook, they would quickly reach the river, and then it would be merely a question of conditions in the reservoir whether they would or would not settle or die before they passed into the effluent pipes at the gatehouse. As I have said before, Jersey City is entitled under its contract to an efficient mechanism for purifying the water, and there is no contrivance in the mechanism as constructed to guard against the dangers of Hibernia brook. Kulchling estimates that the total cost of pollution works, including a capital sum which at 5 per cent. would produce \$900 a year for operating expenses, would be \$46,000.

#### Mt. Tabor.

Mt. Tabor is a summer camping ground. It lies about a mile and a quarter south of the river. There is a brook rising to the north of the hamlet, which flows into it. Here Mr. Whipple found sanitary conditions very much better than they were in Hibernia—no sewer system, but, on the other hand, "no open privies, or only a few." These, as I understand it, do not drain naturally into the brook. The specific complaint, as appears from the testimony of Mr. Kulchling, is that the contents of the cesspools, when emptied, are dumped upon or near manure heaps within a few hundred feet or less of a water course or ditch which finds its way into the brook. Dr. Herold says that there is no possibility of fecal matter getting into the stream, which is 400 feet away; that the course of the polluted water is away from it; and that under existing conditions he cannot conceive of contamination or menace of contamination from this source. It appears to me that on the evi-

dence nothing appears but the risk which is incurred from taking a water supply from a densely populated watershed, and which Jersey City assumed when she entered into the contract. The situation too, is such that it is easily controllable.

#### Boonton Drain.

The next question that I shall consider is the Boonton intercepting sewer or drain. It is agreed on both sides that such a drain or sewer is necessary. Boonton is built on the steep sides of a hill, which to the west slopes toward the river. The defendants say that they have provided an open drain on the property of the Morris Canal & Banking Company. It is at present unnecessary to review the evidence bearing upon the question whether it is sufficient. It seems to be admitted that the water company has nothing but a license to maintain it, and it does not appear that this license is irrevocable. Until a better title is shown, I think that the company has not discharged its obligation.

#### The Rag Mill at Powerville.

There is a considerable amount of evidence relating to this mill. It lies from  $1\frac{1}{2}$  to 2 miles above the reservoir, and formerly discharged a large amount of wastage into the stream, of such a character as to attract to it especial notice. The bill charges that the defendants are under contract to "eliminate" it. The defendants deny any such obligation and say that it is no longer a nuisance.

First, as to the legal question: It appears that the officials of Jersey City had during their tours of inspection seen this mill and that they thought it very objectionable. Prior to the signing of the contract of February 28, 1899, Mr. Edwards, who was acting as counsel for the contractor, addressed this letter to the mayor: "Jersey City, Jan. 6, '99. Hon. Edward Hoos, Mayor, Jersey City—My Dear Sir: When the sewer inspection was made of the Rockaway watershed under the pending proposal to my client, Patrick H. Flynn, to furnish a new water supply to Jersey City, attention was called by his engineers to the rag factory at Powerville as among the possible sources of pollution. You were then told that it was the intention of the contractor to remove the same, although no specific mention had been made of this place in the specification of the proposal. I beg to assure you that such removal has always been contemplated in our plans and that if the contract is awarded to him such removal must take place. Yours respectfully, Wm. F. Edwards, P. H. Flynn." The letter as originally written was signed only by Mr. Edwards, but when the contract was ready for signature Mayor Hoos refused to sign it unless Flynn also signed the letter. This, after some little demur, he did, and then Hoos signed the

contract. The water company's position is that the letter, not being a part of the formal contract, is not binding upon it. There is other testimony upon the subject; but I shall here only refer to that of Mr. William H. Corbin, which is the most favorable to the defendants' contention. He says that in a conversation between representatives of the city and of the water company, shortly before the water company undertook Flynn's obligations, reference was made (inter alia) to Mr. Edwards' promise to remove the rag mill, and that Mr. Gardner, the president of the company, said that he had examined the written contracts and specifications with great care, and had made estimates upon them, and if the parties he represented were to undertake the work at all it would be on the basis of those written contracts, and if there was any other understanding outside of those contracts by anybody he would have nothing to do with them, and the negotiations might as well stop, because those he represented would not undertake any contracts modified in any such way. To this Mr. Record, representing the city, replied that, of course, that was so, and if the Security Company and the East Jersey Water Company came in they would, of course, be held to what the written contracts required, and the city would not accept (require?) anything else. He says the subject dropped there, and nobody again referred to the matter.

In this conversation the reference was not alone to the rag mill, but also to disposal works and other subjects, on which the parties even then seem to have differed. I will assume that it was understood by both sides that the water company, if it undertook the work, would be bound by the written contract, and by that only. What, then, was the written contract? It is elementary that a contract may be contained in more than one writing. If several papers are executed at the same time as parts of one transaction, they together constitute the contract. The formal contract expressly declares that its provisions shall bind the assigns of Flynn and that the specifications and proposal are made part of it. The specifications contain this clause: "The advertisement, the specifications, the accepted proposals, and all maps, plans, and drawings accompanying, attached to, or described therein, the specific contract, and the contractor's bond, are to be considered essential portions of the complete contract." Now, it seems to me that the undertaking contained in the Edwards-Flynn letter was a proposal of Flynn, accepted by the city, and therefore one of the accepted proposals mentioned in the above clause. It conclusively appears from Mr. Corbin's testimony that the water company had notice of it. As it was agreed on all hands that the writings were to be regarded as declaring the extent of the company's liability, and as this was one of them,

it bound the company just as any other writing did.

But this does not solve the question presented. The evidence shows that, acting under the suggestion of Dr. Leal, who told them that they were throwing away that which could be utilized, the proprietors of the mill stopped pouring their waste into the river. It is no longer a menace in any other sense than any factory along the river bank having wastage to deal with is. There is always a possibility that the desire to get rid of it in the easiest and cheapest way, or carelessness or disobedience of orders, may result in pollution. But there is no law that forbids the establishment of factories along streams used for a water supply. If the rag mill is now objectionable, so are the factories along the river bank in Dover, Rockaway, and Boonton. The agreement contained in the letter is to "remove" the mill. It is possible that the water company could purchase it at such a price as the owners might see fit to ask for it; but it may be doubted whether it could be condemned as a whole if it could not be shown to be a nuisance. I have no doubt that Jersey City may condemn a strip of land along the river banks for the purpose of preserving the purity of its water supply. I think it could condemn a strip of suitable width for the purpose of guarding that supply, without any proof of present nuisance; but I should doubt whether it could condemn a factory property in its entirety, extending back a considerable distance from the stream, merely because it was a factory property situate on the river.

Assuming, then, that the letter of the promise has been broken, what is the consequence? The removal of the mill was stipulated for, that the purity of the supply might be conserved. If the city gets a supply free from the pollution caused by the operation of the works in an objectionable way, the substantial object has been attained—the abatement of the nuisance has been effected. Even if the owners should consent to sell, they might take the money, establish themselves anywhere else along the river, and continue the same business in the same way that they are now conducting it. Jersey City would be powerless to object, unless they should begin to pollute it again. According to his promise, Flynn was obliged to remove the factory. Suppose he purchased it; there is nothing in the contract that would have obliged him to convey it to the city. Why, then, should the city have the price or value of this factory deducted from the price of the works? I am of the opinion that relief in respect of this should be denied.

I have now reviewed the principal sources of pollution mentioned in the bill. I do not think it necessary to notice in detail any of the others. The evidence does not satisfy

me that they are at present polluting the stream. If they shall do so in the future, they may be enjoined on the very salutary principle established in *State Board of Health v. Diamond Paper Mills*, 63 N. J. Eq. 111, 51 Atl. 1019, on appeal 64 N. J. Eq. 793, 53 Atl. 1125—a case that decides that the prohibition is against putting any polluting matter into any stream or tributary which furnishes a water supply at any point whatever above the point at which the supply is taken, and without any reference to the question whether the stream appears to be, or is in fact, polluted at the point of intake. I may add that I am very strongly impressed with the conviction that, in view of the conditions prevailing on this populated watershed, Jersey City ought, at the earliest opportunity, to secure as much of the river banks as possible in those districts where the population is still inconsiderable and the land cheap.

#### Watchung Tunnel.

I shall now consider some objections of a different character. The Watchung tunnel is thus referred to in the bill. The defendants cannot convey the works as provided in the contract "because in constructing a tunnel through the Watchung Mountain the defendants adopted a method of construction which was cheaper than that required by the contract; that your orator is entitled to an abatement of the consideration of the contract to the extent of the amount saved by the defendants in constructing their tunnel in a manner different from that required by the contract." In what this difference consists the bill does not state. In the testimony, however, it is said to lie in the fact that the contractor has furnished a gravel, and not a concrete, bottom. To the bottom thus provided two objections are made, viz.: (1) That because of the added friction the flow of water is slightly less; and (2) that it is harder to clean. Both of these objections are substantial, if valid. The question, then, is whether the bottom, as constructed, conforms to the contract. The specification reads as follows: "Where the tunnel is in rock, if the bottom consists in sound and solid rock, it 'may' be leveled up and smoothed and made uniform throughout with Rosendale cement concrete, surfaced with a layer two inches thick of Portland cement mortar. Where the tunnel is in earth or unsound rock, a brick invert 16 inches thick 'shall' be laid at the bottom. If it shall be necessary in order to secure a firm foundation, the invert shall be laid upon a bed of concrete." If this were the only provision on the subject, I should say that, having regard to the employment of the word "may" in the first part of a clause, and the word "shall" in the latter part, it was open to the contractor to resort to any permissible mode of tunnel construction where sound and solid rock was encountered, subject, however, to the

limitation, found in the paragraph headed "Inspection"; "Any workmanship or material not mentioned or described, which may be necessary to make the works constructed complete, and in all respects of the best quality and efficiency, shall be furnished and performed by the contractor as fully and thoroughly as if the full details and specifications therefor had been given therein."

Now, as to the method of construction adopted. Mr. Kulchling says that in no waterworks conduit that he knows of is there a gravel bottom. Without, apparently, denying the statement in this form, Mr. Gardner says that the job is as good and serviceable a one as if it had been built with a concrete bottom, and Mr. Waldo Smith says that it (I suppose he refers to the invert) has been done in a proper way and that it is a good engineering structure. Mr. Hering does not express any opinion. From this testimony I should infer that, in the absence of contract stipulations to the contrary, the mode of construction actually adopted was, from an engineering standpoint, permissible. I should doubt whether it was "of the best quality and efficiency." But there are two other clauses which bear upon the matter: First, the last part of the section that relates to tunnels, "Care shall be taken to leave the interior surface of the tunnel smooth and free from projections;" and, second, the clause of plan No. 1, contained in the proposals, "Thence through Watchung Mountain by a tunnel, brick-lined, having an inside diameter equal to 6.85 feet." All three clauses must be read together. So reading them, we have this: "The tunnel is to be brick-lined; but, where the bottom consists of sound and solid rock, it may be leveled up and smoothed and made uniform throughout with Rosendale cement and Portland cement mortar. In any case care shall be taken to leave the interior surface smooth and free from projections." Now it seems to me that it is perfectly plain, in view of these provisions, that the only permissible departure from a brick lining throughout is, under the conditions named, a substitution of cement and mortar. A gravel construction is excluded.

But it is argued that the tunnel furnished is as good and serviceable as a tunnel of brick or cement. The evidence is that, because of the anticipated increase in friction, the horizontal and vertical diameters of the tunnel were enlarged two or three inches. The weight of the evidence (which is conflicting on this point) seems to be that this allowance is sufficient; but, assuming that the tunnel as built will allow of the passage of 70,000,000 gallons in the manner stipulated, viz., so that "the upper surface of the water shall be one foot from the top of the arch," the defendants are still met by the difficulty that they have not performed their contract according to its terms and that this mode of construction will make it more difficult and

expensive to clean the bottom and free it from such vegetable and animal growths as are often, if not always, found in tunnels used for a similar purpose. The objection is not fanciful, and the city did not acquiesce in the mode of construction adopted. On the contrary, as soon as the company had submitted its amended plan to Mr. Ferris, as by the contract it was required to do, he, under date of January 16, 1904, wrote to Mr. Harrison, the company's engineer, stating that he rejected the modified plans as not conforming to the specifications, "inasmuch as the surface of the invert you propose will be smooth and free from projection." Notwithstanding this rejection, the company went on in their own way. Mr. Gardner testifies that they could not lay the cement because of the volume of water flowing through the bottom. By this statement he can mean only that they could not do it without going to the additional expense of putting in an underdrain; but, if this were necessary in order to enable the company to perform the contract according to its terms, they would be obliged to make such an underdrain.

The city has elected to take the works. The case, therefore, comes within the rule laid down in *Bozarth v. Dudley*, 44 N. J. Law, 304, 43 Am. Rep. 373; and *Feeney v. Bardsley*, 66 N. J. Law, 240, 49 Atl. 443. In this last case, Justice Van Syckel, speaking for the Court of Errors, approved the following direction: "If the contractor has substantially performed his contract, even though he has failed to do so in some minor particulars, he is entitled to recover the contract price, less what will be a fair allowance to the owner to make good the defects in the performance of the contract." This rule seems applicable to the case in hand. The evidence is that the difference between the cost of a concrete bottom and a gravel one is \$18,500.

#### Dam No. 1.

The city's next contention is that the main dam, while properly constructed to retain a supply of 50,000,000 gallons for the requisite number of days, has not been constructed in such a way as that, by simply building on top of it, it may be raised so as to provide for a supply of 70,000,000. The defendants' contention is that the contract does not oblige it to do anything more than construct a dam which shall hold back the 50,000,000-gallon supply. It appears to me that the defendants' contention, in this respect, is correct. The specification contains this clause: "Bidders must also state a price for which the city can buy and own the waterworks of the capacity of fifty (50) million gallons daily, together with the water supply, water rights, lands, reservoir sites, rights of way, and all assessments necessary to fulfill the requirements of this specification and to the extent of seventy (70) million gallons daily." In compliance with this specification, the proposal was as follows: "For the waterworks and all appurte-

nances thereof necessary to fulfill the requirements of these specifications to the extent of 50,000,000 gallons of water daily, together with the water supply, water rights, lands, reservoir sites, rights of way, and all assessments necessary to fulfill the requirements of these specifications, and to the extent of 70,000,000 gallons of water daily, forever, which purchase can be made by the city when the waterworks are completed and accepted hereunder, provided the city shall give notice of its intention to purchase within one year after the date of contract," etc. In these two clauses a very sharp distinction is drawn between the works necessary to provide a supply of 50,000,000 gallons and the water supply, water rights, lands, sites, etc., necessary to enable the possessor, at some period in the future, to enlarge the supply to 70,000,000.

Counsel has not been able to point to a single clause, in any of the writings which go to make up the contract, which requires that, in the construction of the dam, work must be done, not for the purpose of providing a 50,000,000-gallon supply, but for the purpose of partially providing for a 70,000,000-gallon one. Failing to find any such provision in the writings, the city falls back upon a correspondence between Mr. Ferris, city engineer, and Mr. Harrison, the company's engineer, relative to the Parsippany dike, a distinct structure in another part of the reservoir, the result of which was that the company agreed to the city's position in relation to that structure. A perusal of Mr. Ferris' letter, found on page 157, shows that the situation in regard to the dike differed considerably from that at the dam. Mr. Ferris shows that the dike could not have been raised to the 70,000,000-gallon level if constructed as Mr. Harrison was then proposing to construct it. The core wall would then have been in the wrong place, and, if an additional dike with another core wall were to be constructed, the new-work, in view of the necessary excavations, would have imperiled the safety of the original dike. Such, at least, was Mr. Ferris' contention. Now, it may well be that the contractor was obliged to so construct the reservoir intended in the first instance for a 50,000,000-gallon supply that the structure could, without imperiling that supply, be adapted to a 70,000,000 supply. At all events, Mr. Ferris' representations on this head were so positive and so plausible that the water company gave in to them.

But these considerations do not apply to the face of the dam. It is the opinion of all the engineers that that face may be thickened and strengthened on its lower or outer side without at all interfering with the work of the reservoir. Mr. Kuichling himself testifies as follows: "I will say, to thicken the dam as built to an equivalent strength that it would have to be, if built originally to the greater additional thickness, would require



more masonry, and it might possibly be done with a little more than the same masonry, but at very much larger additional cost, because the union between the old and new masonry must be made in expensive manner. Therefore there would be a question of the value of the additional work as compared with the additional masonry." I need not multiply quotations, for this is the statement of the city's expert. The increased cost is perfectly irrelevant, if the contract itself did not require more than a dam capable of containing the 50,000,000-gallon supply. The only clause in all the writings to which counsel has been able to point is that which relates to "raising" the dam in the event that the city should, during the term of the contract, notify the contractor to increase the capacity of his works. This notification was never given. On the contrary, the city elected to purchase. Consequently the clause has no relevancy to the present discussion, even if it could be construed to mean that the contractor was merely to put his material nowhere else than on top of the present dam—a construction that not only seems to be inadmissible in itself, but was never contended for by Mr. Ferris, so far as the dam is concerned.

There is, besides, absolutely nothing in the contract which indicates that the city, if it wished to increase the supply, might not think it better to construct an independent reservoir, for example, in the Longwood valley, or in some other locality above Dover, where the water would be less exposed to contamination. The construction of two or more reservoirs is not only usual in the case of a large city, but commendable. The contract itself contemplates the possibility of such a thing. From whatever point of view the matter is considered, there is absolutely nothing that suggests an obligation to do more than provide a dam suitable for a 50,000,000-gallon supply.

#### The Morris Canal & Banking Company.

I shall not attempt under this head to do anything more than outline the objection to the title of the Jersey City Water Supply Company, founded upon the claim of the Morris Canal Company of a prior right to the flow of the Rockaway above Boonton. The city takes a position with regard to this claim which seems to me to be quite inconsistent with its status as party complainant praying for a specific performance. It seeks in the same breath to have the contract performed and repudiated. Briefly outlined, the facts are these: By the original contract of February 28, 1899, Flynn contracted to give "the whole flow of the Rockaway river, having a watershed and gathering grounds of 122½ square miles." On April 24, 1901, Messrs. Corbin & Corbin addressed a letter to the Jersey City boards, in which they stated that the canal company had the first right to use the waters of the river, and that

Jersey City could obtain from the watershed "only such waters as remain after the needs of the canal are supplied; such needs being necessarily variable from year to year." In view of this claim, Flynn, having (with others) failed to secure legislative consent to the abandonment of the Morris Canal, procured an act of Legislature, approved March 22, 1901 (P. L. p. 416), in which it was provided that it should be lawful for the board having charge of the water supply and the board having charge of the finances of any municipality to modify by resolution the terms of any contract heretofore or hereafter made by such municipality for the construction and purchase of a new water supply "as to area of the watershed or the proportion of the flow of any river or stream tributary thereto, or the capacity of the storage reservoirs thereof, whenever, in the judgment of said boards, such modifications are needed to insure the construction of the works: provided such modification shall not relieve the contractor or his sureties from furnishing and delivering to the municipality the quantity and quality of water required by the original contract." Pursuant to this act, the contract of July 8, 1901, was made between the city, Flynn, and the water supply company. It recites the claim of the Morris Canal and provides (inter alia) that in case, upon the completion and acceptance of the works, the claims of the Morris Canal Company and its lessee shall not have been released or extinguished, it shall be entitled to retain out of the purchase price of \$7,595,000 the sum of \$500,000 until the happening of one of three events: (1) A decision of the highest court of New Jersey adverse to the claim; (2) the delivery of a valid release from the canal company; (3) the abandonment under legislative sanction of the portion of the canal lying between Dover and Montville and the surrender of its right to divert. This supplemental contract, and two others, dated March 31, 1902, conferred valuable rights upon Jersey City, and under them and under the original contract, so far as it remained unmodified, the water company, taking an assignment from Flynn, went on and constructed the works.

The city now contends that the contract of July 8, 1901, was not warranted by the act of March 22, 1901, and that (in the language of the bill) the defendants "cannot convey the whole of said waterworks, \* \* \* (b) because the defendants have not acquired the rights of the Morris Canal to divert water from the water supply about the reservoir at Boonton; that company claiming to have a right to divert such water to such an extent as will prevent the defendants from furnishing the amount of water required by the contract." While the city is not, apparently, satisfied with the contract deduction of \$500,000, it wants specific performance, with an undefined, and, I think I may add, an un-

ascertainable, additional deduction from the contract price on account of the canal company's claim—which, however, both it and the water company dispute. There is such a thing in equity as a deduction from the price stipulated because of the inability of the vendor to give all that he has contracted to give; but here the claim is that this court shall, in the absence of mistake, the parties having contracted exactly as they intended to contract, first, change the contract to the disadvantage of the water company, and then in its changed form compel them to perform it. If the water company was seeking to compel the city to take the works, Jersey City could set up the illegality of the contract (if it was illegal) for the purpose of defeating the suit. It is not entirely obvious why the supplemental agreement is not authorized by the terms of the act; but, even if it be not, Jersey City, as a complainant, is hardly in a position to demand the specific performance of an agreement which it in part repudiates. If it may repudiate, it necessarily puts itself out of court. It is quite beyond the power of any court to compel parties specifically to perform on terms that they have never agreed to perform. The case is all the stronger for the reason that the agreement of July 8, 1901, was as to the Jersey City Water Company the original agreement, by which it first became bound.

I shall now notice very briefly one or two minor objections. As to the steel pipes, it is sufficient to say that the contract does not provide for pipes 76 inches in diameter. It provides a formula according to which their carrying capacity shall be determined. When the site of the reservoir was changed and a greater head obtained, it was possible within the terms of the contract to reduce their size. As to the riparian owners below the reservoir, their rights are inconsiderable, and most of them have been obtained. It is admitted that what remain must be acquired. The question of seepage under the Parsippany dike has been settled. I think, in view of the provisions of the fence act, the water company should make an allowance equal to one-half the cost of fencing.

I have now noticed all the questions raised by the bill. If any others have been raised by the briefs, they are in themselves comparatively insignificant, and not within the issues contained in the pleadings.

(104 Me. 29)

#### TRIPP v. INHABITANTS OF WELLS.

(Supreme Judicial Court of Maine. Feb. 26, 1908.)

#### 1. HIGHWAYS—ACTIONS FOR INJURIES—EXERCISE OF DUE CARE—NECESSITY FOR SHOWING.

To maintain an action against a town for injuries alleged to have been caused by a defect in a highway, it is incumbent on the plaintiff to prove affirmatively his own due care in the prem-

ises. It is not enough that there was no evidence of want of due care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 526.]

#### 2. SAME.

Even though from the evidence it could be inferred that the plaintiff was observing due care, yet, if it could be inferred with equal reason that he was not observing due care, he fails to sustain his burden of proof.

#### 3. SAME.

Where the plaintiff's horse, which she was driving, left the traveled part of the highway, went across the sidewalk, and fell over the outer edge of the sidewalk into a swale below, to the injury of the plaintiff, and no explanation is given for such conduct, the plaintiff has failed to prove affirmatively his own due care in the premises, and hence cannot maintain his action. (Official.)

On Motion from Supreme Judicial Court, York County.

Action by Louisa M. Tripp against the inhabitants of Wells. Verdict for plaintiff, and defendants move to set the same aside. Motion sustained, and verdict set aside.

On motion by defendants. Sustained.

Special action on the case brought under the provisions of Rev. St. c. 23, § 76, to recover damages for injuries alleged to have been received by the plaintiff through a defect in a public way which the defendant town was obliged by law to keep in repair. Plea, the general issue.

Tried at the January term, 1907, Supreme Judicial Court, York county. Verdict for plaintiff for \$1,210.08. Defendants then filed a general motion to have the verdict set aside.

The case appears in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and KING, JJ.

William M. Tripp and Geo. F. & Leroy Haley, for plaintiff. E. P. Spinney and Cleaves, Waterhouse & Emery, for defendants.

EMERY, C. J. This was an action upon the statute to recover damages for injuries alleged to have been received by the plaintiff through a defect in a public way which the defendant town was obliged by law to keep in repair. The practically uncontroverted situation was substantially this: The public way was a highway from Ogunquit to Wells village. At one place it crossed over a brook called "Goodale's Brook," bridged by a culvert covered with earth. The road for most of the way was some 55 feet between fences, with a wrought way of the usual width. The culvert was 31½ feet long. On the westerly side of the road was a plank sidewalk across the end of the culvert and extending some 75 feet each way from it. This sidewalk was 4 or 5 feet wide, and was bordered on the inner or road side with small bushes or vines. Its surface was nearly even with the surface of the traveled part of the road. On the outside the sidewalk was bordered by a railing.

At the culvert, and for some distance either side, the wrought part of the road was of the usual width. The road was graveled, and was free from defects in the part used by teams, automobiles, etc. It was nearly straight, curving a trifle to the right as one passed the culvert going to Wells village. The plaintiff was familiar with the road at this locality, having passed over it many times. She knew the sidewalk was there.

After dark on the evening of November 26, 1905, the plaintiff was driving her horse and single buggy along this road in the direction of Wells village, and was approaching this culvert; the sidewalk and the railing beyond it being on her left. In some way, from some cause, the horse left the traveled part of the road, crossed the sidewalk, and fell over into the brook or swale below, dragging the buggy and the plaintiff after him to her injury. The place where the horse fell was at or a little beyond the end of the culvert. A witness (for the plaintiff) who observed the wheel tracks of the buggy the same evening testified that they came along the road "a natural sweep" to near the place of the accident, and there left the traveled part of the road at an angle of 45 degrees.

The plaintiff claimed that at the place where her horse went over the sidewalk into the brook or swale below the railing was defective, and that that defect was the proximate cause of her injury. Before considering that question, however, it is expedient to inquire whether the plaintiff has presented enough evidence to sustain a preliminary proposition of fact essential to her case, viz., that she was herself in the exercise of the requisite degree of care. The burden is on her to prove that proposition affirmatively. It is not enough that there is no evidence of her want of such care. If there is no evidence either way, the plaintiff fails to sustain her burden. *Crafts v. Boston*, 109 Mass. 519, 521; *Mosher v. Smithfield*, 84 Me. 334, 336, 24 Atl. 876.

The plaintiff's horse that she was driving left the road, crossed the sidewalk, and fell off the outer side of that walk into the brook or swale below. Had the horse kept the road which was safe, there would have been no falling off the sidewalk and no injury. Clearly the burden is on the plaintiff to account for this conduct of the horse, and to show affirmatively that she exercised due care to prevent it. The only evidence she offered was her own testimony as follows: "Well, as far as I know, I drove out of Mrs. Littlefield's yard on the highway, and drove along until I found myself tumbling; that is all I know. Without a moment's warning, I went over this bank. I supposed I was in the middle of the road." On cross-examination she testified that she was able despite the darkness to drive out from Mrs. Littlefield's place into the highway, and turn in the highway toward her home, and after that she knew nothing more until she was tumbling over the bank, except that she "was driving the horse."

This evidence manifestly does not sustain the plaintiff's burden of affirmatively proving her own due care in the premises. Even if from this evidence it could be inferred that she was using due care to guide her horse and keep him in the road, it could be equally well, if not more reasonably, inferred that she was inattentive, and not minding her horse. The circumstances are as consistent with negligence as with care in the manner of her driving at the time of the accident. "Where different inferences are deducible from the same facts which appear and are equally consistent with those facts, it cannot be said that the plaintiff has maintained the proposition upon which alone she would be entitled to recover." *Mosher v. Smithfield*, 84 Me. 334, 337, 24 Atl. 876, 877. The cause of the horse leaving the road is not explained, but left to conjecture. The evidence does not indicate any one cause more than another. Even if it does not show that the plaintiff was inattentive, and hence careless, it does not show affirmatively that she was not, and this latter lack in the evidence is fatal to her action. *McLane v. Perkins*, 92 Me. 39, 48, 42 Atl. 255, 43 L. R. A. 487.

The legal conclusion is that, for want of evidence showing affirmatively her own due care in the premises, the verdict cannot be sustained.

Motion sustained.

Verdict set aside.

(103 Me. 482)

CAMERON v. LEWISTON, B. & B. ST. RY.  
(Supreme Judicial Court of Maine. Feb. 25, 1908.)

# 1. NEGLIGENCE—ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

When the facts disclose a situation, dangerous to life or limb, into which, from its very nature, it is practically certain, even prudent men may be induced to enter, and it is practicable to remove such danger, without injuriously interfering with other rights or privileges, then the court should establish, as the law, the rule which prevents injury or loss of life, rather than that which invites or even permits it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 41.]

# 2. CARRIERS — CARRIAGE OF PASSENGERS — STREET RAILROADS.

A street railroad is a public corporation. It receives all its privileges from the public. It depends upon the public for its income. It invites and induces the public to ride upon its cars. Great experience makes it familiar with the habits of people so riding and with their natural tendency, with or without reason, to move from seat to seat. With its special means of knowledge, it should be held to anticipate, what is even a matter of common knowledge, that a passenger riding upon one of its cars may at any place along the line and while the car is in motion undertake to change his seat.

# 3. SAME—CONTRIBUTORY NEGLIGENCE.

It is too narrow a construction, and against good public policy, to hold that it is negligence per se on the part of a passenger riding on a trolley car not to anticipate that a pole may be permitted to stand so near the railroad track that he cannot, in an erect position and careful manner, pass from one seat in the car to another

over the running board without danger of injury from collision with such pole.

**4. SAME.**

It establishes a safer rule of law to require street railroads to exercise a degree of care sufficient for the protection of their passengers with respect to poles and other obstacles along their rights of way when such protection involves only a question of pecuniary outlay, than to hold that such railroad may be permitted, for the mere purpose of saving expenditure, to continue the maintenance of a structure which may be calculated sooner or later to result in the injury or death of a passenger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1175.]

**5. SAME—QUESTIONS FOR JURY.**

A street railroad owes to its passengers a duty with respect to the proximity to the track of poles and other permanent structures, and that whether, in case of an injury to one of its passengers by coming in contact with a pole or other structures, the defendant was negligent in the location and maintenance thereof, is a question of fact for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1175, 1315.]

**6. SAME.**

In the case at bar, the chartered rights of the defendant, the location of its tracks and poles by the city, and approval of the same by the railroad commissioners, were all proceedings, assuming them to be in all respects legal, intended to bestow upon the defendant the right to exist, not to destroy. They were calculated to confer upon it the right to exercise all the privileges of its franchise, but not immunity from its negligence.

**7. SAME.**

Although in the case at bar on the back of each seat in the car on which the plaintiff's intestate was riding at the time of his injury, in legible letters, plainly to be seen, were the words, "Avoid accidents; wait until the car stops," yet this notice must be construed to have been intended by the defendant as a caution to passengers against alighting from a car in motion, and not as an exemption from its own negligence. If not so intended, it was calculated to so impress the mind of the ordinary passenger.

**8. APPEAL AND ERROR—REVIEW—PRESUMPTION IN FAVOR OF VERDICT.**

The court will sustain in favor of a verdict every inference of fact that can be deduced from the evidence, when considered in the light most favorable to the contention of the winning party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

(Official.)

On Motion from Supreme Judicial Court, Sagadahoc County.

Action on the case by Clara W. Cameron against the Lewiston, Brunswick & Bath Street Railway. Verdict for plaintiff, and defendant moves to set the same aside. Motion overruled.

Action on the case brought by the plaintiff as administratrix of the estate of her husband, Lewis Cameron, to recover damages sustained by her said husband while a passenger on one of the defendant's street cars on lower Washington street, Bath, caused by the alleged negligence of the defendant, and which said injuries subsequently resulted in the death of the plaintiff's intestate. Plea the general issue.

The declaration in the plaintiff's writ was as follows:

"In a plea of the case, for that the defendant is, and on the 3d day of July, 1906, was, a corporation owning and operating a street railway in said Bath, and using in its business cars driven by electricity, by the trolley system, through a street, in said Bath, known as lower Washington street. And said intestate on said 3d day of July, 1906, was a passenger on one of the defendant's open cars, then running on said street in a northerly direction, and was lawfully standing on and moving along the running board of said car, and while he was so standing and moving, and when said car was passing a certain trolley pole, near Weeks street, which was then and there supporting the defendant's trolleywire, and slanting towards the defendant's track, and situated in such close and dangerous proximity to said track, that there was no room for a person, though in the exercise of due care, to stand between said car and said pole without being struck by the latter, said intestate, who was in the exercise of due care and caution, was violently struck by said pole, and thrown to the ground, and solely as a result of the injuries he thus sustained he thereafter suffered great pain, was put to great expense for medical care and treatment, and on the 15th day of July, 1906, he died. The plaintiff further avers that said car was not then furnished with a guard rail on the side of said pole, or any other shield or protection between the passenger on said car and said pole, and that said injury to said intestate and his subsequent suffering and death, and the expense incurred as aforesaid were caused solely by the negligence of the defendant in maintaining its said track, and in running its said car in dangerous proximity to said pole, as aforesaid, and without the protection which would have been afforded by a guard rail or other shield, and were in no respect due to any negligence or want of care of said intestate, all of which suffering and expense were to the damage of said intestate, in his lifetime, in the sum of \$10,000, which sum the defendant has never paid to said intestate or to the plaintiff since his decease, and which shall then and there be made to appear with other due damages."

Tried at the August term, 1907, of the Supreme Judicial Court, Sagadahoc county. Verdict for plaintiff for \$2,875. The defendant then filed a general motion to have the verdict set aside.

The case appears in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and KING, JJ.

Barret Potter and A. N. Williams, for plaintiff. W. H. Newell, for defendant.

SPEAR, J. This case involves an action for damages by the plaintiff, as administratrix, for injuries received by her husband while riding as a passenger upon the defend-

ant's car on lower Washington street, in the city of Bath, alleged to have been caused by the defendant's negligence.

The facts show that the plaintiff's intestate boarded an open car going northerly toward Bath in the early evening. At first he sat upon one of the rear seats. He sat for a minute or so. Then, while the car was in motion, stepped to the running board on the pole side of the car for the apparent purpose of taking a seat nearer the front. In so doing he was struck by a trolley pole, and was so injured by the impact that he died in 11 days. The seating capacity of the car was 72. There were upon it from 16 to 20 passengers. The side of the pole toward the track was 30 $\frac{1}{4}$  inches from the east rail at the ground. It leaned toward the track so that 6 feet up it was 28 $\frac{3}{4}$  inches to a point vertically above the east side of the east rail; that is, the pole leaned 2 inches in 6 feet. The car was 7 feet 9 inches wide, the running board 8 $\frac{1}{2}$  inches wide, 16 $\frac{1}{4}$  inches from the ground, and 16 inches below the floor of the car. It was 3 $\frac{1}{2}$  inches from the running board to the pole. At a distance of 5 $\frac{1}{2}$  feet above the running board it was 8 $\frac{1}{2}$  inches from the grab handle to the pole. As the handle projected outward from the side of the car 3 $\frac{1}{2}$  inches, it was exactly one foot from the side of the car between the grab handles and the pole, 5 $\frac{1}{2}$  feet above the running board. The decedent was about 5 $\frac{1}{2}$  feet in height and weighed about 160 pounds. The car was going at a reasonable rate of speed. The track is laid on the easterly side of the street; the highway travel being westerly of the track.

The deceased was a spar manufacturer with his place of business on the same side of the street as the track. His residence where he had lived four or five years prior to the accident was on the same side of the street, and both were a short distance only from the trolley pole by which he was injured. He frequently rode past it on the car to the city.

There is so little conflict between the testimony of the plaintiff and the defendant with respect to the above statement of facts that, for the purposes of consideration in this case, they may be regarded as undisputed. In favor of a verdict, the court will sustain every inference of fact that can be deduced from the evidence, when considered in the light most favorable to the contention of the winning party.

Therefore, in addition to the conceded facts, the jury were also authorized to find from the evidence that the plaintiff's intestate in attempting to move from one seat in the car to another was standing erect upon the running board when struck by the pole, and, in all other respects, in the exercise of due care, if the act itself, however carefully performed, was not negligence, per se; that at the height of a man's head and shoulders above the running board the distance was only 8 $\frac{1}{2}$  inches

between the grab handles and the pole, or one foot between the side of the car and the pole; that while the car was passing that pole a man of ordinary size, or even less, standing on the running board and facing the direction in which the car was going, could not, however closely he clung to the side of the car, avoid a collision with the pole; that the defendant at the time did not give any notice to the occupants of the car, and that it had never given any notice, of the proximity of the pole to the car, and that it appeared to have been the only pole in that vicinity that was dangerous to a man standing on the running board of an ordinary car; that, while the plaintiff had general knowledge that there was a line of poles along the east side of the track, he had no specific knowledge of the proximity of the particular pole by which he was injured.

It also appeared that upon the back of each seat, in legible letters plainly to be seen, were the words: "Avoid accidents. Wait until the car stops."

The defendant also put in evidence as a part of its case the charter of the railroad company and the records of the city of Bath tending to show a legal location of the railroad, and particularly the legal location of the track and poles, including the pole upon which the plaintiff was injured, on the east side of Washington street where the accident occurred. For the purposes of this case a legal location may be conceded.

Under this evidence three questions were submitted to the jury. (1) Was the defendant negligent? (2) Was the plaintiff's intestate guilty of contributory negligence? (3) The assessment of damages. It is admitted that the amount of damages, if maintainable, is reasonable. No further allusion, therefore, will be made to the question of damages. The jury found upon the other questions that the defendant was guilty of negligence, and that the decedent was not guilty of contributory negligence, or, affirmatively stated, was in the exercise of due care.

(1) Was the defendant negligent?

The ground upon which the defendant claims exemption, as we understand it, is that it had a right to maintain a pole as near to its track or car as it pleased, provided it did not come in contact with passengers occupying seats in the car, or with those riding elsewhere, with the permission of the company. In other words, that the plaintiff had no right to move from seat to seat as he was attempting to do, and that consequently they owed no duty to him while so doing. This must necessarily be the defendant's position, as it requires no argument to demonstrate that it was not authorized to maintain a pole in such a position as to injure a passenger in any situation upon the car where he had a right to be. If the plaintiff had no right to be upon the running board, the defendant was not negligent. If he did have a right to be there, then it is a question of fact for the

jury to say whether he exercised that right in a prudent or negligent manner. As the negligence of the defendant depends upon the duty owed to the plaintiff, it is evident that these two questions must become more or less blended, even in an endeavor to discuss them separately.

We do not understand that the defendant seriously questions the propriety of the verdict if the facts conceded and inferred by the jury were sufficient to constitute the basis of a legal cause of action, but emphatically urges that the controlling fact in the case, that the decedent was voluntarily moving by way of the running board from one seat in the car to another, was evidence, *per se* of negligence—an act which the defendant could not be reasonably held to have anticipated—while the location and use of the pole upon which he was injured were facts which the decedent should be held to have anticipated, and that consequently the verdict of the jury, admitting all the facts to be true, was erroneous in law.

Of course, it follows, if the defendant owed no duty to a passenger upon one of its cars who attempted to move while the car was in motion from one seat to another by way of the running board, it was not guilty of negligence in setting or using a pole erected at any distance from the running board, however near. On the other hand, if the defendant did owe to a passenger upon its cars the duty of using poles erected at such a distance from the running board that a passenger, standing erect and otherwise in the exercise of due care, could pass from one seat in the car to another without danger of collision with the pole, then whether the defendant should be held to be negligent in using a pole thus located was a question of fact to be submitted to the jury.

It is too narrow a construction, and against good public policy, to hold that it is negligence *per se*, on the part of a passenger riding on a trolley car, not to anticipate that a pole may be permitted to stand so near the railroad track that he cannot in an erect position and careful manner pass from one seat in the car to another over the running board without danger of injury from collision with such pole.

The defendant is a public corporation. It receives all its privileges from the public. It depends upon the public for its income. It invites and induces the public to ride upon its cars. Great experience makes it familiar with the habits of people so riding and with their natural tendency, with or without reason, to move from seat to seat. With its special means of knowledge, it should be held to anticipate what is even a matter of common knowledge, that a passenger riding upon one of its cars may, at any place along the line and while the car is in motion, undertake to change his seat. Who has not done it? It establishes a safer rule of law to require street railroads to exercise a de-

gree of care sufficient for the protection of their passengers with respect to poles and other obstacles along their rights of way, when such protection involves only a question of pecuniary outlay, than to hold that such railroad may be permitted, for the mere purpose of saving expenditure, to continue the maintenance of a structure which may be calculated sooner or later to result in the injury or death of a passenger. When the facts disclose a situation, dangerous to life or limb, into which, from its very nature, it is practically certain even prudent men may be induced to enter, and it is practicable to remove such danger, without injuriously interfering with other rights or privileges, then the court should establish as the law the rule which prevents injury or loss of life, rather than that which invites or even permits it.

We believe it to be a better and safer rule in the case at bar to hold that the exercise of due care required that the defendant company should have moved the fatal pole in question such a distance from its track as would have enabled the decedent to have done just what he did do without injury, than to say that the defendant has a right to continue the pole as it was then located, and thereby subject its future passengers to the constant menace of injury or death.

Not only is this rule based upon reason and good public policy, but it is the well-settled law.

In *San Antonio v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, the plaintiff was on the running board moving toward a vacant seat. While crossing a bridge, the space between the bridge and the car not being sufficient to allow his body to pass, he was struck by the bridge and injured. This was held to constitute negligence on the part of the road.

In *Elliott v. Newport Street Railway Company*, 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208, the court held: "A passenger who rides on the foot board of a car necessarily takes on himself the duty of looking out for and protecting himself against the usual and obvious perils of riding there; such, for instance, as injury from passing vehicles, or of being thrown off by the swaying or jolting of the car, assuming, of course, proper management of the car and proper construction and condition of the road. We do not think, however, that the danger of being hit by a trolley pole is such a peril as a passenger whom the railroad company has undertaken to carry on the foot board of its car is bound to anticipate and be on the lookout for; unless, indeed, it appears that the passenger had knowledge of the close proximity of the track to the trolley pole. He has a right to assume that the railway company has performed its duty in so constructing its road that its passengers, even on the foot boards of its cars, riding there by its permission, shall not be exposed to injury by the unsafe construction of its road."

The facts in this case show that the plaintiff was riding on the foot board with the acquiescence of the company, the car being filled with passengers, but this fact does not distinguish it in principle from the case at bar. It is as much a matter of common knowledge that passengers, with the permission of the company, move from seat to seat while the cars are in motion, as that they ride upon the running board when the seats are full. A person standing upon the running board for the purpose of changing his seat is no more bound to anticipate the dangerous proximity of a pole to the car than a person riding on the running board because the seats are full. While different motives may prompt them to occupy the running board, the fact of occupancy, and all the dangers surrounding it, are precisely the same. Every reason which can be urged for anticipating danger in the one case obtains with equal force in the other.

In *North Chicago Ry. v. Williams*, 140 Ill. 275, 29 N. E. 872, the court say: "When a railroad company places its track so near an obstruction which it is necessary for its cars to pass that its passengers, in getting on and off its cars and while riding upon them, are in danger of being injured by contact with such obstruction, it is a fair question for the jury whether the company is or is not guilty of negligence."

In *Anderson v. Railway*, 42 Or. 505, 71 Pac. 659, the court say: "The authorities all agree that it is negligence for a street railway company to permit permanent obstructions to stand so near its tracks that passengers getting on and off its cars or riding thereon, are in danger of coming in contact therewith, and it is generally considered a question for the jury as to whether a given obstruction is so situated." This opinion cites numerous cases. To the same effect are *W. Chicago Railroad Co. v. Marks*, 182 Ill. 15, 55 N. E. 67, *Mason v. St. Railway*, 190 Mass. 255, 76 N. E. 717, *Nugent v. B., C. & M. Railroad*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151, *Withee v. Traction Co.*, 98 Me. 61, 56 Atl. 204, and *Stone v. Street Railway*, 99 Me. 243, 59 Atl. 56. While not in point, they have some bearing upon the principle here involved. Our conclusion upon this point is that street railways do owe their passengers a duty with respect to the proximity to the track of poles and other permanent structures, and that whether, in case of an injury to one of their passengers by coming in contact with a pole or other structure, the defendant was negligent in the location and maintenance thereof, is a question of fact for the jury.

While the defendants put in evidence all the records pertaining to its chartered rights, the location of its tracks and poles by the city, and approval of the same by the railroad commissioners, as an element of defense, it has laid but little stress upon these features in the argument; yet perhaps all

they would bear. All these proceedings, assuming them to be in all respects legal, were intended to bestow upon the defendant the right to exist, not to destroy. They were calculated to confer upon it the right to exercise all the privileges of its franchise, but not immunity from its negligence. They do not, therefore, exempt it from the consequences of its negligent acts.

The verdict of the jury upon the question of the defendant's negligence was fully warranted by the evidence and clearly right.

(2) Was the plaintiff's intestate guilty of contributory negligence? We have already stated the facts and inferences from the facts authorized to be found by the jury, and held as a matter of law that it was not negligence per se for the decedent to have attempted to move from one seat to another as he did when he was injured. The only question of fact, therefore, left for discussion, is whether the evidence warranted the finding that the decedent while in the attempted act of moving was in the exercise of due care. We have already suggested that the jury were authorized to infer from the evidence "that the plaintiff's intestate in attempting to move from one seat in the car to another was standing erect upon the running board when struck by the pole and in all other respects in the exercise of due care." The only explanation which need be here added is that the phrase, "and in all other respects in the exercise of due care," is intended to mean that the accident producing the decedent's injuries was not due to any of the ordinary risks assumed by a passenger who undertakes to ride upon the running board of a trolley car, such as the meeting of other vehicles, the jolting and jostling of the car, or the sudden rounding of a curve, and that he was not swinging himself out from the car in such a manner that the unnecessary swerving of his head and body to accomplish his purpose contributed to the accident.

The defendant, however, contends that, admitting all the facts and inferences found by the jury to be true, yet the decedent was guilty in law of negligence per se in standing upon the running board as the evidence shows he did. As to what constitutes contributory negligence, there are two broad classes of cases promulgated by the courts of this country, one holding that electric railroads should be governed by the rules of law applied to the operation of horse railroads, the other that they should come within the analogy of steam railroads. In the latter class it is held to be negligence per se to ride upon the platform or running board of a moving car, but in the former class it is otherwise; and the question of negligence is regarded as a question of fact. Several states in the Union hold electric roads to the analogy of the steam roads, but a large majority of the states, including Maine, have established the other rule. This question was specifically raised in *Watson v. Portland &*

Cape Elizabeth Ry. Co., 91 Me. 584, 40 Atl. 609, 44 L. R. A. 157, 64 Am. St. Rep. 268. In this case the passenger was voluntarily riding upon the front platform of the car. The car was rounding a sharp curve approaching a switch with such speed that the motorman was unable to see whether it was properly set or not, and, the switch being open, the car was propelled so rapidly on the siding as to cause violent jarring and jolting. The justice in ordering a nonsuit said to the jury: "It is settled as a legal question that one who rides upon the platform of a car, and is injured by being thrown from it as the car rounds a curve, is guilty of contributory negligence." In other words, that the mere fact of voluntarily riding upon the front platform of a car constituted negligence per se. But the court held otherwise, saying: "In our opinion this was not a correct statement of law when applied to a street railroad car, whether propelled by horses, electricity, or otherwise. Riding upon the platform of such cars is too much encouraged by transportation companies and too much indulged in by the public for the court to say as a matter of law that the mere riding upon the platform of such a car is conclusive evidence of negligence, or is negligence per se, or is negligence in law. It depends upon too many other circumstances and conditions for a court to lay down any hard and fast rule in regard to it; but it is a fact which should ordinarily be submitted to the jury in connection with all of the other circumstances of the case."

The principle enunciated in this case and the reasons therefor are as clearly applicable to the situation of a passenger riding upon the running board as to one riding upon the platform.

In *San Antonio Traction Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, the Maine rule is applied to the running board, and the court say: "It is not negligence per se to stand upon the platform, steps, or running board of an electric street car which is crowded; and the weight of authority supports the rule that it is not contributory negligence as a matter of law for a passenger to stand upon the platform of a car or running board, whether there be vacant seats or not in the inside of the car, and, whether the passenger be standing on the platform, running board, or steps, the question of contributory negligence is held to be in a majority of cases, for the jury to determine." See, also, *Ft. Wayne Traction Co. v. Hardendrof*, 164 Ind. 403, 72 N. E. 593; *Joyce on Electric Law*, § 540; 3 *Thompson on Negligence*, §§ 3572-3577. The last two authorities are precisely in point.

It is not the result of the Maine rule that a passenger assumes no risk by riding on the platform or running board of a moving car, for it is well-settled law that he must assume all the usual and obvious perils attendant upon his position. It simply declares

that the question of a passenger's negligence and assumption of risks, while riding upon the platform or running board of a street car, shall be submitted to the jury as a question of fact.

Another defense suggested is that the plaintiff's intestate must have had knowledge of the proximity to the track of the pole upon which he was injured, or by the exercise of due care ought to have known it. This would undoubtedly afford a good defense, if established; but it was a question for the jury (*Withee v. Traction Co.*, 98 Me. 61, 66 Atl. 204), and upon this proposition the jury found in favor of the plaintiff. Upon this contention we find no adequate reason for disturbing the verdict. It may be conceded that the decedent had a general knowledge that the poles in the vicinity where he was injured were near the track, but such knowledge, unless he knew they were near enough to be dangerous to one standing on the running board with due care, would not charge him with contributory negligence. *Withee v. Traction Co.*, supra; *Nugent v. B. & M. Railroad*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 161; *Powers v. Boston*, 154 Mass. 60, 27 N. E. 995; *Ferren v. Old Colony Railroad Co.*, 143 Mass. 197, 9 N. E. 608; *Wheeler v. Company*, 70 N. J. Law, 725, 58 Atl. 927; 3 *Street Railway Reports*, 631; *Hesse v. Company*, 75 Conn. 571, 54 Atl. 299.

The only other defense interposed is that upon the back of each seat was plainly and legibly written the words, "Avoid accidents. Wait until the car stops," which the defendant claims the plaintiff must have seen, and was therefore direct notice to him not to occupy the running board while the car was in motion, and that, if he did so, he assumed the risk of whatever might happen, and was also guilty of contributory negligence in doing a forbidden act. While the evidence in the case might have justified the jury in finding a waiver of the notice, if construed as the defendant contends, yet it is unnecessary to consider this question, as the notice will not bear the construction urged. This notice must be construed to have been intended by the defendant as a caution to passengers against alighting from a car in motion and not as an exemption from its own negligence. If not so intended, it was calculated to so impress the mind of the ordinary passenger.

An allusion to the reason for the notice seems to determine its purpose. One can move about upon the surface of a moving body, subject only to those dangers incident to the motion. But it is a universal law that, if a person alights from a moving vehicle, he is subject to the inevitable tendency of being hurled to the ground in the direction of the motion. Jumping from moving cars, with frequent injury, always has been, and is now, a practice of such common occurrence that the notice upon the back of the seats was undoubtedly intended to operate as a check upon the natural inclination of



passengers to alight from a car before it stops when approaching a stopping place.

Motion overruled.

(104 Me. 33)

**MCCLEERY v. LEWIS.**

(Supreme Judicial Court of Maine. Feb. 26, 1903.)

**1. EVIDENCE — DOCUMENTARY — RECORDS OF CONVEYANCES.**

In an action involving the title to real estate, the record, in the registry of deeds, of what purports to be a deed of conveyance of the land is no evidence that such a deed was, in fact, executed and delivered, when the party offering such record claims as the grantee, or as heir of the grantee named in the record. The statute (Rev. St. c. 84, § 125) making such records evidence does not include cases where the party offering the record claims as the grantee, or as heir of the grantee, in such deeds.

**2. SAME—ANCIENT DEEDS.**

The rule that deeds shown to be 30 years old or more may be received in evidence, without proof of execution, applies only to original deeds, not to copies, nor records of such deeds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence; § 1625.]

**3. SAME.**

The rule that copies of records of deeds may be received in evidence when the originals are lost applies only to cases where it is made to appear aliunde that there was, in fact, an original deed executed and delivered.

**4. SAME.**

As the law is to-day in this state, grantees in deeds, and their heirs, cannot depend upon the record of deeds direct to them. If unable to produce the deed itself, they must produce evidence, aliunde the record, that such a deed was, in fact, executed and delivered.

**5. PROPERTY—EVIDENCE OF TITLE.**

The mere fact that a person is occupying a parcel of land is not evidence that he is claiming title under any particular deed.

(Official.)

Exceptions from Supreme Judicial Court, Franklin County.

Real action by Eliza A. McCleery against Woodard Lewis. Verdict for plaintiff, and defendant excepts. Exceptions sustained.

Real action brought by the plaintiff, to recover one-half part in common and undivided of certain real estate in New Vineyard, Franklin county, from the defendant, who was the co-tenant thereof, together with the sum of \$300 for rents and profits during the six years preceding the date of the writ. Plea, the general issue, with brief statement as follows: "And for brief statement of special matter of defense the defendant says: 'That he does not admit any title in the plaintiff to the premises set forth in the plaintiff's writ and declaration, nor that the plaintiff ever obtained title to the same, nor that the said plaintiff ever held title to the same, or any part thereof; and, if she did hold a deed thereof, the defendant calls for proof of the same and of the execution thereof.' The defendant also filed a claim under the statute for betterments."

The plaintiff claimed title under a supposed deed, dated October 27, 1855, and duly

recorded in the Franklin county registry of deeds, Book 32, p. 167, given by one Joshua Miller, purporting to convey to Rispah Hewey, the mother of the plaintiff, a life estate in the premises, with remainder to the plaintiff and others. Rispah Hewey died several years before the commencement of the plaintiff's action.

The plaintiff was not able to produce the original deed, if any such ever existed, neither was she able to produce any witness that ever saw such a deed or ever heard such an one read. Rev. St. c. 84, § 125, reads as follows:

"In all actions touching the reality, or in which the title to real estate is material to the issue, and where original deeds would be admissible, attested copies of such deeds from the registry may be used in evidence, without proof of their execution, when the party offering such copy is not a grantee in the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs." In accordance with the provisions of this statute the plaintiff then produced an attested copy of the supposed deed from Joshua Miller, and offered the same in evidence. When the copy was offered, the following conversation between the presiding justice and counsel was had:

"Mr. Holman: I now offer a quitclaim deed from Joshua Miller to Rispah Hewey, Eliza Hewey (the plaintiff), Woodard Lewis, and Thomas Lewis.

"The Court: That is a copy, I suppose.

"Mr. Holman: Yes, a certified copy from the record.

"Mr. Butler: I object.

"Mr. Holman: It is dated the 27th day of October, 1855.

"Mr. Butler: I object.

"The Court: I will hear you on that proposition.

"Mr. Butler: My objection is, your Honor, that in all cases, both under the statute and rules of court, that where the party claims under an original deed, or as the heir of a grantee in an original deed, that before an office copy is admissible that plaintiff must prove the execution and genuineness of the original deed, and that the same has been lost, and that he or she has used every reasonable effort to produce it.

"Mr. Holman: My reply to that is that this deed was given in 1855, a good many years ago. The witnesses, as far as we know, are all dead, and one of them we know is dead, and it wasn't executed here, hence it becomes an ancient deed. We have proved the death of the party under whom we claim. We have been to the expense to see every one of her children, and talk with them, and brought them here to court. I have done everything I know how to do. It is entirely impossible for me to prove the deed any more than it is now. I don't know any imaginable way. I have tried to think of every way pos-

sible to prove the deed further than what I have done, and I don't know how I can do it any more.

"The Court: Have you investigated, Mr. Holman, to see whether the witnesses were dead, or the magistrate was alive or dead?

"Mr. Holman: Yes, we have, every one of them. Plamentine Daggett was one of the witnesses, and died a great many years ago, and the deed was executed in Penobscot county. I know nothing about that. The deed was executed 52 years ago. As I understand the law, the presumption is that a man—the average man, 30 years of age—when he would be old enough to execute a deed, that he would be very aged, and as I understood the authorities, and I have looked them up carefully in that respect in my office, and my judgment was that I didn't have to go so far as that on so ancient a deed.

"The Court: You don't produce an ancient deed.

"Mr. Holman: The record of it.

"The Court: It is a copy of what may have been an ancient deed, or would be if it was found.

"Mr. Holman: Mr. Daggett was one of the witnesses. We can show he has been dead a great many years.

"The Court: Let's see your copy. How about George W. Whitney? Oh, that is the justice.

"Mr. Holman: We don't know anything about him. He must be over 80 years of age, if living, and probably was dead years ago, and my woman was poor, and I didn't feel like going to the expense, and didn't think it would be necessary.

"The Court: Of course an ancient deed, if you have shown it is in existence, and the parties purporting to have executed it as parties, or attested it as witnesses, are not producible, the deed *prima facie* proves itself. That is, the very fact of its ancientness. But you don't produce it. You only produce what purports to be an office copy.

"Mr. Holman: I gave them notice to produce the deed, and have shown that the deed went into the hands and possession of Mr. Woodard Lewis.

"Mr. Butler: This deed never went into his hands, and he has never seen it.

"Mr. Holman: It hasn't been testified to.

"Mr. Butler: I can put him on the stand.

"The Court: It presents a rather curious phase. It affords pretty strong moral proof that there is a deed—the fact of finding it on record.

"Mr. Holman: The deed was recorded, as I remember, about the time it was executed.

"The Court: Well, the parties are all here, and there are other issues which may have to be tried out some time. I think I will admit the deed subject to exception, and then you can try out the other issues, and the whole matter can be heard at once, if it has

to be. However, I frankly say to you I think there is some doubt about it."

After the foregoing copy of the deed had been admitted for the purposes as expressed by the presiding justice, the plaintiff abandoned all claim for rents and profits, and the defendant abandoned all claim for betterments, and the jury returned a general verdict for the plaintiff. The defendant excepted to the ruling, admitting the copy of the supposed deed.

The case appears in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, STROUT, SPEAR, and CORNISH, JJ.

Joseph C. Holman, for plaintiff. Frank W. Butler, for defendant.

EMERY, C. J. This was a real action. The plaintiff claimed, and sought to prove, title only under a deed of conveyance, which she claimed was executed and delivered to her mother in 1855, and conveying a life estate to her mother, with remainder to herself. The mother was deceased.

The essential proposition of fact to be proved by the plaintiff was that such a deed had been, in fact, executed and delivered. She was not able to produce any witness that ever saw such a deed, or ever heard such an one read. She did, however, produce an office copy of what purported to be the record of such a deed in the proper registry of deeds, and offered it as admissible evidence that an original deed corresponding to the record had been executed and delivered prior to the date of the record.

We are constrained to hold that, by the settled law of this state, neither the copy of the record, nor the record itself, is admissible evidence to prove the existence of an original; the plaintiff being a grantee in the supposed deed. The statute (Rev. St. c. 84, § 125) authorizing the use of records, and copies of records, of deeds as evidence of the existence, execution, and delivery of originals only applies to deeds prior to that in which the party is the grantee or heir of a grantee. It does not include the deed produced by the plaintiff. *Elwell v. Cunningham*, 74 Me. 127; *Webber v. Stratton*, 89 Me. 379, 36 Atl. 614.

The plaintiff urges that the age of the record, an age of more than half a century, together with the fact that her mother occupied the land for a time after the date of the record, creates a presumption that there was, in fact, an original of the record duly executed and delivered. It is true that when a document, apparently an original deed, and shown to be 30 years old or more, is produced, it may be received in evidence without other proof of execution. But this presumption of due execution applies only to originals, not to copies. Further, the mere fact that the mother occupied the land, there being no evidence that her occupation was under any claim of title, creates no legal pre-

sumption that her occupation was under any particular deed. If neither the copy nor the occupation creates any presumption, both together cannot. Zero plus zero is still zero. In *Elwell v. Cunningham*, 74 Me. 127, the record was nearly 75 years old, yet the court held it was not evidence of the execution and delivery of an original.

The plaintiff's counsel cites several cases, to the effect that an office copy of a deed is admissible in evidence, upon proof that the original is destroyed or lost, or is in the possession of the opposite party, who will not produce it. In those cases there was evidence allunde that an original had been executed and delivered. In this case there is no such evidence. This circumstance shows the inapplicability of the cases cited.

As the law is to-day in this state, grantees in deeds, and their heirs, cannot depend upon the record of deeds direct to them. If unable to produce the original deed, they must produce evidence allunde the record that there was in fact such a deed executed and delivered. The pro forma ruling admitting the copy in this case must be reversed.

Exceptions sustained.

(76 N. H. 27)

STATE v. PEOPLE'S NAT. BANK. SAME  
v. CLAREMONT NAT. BANK. SAME  
v. KEENE NAT. BANK.

(Supreme Court of New Hampshire. Sullivan.  
June 27, 1908.)

**1. BANKS AND BANKING—NATIONAL BANKS—SAVINGS BANKS—RELATION TOWARD DEPOSITORS.**

A national bank is not a savings bank, and it cannot transact the same kind of business that a savings bank is incorporated to do, and, though a national bank has a savings department, it does not receive deposits to be invested in specified securities under the supervision of the bank commissioners, and it does not hold the deposits on a trust creating the relation of trustee and cestui que trust, but on a contract creating the relation of debtor and creditor.

**2. STATUTES — CONSTRUCTION — LEGISLATIVE INTENT.**

The fact that a clause in a statute will, if literally construed, become absurd, makes it necessary to seek the legislative intention embodied in the words used by adopting a more liberal interpretation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 261.]

**3. BANKS AND BANKING—SAVINGS BANKS—RELATION BETWEEN BANK AND DEPOSITORS.**

The depositors in a savings bank do not personally loan the money deposited, but intrust it to the bank as their trustee to be kept, invested, managed, and paid out, according to the provisions of the charter and by-laws of the bank, and where there is a loss they share it according to the amount of their deposits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 1157.]

**4. SAME—NATIONAL BANKS.**

A national bank receiving money from depositors for investment, under an agreement to pay a fixed rate of interest thereon, is a debtor to the depositors for the deposits and interest, for the interest agreed to be paid on the money received is not in the nature of a dividend of

profits realized from the successful management of the bank, but the depositors' security depends on the general solvency of the bank.

**5. CONSTITUTIONAL LAW—VALIDITY OF STATUTES—CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY.**

The fact that Laws 1907, p. 111, c. 112, prohibiting the use of the name "savings bank" except in specified cases, etc., would be unconstitutional as violating Bill of Rights, art. 2, if construed to interfere with and abridge the freedom of contract by individuals receiving money from other individuals on a contract to repay it with interest at a stipulated rate, is strong evidence that the Legislature in enacting it did not have that intention with reference to individuals, and, if not with reference to them, the inference is strong that the same language is not intended to have a different meaning when applied to corporations also mentioned in the act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 46.]

**6. STATUTES — CONSTRUCTION — INTENTION OF LEGISLATURE.**

All parts of a statute must be considered together, and such construction given to it as will best answer the intention of the Legislature, and to accomplish this object the letter of the statute may be restrained by an equitable construction, or enlarged, and sometimes the construction may be even contrary to the letter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 260, 261, 282.]

**7. BANKS AND BANKING—SAVINGS BANK—STATUTES—CONSTRUCTION.**

The purpose of Laws 1907, p. 111, c. 112, providing that no person, corporation, or association, except savings banks incorporated in the state, etc., shall make use of words indicating that a place of business is the office of a savings bank, nor make use of any printed or written matter having words indicating that a business is the business of a savings bank, nor receive deposits and transact business in the manner of a savings bank, etc., is to prevent the obtaining of the money of depositors on a false representation that the party receiving it is authorized to do and is doing a business like that of a savings bank, and the act does not interfere with the general business of investment by banking institutions of deposits received from their customers on which they agree to pay interest, and the act, so construed, is intended to apply to and includes national banks.

**8. CRIMINAL LAW—REVIEW—DETERMINATION—AFFIRMANCE—DECISION PRO FORMA.**

The Supreme Court, on exceptions to the overruling of a demurrer to an information charging a national bank with violating Laws 1907, p. 111, c. 112, prohibiting any association except savings banks incorporated in the state from using words indicating that its place of business is the business of a savings bank, etc., raising the question whether the Legislature has the power to legislate on the subject with reference to national banks, will overrule the exception in order that an opportunity may be afforded for an authoritative decision on the question by the federal courts if the case is not otherwise disposed of at the trial.

Transferred from Superior Court.

Informations by the state charging the People's National Bank, the Claremont National Bank, and the Keene National Bank with violating Laws 1907, p. 111, c. 112. The demurrers to the informations on the ground that the statute did not apply to national banks were overruled, subject to exception, and each bank filed an answer to which the state demurred, and the demurrers were sustained,

and defendants excepted. Exception to the orders overruling the demurrers to the informations overruled, and exception to the orders sustaining demurrers to the answers sustained.

Informations alleging that the defendants are violating the provisions of chapter 112, p. 111, Laws 1907. Transferred from the November term, 1907, of the superior court, by Chamberlin, J. The cases are substantially alike, and the facts stated in the first case may be deemed to apply to the others. The defendant's demurrer to the information, on the ground that the statute did not apply to national banks, was overruled, subject to exception. Thereupon the bank filed an answer, alleging as follows: "The defendant says: That it is a national banking association, duly organized and established under the laws of the United States. \* \* \* That its place of business is in Claremont. \* \* \* That in the conduct of its lawful business it did," on November 1, 1907, "receive deposits of money upon which it agreed to pay interest to the depositors. That upon receiving said deposits, it issued to each depositor a pass book, bearing upon its cover the following words: 'Interest-bearing deposits People's National Bank, Claremont, N. H.' In account with John Doe.' That said book contained, among others, the following regulations: '(1) Deposits or withdrawals may be made at any time. (2) Interest at the rate of 3 per cent. per annum will be credited to depositors January 1st and July 1st, and this interest will be at once added to the principal, and will draw interest same as other deposits; the interest thus being compounded twice a year. \* \* \* (9) The bank shall have the right to return any or all deposits in whole or in part, or to decline to receive deposits in its savings department, whenever it may deem proper.' That the form suggested in said book for the withdrawal of money upon an order contains the following words: 'People's National Bank, interest-bearing deposits.' That on said 1st day of November, 1907, it caused to be printed in the National Eagle, a newspaper published and circulated in said Claremont, an advertisement containing the following words: 'A general banking business transacted. Three per cent. interest on all time deposits.' And the defendant, further answering, denies each and every allegation in said information, except as the same are herein admitted, and says that the business transacted as above set forth in this answer was done in accordance with and under authority of the laws of the United States, \* \* \* and specifically denies that its said business carried on as aforesaid was in violation of any valid law or statute of the state of New Hampshire." To this answer the state demurred. The demurrer was sustained, and the defendant excepted.

Edwin G. Eastman, Atty. Gen., for the State. Streeter & Hollis, for defendants.

WALKER, J. The statute (Laws 1907, p. 111, c. 112) under which the prosecution was brought is as follows:

"Section 1. The words savings bank as used in this act shall include only institutions for savings incorporated as such in this state.

"Sec. 2. No person, copartnership, incorporation, or association, except savings banks incorporated in this state, and trust companies, loan and trust companies, loan and banking companies thereto empowered by their charters granted by this state, shall hereafter make use of any sign at the place where its business is transacted having thereon any name, or other word or words indicating that such place or office is the place or office of a savings bank. Nor shall such corporation, person, copartnership or association make use of or circulate any written or printed or partly written and partly printed paper whatever, having thereon any name, or other word or words, indicating that such business is the business of a savings bank; nor shall any such person, copartnership, association, or incorporation receive deposits and transact business in the way or manner of a savings bank, or in such a way or manner as to lead the public to believe, or, in the opinion of the bank commissioners, might lead the public to believe, that its business is that of a savings bank.

"Sec. 3. The bank commissioners shall have the authority to examine the accounts, books, and papers of any corporation, person, copartnership, or association which makes a business of receiving money on deposit, in order to ascertain whether such person, copartnership, corporation, or association has violated any provision of this act; and any person, copartnership, incorporation, or association violating any provision of this act shall forfeit to this state one hundred dollars a day for every day or part thereof during which such violation continues. Any violation of the provisions of this act shall forthwith be reported by the bank commissioners to the Attorney General. The said forfeiture may be recovered by an information or other appropriate proceeding brought in the superior court in the name of the Attorney General. Upon such information or other proceeding the court may issue an injunction restraining such person, copartnership, incorporation, or association from further prosecution of its business within this state during the pendency of such proceeding or for all time, and may make such other order or decree as equity and justice may require."

It is claimed that the statute prohibits the defendants from doing the kind of business partially described in the answers, because, it is urged, they "receive deposits and transact business in the way or manner of a savings bank." This contention makes it necessary to give a construction to the language of the statute. Evidently, the phrase quoted cannot be given a literal meaning. As a national bank is not a savings bank, it cannot

transact the same kind of business that a savings bank is incorporated to do. If it has a savings department, it does not receive deposits to be invested in specified securities under the supervision of the bank commissioners. It does not hold the deposits upon a trust creating the relation of trustee and cestui que trust, but upon a contract creating the relation of debtor and creditor. "Although a bank may be called a savings bank, if it is really a stockholders' bank, where the capital is owned by the shareholders, the name will amount to nothing (unless it produces actual harm to a depositor by misleading him without his fault), and in such a bank a deposit creates the relation of debtor and creditor, and the depositor has no lien or trust in the bonds in which the money he deposits is invested, as is the case in a savings bank, even though the bank officers promise to hold the bonds for his benefit. Such a lien can only be created by mortgage or pledge." 2 Morse, Banks, § 618. To give this clause a literal meaning would make it inoperative and senseless, and the fact that it would thus become absurd makes it necessary to seek the legislative intention embodied in the words used, by adopting a more liberal interpretation.

The claim of the state is that this language was inserted in the statute to prevent corporations, not specially authorized by the Legislature, from doing a savings bank business or an investment business substantially similar to the business of a savings bank, and that the receiving of money by a national bank from its customers for investment, upon which it agrees to pay them a certain rate of interest, is the doing of a savings business which the Legislature intended to prohibit. This argument obviously can only be supported by a finding that the Legislature intended to prevent the customers of a national bank from loaning their money to the bank under contracts creating the relation of debtor and creditor. In a general sense, it may be true that the bank in such a case receives deposits for investment upon which the depositors receive interest, and that the business thus done is practically in many respects a savings bank business. *Mitchell v. Beckman*, 64 Cal. 117, 122, 28 Pac. 110. The depositors in a savings bank "do not personally loan the money deposited, but intrust it to the bank, as their trustee or agent, to be kept, invested, managed, and paid out, according to the provisions of the charter and by-laws of the institution. If there is a profit, they receive it; if there is a loss, they share it according to the amount of their deposits." *Hall v. Paris*, 59 N. H. 71, 73; *Cogswell v. Bank*, 59 N. H. 43; *Bank Commissioners v. Banking Co.*, 74 N. H. 292, 67 Atl. 583; *Mann v. State Treasurer*, 74 N. H. 345, 347, 348, 68 Atl. 130. But such does not appear to be the effect of the investment business undertaken by the defendants. The contracts with their depositors, as set up in

the answers and admitted by the demurrers, provide for the receipt of deposits of money upon which each bank agrees to pay interest to the depositors at a certain rate per cent. The interest received by the depositors is not in a legal sense dependent upon the success of the banks in making paying investments. So far as appears, the banks are bound to pay the stipulated interest, as well as the amounts of the so-called deposits, as legal debts which they owe to the patrons of their savings departments. The relation created is that of debtor and creditor, not that of a trust or bailment. The interest agreed to be paid on the money received in this way by the bank is not in the nature of a dividend of profits realized from the successful management of a savings bank. The depositors' security, as a matter of law, does not depend upon the character of the investments made by the bank, but upon the general solvency of the institution. The defendants therefore are not doing a savings bank business, unless every person who receives his neighbors' money upon a contract to repay it with interest at a stipulated rate can be deemed to be engaged in business of that character within the meaning of the statute in question, for the statute includes persons as well as corporations. That the statute was intended to have that effect, and to seriously interfere with and abridge the freedom of contract in this respect, is a proposition that cannot be seriously entertained, in view of "the natural, essential, and inherent rights," which "all men" have, of "acquiring, possessing, and protecting property." Bill of Rights, art. 2; *State v. Ramseyer*, 73 N. H. 31, 32-34, 58 Atl. 958. If such an intention might be found from the words of the statute, the unconstitutional effect of it would be strong evidence tending to show that the Legislature in enacting it did not have that intention with reference to natural persons; and, if not with reference to them, the inference would be that the same language was not intended to have a different meaning when applied to corporations.

The position of the state is an apt illustration of the construction of legislative language which disregards the general intent apparent from a consideration of the entire statute in its practical application. "It is a very familiar rule in the interpretation of statutes that all parts of the act must be considered together, and such construction given to it as will best answer the intention of the makers. To accomplish this object, in some cases the letter of the statute may be restrained by an equitable construction; in others, enlarged; and sometimes the construction may be even contrary to the letter." *Pierce v. Emery*, 32 N. H. 484, 508. "What is within the legally proved intention of the Legislature is within the statute, though not within the letter; and what is within the letter, but not within the intention, is not within the statute." Opinion of the Justices, 66 N.

H. 629, 655, 33 Atl. 1090; *Thompson v. Esty*, 69 N. H. 55, 75, 45 Atl. 566; *Stanyan v. Peterborough*, 69 N. H. 372, 373, 46 Atl. 181; *State v. Railroad*, 70 N. H. 421, 431, 48 Atl. 1103. Unless it was intended to create a monopoly in favor of savings banks and similar institutions, incorporated under the laws of this state, in the business of receiving money on contracts generally for investment and accumulation, no reason is apparent why legislation having that effect should have been deemed desirable. An examination of the statute reveals its controlling purpose to be the prevention of deception, fraud, and false representations by persons and corporations in assuming to invest funds deposited with or intrusted to them, under implied contracts giving the depositors the same advantages and protection afforded by savings banks under the laws of this state. No such person or corporation shall "make use of any sign at the place where its business is transacted having thereon any name, or other word or words, indicating that such place or office is the place or office of a savings bank"; nor shall it "make use of or circulate any written or printed or partly written and partly printed paper whatever, having thereon any name, or other word or words, indicating that such business is the business of a savings bank." It is also prohibited from transacting business "in such a way or manner as to lead the public to believe \* \* \* that its business is that of a savings bank." Section 1 provides that "the words savings bank as used in this act shall include only institutions for savings incorporated as such in this state." These provisions plainly show that it was the purpose of the Legislature to prevent the obtaining of the money of depositors upon a false representation that the party receiving it is authorized to do, and is doing, an investment business like that of a savings bank "incorporated as such in this state." In the provisions quoted no intention is expressed, and none can reasonably be inferred, that the general business of investment by banking institutions of deposits received from their customers, upon which they agree to pay interest, should be prohibited. Indeed, the natural inference is that the legality of such business was recognized, and that only the method by which it was done should be regulated and somewhat restricted in the interest of fair dealing. Such seems to be the general purpose of the statute, which is of much significance in ascertaining the meaning of special phrases. *Barker v. Warren*, 46 N. H. 124. And the provision that other persons or corporations shall not "transact business in the way or manner of a savings bank" must be construed in harmony with this general purpose. If the idea had been to prohibit the doing of a business substantially or practically similar to that of a locally incorporated savings bank, more fortunate language would doubtless have been used to express that idea. Circumlocution rendering careful

construction of language necessary is not ordinarily employed in penal statutes whose purpose is to prohibit the doing of specific acts. If the object is to make a certain act a crime, the prohibition would hardly be inferred from language limiting "the way or manner" of doing it. This particular phrase, when read in connection with the remaining language of the statute, and in view of the general purpose of the act, refers to the method of doing what may be termed a "savings bank business." It was intended to prohibit the adoption and use of methods of business so similar to those of local savings banks as to create the belief on the part of depositors that they were receiving the protective security which is afforded to depositors in savings banks chartered and controlled by the laws of this state. *People v. Trust Co.*, 130 N. Y. 185, 34 N. E. 898. If this construction renders the statute to some extent redundant, that not uncommon defect in legislative expression does not affect or change the evident intention of the Legislature found from a consideration of all the competent evidence.

That the statute, thus construed, was intended to apply to national banks, cannot admit of doubt. The language is amply sufficient to include such corporations, and there is little in the practical working of the act that shows it was not intended to have that effect. This result presents the question whether the Legislature had the power or jurisdiction to legislate on this subject with reference to national banks chartered under the federal law—a point raised by the demurrer to the information. As this is a question of much importance, and perhaps of considerable difficulty (*National Bank v. Commonwealth*, 9 Wall. [U. S.] 353, 19 L. Ed. 701; *McClellan v. Chipman*, 164 U. S. 347, 17 Sup. Ct. 85, 41 L. Ed. 461; *Easton v. Iowa*, 188 U. S. 220, 23 Sup. Ct. 288, 47 L. Ed. 452), it seems advisable, under the circumstances, to overrule the exception to the order of the court overruling the demurrer, in order that an opportunity may be afforded for an authoritative decision of the question by the federal courts, if the case is not otherwise disposed of at the trial. *State v. Collins*, 67 N. H. 540, 42 Atl. 51; *State v. Collins*, 70 N. H. 218, 45 Atl. 1080.

The exception to the order overruling the demurrer to the information is overruled, and the exception to the order sustaining the demurrer to the answer is sustained. All concurred.

(221 Pa. 142)

MANTZ v. KISTLER et al.

(Supreme Court of Pennsylvania. May 4, 1908.)

1. EXECUTION—SALE—PROPERTY SUBJECT.

A creditor can sell any title alleged to be in the debtor, leaving the purchaser to try the validity of it afterwards in ejectment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 76-87.]

## 2. SAME—INJUNCTION.

Defendant in execution cannot enjoin sheriff's sale of his property, on the ground that he is not the defendant, but that another person of a similar name is the defendant.

Appeal from Court of Common Pleas, Schuylkill County.

Bill by Francis K. Mantz against Charles S. Kistler and others. From a decree dissolving the preliminary injunction, plaintiff appeals. Affirmed.

The following is the opinion of Bechtel, P. J., in the court below:

"David Lorah et al. recovered a judgment against Francis Mantz et al. (to No. 318, September term, 1895), on March 28, 1907, for \$1,700. This judgment has since become the property of Charles S. Kistler, and an execution has been issued thereon. The sheriff, in attempting to collect the amount of his writ, levied upon the property of Francis K. Mantz, who came into court and filed his bill in equity to the above number and term and obtained a preliminary injunction to restrain further action as to his property. The ground of this action is that the plaintiff in this equity proceeding says: He is not the Francis Mantz who is a defendant in No. 318, September term, 1895, and consequently his property should not be made to answer for the above-mentioned debt. It is therefore, first, a question of identity, and, second, a question of remedy, under the contention of the defendant, as he denies the right of the plaintiff to the intervention of a court of equity. An answer has been filed, fairly raising these questions, and testimony has been taken. As this is a motion to continue an injunction, and the answer is a denial of the material allegations of the bill, the plaintiff has the laboring oar. The testimony submitted in his behalf shows that he is not the Francis Mantz, defendant in the judgment, as he contends, but the testimony of the defendant tends to contradict his evidence and tends to show the contrary. If the evidence of the defendants is to be accepted, then it rather convicts the plaintiff of the trespass which is the foundation of the judgment. A careful examination of all the evidence presented points out the existence of an honest disputed question of fact."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

R. H. Koch and E. O. Nothstein, for appellants. Guy E. Farquhar and J. W. Moyer, for appellee.

MITCHELL, C. J. The substantial fact on which this case turns is the identity of the complainant with the Francis Mantz who was a party defendant to the judgment sought to be enjoined. Presumably this is a question of fact for the decision of a jury. The practice in Pennsylvania is to allow a creditor to sell any title alleged to be in the debtor, and to try the validity of it afterwards in an ac-

tion of ejectment by the purchaser. Taylor's Appeal, 93 Pa. 21. It is not the best system, being a makeshift, in the absence of a court of chancery, for the administration of equitable principles under the forms furnished by the common law; but it is settled as the practice in this state, and in the present case it is not altogether inconvenient, and certainly not inadequate. The remedy in equity as administered in some jurisdictions, notably our neighboring state of New Jersey, is very much superior. There the rights of parties are fought out and adjusted in advance of a sale, so that every claimant or outside purchaser may bid at the sale with exact knowledge of what title will pass, and what disposition will be made of the proceeds; but the other practice has been long established here and is only departed from in very clear cases. Hunter's Appeal, 40 Pa. 194; Winch's Appeal, 61 Pa. 424; Kreamer v. Fleming, 200 Pa. 414, 50 Atl. 233.

In the present case the issue, as already said, is upon a single question of fact, the identity of the complainant, Francis K. Mantz, with the Francis Mantz, defendant in the judgment. It is an issue, *prima facie*, for the determination of a jury, and the inconvenience of postponing its decision until an ejectment after the sale is not great enough to bring the case within the exceptions to the general rule.

Decree affirmed.

(220 Pa. 621)

## BALLANTINE v. CUMMINGS et al.

(Supreme Court of Pennsylvania. April 20, 1908.)

## 1. "CONSPIRACY"—WHAT CONSTITUTES.

A "conspiracy" is a combination or agreement between two or more persons to do an unlawful thing, or to do a lawful thing in an unlawful manner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 1-5.

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

## 2. SAME—"CONSPIRACY TO DEFRAUD."

A "conspiracy to defraud" on the part of two or more persons means a common purpose supported by a concerted action to defraud, that each has the intent to do it, that it is common to each of them, and that each understands that the other has that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 12.]

## 3. SAME—EVIDENCE.

In trespass to recover because of an alleged conspiracy fraudulently and maliciously entered into to defraud the public in general and plaintiff in particular, plaintiff must show that such conspiracy was entered into in the first place and as a result thereof he was injured.

## 4. SAME.

A conspiracy may be established either by direct and positive testimony showing a collusive agreement to do an unlawful thing, or by acts and circumstances warranting an inference that the unlawful combination had been formed for the fraudulent purpose charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 26.]

## 5. SAME.

In an action for damages caused by an alleged fraudulent conspiracy, failure to prove the unlawful combination defeats the right to recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 2.]

## 6. SAME—CIRCUMSTANTIAL EVIDENCE.

Where circumstantial evidence is relied on to establish the conspiracy, it is for the court to determine whether the proven acts and circumstances, if believed, are sufficient in law to show an unlawful combination by the parties.

## 7. SAME—SUBSEQUENT ACTS.

Where subsequent acts are relied on to establish a conspiracy, they must clearly indicate the prior collusive combination and fraudulent purpose and must warrant the conclusion that the subsequent acts were done in furtherance of the unlawful combination and in pursuance of the fraudulent scheme.

## 8. SAME.

Disconnected circumstances, any one of which, or all of which, are just as consistent with a lawful purpose as with an unlawful undertaking, are insufficient to establish a conspiracy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 28.]

## 9. SAME.

Plaintiff alleged a fraudulent combination to induce him to invest in preferred stock of a corporation at an excessive price, and offered evidence as to sales of the common stock of the corporation by the defendants; but there was no offer to show that such sales affected the value of the preferred stock, or that it was a part of a conspiracy, or that the price paid for the preferred stock was more than its market value. *Held* inadmissible.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Charles M. Ballantine against George K. Cummings and others. Verdict for defendants, and plaintiff appeals. Affirmed.

At the trial, when plaintiff was on the stand, he was asked this question: "Mr. Bracken: Q. Had you any knowledge, prior to your purchase in March, 1899, of the listing of the common stock of the company upon the Philadelphia Stock Exchange? Mr. Graham: The only stock involved here is preferred stock. I object to any evidence of the listing of the common stock. It is not in issue, and the preferred stock was not a listed stock at the time of the purchase of this stock, nor for six months afterwards. The Court: I will sustain the objection at this stage of the case. (Exception.)"

J. Bell Austin was examined as follows: "Q. What is your business? A. Secretary and treasurer of the Philadelphia Stock Exchange. Q. Did you hold that position in January, 1899? A. Yes, sir. Q. What is the Philadelphia Stock Exchange? A. A place where stocks and bonds are bought and sold. Q. I mean in respect to its membership. It is an organization, isn't it, of brokers for the sale and purchase of stocks and bonds? A. Yes, sir. Q. Have you with you any papers that were filed with the Philadelphia Stock Exchange by the Daylight Prism Company? A. I think so, yes. Q. Will you please produce them. (Witness produces papers.) Q. One of the papers you produced is entitled at the

head, 'Philadelphia Stock Exchange, stock application for the listing of stock dated August 1, 1899'? A. Yes, sir. Q. Have you an application of an earlier date? A. That is preferred stock, isn't it? Mr. Graham: Yes. A. Yes, that is for the common stock. Q. You also produce an application dated January 13, 1899, for the listing of the common stock? A. The common stock? Q. On the Philadelphia Stock Exchange. Was that delivered to you on or about that date? Mr. Graham: I object to all inquiries relating to the listing and sale of common stock. The Court: I cannot view this offer of the listing of this common stock as material to this issue. I sustain Mr. Graham's objection. (Exception.) Mr. Bracken: I offer to prove from the record made by the witness of the daily sales in the Stock Exchange of common stock made during the period from the listing, January, 1899, down to the date of purchase of the plaintiff's stock, to be followed by evidence that those sales correspond with sales made by brokers for G. K. and J. E. Cummings, the defendants, one to the other. (Objected to as irrelevant and immaterial, and not pertinent to the issue. Objection sustained. Exception.)"

Patrick Henry was examined as follows: "Mr. Bracken: Q. Are the books you have produced here kept under your supervision? A. Yes, sir. Q. And have you several bookkeepers who make the entries from time to time? A. Yes, sir. Q. Have you an account in one of these books with either J. E. or G. K. Cummings? (Objected to.) The Court: As to the entries in these books which the witness produces, he is not competent to testify; but the real question, I suppose, is that which will follow, namely, were there transactions between De Haven and Townsend as brokers, and G. K. Cummings and J. E. Cummings in common stock of this company during a certain period; is that right? Mr. Bracken: That is undoubtedly what I propose to do, to prove just what the dealings were in common stock during the period in question on the part of one or the other of the defendants through De Haven and Townsend as their broker or as his broker. The Court: Then any technical question to the books themselves is not pressed at this time. Mr. Graham: I feel that it is impossible for this witness to prove anything of that nature. In the first place, your honor would not admit evidence of dealings coming from books of other people as against us, against the defendants in this case, and if he wants to prove transactions he would have to go and prove the identity of the man and the transaction, too, before it would be admissible in evidence here; but I will not press the technical objection, which I am sure is one that could not be surmounted, but meet the evidence on its merits, the question of whether this is admissible testimony, even if he had established proof of these sales. Mr. Bracken: I don't know any better proof under the law than entries made in books of brokers, made in the



due course of business, where you prove the entries. Probably you must call the people who made the entries, but, having done that, the books are competent evidence in any controversy of this sort. They are not evidence in favor of the person who made the entries as against the defendant; but, in a controversy as between third persons, books made up in due course of business and properly proved and authenticated have always been held to be good evidence of the facts that they show. The Court: The objection to the offer of the sales of common stock during this period with which the defendants had to do is sustained. (Exception.)"

Hugo H. Ditman was examined as follows: "Mr. Bracken: I offer to prove by this witness, who was the bookkeeper and connected with Gillman & Finninger, brokers on the Stock Exchange in 1899, that between the dates of the listing of the common stock of the Daylight Prism Company and the date of the purchase of the preferred stock by the plaintiff, Gillman & Finninger both bought and sold large amounts of common stock on behalf of Mr. George K. Cummings and Mr. J. E. Cummings, and that sales were made on certain dates by one to the other. (Objected to on the ground formerly stated. Objection sustained. Exception.)"

J. E. Cummings, called for cross-examination, was asked this question: "Mr. Bracken: Q. Will you state whether or not, prior to March 19, 1899, after the date of the organization of the company, you made any sales or purchases of the common stock of the Daylight Prism Company of America? (Objected to. Objection sustained. Exception.)"

Joseph H. Straub was examined as follows: "Mr. Bracken: I offer to prove by the witness that, as a stock broker, his firm represented G. K. and J. E. Cummings, during the period from the listing of the stock and prior to April 20, 1899, and that during that period he purchased and sold common stock of the Daylight Prism Company on behalf of both of the defendants, and that the sales thus made were duly advertised in the sales made from day to day on the Philadelphia Stock Exchange, and that it will be followed by proof that these advertisements came to the notice of the plaintiff. Mr. Graham: Q. Had G. K. Cummings any account with your firm? A. I don't know that he had. I never traded for him. The only account I had was with Mr. J. E. Cummings. I did not keep the books. I only executed the orders on the Exchange, and I only knew Mr. Cummings there (indicating). I did not know the other brother in a business way. I never got an order from him. I don't know that we did. I did not know him in any business transaction. Mr. Graham: The offer is objected to. (Objection sustained for the reasons stated in answer to former objections to the same offer as to other witnesses. Exception.)"

C. E. Schmidt, a witness called on behalf of the plaintiff, was asked this question: "Q.

Will you state whether or not, in January of 1899, you had any conversation with either G. K. or J. E. Cummings with reference to the purchase or sale of common stock on the Philadelphia Stock Exchange? Mr. Graham: You may answer, 'yes or no.' A. Yes. Mr. Bracken: Q. With which one had you any conversation? A. G. K. Cummings. Q. State what the conversation was. (Objected to.) The Court: Q. This is with relation to common stock? A. Common stock. (Objection sustained. Exception to plaintiff.)"

The court charged, in part, as follows:

"The allegation of the plaintiff is that the defendants, while officers, directors, and stockholders of the Daylight Prism Company of Pennsylvania, a corporation under the laws of West Virginia, fraudulently and maliciously conspired together to cheat and defraud the public, by inducing members thereof to purchase stock of the company: (1) By making and publishing false statements that dividends had been declared out of earnings of the corporation, when, in fact, no dividends had been earned, and by paying out of the capital stock sums of money purporting to be dividends declared out of profits; (2) by making, through various brokers, fictitious sales and purchases to and from one another of the stock of the corporation, for the purpose of creating a fictitious market value for the stock, so as to deceive the public into the belief that the stock had a value which, in fact, it did not possess; and (3) by falsely and fraudulently representing to the public that the preferred stock had been so issued, and that upon dissolution of the corporation the preferred stock would participate in the distribution of assets in priority to the common stock; that is to say, that the preferred stock was entitled to preference in payment of principal as well as dividend out of the assets of the corporation, before the common stock would be entitled to participate at all in the assets. The plaintiff avers that these alleged false statements were brought to his knowledge, and that he believed them to be true, and that in this belief he purchased on March 23, 1899, 100 shares of preferred stock of the company at \$65 per share, and on April 20, 1899, 200 shares of preferred stock of the company at \$70 per share, for which he paid in all \$20,500, all of which stock he alleges to have been worthless, both at the time of the purchase and at the present time, or, rather, at the time of bringing this suit, whereby he sustained a loss of the full sum paid by him for the stock. Counsel for the plaintiff, in his behalf, at the trial has disclaimed any right to recover from the four defendants Carr, Ringgold, Schmidt, and Holden, all of whom he absolves from any part in the alleged conspiracy. These four men were directors of the company at the time of the declaration of the alleged unlawful dividends, and appear to have voted in favor thereof. The four directors named being eliminated from the case, the question to

be determined is: Did the three remaining defendants, George K. Cummings, Henry M. Cummings, and John E. Cummings, or any two of them, commit the offense complained of, and, if so, was the plaintiff deceived and misled by their combined act to his loss and damage? Of the three defendants last named, Henry M. Cummings only was an officer and director of the company. John E. Cummings was the general manager, and George K. Cummings was a stockholder only. The charge or allegation, then, is that they, the three Cummings, were guilty of a conspiracy to cheat and defraud in the manner before referred to, and that the plaintiff was thereby deceived to his injury and loss. \* \* \*

"With relation to the second and third points, there is no evidence of a substantial character. With relation to the first point, there is evidence in the testimony of Mr. Butler, an expert accountant, that at the time the dividends of January 7, 1890, and April 10, 1890, were declared, certain items in the books were improperly considered and carried as assets, and certain other items should have been considered as liabilities which were not so considered, and that, by making these necessary additions to the one side and deductions from the other side of the accounts, it is shown that at the time of the declaration of the dividends the corporation did not properly have net earnings or profits on its business, out of which it could lawfully pay dividends without depleting its capital. On the other hand, and as against this testimony of the expert accountant, the plaintiff has offered in evidence the financial report of the condition of the company, made by expert accountants, Francis & Sterrett, just prior to the meeting of directors of January, 1890, in which it is shown that the net profits of the company were something over \$16,000, which, if true, placed the company in a financial condition entitling its directors to declare the dividend which was declared, and this report of the experts appears to have been procured for the guidance of the directors, or, at least, was used and relied upon by them apparently for that purpose, namely, for the declaration of the dividends. In addition to this fact, the plaintiff has called Messrs. Holden, Schmidt, Ringgold, and Carr, four of the defendants, constituting four of the five directors of the company, in office at the time of the declaration of the alleged fraudulent dividends, all of whom have testified that they acted solely upon their own judgment and responsibility in the declaration of the dividends and because they believed it to be proper to do so, and no one of them has been shown to have been materially influenced in his action or in his judgment by any of the three Cummings, the other defendants. It is difficult therefore, and indeed impossible, to find from the evidence that the declaration of dividends referred to, even though they may have been improperly declared and paid, was

the result of any preconceived action or conspiracy on the part of the three Cummings or any two of them. In addition to these facts, it is the alleged wrong done the plaintiff, and not the conspiracy, if there was one, which is the substance of this case; that is to say, even though there were a conspiracy among the defendants for the purpose of deceiving the public, yet that fact in itself would not entitle the plaintiff to recover in this cause, for, in addition to proving a conspiracy on the part of the defendants as alleged, he must also prove that he (the plaintiff) was thereby deceived and misled, and that he purchased the stock as a result of what the defendants did in pursuance of their preconceived intention to practice a fraud upon either the public in general or upon the plaintiff, and that the purchase of the stock, under such circumstances, resulted in a loss to him. Of the fact of such deception or that any act or misstatements of the defendants by preconceived action with intent to defraud was the inducing cause of the plaintiff purchasing the stock in question there is not sufficient evidence to entitle him to recover. In cases of this nature, the substance of the plaintiff's allegations must be proved by evidence of a satisfactory character, and, if there is no such evidence, it becomes the duty of the court to so instruct the jury. After a careful consideration of the evidence in this case, I am of the opinion that it is not of such a character as to entitle the plaintiff to a verdict."

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

F. B. Bracken, for appellant. George S. Graham, for appellees.

ELKIN, J. This is an action of trespass for damages claimed to have been suffered by reason of an alleged conspiracy fraudulently and maliciously entered into by defendants to cheat and defraud the public in general and the appellant in particular. In order to sustain a recovery, the burden is on appellant to prove by sufficient testimony that such a conspiracy was entered into in the first place, and that, as a result of the fraudulent acts done and false statements made for the purpose of furthering the scheme to defraud, he was induced to invest in the preferred stock purchased by him at a price in excess of its real value. "Conspiracy" is a combination or agreement between two or more persons to do an unlawful thing, or to do a lawful thing in an unlawful manner. A "conspiracy to defraud" on the part of two or more persons means a common purpose supported by a concerted action to defraud, that each has the intent to do it, and that it is common to each of them, and that each understands that the other has that purpose. *United States v. Frisbie* (C. C.) 28 Fed. 808. In the case at bar seven defendants are charged with conspiracy, but it is conceded there is

no evidence against four of them, and certainly as to the other three the evidence is not sufficient to show concerted action or common intent or collusive understanding or unlawful combination to cheat and defraud appellant.

A conspiracy may be proven either by direct and positive testimony showing that a collusive agreement had been entered into to do an unlawful thing, or by acts and circumstances sufficient to warrant an inference that the unlawful combination had been in point of fact formed for the fraudulent purpose charged, and when circumstantial evidence is relied on to prove the conspiracy its sufficiency must first be determined by the court. It must not be overlooked that in a suit alleging conspiracy between two or more persons the foundation of the action is the unlawful combination. Failure to prove the unlawful combination defeats the right to recover, and the unlawful combination, like any other substantive fact, must be established by sufficient relevant testimony. If the testimony is direct and positive, as a rule the question of sufficiency cannot arise, and in such cases it is for the jury to pass upon the credibility of witnesses and determine the fact by the weight of the evidence. When the testimony is not direct and positive, but where subsequent acts and circumstances are relied on to establish the conspiracy, a very different situation is presented. In such a case the first duty rests with the court to say whether the proven acts and circumstances, even if believed, are sufficient in law to establish in point of fact that the unlawful combination had been entered into by the parties charged, or two or more of them, at some prior date. If the subsequent acts do not show, or tend to show, the prior unlawful combination and purpose, the very foundation of the action, it is clear the plaintiff has failed to make out his case, and it is the duty of the court to say so. It may be, and no doubt is, often difficult to determine when the subsequent acts relied on are sufficient to establish the conspiracy, and when they should be deemed insufficient. These, however, are difficulties with which courts are frequently confronted, and which must be met and determined with an eye single to the legal rights of the parties. When conspiracy is alleged, it must be proven by full, clear, and satisfactory evidence. This measure of proof is recognized in all our cases as the correct rule, and, while it is permissible to prove subsequent acts from which the conspiracy itself may be inferred, when such acts are relied on to establish the conspiracy, they must be such as to clearly indicate the prior collusive combination and fraudulent purpose, not slight circumstances of suspicion upon which a jury might guess or conjecture as to the fact of such unlawful combination ever having been entered into, but they must be such as to warrant the belief and justify the conclusion that the subsequent acts were

done in furtherance of the unlawful combination and in pursuance of the scheme to defraud. The subsequent acts must negative the idea of a lawful undertaking or purpose, and must tend to show the prior unlawful combination. If the subsequent acts show an honest purpose or a lawful transaction, it would do violence to the settled rules of evidence and to the legal rights of parties to hold that testimony which shows subsequent lawful acts is sufficient to establish a prior unlawful combination. The burden is on him who alleges a conspiracy as the foundation of his suit to prove it by sufficient testimony, and, failing to do so, his action fails. A conspiracy must be proven by substantive facts, not by disconnected circumstances, any one of which, or all of which, are more consistent, or just as consistent, with a lawful purpose as with an unlawful undertaking.

In the present case there is no direct or positive testimony showing, or tending to show, that an unlawful combination had ever been formed by the defendants, or by two or more of them, to cheat and defraud appellant, and the subsequent acts of some of the defendants proven at the trial, and the rejected offers of testimony relating to the sales of common stock on the stock exchange, in no way connected with the purchase of preferred stock at private sale, or with any dealings between appellant and appellees concerning the purchase and sale of the particular stock upon which this suit is based, fall far short of being sufficient to establish an unlawful combination. Under such circumstances, it was the duty of the court to take the responsibility by directing the jury to return a verdict for defendants, which the learned trial judge did, and in so doing he followed the rule of our own cases. *Newall v. Jenkins*, 26 Pa. 159; *Gaunce v. Backhouse*, 37 Pa. 350; *Benford v. Sanner*, 40 Pa. 9, 80 Am. Dec. 545; *Mead v. Conroe*, 113 Pa. 220, 8 Atl. 374; *Collins v. Cronin*, 117 Pa. 35, 11 Atl. 869; *Nat. Bank v. Tinker*, 153 Pa. 17, 27 Atl. 838.

The first eight assignments of error relate to the refusal of the court to allow appellant to show the listing of the common stock of the Daylight Prism Company on the Philadelphia Stock Exchange and the sales of said stock by the defendants and others through brokers. The transaction about which appellant complains was the purchase by him of preferred stock, not listed nor sold on the stock exchange at the time, and in the rejected offers of testimony it was not proposed to show that the sales of common stock affected the value of the preferred stock, or that it was part of a conspiracy to cheat and defraud, or that when the preferred stock was purchased the price paid for same did not represent its then market value, or that he relied on the quotation of the common stock when he purchased the preferred shares at private sale. The rejected offers of testimony were too indefinite,

vague and remote to sustain the allegation of conspiracy and were properly excluded. Nor is *McElroy v. Harnack*, 213 Pa. 444, 63 Atl. 127, authority for a different rule. It is true in that case the plaintiffs were permitted to show that the brokers, by what is known as "wash or fictitious sales," on the stock exchange, gave the bonds a high market value, more than their real worth, which enabled the other defendants to borrow money in excess of their value by using the bonds as collateral. It is clear, however, that the whole transaction in that case from the incorporation of the company, the purchase of incumbered real estate, the execution of a mortgage greatly in excess of the value of the property, the issuance of bonds on the same, and the sale of these bonds fictitiously on the stock exchange, was part of a collusive scheme to defraud the public or individuals who had anything to do with the bonds as a purchaser or as a lender of money with them as collateral. Then, again, the brokers in that case who manipulated the fictitious sales were two of the defendants, and they had been connected with the collusive scheme from its inception. None of these facts appear in the present case.

The remaining assignments of error, relating to the declaration of dividends and the exclusion of testimony tending to show control of the company by defendants, are without merit under the facts of this case. The excluded testimony, if admitted and believed, was not sufficient to establish a conspiracy to cheat and defraud appellant in the purchase of his preferred stock, and, since this is the foundation upon which the right to recover depends, the suit must fail.

Judgment affirmed.

(221 Pa. 141)

**RAHN TP. SCHOOL DIST. v. LEHIGH COAL & NAVIGATION CO.**

(Supreme Court of Pennsylvania. May 4, 1908.)

**APPEAL AND ERROR—REVIEW—FINDING OF FACT.**

A finding of fact on a bill in equity will not be set aside, when based on sufficient evidence, and no manifest error appears.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970-3978.]

Appeal from Court of Common Pleas, Schuylkill County.

Bill by Rahn township school district against the Lehigh Coal & Navigation Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Plaintiff claimed that the defendant had received certain sums of money arising from granting licenses, that these moneys belonged to the plaintiff, and had not been paid over. The court found as a fact that the payments had been made to Fergus G. Farquhar, who, although local attorney for defendant, had no authority, either expressly or by implication, to receive the moneys, and that Far-

quhar had retained such moneys and appropriated them to his own use.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

J. O. Ulrich and L. C. Scott, for appellant. Abraham M. Beitler, Geo. M. Roads, and W. G. Thomas, for appellee.

PER CURIAM. It does not appear that complainant's right to the money in question is disputed as a matter of law, but there is full denial sustained by the court that defendant ever received it. The question turned on whether Farquhar, who actually received the money, did so as attorney for defendant, or in some other capacity. The court found that Farquhar had no authority, in fact, to receive it, nor did he occupy any such professional relation to defendant as to raise an implication of such authority. The evidence was carefully examined by the learned judge, the facts clearly found, and the conclusions accurately drawn. We see no reason to disturb them.

Decree affirmed.

(221 Pa. 147)

**MOYER v. UNITED TRACTION CO.**

(Supreme Court of Pennsylvania. May 4, 1908.)

**STREET RAILROADS — INJURY TO PERSON ON TRACK.**

In an action to recover for injuries received by being struck by a street car while lying on the track, evidence held to require binding instructions for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 239-250.]

Appeal from Court of Common Pleas, Berks County.

Action by William C. Moyer against the United Traction Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Ermentrout, P. J., filed the following opinion on rule for new trial:

"When plaintiff's evidence closed, a motion for a nonsuit was made by counsel for defendant. This was overruled, so that the whole evidence might be spread upon the record. After full consideration, we felt it our duty to instruct the jury to find a verdict in favor of the defendant. An examination of the testimony and argument of counsel have not convinced us of any error in directing a verdict for the defendant. The charge contains all that is necessary to be said in the matter. The plaintiff was not a passenger. The team upon which he was riding was not struck by the car; but in leaving the tracks of the company defendant he fell from the somewhat insecure position he occupied upon the wagon. In some way or other there was a contact between the plaintiff and the car. The evidence fails to disclose anything that the motorman could have done in the emergency that he did not do.

"As was said in the charge: 'The motor-man was not bound to anticipate his falling off and being stunned upon or at the side of the track; but, when the motorman discovered plaintiff's position upon the track, he immediately reversed the car and applied the hand brake, when the fuse blew out. This timely action on the part of the motorman undoubtedly saved plaintiff's life. Had it not been for the fuse blowing out, plaintiff would have suffered no injury; for the car would have been stopped in time. The evidence is undisputed that, but for the blowing out of the fuse, the motorman's actions would have avoided all danger. He did all that could be done at the time to avoid the accident, and nothing more was required of him.' The plaintiff was not a passenger. He was, therefore, subject to the burden of proof, and must establish the fact of negligence on the part of the defendant by affirmative testimony, failing in which he fails in his suit.

"Rule discharged."

Argued before MITCHELL, C. J., and FELL, BROWN, ELKIN, and STEWART, JJ.

Isaac Helster and Rieser & Schaffer, for appellant. C. H. Ruhl, J. Milton Miller, and R. L. Jones, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the court below refusing a new trial.

(221 Pa. 121)

RILEY et al. v. REMINGTON et al.

(Supreme Court of Pennsylvania. May 4, 1908.)  
DOWER—RIGHTS AND REMEDIES OF WIDOW—MORTGAGE.

The widow and children of a decedent executed a deed of land formerly belonging to him, receiving a purchase-money mortgage, providing that interest on a stated sum was to be paid to the widow "in lieu of her dower," and to secure such interest. During the life of the widow the mortgage was foreclosed. Held, that the widow was entitled to receive the sum mentioned in the mortgage as being in lieu of dower set apart to her for life from the proceeds of the sale.

Appeal from Court of Common Pleas, Delaware County.

Action by Sarah E. Riley and others against Pym Remington and others. From an order dismissing exceptions to auditor's report, William H. Lush, administrator, appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

R. R. Foulke and George T. Butler, for appellant. Ernest Le Roy Green, Horace P. Green, and V. Gilpin Robinson, for appellees.

MITCHELL, C. J. The fund for distribution arose from the foreclosure of a purchase-money mortgage, which contained the following provision: "The interest of the sum of

\$2,609.75 [to be paid] to Sarah E. Riley, widow of Thomas Riley, deceased, during said term, if she shall so long live, the same being in lieu of her dower, and the remainder of said interest to the said Anna C. Riley, Mary E. Lush, Elizabeth B. Riley, Theodora Riley, and Margaret T. Riley, in equal proportions; said principal sum being part purchase money of said real estate this day conveyed to the said Clarice V. Remington by the said parties of the second part hereto, and the said Sarah E. Riley being joined herein for the purpose of securing to her the interest on the said sum of \$2,609.75, which sum represents her dower interest in said real estate." The fund being insufficient to cover the amount set aside to secure the widow and the arrears of interest due her, the auditor awarded her the whole of it. The other parties claim a pro rata distribution.

The provision in regard to the widow, being by express agreement "in lieu of her dower" and to secure her interest, is entitled to all the attributes of dower necessary to her protection. Among these is priority of claim, both as to principal and interest of the stipulated sum of \$2,609.75. If the widow had not joined in the sale, the purchaser would have taken the land subject to her paramount claim of dower, the priority of which neither he nor the heirs could contest. If, then, the purchaser had given her a separate mortgage, it would have retained the quality and precedence which the dower had for which it was substituted. The proceeds of a sale under such mortgage would have gone first to the widow, both for principal and arrears of interest, even if they took the whole. In fact, all the parties joined in one mortgage, but their respective interests and status were expressly preserved by the provision that the widow was "joined herein for the purpose of securing to her the interest on the said sum of \$2,609.75, which sum represents her dower interest in said real estate." The clear intention, as well as the legal effect, was to secure to the widow the same relative rights and priority that she had under her original estate of dower.

Judgment affirmed.

(221 Pa. 120)

HENDRICKSON et ux. v. CHESTER CITY.

(Supreme Court of Pennsylvania. May 4, 1908.)  
MUNICIPAL CORPORATIONS—SLIPPERY SIDEWALK—INJURY TO PEDESTRIAN.

Where plaintiff fell on a sidewalk because of the generally slippery condition of the street, such as naturally occurs in all cities in winter time, the city was not liable for the injuries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1626, 1627.]

Appeal from Court of Common Pleas, Delaware County.

Action by Samuel H. Hendrickson and wife against Chester City. Judgment for defendant, and plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

A. B. Geary, for appellants. A. A. Cochran, for appellee.

**PER CURIAM.** It was not shown that the place of the accident was essentially or continuously dangerous, though it might become so from time to time, when the ice melted in the day and froze in the night. There was no accumulation of ice or snow that remained there all the time. This resulted in a temporary and changeable condition, dependent on the variation of the weather, and it appeared that on the day preceding the evening of the accident the ice had melted and the street was clear. The learned judge was of opinion that the most that was shown "was a general slippery condition of the street, which occurs in all cities in winter time." We have not been convinced that this was an erroneous view.

Judgment affirmed.

(221 Pa. 136)

#### LIGHT v. LIGHT.

(Supreme Court of Pennsylvania. May 4, 1908.)

##### DEEDS—VALIDITY.

Where an ignorant, elderly, and feeble woman executed a deed to her niece, who occupied a confidential relation to her, it will be set aside, where the niece, by importunities and threats of suicide, induced her aunt to promise to execute a deed reserving to herself a life interest and giving the remainder to the niece, but the latter, deceiving her attorney, procured a deed to be prepared, absolute in its terms, which the aunt executed in the belief that it was of that character which she had promised to make.

Appeal from Court of Common Pleas, Lebanon County.

Bill by Mary A. Light against Fannie B. Light. Decree for plaintiff, and defendant appeals. Affirmed.

The following is the opinion of Ehrgood, P. J., in the court below:

"From the evidence submitted we find the following facts:

"(1) That Mary A. Light, the above-named plaintiff, is a person of limited education and practically no business qualifications, more than 60 years of age, and enfeebled through sickness; that she has always reposed great confidence and trust in the defendant, Fannie B. Light, who is her niece, and has lived in the same family with her for more than 30 years, and at various times was intrusted with the legal papers and business of the said plaintiff, and was fully conversant with her affairs.

"(2) That on September 30, 1868, she became seised in her demesne as of fee, and remained so seised until September 28, 1904, of a certain lot of ground situate in North Lebanon township, Lebanon county.

"(3) That upon said lot was erected a large brick dwelling house, known as No. 917

Maple street, and several outbuildings. The whole of said lot and buildings, on September 28, 1904, were in the actual possession of William V. Light, as tenant of the plaintiff, and still are in his possession; he holding the same as tenant of the plaintiff, and paying the rents to her.

"(4) That by intimations of personal violence to herself by the defendant, importunities for the real estate in question, flattery, and misstatements, she so worked upon the feelings of the defendant that the defendant offered to give her the sum of \$200, which the defendant declined, but insisted that the plaintiff should give her the aforesaid house and lot. That the plaintiff finally agreed to give to the said defendant the aforesaid house and lot after her death, but reserving and retaining unto herself the absolute control and possession of said property during her lifetime, with the right to use up the whole, if necessary, for her maintenance and support.

"(5) That the said Fannie B. Light, the above-named defendant, thereupon, in violation of this agreement, procured an attorney, and, without informing him of the full and entire agreement, had him prepare an absolute deed of conveyance of the said house and lot to her, the said defendant, without any such reservation as agreed to, and without informing the said plaintiff that she procured an absolute deed to be prepared, which the said Mary A. Light, the above-named plaintiff, executed by mistake, on September 28, 1904, through the deceit practiced upon her by the defendant, and under the belief that it was such a writing as had been agreed upon, and without time and opportunity being given to her to consult counsel of her own choice, or counsel who prepared the deed, except in the presence of the defendant, or to consult any of her relatives and friends, other than the defendant, but wholly upon the implicit confidence and trust she reposed in the defendant.

"(6) That after the execution of the aforesaid deed of conveyance the same was handed to the defendant and remained in her possession until August 11, 1905, when she took it to the recorder's office of Lebanon county and had the same recorded.

"(7) That the plaintiff did not know that she executed an absolute fee-simple title of her property to the defendant until a short time before she instituted these proceedings, when she learned its real legal effect through friends; and, after verifying their statements, through counsel, she at once rescinded her agreement, and demanded the cancellation of the said deed of conveyance, which the defendant refused and still refuses.

"(8) That the plaintiff never intended to convey her aforesaid property absolutely to the defendant, but only what remained after her death.

"(9) That no money was paid by the de-

fendant to the plaintiff for said property nor by any one else for her, and that the plaintiff was not indebted to the defendant, nor did any valuable consideration whatever pass between them for said property.

"(10) The plaintiff's estate, exclusive of the real estate in question, consists of personal property to the amount of about \$1,000, the real estate in question being the bulk of her estate.

"Conclusions of law: As a general rule, fraud is not presumed, but must be proved by the party seeking to relieve himself on that ground. But when the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on equal terms, but that either, on the one side, from superior knowledge of the matter derived from a fiduciary relation or from overmastering influence, or, on the other side, from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, then the burden is shifted, the transaction is presumed void, and it is incumbent upon the party in whom such confidence is reposed, to show affirmatively that no deception was used, and that all was fair, open, voluntary, and well understood. *Beach on Modern Eq. Jur.*, § 114; *Stepp v. Frampton*, 179 Pa. 284, 38 Atl. 177; *Hasel v. Bellstein*, 179 Pa. 560, 38 Atl. 336.

"Discussion: The defendant admits that a confidential relation existed between herself and the plaintiff, and from the appearance of the parties before the court and their testimony it is not only evident that a relation of trust and confidence existed, but also that the defendant exerted an overmastering influence over the plaintiff prior to the execution and delivery of the deed. The defendant prior to this time was employed in a telephone exchange, and was sick for about three weeks, and was at home with the defendant at her father's house, during which time she persuaded the plaintiff to give her the bulk of her property after her death. From her own testimony the defendant commenced the conversation about the property. The plaintiff says that the defendant said that they were like sisters, and that she would be the next to get the property. And also that she said she could not work at the telephone long any more, and she thought already she would kill herself about it. That her brothers and sisters had homes of their own, and she had none. The defendant also admits that the plaintiff was to have a life interest in the said house and lot, and yet not one word about it was said when she employed an attorney to prepare the deed, or did she say anything when the plaintiff executed the deed. The defendant did not show in this proceeding, after she admitted the existence of a confidential relation, that no deception was used, and that all was fair, open, voluntary, and well understood by the defendant. Even after the deed was executed

and delivered to her (the old lady), the plaintiff was permitted to treat this house and lot as if no transfer of title had taken place, and she was kept in ignorance of the full import of the instrument she had signed in the office of Mr. Adams until the defendant placed the deed on record about a year afterwards. The defendant not only succeeded in deceiving her aunt, the plaintiff, but also her counsel, of the true facts. It is idle to suggest a parol agreement as to the rents. There is not a particle of testimony that any agreement was made subsequent to the execution of the deed, nor that such part of their agreement was to be left out of the deed. A fraud was perpetrated on the plaintiff, and she is entitled to a decree.

"And now, March 16, 1907, this cause came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz.: (1) That the said deed of September 28, 1904, executed by the plaintiff and delivered to the defendant, is null and void, and passed no title to the defendant to the property therein described. (2) That the said deed be delivered up to the plaintiff to be canceled. (3) That the said deed be marked void upon the books in the office of the recorder of deeds for the county of Lebanon, wherein the same is recorded. (4) That the defendant pay the costs of these proceedings."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

Robert L. Adams, Paul G. Adams, and J. G. Adams, for appellant. Samuel T. Meyer, for appellee.

PER CURIAM. The decree is affirmed, on the opinion of the court below.

(221 Pa. 129)

REA v. MEDIA, M., A. & C. ELECTRIC RY. CO.

(Supreme Court of Pennsylvania. May 4, 1908.)

# 1. CARRIERS — INJURY TO PASSENGER — EVIDENCE.

Where plaintiff, in an action against a street railway for personal injuries, testifies that the car had stopped and she had put her foot on the step, when the conductor suddenly started the car and she was thrown to the ground, a prima facie case is made for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1313.]

# 2. SAME—CONTRIBUTORY NEGLIGENCE.

The question of plaintiff's contributory negligence, when injured by alleged negligent starting of a street car while she was on the step, was one for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1402.]

# 3. APPEAL AND ERROR — REVIEW OF EVIDENCE.

A judgment in a personal injury case will not be reversed, where the trial judge considered the question on a rule for new trial and concluded that he could not say that there was such a preponderance of evidence for defendant as to warrant the setting aside of the ver-

dict, though the Supreme Court may be of opinion that the evidence was against the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3948-3950.]

Appeal from Court of Common Pleas, Delaware County.

Action by William B. Rea against the Media, Middletown, Aston & Chester Electric Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

David Wallerstein and E. A. Howell, for appellant. Carlos E. Hough, for appellee.

**PER CURIAM.** The plaintiff testified that the car had stopped, and she had put her left foot on the step and was reaching with her right hand for the hand rail, when the conductor suddenly started the car and she was thrown to the ground. This made a prima facie case for the jury.

The plaintiff also testified that while she was in the act of reaching for the hand rail she saw the conductor, standing with his back to her, put his hand up, and she supposed he started the car; but she made no outcry or other effort to attract his attention. This is argued by appellant as showing contributory negligence. It was certainly evidence of it, but did not establish the fact so clearly that the court could take the question from the jury.

The weight of the evidence was that the car had not stopped when plaintiff attempted to board it. On her own showing there was a sort of scramble there, some boys and several young girls making a rush and getting on the car before it stopped. The weight of the evidence clearly appears to be that plaintiff also made a like attempt. It would have put the case in a more satisfactory shape, had the court granted a new trial on this point. But the learned judge saw and heard the witnesses, considered this question on a rule for new trial, and concluded that he could not say that there was "such a preponderance of evidence in favor of the defendant as would warrant the setting aside of the verdict." While we should have reached a different conclusion, we cannot say his was so clearly wrong as to require a reversal of the judgment.

Judgment affirmed.

(221 Pa. 145)

#### IN RE O'BOLD'S ESTATE.

(Supreme Court of Pennsylvania. May 4, 1908.)

#### 1. ACCOUNT STATED—EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST DECEDENT—ESTOPPEL.

Where a physician rendered a bill in a lump sum to an executor for services to decedent, and three years later presented an itemized claim for a larger sum, as the executor had not acted on the original bill, the physician was not estopped in presenting the second bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Account Stated, § 44.]

#### 2. TRIAL—OBJECTIONS TO EVIDENCE—WAIVER.

In presenting a claim against decedent's account, a physician offered in evidence a visiting list, showing a record of all unpaid visits made to his patients, including decedent. Held, that where no objection was made to the admission of the list, and the physician was examined by the executor in connection therewith, any objections to the list were waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 261-267, 974-976.]

Appeal from Orphans' Court, Adams County.

In the matter of the estate of Vincent O'Bold. From a decree dismissing exceptions to auditor's report, C. J. Dellone, executor, appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, ELKIN, and STEWART, JJ.

W. C. Sheely, for appellant. Donald P. McPherson, for appellee.

**PER CURIAM.** The first question under the assignments of error is the reasonableness of the claim of the physician for services rendered to the decedent. The claim was allowed by the auditor, and the allowance was confirmed by the court. Both were in better position to judge of the validity of the claim than we are. But the physician, after several demands upon him to furnish his account for services to the decedent, rendered a bill in a lump sum of \$1,250. Three years later at the audit he presented an itemized claim for \$1,685.50. So serious a discrepancy raised at once a presumption that the estate of the decedent was in danger of being fleeced, and called upon the auditor and court for a rigid examination and explanation, for the protection of the estate of the dead man, who could no longer protect himself. And this presumption was not lessened by the testimony of the physician, in response to the question: "State whether or not the charges you have made for services rendered the decedent in this case are the regular charges for that kind of work? A. I have charged more, and I have charged less. I charge according to the ability of the man to pay me for my services." But the inconsistency of the claims for services, though discreditable, as showing a desire for special profit rather than for fair compensation, did not amount to an estoppel. The executor not having acted on the first bill, the essential element of estoppel is wanting. Where a witness or a party makes discrepant admissions, or claims, the result is for the jury, and, in cases like the present, for the auditor and the court, the auditor and court made an examination; and, while it would have been more satisfactory if the physician had been held to a higher standard of professional ethics, we cannot say that the result was erroneous as a matter of law.

In regard to the evidence the learned court says: "The claimant, in accordance with the practice of physicians, kept a visiting list, in



which he made daily entries of his visits. It was not an independent record of visits and service done Mr. O'Bold, such as were excluded as book entries in Fulton's Estate, 178 Pa. 78, 35 Atl. 880, 35 L. R. A. 133, but it was his record of visits in the regular course of his business as a practitioner of medicine, in which sense it made a record of not only the visits paid Mr. O'Bold, but also all the unpaid visits made to all his patients. This visiting list being offered in evidence without objection, and accepted as correct by the accountant as to their date and number, as it seems to have been, and the claimant being called and examined in support of his claim, without any objection at the time by the accountant, both the visiting list and the testimony of Doctor Melsenholder were properly considered by the auditor in determining the question of this claim." Whatever objections might have been available against the visiting list as a book of original entries were certainly waived under this state of facts.

In regard to the auditor's fee, it is to be said, as of the physician's claim, that the court below was in better position to determine the value of the services than we are, and its decision has not been shown to be so erroneous as to call for interference.

Decree affirmed.

(221 Pa. 153)

#### REBER v. SCHROEDER.

(Supreme Court of Pennsylvania. May 4, 1908.)

##### 1. REPLEVIN—TITLE—EVIDENCE.

A verdict for plaintiff in replevin against an executor to recover certificates of stock was sustained by evidence showing that the certificates were found in decedent's safe in a sealed envelope, with a power of attorney transferring them to plaintiff, with a statement on the envelope, signed by decedent, that the contents belonged to plaintiff, and were to be delivered at his death, and with testimony by plaintiff that there had been a complete delivery of the shares to her, and that she placed them with decedent for safe-keeping.

##### 2. SAME—VERDICT—WRIT OF RETORNO HABENDO.

Where defendant in replevin has retained possession of the property under a claimed property bond, and a general verdict is rendered for plaintiff, and judgment entered thereon, plaintiff, under Act April 19, 1901 (P. L. 88), is entitled to a writ of retorno habendo, though the jury fails to find the value of the property and damages for its retention.

Appeal from Court of Common Pleas, Berks County.

Action by Sarah Reber against Daniel E. Schroeder, executor of George F. Hagenman. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, ELKIN, and STEWART, JJ.

William B. Bechtel, for appellant. C. H. Ruhl and J. K. Grant, for appellee.

FELL, J. This was an action of replevin for certificates of stock of a national bank,

which were in the name and possession of George F. Hagenman at the time of his death, and were found in his safe by his executor, inclosed in a sealed envelope, with a power of attorney transferring them to the plaintiff. There was an indorsement on the envelope, signed by the decedent, as follows: "The contents of this envelope belong to Miss Sarah Reber, No. 19 South Second St., Reading, Pa., and must be delivered to her at my death." The plaintiff did not rely upon this indorsement to establish her right to the shares, but presented testimony tending to show that there had been a complete delivery of the shares to her by the decedent, and that she had placed them in his hands for safe-keeping. The issue of fact was carefully submitted to the jury, and none of the assignments of error that relate to the admission of evidence or to the charge of the court has merit.

The thirteenth and fourteenth assignments relate to the verdict and the judgment entered thereon, and give rise to questions under the act of April 19, 1901 (P. L. 88), regulating the practice in replevin. The defendant had entered a claim property bond, and retained possession of the stock certificate. The verdict rendered was for the plaintiff, without a finding of the value of the shares and damages for their detention, and the judgment entered was a general one in favor of the plaintiff. At common law, and before the act of 1901, where the defendant retained possession of the property, the action proceeded for damages only. The property could not be recovered from him, nor could he tender it in satisfaction of the verdict. The giving of the claim property bond put an end to the plaintiff's title, which was thereupon turned into a chose in action, to be compensated for in damages. The defendant was the only party who could have a judgment de retorno habendo. Fisher v. Whoolery, 25 Pa. 197; Schofield v. Ferrers, 46 Pa. 438; Rocky v. Burkhalter, 68 Pa. 221; Morris on Replevin, 210. The act of 1901 has changed the practice in this respect, and a plaintiff who has not been given possession of the property is entitled to a writ of retorno habendo, as well as to a writ of fieri facias, to recover the value of the property and damages awarded and costs. It is provided by section 5 that, where judgment has been entered for the plaintiff for the want of a sufficient affidavit of defense, for a portion of the goods and chattels replevied, he may proceed to recover such goods and chattels by a writ of retorno habendo, or the value thereof, after assessment of damages on a writ of inquiry. Section 7 provides that "if the title to said goods and chattels be found finally to be in a party who has not been given possession of the same, in said proceeding, the jury shall determine the value thereof to the successful party, and he may, at his option, issue a writ in the nature of a writ of retorno habendo, requiring the de-

livery thereof to him, with an added clause of *ieri facias* as to damages awarded and costs; and upon failure so to recover them, or in the first instance, he may issue execution for the value thereof, and the damages awarded and costs; or he may sue, in the first instance, upon the bond given, and recover thereon the value of the goods and chattels, damages and costs, in the same manner that recovery is had upon other official bonds." Before the act of 1901 the verdict rendered in this case would have been of no avail to the plaintiff, because a judgment *retorno habendo* could not have been entered upon it (*Moore v. Shenk*, 3 Pa. 13, 45 Am. Dec. 618); and there was no award of damages for which a writ of execution could issue. But by virtue of the act, the plaintiff is entitled to a return of the property, and she may have a writ to enforce the right. A judgment on the verdict is sufficient to sustain such a writ. She has not obtained all that she was entitled to by the trial, because of the failure of the jury to find the value of the property and damages for its detention, but the judgment on the verdict is not invalid.

The judgment is affirmed.

(221 Pa. 160)

**RIDGEWAY DYNAMO & ENGINE CO. v. PENNSYLVANIA CEMENT CO.**

(Supreme Court of Pennsylvania. May 4, 1908.)

**1. SALES—MANUFACTURED GOODS—REFUSAL TO ACCEPT—DAMAGES.**

The measure of damage, on refusal of a purchaser to accept an article specially manufactured for him, where there is no market in which it can readily be sold, is the difference between the cost and the price the purchaser agreed to pay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Sales, § 1106.]

**2. EVIDENCE—PAROL EVIDENCE.**

An oral agreement, alleged to have been made at the time of the making of a written agreement, cannot be shown, where it was inconsistent with the terms of the written agreement, which stipulated that all previous communications between the parties are withdrawn and annulled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2030-2047.]

Appeal from Court of Common Pleas, Northampton County.

Action by the Ridgeway Dynamo & Engine Company against the Pennsylvania Cement Company. Judgment for plaintiff, and defendant appeals. Affirmed.

At the trial, when a witness for defendant was called, the following offer was made: "Mr. Smith: We propose to show by this witness that, at the time the contract was executed, and simultaneous with the time that the contract was executed, there was an oral understanding between the parties, which oral understanding was the inducement for the making of the written contract that construction of these engines was not to be started until notice be given by the Pennsylvania Cement Company, and until the Pennsyl-

vania Cement Company had furnished drawings and certain drafts showing the foundation plans and the plans for the templet of these two engines. Mr. Steele: Objected to for the same reasons, and for the further reasons that it is attempted to reform or set aside a written agreement, and no allegation of fraud, accident, or mistake is set forth in the answer that is filed. The Court: Ordinarily, in the case of the execution of written agreements, a parol contemporaneous agreement or verbal understanding, varying the terms of it upon the strength of which the written agreement is actually signed, is admissible, if it be the inducement solely upon which the written contract is to be carried into effect. There is in this agreement, however, the written stipulation, referred to in the objection, which, by its written terms, excludes the admission of any other terms than those which are herein expressed. Whether or not that would be sufficient to exclude the present offer of proof, there is nothing in the pleadings that admits such testimony for the alteration, explanation, or variation of the written agreement, and it is therefore inadmissible. *Krueger v. Nicola*, 205 Pa. 38, 54 Atl. 494. To which ruling defendant excepts, and bill sealed."

The court charged in part as follows: "If the plaintiff, then, has failed to satisfy you that these engines didn't have such a market value, then your verdict would be for the plaintiff for nominal damages. But if he has satisfied you that they had no market value, that there was no particular market value for these engines, they had none fixed in the market, that they were manufactured from special designs for a special purpose, then he is entitled to recover substantial damages, and not merely nominal damages, and then it is for you to say, if you pass this point and determine that the plaintiff has suffered a loss for which he ought to recover substantial damages, it is necessary for you to say how much; and in that event, if he be entitled to recover substantial damages, then he would be entitled to recover the difference between the contract price and the actual cost and expenses that would be necessary to be employed by him to manufacture these engines and deliver them at Bath at the time stipulated for in the contract."

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Edward J. Fox and James W. Fox, for appellant. H. J. Steele and Fred H. Ely, for appellee.

POTTER, J. The Ridgeway Dynamo & Engine Company entered into a written contract to furnish to the Pennsylvania Cement Company two automatic center crank engines, to be delivered for the net sum of \$3,000. The contract provided for certain special features as to the main bearings, and

a particular form of crosshead, and for certain other special parts as applied to the type of engine which was ordered; the result of the requirements being apparently the production of an engine not in general demand, and not readily salable. After the engines had been partly constructed, the cement company countermanded the order, whereupon the engine company stopped the construction work, and made use of the material for other purposes. The engine company then brought this suit to recover damages for breach of the contract. The trial resulted in a verdict for the plaintiff, upon which judgment was entered, and defendant has appealed.

The first question raised by the assignments of error is as to the measure of damages. The trial judge charged the jury that if they were satisfied from the evidence that the engines were manufactured from special designs for a special purpose, and had no fixed market value, the plaintiff would be entitled to recover the difference between the actual cost of manufacturing and delivering the engines and the contract price. The learned trial judge correctly stated the rule applicable to such a state of facts as this, where, from the nature of the article, there is no market in which it can readily be sold. In such case the great weight of authority is to the effect that the measure of damages is the difference between what it would cost to make and deliver the article and the price which the purchaser has agreed to pay for it. The principle is thus stated in 2 Sedgwick on Damages (8th Ed.) § 618, p. 269: "Where one engaged in the performance of a contract is wrongfully prevented by the employer from completing it, the measure of damages is the difference between the price agreed to be paid for the work and what it would have cost the plaintiff to complete it. Differently stated, the rule in such case is recompense to the plaintiff for the part performance and indemnity for his loss in respect to the part unexecuted. The plaintiff is to be placed in the same condition he would have been in if he had been allowed to proceed without interference." This rule gives to the party which has complied with the agreement the value of his bargain. In the present instance the amount which was lost to the plaintiff by reason of the breach of the contract was capable of being ascertained with reasonable certainty, and was therefore properly adopted as the measure of the damages to be recovered by it, as the injured party, from the one in default.

The second question raised by this appeal appears in the fourth assignment of error. Defendant offered to show that, simultaneously with the execution of the contract, there was an oral understanding between the parties, which was the inducement for the making of the written contract; that the construction of the engines was not to begin

until notice was given by the defendant company and certain drawings furnished showing the foundation plans, etc. Upon objection by the plaintiff the offer was excluded, and properly so, we think. While a contemporaneous oral agreement, entered into as an inducement to the execution of a written agreement, and not inconsistent with it, may be shown in defense to a suit upon a written contract (Keller v. Cohen, 217 Pa. 522, 66 Atl. 862), yet in the present case the agreement which it was attempted to set up is clearly inconsistent with the written contract. Furthermore, the written agreement contained an express stipulation that "all previous communications between said parties, either verbal or written, contrary to the provisions hereof, are hereby withdrawn and annulled; and that no modification of this agreement shall be binding upon the parties hereto, or either of them, unless such modification shall be in writing." Under this stipulation, inserted evidently for the very purpose of preventing the introduction of any such claim as that presented by the defendant, there was no room for the admission of evidence as to any other terms than those expressed in the written contract. The trial judge was clearly right in refusing to admit proof of the alleged parol contemporaneous agreement.

The judgment is affirmed.

(221 Pa. 156)

#### BAUER v. FABEL.

(Supreme Court of Pennsylvania. May 4, 1908.)  
GAMING — GAMBLING CONTRACT — RIGHTS OF PARTIES.

Where plaintiff sued on a check given in payment of a balance on an account, based on the purchase and sale of stock on a margin, he can recover so much as represents the amount deposited as margin, where it can be distinguished from the amount representing profits on the transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 74.]

Appeal from Court of Common Pleas, Monroe County.

Action by Jacob Bauer against George W. Fabel. Judgment for plaintiff, and defendant appeals. Affirmed.

The court charged in part as follows: "But if you find that this transaction was not a legal transaction, but that under the facts, as you have heard them testified to, and as explained by the court, it was a gambling transaction, then the court instructs you, under all the testimony in this case, and that finding, that George W. Fabel was a simple stakeholder. If you find that he simply held this money, and he bought no stocks with it, and he sold no stocks, and that the plaintiff understood that that was just what he was going to do with it, or that he sent it to Sage & Co., and no stocks were bought and no stocks were sold, and the money came back to George W. Fabel,

then as far as the \$2,000 was concerned, which it was testified to was margins, and included in this check of \$3,260.50, it was nothing more than a stake which George W. Fabel, the defendant, held for Jacob Bauer, the plaintiff. As the court remembers the testimony, it was clearly shown, without contradiction, that this check was made up of \$2,000, which was margin deposited by the plaintiff in this case on these transactions, whether legal or illegal, as you should find them, and that when George W. Fabel sent this check, it was intended to pay that \$2,000 back, and \$1,262.50 profits. As the court remembers it, there is no question about that. If it was denied in any way, I would like counsel to so state now. If this check was made up in such a way that the sums which it represented could not be distinguished or separated, you could not tell how much of it was profits on these transactions and how much was margin. We would instruct you that you could not guess at it, and therefore you could not find a verdict with regard to it. But the two kinds of transactions, or the two kinds of amounts that it represented, being so easily ascertained, the \$2,000 being money deposited on margin, and the \$1,260.50 being profits, there is no trouble in your minds, and none in the mind of the court, what should be done in the matter relative thereto. The Supreme Court of our state holds that where a man received money as a stakeholder, no matter whether it is received for a legal purpose or an illegal purpose, the man who pays that money to the stakeholder has the right to demand it back, and if he does not pay it back, sue and recover in a court of justice. Not even that the man should keep the identical money as a stake, and so hold it, until the matter upon which it was paid was decided, but only so it can be arrived at and distinguished, and our courts have gone further, and held that gambling transactions in stocks are wagering transactions, and that the broker in that case is nothing more than a stakeholder, and he cannot resist the payment of the money, to the man who deposited it there on margins, by stating that man paid it to him for an illegal purpose, and that he is not bound to pay it back. The Supreme Court, in the opinion of this court, says that a person who deposits that money as a stake has the right to the return of it, and as the amount can be ascertained in this case, we say to you that, in case you find the transactions between these parties as gambling transactions, then your verdict should be in the sum of \$2,000 in favor of the plaintiff, with interest from August 24, 1906. You may wonder in your own minds, gentlemen of the jury, why this amount is larger than the other amount. It is larger than if you find that the transaction was a fair transaction, and the court explains to you that the reason of that is that, if you find the transactions were gambling transactions, the court must take the defend-

ant at his own word; and, as these moneys represented by the check of \$2,000 were invested by him in gambling transactions, he has no right to recover from the plaintiff in this case. He must either stand by his proposition in the whole, or else drop it, and if he claims that the whole matter was a gambling transaction, through and through, all that he can defend against is the profits in this transaction, and those profits were \$1,262.50. We think we have explained this matter now clearly to you. In other words, gentlemen of the jury, in order that there will be no confusion in your minds under the instruction as the court gives it to you, your verdict should be in favor of the plaintiff, either for \$1,962.50, with interest from August 24, 1906, or for the sum of \$2,000, with interest from August 24, 1906, as you shall decide that first proposition which was given to you by the court."

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Rogers L. Burnett, for appellant. Wilton A. Erdman, for appellee.

**PER CURIAM.** This was an action on a check for \$3,262.50, given by the defendant to the plaintiff in payment of the balance due on an account between them, which involved the purchase and sale of shares of stock on margin. The money deposited as margin was \$2,000, and the balance of the check, \$1,262.50, represented profits on purchases and sales that had been made. The jury found that the transaction was a wagering one, and by direction of the court rendered a verdict for the amount of the deposit only, with interest.

The defendant bought the stocks through a third party, to whom he transferred the deposit, and from whom he received back the deposit with the profits, and it is at least doubtful whether he should not have been regarded as an agent who had received money for his principal, and could not avoid liability by setting up the illegality of the transaction from which the money came. *Smith v. Blachley*, 188 Pa. 550, 41 Atl. 619, 68 Am. St. Rep. 887; *Hertzler v. Geigley*, 196 Pa. 419, 46 Atl. 366, 76 Am. St. Rep. 724. But be this as it may, the transaction in which the deposit was made was closed, and the deposit could be recovered back. In *Peters v. Grim*, 149 Pa. 163, 24 Atl. 192, 34 Am. St. Rep. 599, *Repplier v. Jacobs*, 149 Pa. 167, 24 Atl. 194, and *J. C. McNaughton Co. v. Haldeman*, 160 Pa. 144, 28 Atl. 647, it was held that where wagering transactions in stocks had been closed, and there remained nothing in the broker's hands but the original deposit made by his principal, it could be recovered back. The same rule should apply to the deposit, although the profits are in the broker's possession, where one can be readily and clearly distinguished from the other, and the plaintiff does not require the aid of the original transaction to prove his case.

The judgment is affirmed.

(81 Vt. 346)

**HARRIS v. BOTTUM et al.**(Supreme Court of Vermont. Bennington.  
July 30, 1908.)**1. FRAUD—PLEADING—ALLEGATIONS—SUFFICIENCY.**

Where fraud is alleged in a pleading, the circumstances constituting it should be set forth with sufficient particularity to apprise the other party what he is called on to answer, and it must be so distinctly alleged that it may be put in issue, and evidence thereof given so that the court can determine whether the acts complained of are fraudulent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 37.]

**2. RELEASE—FRAUD—PLEADING—SUFFICIENCY—"UNDULY INFLUENCED."**

In an action by an employé for personal injuries, a replication to an answer relying on a release of the claim, which alleges that by reason of her injuries, bodily pain, and mental anguish consequent thereupon, and by reason of medicines taken to alleviate the pain, the employé had become so weak in body and enfeebled in mind that she did not understand the meaning of the writing, and while in that condition, of which the employer knew, he wrongfully procured and unduly influenced her to sign the writing, etc., is insufficient to show that the release was obtained by the employer's fraud: the words "unduly influenced" being no more than the equivalent of "falsely and fraudulently."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172, 7823-7824.]

**3. MASTER AND SERVANT—REASONABLY SAFE PLACE TO WORK—OBLIGATION OF EMPLOYER.**

An employer must prepare for his employé a reasonably safe place to work and maintain it in a reasonably safe condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171-174.]

**4. SAME—ASSUMPTION OF RISK.**

Where the place prepared by an employer for an employé in which to work was so obviously unsafe as to charge the employé with knowledge thereof, and he nevertheless entered on the work, he assumed the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

**5. SAME.**

An employé, by accepting service and continuing therein, assumes the hazards incident to obvious and known dangers, and he assumes the open and obvious dangers incident to the operation of unguarded machinery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 552, 553.]

**6. SAME—INJURIES TO EMPLOYÉ—ACTIONS—DECLARATION—SUFFICIENCY.**

A declaration, in an action for injuries to an employé while operating a machine, which alleges that it was her duty, by the direction of the employer's superintendent, to operate the machine, that she did not know that it was a dangerous employment, that it was the employer's duty to place guards around the machine, thereby protecting the employé from injury, that the employer did not place guards around the machine, that she had requested the employer to make the machine safer, and that she continued to run it without this being done, fails to state a cause of action, since it shows that it was obvious to the employé that there was no guard on the machine, and that she believed that it was dangerous to run it without a guard, so that she assumed the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 845.]

**7. SAME—DEFECTIVE MACHINERY—ASSUMPTION OF RISK—PROMISE TO REPAIR.**

Where the promise of the employer to repair defects in a machine of which the employé has complained induces the latter to continue in the employment, she may recover for injuries received within a reasonable time in which to repair the defects, unless the danger is so imminent that no reasonably prudent person would continue in the employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 645.]

**8. SAME.**

An employé, operating a machine with knowledge of the defects therein and in reliance on the promise of the employer to repair the defects, must exercise greater care than is required of an employé having no knowledge of the defects.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 638-647.]

**9. SAME.**

A declaration, in an action for injuries to an employé while operating a machine, which contains no allegation that she was induced to remain in the service by reason of the employer's promise to remedy the defects in the machine complained of, states no cause of action, since, in the absence of such allegation, it must be presumed that she assumed the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 845.]

Exceptions from Bennington County Court; Seneca Haselton, Judge.

Case for negligence by Sybil Harris against Fred L. Bottum and another. Heard on demurrer to plaintiff's replication to defendants' plea of release. Demurrer overruled, replication adjudged sufficient, and defendants excepted. Reversed, demurrer sustained, declaration adjudged insufficient, and cause remanded.

John V. D. S. Merrill, for plaintiff. O. M. Barber, for defendants.

**TYLER, J.** The plaintiff alleges, in her first count: That it was her duty, by the terms of her employment and by the direction of the defendant's superintendent, to operate the machine on the occasion alleged; that she was not a skilled operative; that she did not know it was a dangerous employment; that the defendants knew it and should have informed her of it and instructed her how to perform her work without danger to herself; and that it was their duty to place guards around the machine which would have protected her from injury. The negligence complained of was that the defendants did not place a guard in front of the small cylinder, that they did not have the cloth securely fastened to the cylinder at which the plaintiff worked to prevent its dropping down, and that the defendants did not instruct her about the danger, of which they well knew, and did not inform her how to avoid. The plaintiff alleges that the accident occurred by reason of one end of the cloth becoming unfastened and dropping down while she was operating the machine which was revolving rapidly, that her duty compelled her to put the cloth back

in its place, and that, while so doing, by reason of there being no guard on the machine, her hand was drawn between the large and one of the small cylinders and injured. In the second and third counts, the plaintiff alleges the necessity of placing guards around other cylinders. In the second, she alleges that the defendants knew that it was their duty to keep the cloth fastened to the cylinder, and that they had promised her that they would keep it so fastened, but had neglected that duty.

1. The defendants pleaded that by a certain writing signed by the plaintiff, and for a good and valuable consideration paid to her by them, which she accepted, she released and discharged them from her supposed cause of action. The plaintiff replied that the release was obtained of her by the defendants' fraud and their undue advantage and influence over her, and that while she was weak in body and enfeebled in mind, and when the defendants knew she was in that condition, they wrongfully procured her to sign the release, which, by reason of her said condition, she did without knowing or having reason to know the legal effect or contents thereof. The sufficiency of the replication is called in question by a demurrer. It is the general rule that, where fraud is alleged in pleading, the facts and circumstances constituting it should be set forth clearly and concisely and with sufficient particularity to apprise the other party what he is called upon to answer. 9 Ency. Pl. & Pr. 687. The defendants cite numerous authorities in support of this proposition, but it is unnecessary to look beyond our own decisions upon this subject. In the early case of *Ide v. Gray*, 11 Vt. 615, the court held that a declaration in fraud could not be sustained without appropriate facts to ground the action upon showing that the plaintiff had been damaged by the defendant's deceit. The rule is recognized and stated as elementary in *Brainard v. Van Dyke*, 71 Vt. 359, 45 Atl. 758. In the recent case of *Quinn v. Valiquette*, 80 Vt. 434, 68 Atl. 515, where the allegation in a bill in chancery which was brought to have an extension of a lease set aside on the ground of fraud, the court said: "There is no sufficient allegation that the defendant procured the extension of the lease by fraud, for it is not enough to characterize a thing as fraudulent without alleging that which makes it fraudulent, and there is no such allegation." The rule is forcibly stated in *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104.

The plaintiff alleges in her replication that, by reason of her injuries and the bodily pain and mental agony consequent thereupon and by reason of certain medicines, which, under her physician's advice, she had taken to alleviate her pain, she had become so weak in body and enfeebled in mind that she did not understand or suspect the meaning and legal effect of said writing, and that

while in that condition of body and mind, of which the defendants well knew, and knowing that she did not understand the meaning and effect of said writing, they wrongfully asked, procured, and unduly influenced her to sign said writing, which she did in their presence and solely by reason of their said request, procurement, and undue influence and by reason of her said condition. The plaintiff thus states three things, no one of which alone, by all combined, the defendants did, that caused her to sign the writing. This allegation does not comply with the rule, in that it fails to allege what means the defendants used to procure the plaintiff's signature, and how they unduly influenced her to sign the writing. Fraud must be distinctly alleged in the pleadings, so that it may be put in issue, and evidence thereof given so that the court can see and determine whether the defendants' acts were fraudulent, as alleged, or not. The replication contains no substantive allegation of fraud. The use of the words "unduly influenced" is no more a compliance with the rule than is the averment that certain things were done "with a fraudulent design," or that the defendant "craftily and subtly deceived" the plaintiff, which averments have been held insufficient. *Dean v. Mason*, 4 Conn. 428, 10 Am. Dec. 162; *Evertson's Ex'rs v. Miles*, 6 Johns. (N. Y.) 138. The words "unduly influenced" are not more than the equivalent of "falsely and fraudulently," which term was used in the declaration in *Wright v. Bourdon*, 50 Vt. 494. The words "by the unlawful imprisonment and fraud of the defendant," used in the replication in *Brainard v. Van Dyke*, supra, were held not to meet the requirements of the rule.

2. The main question is: Does the declaration present a cause of action against the defendants? The rules of law relating to the reciprocal duties of master and servant are well settled. The only difficulty is in their application to different cases as they are presented by trials of issues of fact or by demurrers. In this case it was the defendants' legal duty to provide for the plaintiff a reasonably safe place in which to work, and to maintain it in a reasonably safe condition during the employment; but it does not necessarily follow that the defendants are liable to the plaintiff for the injuries that she received, if the place where she was employed to work was unsafe, and she was injured in consequence of such unsafe condition. If the place was obviously unsafe so as to charge the plaintiff with knowledge thereof, and she nevertheless entered upon the work, she assumed the risk. It would be manifest injustice to hold an employer liable for injuries received by an employé through defects or insufficiencies in place or machines that the employé observed, or that were plainly observable by him. It was obvious to the plaintiff that there was no guard upon the machine. From her allegation that

she had requested the defendants to fasten the cloth upon the cylinder, and that they had promised to do so, it is inferable that she had previously operated the machine; but, if this was the first time she used it, she saw that it had no guard and believed it was dangerous to run the machine without one. It was held, in *Carbine's Adm'r v. Railway Co.*, 61 Vt. 348, 17 Atl. 491, that a servant assumes no risk caused by his employer's breach of duty, unless he has knowledge of the danger thereby caused and voluntarily continues in the employment; but, if with this knowledge he does continue therein, the increased danger becomes an incident of the service which he assumes, and for any injury resulting therefrom the master is not liable. By the acceptance of the service and the continuance therein the servant assumes the hazard incident to obvious and known dangers. The rule was thus correctly stated as applicable to the facts in that case. But see *Latre-mouille v. Bennington & Rut. Ry. Co.*, 63 Vt. 340, 22 Atl. 656; *Geno v. Fall Mountain Co.*, 68 Vt. 568, 35 Atl. 475; *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125, 52 Atl. 526; *Skinner, Adm'r, v. Cen. Vt. R. Co.*, 73 Vt. 336, 50 Atl. 1099. The rule is clearly stated in *Dunbar v. Cen. Vt. R. Co.*, 79 Vt., on page 476, 65 Atl. 528: " \* \* \* Unless he knew and comprehended it, or it was so plainly observable that he will be taken to have known and comprehended it, then, in either case, he cannot recover." *Connolly v. Eldredge*, 160 Mass. 566, 36 N. E. 469, was similar in its facts to the present case. There the plaintiff, when injured, was by direction of her superior, but without special direction, putting a new cloth covering on the upper roller, over the guard of a steam ironing machine. Held, that the elements of danger were observable and required no instructions to make them appreciated, and that the action could not be maintained. In *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 337, 9 Am. St. Rep. 806, it was held that a servant, by accepting and remaining in the service, assumed all the risk from an uncovered saw that projected over its frame partly across a narrow passageway along which he was obliged to go in the performance of his duties. The law is settled that the employé assumes the open and obvious danger incident to the operation of unguarded machinery. 20 Am. & Eng. Enc. 117, and cases there cited. There is no averment in the declaration that the plaintiff had not mental capacity to comprehend the danger of her employment. On the contrary, she alleges that she did comprehend it sufficiently to request the defendants to make the machine safer to use, and that she continued to run it without this being done.

3. The remaining question is: What was the effect of the defendants' alleged promise to remedy the defects in the machinery? The general rule is, where the promise of the master to repair defects, of which the servant has complained, induces the servant to

continue in the employment, he may recover for injuries received within a reasonable time for the repair of the defects, unless the danger is so imminent that no reasonably prudent man would continue in the service. If a servant is engaged in a dangerous service in which the machinery is defective, and has knowledge thereof, makes objection thereto, and is induced to remain in the master's employment by promise or assurance of its repair, and, not having waived the objection, is injured by reason of such defect, without contributory negligence on his part, he is entitled to recover; but greater care is required of him than if he had not known of the defect. *Erdman v. Ill. Steel Co.*, 95 Wis. 6, 69 N. W. 993, 60 Am. St. Rep. 68. In this case the declaration contains no allegation that the plaintiff was induced to remain in the defendants' service by reason of their promise to remedy the alleged defect in the machine. Therefore she remained at her own risk.

Upon the allegations in the declaration the plaintiff is not entitled to recover.

Judgment reversed, demurrer sustained, declaration adjudged insufficient, and cause remanded.

(81 Vt. 354)

DAVIS & FARNHAM MFG. CO. v. DUNBAR et al.

(Supreme Court of Vermont. Washington. July 30, 1908.)

# 1. CORPORATIONS—CONTRACTS—SALE OF CORPORATE BONDS—CONSTRUCTION.

A corporation, issuing mortgage bonds to the amount of \$75,000 to pay for the construction of a plant, contracted with a broker whereby he agreed to sell, at 80 per cent. of the face value, bonds to the amount of \$75,000 "more or less," as might be required to meet the cost of the plant, and whereby he agreed to accept \$75,000 "more or less" of the proposed issue of bonds as might be required for construction purposes, to pay for the same as ordered, and to accept and pay for, at the rate named, a sufficient amount to meet the requirements of the corporation for construction purposes, or otherwise to provide for the needs of the corporation for such purposes. Held, that the broker was not bound to pay cash for the bonds, but was bound to provide for the requirements of the corporation, and he was not obliged to sell the entire \$75,000 of bonds, but only a sufficient amount for the construction of the plant, and on his furnishing material sufficient for construction purposes he complied with his agreement.

## 2. SAME—WAIVER.

A broker contracted with a corporation to sell its mortgage bonds. He reported to the directors thereof that it was difficult to sell the bonds, and that they might dispose of them. They did not release him from his contract, and he continued to have the exclusive right of sale and exercised such right until the required amount was sold. Held, not to show a waiver of the contract, as a matter of law.

## 3. SAME—CONSTRUCTION OF CONTRACT.

A contract between the directors of a corporation individually and a broker recited that the broker had undertaken to finance the corporation, that he had its bonds for sale, that he desired the directors individually to subscribe for and purchase \$25,000 of bonds, and stated

the amount that each of the directors would take, and stipulated that they were not to take their bonds until the broker had paid \$25,000 for bonds subscribed for by him. *Held*, that the contract constituted a sale of \$25,000 of the bonds by the broker to the directors individually; the broker agreeing to take the same amount.

Exceptions from Washington County Court; Eleazer Waterman, Judge.

Action of assumpsit by the Davis & Farnham Manufacturing Company against E. K. Dunbar and another as trustee. Heard on report of commissioner to take trustee's disclosure. Judgment for plaintiff against trustee for \$10,074.06, and he brings exceptions. *Affirmed*.

John W. Gordon, for plaintiff. S. Holister Jackson, for defendant. Brown & Hopkins, for trustee.

TYLER, J. The only question that comes to this court is for what amount the trustee should be held liable. The commissioner reports that in the year 1904 the People's Lighting & Power Company, trustee, caused mortgage bonds secured on its franchise and property to be issued to the amount of \$75,000 to pay for the construction of its plant in Barre. It subsequently entered into a written contract with the defendant Dunbar, a broker, which provided that: "The Barre Co. will sell to Dunbar & Co. at 90 per cent. of the face value, as called upon by said Dunbar & Co., bonds to the amount of \$75,000, more or less, as may be required to meet the cost of constructing and putting into operation the proposed plant. \* \* \* The defendant agreed to accept \$75,000, more or less, of the proposed issue of bonds, as might be required for construction purposes, at 90 cents on the dollar, "to pay for the same as ordered, and to accept and pay for, at the rate named, a sufficient amount to meet the requirements of said Barre Company for construction purposes, from month to month, or otherwise to provide for the needs of said Barre Company for construction purposes from month to month." He received the bonds at 90 cents on a dollar and was credited with them at 100. The defendant also made a written agreement with Humphrey, Flynn, and Howland, who were directors of the company; Flynn being president and Howland treasurer, and all actively engaged in promoting its interests. The agreement was with them as individuals, and was made and went into effect March 24, 1904, contemporaneously with the other contract. By its terms the defendant agreed to subscribe for, or procure satisfactory subscribers for, \$25,000 worth of the bonds at par, to be paid for by him, or by the subscribers, to the treasurer of the company. Humphrey, Flynn, and Howland subscribed respectively for \$6,000, and \$6,000, and \$13,000; it being stipulated that they were not to take their bonds or pay their subscriptions until the defendant had paid the

\$25,000 for the bonds subscribed for by him. Soon after these agreements were executed and delivered, the defendant began to make efforts to sell the bonds, but did not find ready purchasers. He made contracts with the plaintiff and others to furnish material for building the plant and laying pipes to connect therewith, and made arrangements with the contracting parties by which they took bonds in payment for material furnished by them. At some time between April 26 and July 25, 1904, a meeting of the trustee's directors and the defendant was held, and the sale of the bonds was discussed, the defendant informing the directors that the bonds were looked upon with distrust, and that he was not able to sell them, that they might take them and do what they pleased with them, and that he could not do any more than he had done. The defendant had then furnished material for the plant to the amount of \$25,000, and he thereafter continued to sell the bonds and to furnish material as it was required. The bonds were ready for delivery and first went into the hands of purchasers July 25, 1904, after which Humphrey and Flynn took and paid for at par the amount for which they had respectively subscribed. Howland took his \$13,000 at 90 per cent. All the bonds were taken under the written contract made with the defendant. In the autumn of 1904 these three subscribers took about \$10,000 more of the bonds, and the plant was completed about the 1st of the following December, down to which time the defendant continued his efforts to sell bonds and furnish material.

It appears by the contract made by the defendant with the company that he was to accept as many of the bonds as were required for construction purposes—"75,000, more or less." He was not bound to pay cash for them, but he was to provide for the requirements of the company, and, in accordance with the contract, he sold bonds and took material in payment thereof, to the amount, as the report shows, of \$41,129.51. He was not obliged to sell the entire \$75,000 of bonds, but a sufficient amount for the construction of the plant. He sold and furnished material sufficient for construction purposes. Although he at one time reported to the directors of the company that it was difficult to sell the bonds, and that they might dispose of them, they did not release him from his contract, and he continued to have the exclusive right of sale, and exercised that right until the required amount of material was furnished. The commissioner does not find a waiver of the contract, and no waiver appears as matter of law.

The second contract recites that the defendant had undertaken to finance the company, that he had its bonds in his hands for sale, and that he desired "the parties of the second part to subscribe for and purchase



them to the amount of \$25,000." It then states the amount that each party would take. The contract clearly constituted a sale of \$25,000 of the bonds by the defendant to Humphrey, Flynn, and Howland as individuals; the defendant agreeing to take the same amount.

Upon the commissioner's report, the judgment below was correct, and is affirmed, with interest.

(81 Vt. 302)

#### WEED v. HUNT.

(Supreme Court of Vermont. Washington. July 27, 1908.)

#### 1. JUDGMENT—EQUITABLE RELIEF—ADEQUACY OF REMEDY AT LAW.

One is not entitled to maintain a suit in equity to restrain the enforcement of a judgment by default rendered in an action in Connecticut, on the ground that he was prevented by accident and inexcusable mistake from setting up a defense, where Gen. St. Conn. 1902, §§ 748, 749, prescribing a remedy for opening defaults, gave him an adequate remedy at law after he became aware of the entry of the judgment, and where the failure to avail himself of such remedy was not excused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 769.]

#### 2. SAME.

Where there is a plain and adequate remedy at law to set aside a judgment by default obtained through accident and mistake, equity will not furnish relief against the judgment, nor will equity furnish aid when the judgment debtor has without good excuse failed to avail himself of such adequate remedy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 769.]

#### 3. APPEAL AND ERROR—LAW OF THE CASE.

A decision on demurrer to a bill seeking to enjoin the enforcement of a default judgment, and alleging that the orator has no adequate remedy at law and has not been negligent in failing to avail himself of his legal remedies, that he may appeal to equity for relief, is not conclusive, on it appearing that, under the provisions of the law of a sister state in which the judgment was rendered, he had an adequate remedy at law and showed no excuse for his failure to pursue such remedy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4361-4368.]

#### 4. JUDGMENT—CONCLUSIVENESS—DEFENSES.

The inability of a married woman to make a contract as surety for her husband and usury are legal defenses and must be set up in an action at law, or they are concluded by the judgment rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1130-1137.]

Appeal in Chancery, Washington County; Alfred A. Hall, Chancellor.

Suit brought by Emily K. Weed against Berton A. Hunt to enjoin the enforcement of a default judgment. Heard on pleadings and master's report and exceptions thereto. There was a decree pro forma overruling the exceptions and dismissing the bill, and oratrix appeals. Affirmed, and cause remanded.

See 76 Vt. 212, 56 Atl. 980.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

T. J. Deavitt and Edward H. Deavitt, for appellant. B. A. Hunt, pro se.

WATSON, J. The oratrix seeks to enjoin the enforcement of a judgment by default obtained against her by the present defendant in garnishment proceedings in the state of Connecticut, on the ground that she was prevented by accident and nonnegligent mistake on the part of her counsel from setting up certain valid defenses. Without consideration of other points in this case, suffice it to say that the oratrix is precluded from obtaining the relief sought by the following facts set forth in that part of the special master's report wherein he says:

"It is claimed by the defendant that the oratrix had a complete remedy at law in Connecticut even after the rendition of the judgment by default, and that she negligently omitted to avail herself thereof. The law of Connecticut upon that subject then was and now is as follows:

"Sec. 748. [Gen. St. 1902]. Opening Defaults. Any judgment rendered or decree passed upon a default, in the superior court, court of common pleas, or in any city court, may be set aside at the term succeeding that in which it was rendered or passed, and the cause reinstated on the docket, on such terms, as respects costs, as the court may deem reasonable, upon the complaint of any person prejudiced thereby, showing that a good defense in whole or part existed at the time of the rendition of said judgment or the passage of such decree, and that the defendant was prevented by mistake, accident, or other reasonable cause, from appearing to make the same.

"Sec. 749. Contents of Complaint. Such complaint shall be verified by the oath of the complainant or his attorney, and shall state in general terms the nature of the defense, and particularly set forth the reason why the defendant failed to appear. The court shall order reasonable notice of the pendency of such complaint to be given to the adverse party, and may enjoin him against enforcing said judgment or decree, until the decision upon said complaint."

"The record in Hunt v. Weed in Connecticut shows that Sperry and McLean originally entered an appearance for the insurance company, but that on January 11, 1902, they entered an appearance for Mrs. Weed, which appearance was withdrawn January 24th, and that the case having been continued, and various orders of court complied with, judgment by default was rendered May 23, 1902, and execution issued May 24, 1902. On June 16th scire facias was brought against the insurance company based upon the judgment against Mrs. Weed, returnable on the first return day thereafter, the first Tuesday of September, 1902. The first session of court was held on the 10th day of October, 1902, and an appearance was en-

tered on that day for the defendant by Sperry and McLean; but no answer has been filed in the case, all proceedings being delayed on account of the injunction. The Connecticut statutes provide that processes in civil actions, returnable to the superior court, shall be made returnable on the first Tuesday of any month, except July and August, and that all processes shall be made returnable to the next return day or to the next but one to which it can be made returnable. The sessions of the superior court in Hartford county, where the suit was pending against Mrs. Weed, begin on the second day of October and the first Tuesdays of January and April. The first Tuesday in September, 1902, was the first day to which the scire facias could have been made returnable. It was not, however, the first time that an application could have been made to open the default in the suit of the defendant against Mrs. Weed. That default was entered up May 23, 1902. Under the Connecticut statute, application to reopen the default could have been made at any time during that term which expired about the 1st of July, verbally, or application in the nature of a complaint could have been brought returnable the first Tuesday of September, asking to have it reopened. No application has been made to reopen that Connecticut judgment. It would have been necessary to have sustained any application to reopen the judgment to have shown that a good defense existed at the time of the granting of the default, and that the defendant was prevented by some reasonable cause from appearing to make the same."

In connection with these facts should be considered the affidavit of oratrix's counsel (which was attached to the bill) that on or about June 3, 1902, he became aware and knew of the alleged accident and mistake of the rendition of a valid judgment against oratrix, and of the true state of affairs in general.

Thus it appears that the judgment by default was obtained May 23, 1902, and that on or about June 3, 1902, the oratrix's counsel became aware that the alleged unjust judgment had been entered by accident and mistake. Yet he made no application to the Connecticut court of law to open the default, although the statutes of Connecticut offered ample remedy at law for opening and setting aside the judgment before the defendant Hunt could prosecute his proceedings on the judgment. When there is a plain and adequate remedy at law to set aside a judgment by default obtained through accident and mistake, equity will not furnish relief against the judgment. *Sleeper & Sleeper v. Coker*, 48 Vt. 9. None the more will equity furnish succor when the judgment debtor has without good excuse failed to avail himself of his erstwhile adequate remedy at law. *Burton v. Wiley*, 26 Vt. 430. The following authorities from other jurisdictions apply these doctrines to circumstances essentially iden-

tical with those of the case at issue. In *Borland v. Thornton*, 12 Cal. 440, it was held that a court of equity will not enjoin the enforcement of a judgment when the complaint "does not set forth any reason for failing to apply to the district court to open the judgment, and to allow the plaintiff to file an answer." The court said (page 445): "Equity will not entertain jurisdiction of a suit of this nature, merely on the ground that the demand may be unconscientious, and that injustice may have been done, provided it was competent for the party to have placed the matter before the court in the original action, either before issue joined, or upon motion to set aside the verdict or judgment." In *Heller v. Dyerville Mfg. Co.*, 116 Cal. 127, 47 Pac. 1016, a case in which the plaintiff was seeking, in equity, to enjoin the enforcement of and to modify a judgment, it appeared that the plaintiff could have moved at law to vacate or modify the judgment at any time within six months after its rendition, but that, with knowledge of the facts, he had failed so to do. Held, that there was open to the plaintiff "a plain, speedy, and adequate remedy at law, and in such case there is no occasion to resort to equity, and it will not be permitted." In *Bergstrom v. Kiel*, 28 Tex. Civ. App. 532, 67 S. W. 781, it was held that equity will not furnish relief against a judgment obtained by fraud, since the plaintiff, who was chargeable, was negligent in not moving to set it aside or taking an appeal therefrom. In *Long v. Eisenbels*, 18 Wash. 423, 51 Pac. 1061, it was held, as stated in the headnote, that "a party seeking the aid of a court of equity for the vacation of a judgment after the period allowed by statute for correction upon motion in the original action must show that he is without fault or negligence in not having made seasonable application under the provisions of the statute." Reference may also be made to the recent case of *Freeman v. Wood*, 14 N. D. 392, 103 N. W. 392.

With the decisions and reasoning of the foregoing cases we heartily concur. Equity's principles would, indeed, be subverted if a person could lift himself into equity's jurisdiction by purposely spurning an adequate remedy at law. In the present case, the oratrix has not excused, nor attempted to excuse, for failure to avail herself of her adequate legal remedies for relief against the Connecticut judgment. Hence, on principle and authority, equity will afford her no aid.

The decision of this court on the demurrer to the bill is in no wise conclusive of the present question nor inconsistent with the position herein taken. See *Weed v. Hunt*, 76 Vt. 212, 56 Atl. 980. There we held merely that if, as alleged in the bill, the oratrix had no adequate remedy at law against the alleged unjust judgment and had not been negligent by herself or by her counsel in failing to avail herself of her legal remedies, she might appeal to a court of equity for re-

lief; but the facts as found by the master, especially the provisions of the law of Connecticut for opening judgments by default, negative the truth of certain essential allegations of the bill, and we render a decision now on a state of facts in certain essential particulars directly opposite to those upon which we passed in overruling the demurrer. *Viele v. Hoag*, 24 Vt. 46, cited by counsel for the oratrix as an authority for equitable relief in the case at issue, is not in point. In that case, it was held that a party having a defense, in former times equitable, but subsequently also legal in nature, cannot be deprived of the privilege of setting up his defense in equity, even after proceedings at law, provided there has been no delay or negligence in seeking relief in equity. But in the case at issue the defenses claimed by the oratrix—the alleged inability of a married woman to make a contract as surety for her husband, and usury—are legal defenses and must be set up in the action at law, or be concluded by the judgment therein. See *Day v. Cummings*, 19 Vt. 496, 500.

Pro forma decree affirmed, and cause remanded.

(81 Vt. 308)

#### In re ALDRICH'S WILL.

(Supreme Court of Vermont. Washington. July 27, 1908.)

#### TRUSTS—ACTION BY TRUSTEES—ACTIONS—PARTIES.

Under a will constituting the inhabitants of a city and a town the cestuis que trustent of a trust estate therein created, such inhabitants have the equitable and ultimate interest, making them necessary parties to a bill by the trustee.

Appeal in Chancery, Washington County; Alfred A. Hall, Chancellor.

Bill by the trustee named in the will of Leonard F. Aldrich, deceased. Decree pro forma dismissing the bill, and the trustee appeals. Decree reversed pro forma, and cause remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Edward W. Bisbee, for appellant. J. Ward Carver, for appellee.

WATSON, J. By the will the inhabitants of both the city of Barre and the town of Barre constitute the cestuis que trustent of the trust estate of which the orator is trustee, but they are not made parties to the bill and are not before the court. No one was in form made defendant, although the city and town respectively accepted service of the bill and have appeared by their solicitor. Yet these corporations are not the same as the inhabitants thereof and do not bear the same relation to the will. The cestuis que trustent have the equitable and ultimate interest to be affected by a decree upon the questions presented by the bill. Consequently, they are necessary parties. Story, Eq. Pl. § 207.

The decree will therefore be reversed pro forma, and cause remanded that the orator may act as it may be advised.

Decree reversed pro forma, and cause remanded.

(81 Vt. 319)

#### CHILD et al. v. SHAW et al. (two cases).

(Supreme Court of Vermont. Addison. July 27, 1908.)

#### 1. APPEAL AND ERROR—RECORD—EVIDENCE BEFORE MASTER.

The Supreme Court cannot consider evidence before a master not attached to or made a part of his report, and, consequently, sending up the minutes of evidence not incorporated in or referred to in his report has no effect whatever.

#### 2. SAME—REVIEW—QUESTIONS OF FACT—FINDINGS OF MASTER.

Where the facts detailed by a master tend to cast no doubt on the validity of his conclusions, and the evidence before him cannot be considered to determine whether it supports his conclusions because not attached or made a part of his report, those conclusions must stand as facts.

Appeal in Chancery, Addison County; Wm. H. Taylor, Chancellor.

Two bills by Willis B. Child and others against Rollin L. Shaw and others. Decrees for defendants, and orators appeal. Decrees affirmed, and causes remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Charles S. Crysler and Senter & Senter, for appellants. Frank L. Fish and Frank W. Tuttle, for appellees.

WATSON, J. The orators seek to have certain deeds set aside and canceled on the grounds that the grantor was mentally incapable of executing them, and that they were obtained from her through fraud and undue influence. The special master found: That the grantor at the time of the execution of the deeds was an "aggressive, capable, strong-minded, intelligent business woman, of sound mind and memory, and capable of entering into a valid and binding contract"; that she was fully aware of the effect of the execution and delivery of the deeds, and knew perfectly what would be the result thereof; and that she had given the matter full and fair consideration, and executed the deeds freely and of her own accord, without influence or suggestion from any one, and without any fraud, flattery, or imposition whatever. Upon the special master's report, the chancellor dismissed the orators' bills. The only complaint made in the orators' brief on appeal to this court seems to be that, in the light of the distrustful scrutiny with which equity views transactions apparently favoring a fiduciary at the expense of the beneficiary, the special master should not have found that the making and execution of the deeds were untainted by fraud, undue influence, or other unconscionable conduct. Even if the principle al-

luded to be applicable (and we do not decide that it is), the facts detailed by the master fully support his conclusions. The evidence given before the master has not been attached to nor made a part of his report, and this court cannot consider evidence not so reported by the master. Sending up minutes of evidence not incorporated in nor referred to in the master's report has no effect whatsoever. Since the facts detailed by the master tend to cast no doubt on the validity of his conclusions, and since this court has no legal means of considering the evidence and determining whether or not it supports the master's conclusions, those conclusions must stand as facts.

The decrees dismissing the bill, with costs, must therefore be affirmed.

Decrees affirmed, and causes remanded.

(51 Vt. 308.)

### HARRISON v. DAVIS.

(Supreme Court of Vermont. Rutland. July 27, 1908.)

#### 1. MUNICIPAL CORPORATIONS — DEPARTMENTS — EDUCATION — DISBURSEMENT OF FUNDS.

Under a city charter creating a board of school commissioners to have the custody of public school property, and empowered to employ teachers and fix their compensation, and given the control of all the public schools, and providing that such board shall "examine and allow all claims arising therefrom, and draw warrants for the payment of such claims upon the city treasurer," and that "the city treasurer shall keep a separate account of all moneys appropriated for the use of schools," and shall pay out of such moneys "all warrants drawn by the board of school commissioners for the use of schools," and that the compensation of the superintendent of schools "shall be paid by the school commissioners in the same manner as other expenses arising from the support of schools," the city treasurer is made the sole custodian of the moneys appropriated for the use of the schools and the disbursing officer thereof in payment of warrants drawn by the commissioners, and the latter cannot draw a warrant payable to one of their number for the aggregate sum of a number of claims examined and allowed by them and receive the money thereon from the treasurer with which to pay such claims.

#### 2. SAME.

A provision of a city charter, that the school commissioners shall have in general all the power and perform all the duties pertaining to the office of prudential committee of a school district not inconsistent with the system established by the city charter, does not authorize the school commissioners to draw a warrant payable to one of their number for the aggregate sum of a number of claims examined and allowed by them, and to receive the money thereon from the city treasurer with which to pay such claims.

Petition by Charles H. Harrison for mandamus to be directed to Will L. Davis. Petition dismissed.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Hunton & Stickney, for petitioner. F. G. Swinnerton and Butler & Moloney, for defendant.

WATSON, J. The charter of the city of Rutland provides for the establishment of a

board of school commissioners, which board shall have the care and custody of all the property used for the several public schools of the city, employ teachers and fix their compensation, have the management and control of all the public schools of the city, "examine and allow all claims arising therefrom, and draw warrants for the payment of such claims upon the city treasurer," and that "the city treasurer shall keep a separate account of all the moneys appropriated for the use of schools," and shall pay out of such moneys "all warrants drawn by the board of school commissioners for the use of schools." These two provisions relating to the drawing of warrants by the school commissioners and the payment thereof by the treasurer are parts of the same section (31), and should be construed together. Thus construed, there would not seem to be much doubt as to the true meaning.

The claims to be examined and allowed by the board of commissioners are the claims of other persons growing out of the administration of the department of schools within the scope of the authority of the commissioners as such, and it is for the payment of such claims to the respective claimants that the commissioners are empowered to draw warrants upon the city treasurer. This view is strengthened by the subsequent provision, in the same section, that the compensation to the superintendent of schools "shall be paid by the school commissioners in the same manner as other expenses arising from the support of schools." The charter contains no provisions for the payment of such expenses by the commissioners in any other manner. The treasurer is made the sole custodian of the moneys appropriated for the use of schools and the disbursing officer thereof in payment of warrants drawn by the commissioners for such use. Yet if the latter can draw a warrant payable to some one of their number for the aggregate sum of a large number of claims examined and allowed by them, and thereon get the money of the treasurer with which to pay the claims within the aggregation, warrants are not drawn by the commissioners upon the treasurer for the payment of such claims, and the treasurer is neither the sole custodian nor the disbursing officer, to that extent, of the moneys appropriated for the use of schools. With the overseer of the poor it is different, and the distinctions are significant here. The charter in express terms withholds from that officer the power to draw orders on the city treasurer, and provides that he shall be supplied with money for the purpose of his office, thus making him a disbursing officer in the payment of all bills contracted in the proper performance of his duties. Section 13.

Nor does the provision that the school commissioners shall have in general all the power and authority, and perform all the duties pertaining to the office of prudential committee of school districts not inconsistent with the

system established by the city charter, sustain the relator's position, for we find no law giving prudential committees the powers here contended for, and, if such law were found, there would be grave doubts whether it be not inconsistent with the system here under consideration, and hence by the terms of the charter not applicable. It follows that the writ should not issue.

In thus disposing of the case, we have not taken into consideration one way or the other the resolutions passed by the board of aldermen on the recommendation of the mayor, nor do we give any intimation as to whether the mayor and board of aldermen have any power thus to interfere with matters pertaining solely to the department of schools.

Petition dismissed, with costs.

(31 Vt. 319)

SMITH v. STANNARD et al.

(Supreme Court of Vermont. Rutland. July 27, 1908.)

**1. TAXATION—ACTIONS FOR UNPAID TAXES—QUESTIONS FOR JURY.**

In assumpsit for taxes, whether defendant's domicile was in the town in which taxed, at a certain time, or in a town of another state, held for the jury.

**2. APPEAL AND ERROR—RECORD—QUESTIONS PRESENTED FOR REVIEW—NECESSITY OF SETTING FORTH ALL THE EVIDENCE.**

Where it does not appear that all the evidence bearing on the question of the removal of a person from the domicile which she had at a certain time, and at which she was taxed, is shown by the bill of exceptions, and no part of the transcript of the evidence on that question is before the Supreme Court, it cannot say, as a matter of law on the record before it, that she made such a removal as to constitute a change of domicile.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2911-2915.]

**3. TAXATION—ASSESSMENT ROLLS OR BOOKS—ABSTRACT OF—REQUISITES.**

Pub. St. 1906, § 565, providing that the listers of each town shall arrange in alphabetical order an abstract of the individual list of all taxpayers of such town, and lodge the same in the town clerk's office, does not require that an abstract of the list of a recusant taxpayer, which has been made up by the listers pursuant to section 561, because of willful omission to return an inventory, shall contain in detail the action of the listers in making up the list; but an abstract showing severally the appraisal of the taxpayer's different pieces of real estate, also of her personal estate, and that such appraisals, doubled for failure to return an inventory, were taken in the aggregate as her total real and personal estate, is sufficient.

**4. SAME.**

Pub. St. 1906, § 503, specifying to whom and where, as to municipal and quasi municipal corporations, taxable real estate shall be set in the list, and section 510, containing like provisions as to personal estate, and section 571, declaring the required particulars of the completed grand list, are applicable as well where the list of a taxpayer is made up pursuant to section 561 by the listers because of willful omission to return an inventory, as where the list is based on an inventory properly returned, and the completed grand list of a taxpayer who has willfully omitted to return an inventory is not required to contain in detail the action of the listers in making up the same.

**5. SAME—ACTIONS FOR UNPAID TAXES—EVIDENCE—ADMISSIBILITY.**

Neither the abstract of the individual list of a taxpayer directed by Pub. St. 1906, § 565, to be lodged with the town clerk by the listers, nor the completed grand list provided for by section 571, being required to show the different steps taken by the listers in making up the list of a recusant taxpayer pursuant to section 561, parol evidence was properly received, in an action for taxes, for that purpose.

**6. SAME—MODE OF ASSESSMENT—VALUATION.**

Pub. St. 1906, § 555, providing that real estate in the last quadrennial appraisal, taxable to a person duly filling out, swearing to, and returning an inventory, shall be appraised by the listers at the valuation established in such appraisal, and requiring additions or deductions in circumstances therein mentioned, and section 556, providing that, if any real estate taxable to such person was omitted from the last quadrennial appraisal, the listers shall appraise the same at its value in money, subject to the rules directing the quadrennial appraisal of real estate, apply only to real estate "taxable to a person duly filling out, swearing to, and returning an inventory," and has no application where the real estate is taxable to a person who willfully omits to return such an inventory, and the listers in making up the list of a person who had willfully omitted to return an inventory was not authorized, instead of appraising the real estate themselves, to take the valuation established in the last quadrennial appraisal.

**7. SAME—REVIEW OF ASSESSMENTS—NOTICE TO PUBLIC OF MEETING OF LISTERS.**

Pub. St. 1906, § 568, requiring notice of the place of hearing by listers of persons aggrieved by their appraisal to be posted in the town clerk's office and two other public places, on or before a designated date, is mandatory, and compliance therewith is essential to the validity of a grand list, and hence there being no evidence, as to two of the notices, tend to show that they had been posted in time, or tending to show that any of the notices posted stated the place of hearing, it was error to receive the grand list in evidence in an action for taxes.

**8. SAME—COLLECTION—NOTICE.**

Under Pub. St. 1906, § 481, requiring a treasurer on receipt of a tax bill to post notices in at least three public places, and to publish the same for one week in the newspapers of the town, "calling upon the taxpayers to pay their respective taxes within ninety days from the date of such notices," and section 482, providing that at the expiration of such 90 days, the treasurer shall issue his warrant against delinquent taxpayers for the amount of taxes remaining unpaid, and deliver the same to the collector of the town, compliance with section 481 is a prerequisite to the treasurer's authority to issue his warrant, and hence where, in an action for taxes, it did not appear when the notice published in a newspaper was dated, or published, or what were its contents, and there was no evidence tending to show when the posted notices were posted, or what were their contents, and there was no other evidence tending to show either actual or constructive notice of the assessment of the tax sued for, or the time and place when and where payable, it was error to receive the treasurer's warrant in evidence.

Exceptions from Rutland County Court; Loveland Munson, Judge.

Assumpsit by trustee process by William A. Smith for the collection of a tax assessed against Mary A. Stannard, in which action the First National Bank of Fair Haven and others were named as trustees. Judgment for plaintiff, and Mary A. Stannard excepts. Reversed and remanded.

The action is assumpsit by trustee process for the collection of a tax assessed against the defendant in the town of Fair Haven on the grand list of the year 1902. The plaintiff's evidence tended to show: That Herman Stannard, a brother of the defendant, deceased June 16, 1901; that prior to his decease he had spent a part of every year for seven or eight years in Fair Haven during the time from May or June until February or March following; that when he was there his sister, the defendant, a single woman about 80 years of age, was frequently seen there with him; and that after his decease she remained there till March 17, 1902, when she left Fair Haven and never returned. The exceptions state that "as to the tendency of the evidence concerning the character and continuance of her abode with her brother, and of his residence at Fair Haven, the reporter's transcript of the testimony of the following witnesses is referred to and shall control," giving the names of the particular witnesses. In addition to what has already been stated respecting the evidence, the testimony of these witnesses tended to show: That the brother, who was a widower, owned two dwelling houses concurrently till the fall of 1900, one at Hampton, N. Y., which he sold that fall, and one on River street in the village of Fair Haven, this state, which he deeded to his daughter, Mary E. Stannard, who lived with him, about two weeks before his death. That when owning both places he stayed at each a portion of every year for some years prior to his decease. That after selling the one at Hampton he stayed at the one in Fair Haven and was taken ill there in the fall of 1900, his illness continuing till his death. That previous to the year 1895, and ever after, the defendant's sister, Mrs. Kirkland, owned a house in Granville, N. Y., in which she resided. That in the spring of 1895 the defendant, having been living with her brother at Hampton, went from there to her sister's house in Granville, taking her trunk with her, from which time forward as long as the brother lived, and longer, she had two rooms there set apart, furnished either by herself or her sister, for her occupancy, and therein her trunk and things were continually kept. That during the same time these rooms were occupied by no one else, except that when she was away her niece, Miss Kirkland, slept in one of them sometimes, perhaps once or twice in a summer, when necessary because she had company and was short of room. That when there the defendant did not board, but did pay in part the expense of the household. She bought things for the family, and so did her sister, Mrs. Kirkland, each as she thought was right, and the defendant called that her home. That during the seven or eight years before mentioned, the defendant lived with her brother in the house on River street in Fair Haven as his house-

keeper whenever he was there. They closed the house and went away together each year in February or March and returned together in May or June following, except that in the spring of 1901 she went away and returned as usual, but he, being ill, did not go. That she was never in any of those years at Fair Haven on the 1st day of April. That when thus acting as housekeeper for him she sometimes bought milk tickets and paid for them, also groceries, but as to whose money was used by her for such purposes there was no evidence. That she assisted some of the time in caring for her brother during his illness. That the furniture in the house before and at the time of the brother's death belonged to his son, who predeceased his father. No part of it was owned by the defendant. And that after the brother's death the defendant remained there with her niece, Mary E., the owner of the house, without any arrangement therefor, until the 17th day of the next March, when she went to the house of her sister, Mrs. Kirkland, in Granville, N. Y., taking with her all the personal effects which she had there, being a valise and some things she needed to wear. The exceptions state that the defendant was at Mrs. Kirkland's in Granville at intervals when not at her brother's in Fair Haven, and she remained there continuously from and after the time she left Fair Haven, March 17, 1902, as before stated. The plaintiff also introduced evidence showing, and defendant conceded, that she testified, among other things, in giving her deposition to be used in this case: That her residence was in the town of Granville, N. Y., and had been since 1895; that she had had considerable property for several years during that time, mortgages and the like, since 1898; that at no time had she paid any taxes in the town of Granville or elsewhere since 1895, but had paid a tax every year they asked her. It was conceded that the population of Fair Haven April 1, 1902, exceeded 2,500, and did not exceed 3,000.

Argued before ROWELL, C. J., and TYLER and WATSON, JJ., and WATERMAN, Superior Court Judge.

E. D. Raymond, F. S. Platt, and Butler & Moloney, for plaintiff. John G. Sargent and Hunton & Stickney, for defendants.

WATSON, J. At the close of the evidence, the defendant moved that a verdict be directed in her favor on the grounds that: (1) There is no evidence on the part of the plaintiff tending to show such an appraisal of the defendant's taxable property as the law requires; (2) there is no evidence tending to show notice to the defendant that the listers in reference to her list have taken the steps which the law requires; (3) there is no evidence that a notice to the defendant, she having removed from Fair Haven and not being there, was given to her by the treas-

urer of the town within the time required by law, before he issued a warrant for the collection of the tax; (4) the evidence has no tendency to show that on the 1st day of April, 1902, the defendant was a resident of Fair Haven, so that the listers were justified in making up a list as they did; and (5) there is no evidence of a seasonable lodging in the town clerk's office of an abstract of individual lists, and that notices of the time and place of hearing persons aggrieved by an action of the listers were posted in the town clerk's office and other places required by law within the time the law required. The motion was overruled, to which the defendant excepted.

For the tendency of the evidence concerning the character and continuance of defendant's abode with her brother, and of his residence at Fair Haven, the reporter's transcript of the testimony of certain witnesses is referred to and is to control. The brother died June 16, 1901. Consequently, her abode with him, and his residence, wherever it was, ceased at that time, and our consideration of the testimony to which reference is thus made is limited accordingly. As the case stood on the evidence, whether the defendant's domicile was at Granville, N. Y., or at Fair Haven, this state, at the time of her brother's death, was clearly a question of fact for the jury. *Jamaica v. Townshend*, 19 Vt. 267; *Mann v. Clark*, 33 Vt. 55; *Hurlbut v. Green*, 42 Vt. 816; *Anderson v. Est. of Anderson*, 42 Vt. 350, 1 Am. Rep. 334; *Fulham v. Howe*, 60 Vt. 351, 14 Atl. 652. The verdict shows that the jury must have found it to be at Fair Haven, and the exceptions state that after her brother's decease the defendant remained there until March 17, 1902, a period of nine months, when she left there and never returned. It does not appear that all the evidence bearing on the question of her removal at that time is shown by the bill of exceptions, and, as before seen, no part of the transcript of the testimony is before us thereon. We cannot say therefore as matter of law, on the record before us, that she made such a removal from Fair Haven to Granville as to constitute a change of her domicile to the latter place before the 1st day of April following, and consequently in overruling the fourth ground of the motion error does not appear. It follows that the defendant's standing on the record is that of a resident taxpayer, and the other questions presented must be determined accordingly.

Parol evidence given by two of the listers was admitted, subject to exception, showing in what manner the listers made up the defendant's list in question; that, the defendant not filling out an inventory as required by law, they "ascertained by means of reports of offsets claimed by other taxpayers in their inventories, reports of sundry persons in answer to inquiries of the listers themselves, and reports of sundry persons in an-

swer to inquiries of Mr. Raymond, acting as attorney for the listers, that the defendant had debts due her to the amount of \$33,740, that she had live stock on a farm in Fair Haven which the listers appraised at \$650, and that she had real estate in that town standing in her name which stood on the quadrennial valuation of real estate for 1898 at \$11,850; that the listers then added together these three items including "the amount at which the real estate standing in her name stood in the quadrennial valuation of 1898 without any appraisal of its value by themselves," the amount so obtained being \$46,240, which amount they doubled, making \$92,480. No assessment was made, and there was no poll. In these circumstances, the statute provides that 1 per cent. of the amount obtained by doubling shall constitute the person's grand list. Pub. St. 1906, § 561. It is argued that the action of the listers in making up the list of a recusant taxpayer must be shown by the abstract of the individual lists required by law to be lodged in the town clerk's office for the inspection of taxpayers, and by the completed grand list. We do not think, however, that this need be shown by either. The requirements of the statute (Pub. St. 1906, § 565) regarding such abstract are the same whether the list of a taxpayer be based on an inventory, or be made up by the listers according to the provisions of law (Pub. St. 1906, § 561), because of willful omission to return an inventory. It has been held that the abstract need not contain a schedule of all the estate appraised as belonging to the taxpayer, with the sum at which each article is appraised. *Taylor v. Moore*, 63 Vt. 60, 21 Atl. 919. On the reasoning of that case, it is clear that it need not contain in detail the action of the listers in making up the list of a recusant taxpayer. The purpose intended, as there declared by the court, namely, to have deposited in an accessible place information from which every taxable inhabitant can ascertain, at least, the amount of his list derived from his estate or property, and also the amount set to him, as compared with the several amounts derived from such property set to the other taxable inhabitants of the town, is served without such detail. The abstract in question shows severally the appraisal of the defendant's different pieces of real estate, also of her personal property, and that such appraisals, doubled, were taken in the aggregate as her total real and personal estate. Nothing more is required by the law in this respect.

It is further said that the law relating to the doubling process does not contemplate doubling each item going into the list to make up the full amount of the taxpayer's personal property, nor does it contemplate any classification into real and personal property, or distribution of property on account of its location; but herein the law of such procedure

should be construed with reference to the statute specifying to whom, and where in respect to municipal and quasi municipal corporations, taxable real estate and personal property shall be set in the list (Pub. St. 1906, §§ 503, 510), also, with reference to the required particulars of the completed grand list (Pub. St. 1906, § 571). The law of these sections is applicable whether the list of a particular taxpayer be based upon an inventory by him properly made out and returned, or be made up by the listers under the statute. By the section last cited, where there is no poll and no deductions, as in the case before us, the completed list shall contain the quantity of real estate owned by the taxable person, specifying the class to which it belongs and the village, school, and fire district in which it is situated, the value of the person's personal estate, and 1 per cent. of the value of such real and personal estate shall be his grand list for the assessment of taxes. Like the abstract, the completed list is not required to show the different steps taken by the listers in making the list of a recusant taxpayer, and, it being a matter not necessary to be shown by either, we have no doubt that the parol evidence was properly received for that purpose.

It is said that the items of real estate were transferred directly from the quadrennial appraisal without consideration by the listers, and that this procedure was unwarranted by law. By Pub. St. 1906, § 555, "the real estate in the last quadrennial appraisal, taxable to a person duly filling out, swearing to and returning an inventory, shall be appraised by the listers at the valuation established in such appraisal," and then additions or deductions may be made in circumstances mentioned therein. By section 556, "if any real estate taxable to such person was omitted from the last quadrennial appraisal, the listers shall appraise the same at its value in money, subject to the rules directing the quadrennial appraisal of real estate." It will be noticed that the law of these two sections by express terms applies only to real estate "taxable to a person duly filling out, swearing to and returning an inventory." It has no application when the real estate is taxable to a person who willfully omits to return such an inventory. Then the listers are required to ascertain as best they can the amount of taxable property of the person without regard to character, appraise the same, including the real estate at its value in money, and double the amount so obtained. See *Bartlett v. Wilson*, 60 Vt. 644, 15 Atl. 317; *Rowell v. Horton*, 58 Vt. 1, 3 Atl. 906; *Howes v. Bassett*, 56 Vt. 141. It is urged by the plaintiff that in *Bartlett v. Wilson* a like action by the listers in taking a former appraisal of the real estate of the recusant taxpayer was sanctioned. True, there the real estate was taken at its appraisal the preceding year, and that item

and the amount of the assessment for money and debts due were doubled for the person's grand list. Yet the question of the right to take such appraisal was not raised. The opinion states that "no question was made upon trial as to the proceedings of the listers, save the doubling of the appraised value of the real estate." In the case at bar, as before seen, it appears that the listers, in making up the defendant's list, instead of appraising the real estate themselves, took the valuation established in the last quadrennial appraisal. This was unauthorized in law, and the list, when made up, was not their judicial determination arrived at in the way pointed out by statute. Consequently, the grand list of the defendant to the extent of the real estate is illegal; but whether her whole list was thereby rendered invalid it is unnecessary now to consider (see Pub. St. 1906, § 606), since our holdings on certain other questions require a reversal of the judgment.

It is also contended that the item of debts due the defendant is simply an arbitrary assessment by the listers; that is, there are no choses in action shown as appraised. This question we do not decide.

The statute provides that on the first Tuesday in May the listers shall meet at some place to be appointed by them, and shall on that day, and from day to day thereafter, hear persons aggrieved by their appraisal or by any of their acts, until all applications are heard and decided and the list corrected accordingly. Notice of the place of hearing shall be posted in the town clerk's office and in two other public places in the town on or before the 25th day of April. Pub. St. 1906, § 568. It appeared that at some time one of the listers posted in the town clerk's office, in the post office, and in the Hotel Rutledge, all public places in Fair Haven, notices with regard to a meeting of the board of listers to hear grievances, and that the meeting was held May 16th at the town clerk's office. The evidence tended to show that the notice was posted in the post office within the time required by law; but there was no evidence as to the time when the notices were posted in the other two places, nor tending to show that any of the notices posted stated the place of hearing. The law particularly specifies that "notice of the place of hearing" shall be so given. On May 7, 1902, the listers left a written notice, signed by them and addressed to the defendant, under the outside door in the L part of the house on River street in Fair Haven, from which she had departed March 17, 1902, of the fact that they had made up a list against the defendant, and how, and the amount thereof after doubling, also of a meeting to be held by the listers at the town clerk's office in Fair Haven, May 16, 1902, at 2 o'clock p. m., to hear persons aggrieved by their appraisal or by any of their acts; but there was no evidence tending



to show that this notice, or any information concerning it, ever came to the defendant's knowledge. Whatever the effect might have been had she received this notice, or had knowledge thereof, in season to appear and be heard before the listers at the time and place named, as the case stands, any shortage in the notices of such meeting required by law to be posted was not aided thereby. The statute regarding the posting of such notices is mandatory, and a compliance with its provisions is essential to the validity of the list. There being no evidence tending to show such compliance, it was error to receive the grand list in evidence, and the defendant's motion for a verdict should have been granted on the fifth ground stated therein.

No question is made but that a vote previously taken by the town of Fair Haven to collect its taxes by its treasurer was in force throughout the year 1902. The plaintiff's evidence tended to show that the tax book was received by the treasurer from the selectmen July 10, 1902, and that the treasurer published in the "Fair Haven Era" for three weeks a notice "that the tax books had been placed in his hands for collection." Further than this, as to when the notice was dated, or published, or what were its contents, there was no evidence. The evidence further tended to show that the treasurer posted some notices in the First National Bank, the Allen National Bank, and F. H. Shepard's store, all public places in Fair Haven; but there was no evidence tending to show the dates when these notices were posted, nor anything as to their contents, nor what they referred to, nor was there any evidence, further than above mentioned, tending to show either actual or constructive notice to the defendant of the assessment of the tax sued for against her, or of the time and place when and where payable. On receipt of the tax bill, it was the duty of the treasurer by statute to post notices in at least three public places and publish the same for one week in the public newspapers of the town, if any were there published, "calling upon the taxpayers to pay their respective taxes within ninety days from the date of said notice," and at the expiration of such 90 days to issue his warrant against the delinquent taxpayers for the amount of all their taxes payable to him, returnable in 60 days from the date thereof, and deliver the same to the collector of the town. Pub. St. 1906, §§ 481, 482. A compliance with the provisions of the statute in these respects was prerequisite to the treasurer's authority to issue his warrant against the defendant, as a delinquent taxpayer, and proof thereof is essential to the plaintiff's right of recovery. Since, as before seen, the evidence did not tend to show such compliance, the receipt of the treasurer's warrant in evidence was error.

Judgment reversed, and cause remanded.

## WILKINS v. BROOK et al.

(81 Vt. 332)

(Supreme Court of Vermont. Chittenden. July 27, 1908.)

### 1. JUDGMENT—DEFAULT AGAINST ONE OF SEVERAL DEFENDANTS—EFFECT.

Though one of two defendants in an action for damages defaulted, she remained a party for the purpose of assessing damages; the default judgment being interlocutory, and not final.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 419.]

### 2. APPEAL AND ERROR — REVIEW — INSUFFICIENT BILL OF EXCEPTIONS.

A bill of exceptions to the admission of testimony, "subject to the objections and exceptions appearing in the record," and a reference to a transcript of the testimony made a part of the bill, are insufficient to preserve for review the rulings admitting the testimony, except so far as the briefs specifically point out the exceptions taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2446.]

### 3. TRIAL—EVIDENCE IN REBUTAL.

In an action for malpractice upon decedent, defendant's testimony tended to show that from 1890 to September, 1898, when he began to treat decedent, she was at times infirm in health, etc.; the witnesses specifying the particular times to which their testimony related. Plaintiff then offered testimony to show that at times during such period decedent appeared to be well, and not afflicted as defendant's witnesses said she was, but plaintiff's witnesses' attention was not called to the specific times to which defendant's witnesses testified. *Held*, that plaintiff's testimony was admissible in rebuttal, as tending to show that decedent's condition was other than as testified by defendant's witnesses, at the times concerning which defendant's witnesses testified, though it tended to show her condition at other times.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 149.]

### 4. EVIDENCE—HEARSAY.

In an action for malpractice upon decedent, a physician testifying for plaintiff could repeat statements made to him by decedent concerning her past suffering, so far as essential to a correct diagnosis of her case, such statements having no hearsay quality, but being treated merely as observed facts, forming part of the physician's data, and bearing upon the weight of his opinion, regardless of their correctness, but the statements were inadmissible as tending to show the fact of such pain, being hearsay on that point.

### 5. WITNESSES — COMPETENCY — TRANSACTION WITH DECEDENT—"CONTRACT IN ISSUE."

Under Pub. St. 1906, § 1590, providing that when an executor, etc., is a party, the other party cannot testify in his own favor, unless the "contract in issue" was originally made with a person living and competent to testify, the words "contract in issue" relate to the issues made by the evidence, as well as to those made by the pleadings; and, in an action for malpractice upon decedent, wherein plaintiff alleged that decedent employed defendant to treat her, but showed that he himself made the contract, defendant could testify to the contract, but he was not a competent witness generally.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, p. 1530.]

### 6. SAME.

Under Pub. St. 1906, § 1590, a defendant, in an action for malpractice upon decedent, not a party to the contract of employment, was an incompetent witness.

# 7. APPEAL AND ERROR—REVIEW.—INSUFFICIENT BILL OF EXCEPTIONS.

An exception to the striking out of an answer in a deposition, and an exception to the exclusion of other evidence, will not be considered, where the bill of exceptions does not show the ground of exception, and nothing is pointed out in the transcript to show it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2297.]

# 8. PHYSICIANS AND SURGEONS—ACTION FOR MALPRACTICE—PROOF—REQUISITES.

To warrant a finding of malpractice, there must be medical expert testimony to show it; it being insufficient to show merely that the treatment was injurious.

# 9. SAME—OSTEOPATHY.

Osteopathy being a school of practice distinct from other medical schools, in an action against osteopaths for malpractice, it was improper to submit to the jury a rule applicable to the medical profession generally, where there was no evidence tending to show that defendants treated the case otherwise than as osteopaths.

# 10. NEW TRIAL — NEWLY DISCOVERED EVIDENCE—MATERIALITY.

In an action for malpractice upon decedent, plaintiff's testimony as to a conversation he and decedent had with defendant, in which decedent claimed that defendant hurt her at the last treatment, did not tend to show malpractice, but at most an implied admission that defendant might have hurt her through overrating her strength; and hence defendant is not entitled to a new trial, on verdict for plaintiff, because of newly discovered evidence that decedent's condition after her last treatment was not due to that, but to a fall from a car while returning home from the treatment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 215-217.]

# 11. PHYSICIANS AND SURGEONS—ERROR OF JUDGMENT—NOT MALPRACTICE.

A medical practitioner's error of judgment in treating a case does not show malpractice, unless so gross as to be inconsistent with due care, and malpractice cannot be inferred from results of the treatment alone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Physicians and Surgeons, § 32.]

# 12. NEW TRIAL—PETITION—TIME FOR BRINGING.

A petition for a new trial may sometimes be deferred until the case is disposed of on exceptions, since it can be brought at any time within two years after rendition of the original judgment.

Exceptions from Chittenden County Court; Alfred A. Hall, Judge.

Action by Lucia Wilkins, administrator, against William W. Brock and another. From a judgment for plaintiff, defendants bring exceptions. Reversed, petition dismissed, and cause remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

B. E. Bullard and V. A. Bullard, for plaintiff. R. M. Harvey and E. C. Mower, for defendants.

ROWELL, C. J. This is an action for malpractice as physicians. The declaration contains a count in trespass for assault and battery, and two counts in case. At the close of all the testimony the count in trespass was ruled out, there being no evidence

to support it, and the case submitted only on the other counts. The defendant Roselle let judgment go by default. The defendant Brock pleaded not guilty, and the issue was tried by jury and found for the plaintiff, and damages assessed against the defendants jointly, by direction of the court, the defendant Roselle not appearing. To this the defendant Brock excepted, and objects that Roselle was not a party on trial, and stood as though she had never been a party to the action, and that he was prejudiced by bringing thus prominently before the jury that she had admitted her guilt, as the jury would be likely to think that, as she was guilty, he was also, as they joined in the treatment complained of. But here was no error, for the judgment against Roselle was interlocutory, not final, and therefore she remained a party for the purpose of assessing damages; and, though she was defaulted and Brock found guilty, yet the final judgment was to be joint, for they were declared against jointly, and there could be but one assessment of damages, and that assessment had to be by the jury that tried the issue between the plaintiff and Brock. Mr. Tidd says that, in an action against several, if some let judgment go by default, and others plead to issue, the jury that tries the issue assesses damages against all. 2 Tidd's Pr. (3d Am. Ed.) 894. So in Heydon's Case, 11 Co. (5a), which was trespass for assault and battery against three, two pleaded to issue and tried separately, and damages in different amounts were assessed. One let judgment go by default, and a writ of inquiry of damages was awarded on the roll, but not issued. Thereupon a great question was moved, and depended for divers terms how, and against whom, and for what amount judgment should be entered; and at last, on consideration had of the precedents and the books, judgment was entered against all for the sum first assessed and that judgment was affirmed on error. So in 1 Saund. 207a, note (2), it is said that where several are jointly charged in an action of trespass, and plead jointly, or sever in their pleas, or one lets judgment go by default, and the jury assesses several damages, the verdict is wrong, and the judgment erroneous; but that the plaintiff may cure the verdict by entering a nol. pros. as to all the defendants but one, and taking judgment against him only. So in Bohun v. Taylor, 6 Cow. (N. Y.) 313, it is said that where there is but one trespass, and all are found guilty of the whole, the damages must be entire, though the defendants sever, and one lets judgment go by default. And in Gerrish v. Cummings, 4 Cush. (Mass.) 391, it is said that in an action of trover there can be but one assessment of damages; that though one defendant is defaulted, and the other found guilty, yet there must be a joint judgment, and that the verdict, which is to fix the amount of

damages, fixes it as well for the party defaulted as for the party that pleaded.

The plaintiff claimed, and the testimony on his part tended to show, that about the 1st of September, 1898, the intestate was in a condition of exhaustion of the nervous system, a functional disease called neurasthenia, which had been coming on for three months, and that the defendant treated her therefor about six weeks, ending the 12th of October following; that the last treatment was such that it caused "general myelitis from traumatic origin," an organic disease of the spinal cord or its membranes, which betrayed itself at once by pain in the back, inability to walk without assistance, and the like, and from which she thenceforth languished, and, languishing, died in March, 1900. The plaintiff introduced in his opening the testimony of a large number of witnesses, some of whom are named in the bill of exceptions and some not, but referred to as "many others," for the purpose of showing in a general way the good health of the intestate for 20 years or more prior to three months next before the defendant began to treat her, and her bad health ever after her last treatment. The exceptions say that "this testimony was admitted under the circumstances, and subject to the objections and exceptions appearing in the record," and a transcript of the testimony is referred to and made a part of the bill of exceptions, but the bill affords no other means of finding out what those circumstances, objections, and exceptions are. Nor do the defendant's counsel aid us in this respect, for they point out nothing to enable us to find what the transcript contains on the subject, but leave us to search it for ourselves. But this court does not search the transcript for exceptions referred to in this way. The bill of exceptions should show what the exceptions are, and would, if drawn according to the rule in such case made and provided; but if it does not, and the transcript is referred to for them, they will be noticed only so far as counsel point them out specifically in their brief.

To meet the testimony thus introduced, the defendant introduced testimony tending to show that from 1890 to September, 1898, when he began to treat her, the intestate was at times infirm in health, unable to walk, had symptoms of paralysis of the lower limbs, backache, and total disability at times, was injured in a carriage accident before 1890, and suffered in the same way from that; was injured by overwork in 1892-93, which rendered her unable to walk without assistance for a time; that at times after that, up to September, 1898, she walked feebly, and with a shuffling gait, and complained of inability to walk, and of pain in her back and limbs; that in the last few months before September she was unable to walk at all without taking hold of things,

shuffled and scuffed her feet, and was unable to work, which was her condition when the defendant began to treat her; and that she improved under his treatment to such an extent that she came to his office alone the last time she was treated, and went away alone, walking to the car. In giving this testimony the witnesses specified the particular times and occasions to which it related.

The plaintiff called in rebuttal several witnesses, who testified to times and occasions, from 1880 to 1898, when the intestate appeared to be well, and not afflicted as the defendant's witnesses said she was. But the attention of none of the plaintiff's witnesses was called to the specific times to which the defendant's witnesses testified; and, because it was not, it is objected that their testimony was not admissible as rebutting. This is the only objection. But that is not determinative of the character of the testimony in this respect; for if it tended to show her condition to be different at other times during the period covered by the defendant's witnesses, it tended to show it different at those times, and that it did thus tend cannot be doubted. The plaintiff called a physician, who examined the intestate in February, 1900, to ascertain her condition, and who testified that in making his diagnosis it was necessary for him to know the history of her trouble, and that consequently he elicited from her that her pain at that time, and for some weeks before, was irregular, but located in her back; that the first severe pain she had there was in September or October, 1898, and started suddenly and severely following some treatment, and continued to be severe for over a year; that she received an extremely severe and sudden injury upon her back in September or October, from the effects of which she fainted, followed by unconsciousness, and was unable to walk directly after it. The defendant did not object to the admission of what the intestate said about present pain, but objected to what she said about past pain, when it began, etc., as being "historic narrative." But the court held it admissible, without indicating what use could be made of it, and overruled the objection, to which the defendant excepted.

If some of the statements were admissible, we shall not consider whether others were or not, as the position taken by the defendant does not require it; for he contends generally that, while her statements and complaints of present pain and suffering were competent to show her condition at that time, it was error to go beyond that, and permit the witness to narrate in detail her statements as to past pain, when it began, its origin, nature, severity, and attendant effects, covering more than a year before his examination. That some of those statements were admissible is clear, for they were of past pain and suffering; and, when that information is neces-

sary to a correct diagnosis, statements of it may be testified to by the physician as forming a part of the basis of his opinion. *Knox v. Wheelock*, 54 Vt. 150; *Hathaway's Adm'r v. National Life Ins. Co.*, 48 Vt. 335. In such cases the statements of the patient have no hearsay quality, but are treated merely as observed facts, forming part of the physician's data, and bearing upon the weight of his opinion, without regard to their correctness or incorrectness. But here the court went further, and allowed the statements of past pain to be argued to the jury as evidence tending to show the fact of such pain; and in its charge it allowed the jury to consider all those statements, with no other limitation than that they must not be weighed as tending to show that the intestate received an injury from the defendant. That was error; for when those statements were used as direct testimonial evidence of the truth of what they asserted, they were carried beyond their legitimate scope, for, as to that, they were nothing but hearsay. 3 Wig. Ev., § 1720.

The counts in case allege that the intestate employed the defendants to treat her. The plaintiff testified in his opening, however, and it appeared without question during the whole trial, that he himself made the contract, and with the defendant Brock alone, and he told what the contract was. The defendant Brock offered to testify, in his own favor, to the contract, claiming that it was different in some respects from what the plaintiff testified it was. But the court excluded him as incompetent, under Pub. St. 1906. This was error, for the contract was originally made with the plaintiff acting for himself, and not for the intestate, who was his wife, and so he was a party to it, and was living and competent to testify, and had testified. This brought the matter within the exception of section 1590 of the statute, which provides that, when an executor or administrator is a party, the other party shall not be permitted to testify in his own favor, "unless the contract in issue was originally made with a person who is living and competent to testify." The words "contract in issue," as there used, mean the contract in dispute or in question, and relate as well to the issues made by the evidence as to the issues made by the pleadings; and the contract here in question was brought forward by the plaintiff and made an issue by his evidence, but whether necessarily or not we need not inquire, for it was treated as necessary and material, both by the plaintiff and the court in its charge. Brock, therefore, was a competent witness to the contract. But that did not make him a competent witness generally, for the purpose of the exception is, not to shut the mouth of the defendant as to contracts made with parties still living and competent to testify, but to preserve equality of testimonial competency, beyond

which the exception does not go, and the exclusion of the statute is operative.

Brock also offered to testify to certain other things as collateral. But they were not collateral, but bore directly on the cause of action in issue and on trial, and antedated the death of the intestate. The same is true of the defendant Roselle's deposition in this respect; and, as she is a party to the action, and not a party to the contract between the plaintiff and Brock, the deposition was properly excluded.

An answer to a question in *H. P. Hinkley's* deposition, introduced by the defendant, was stricken out, to which the defendant excepted. But as the bill of exceptions does not show on what ground, and nothing is pointed out in the transcript to show it, the exception is not considered. For the same reason we do not consider the exceptions to the exclusion of Brock's diploma, and his offer to show that Roselle is a graduate of the American School of Osteopathy at Kirksville, and had the reputation of being, and was in fact, a competent and skillful practitioner of osteopathy.

The defendant Brock's motion for a verdict should have been sustained, for to warrant the finding of malpractice it was necessary to have medical expert testimony to show it, and there was none; but, on the contrary, there was such testimony tending to show that the treatment was proper, and according to the principles and practice of osteopathy. It was not enough to show merely that the treatment was injurious, but it was necessary to go further, and show by competent witnesses that the requisite care and skill was not exercised in giving it—for that was the only question, according to the plaintiff's brief—and that was not done. Such is the doctrine of all the cases. *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807; *Sims v. Parker*, 41 Ill. App. 284; *De Long v. Delaney*, 206 Pa. 226, 55 Atl. 965; *Feeney v. Spalding*, 89 Me. 111, 35 Atl. 1027. This virtually disposes of the question made on the admission of the testimony of the plaintiff's medical expert, given in answer to certain hypothetical questions, for the testimony was not offered for the purpose of showing that the treatment was not proper osteopathic treatment, but only to show that it was injurious, which did not tend to show malpractice without more, and there was no more.

The second count alleges that the defendants professed to be practicing the art of healing and curing sick and diseased people after and by the methods of the school of osteopathy, and that the intestate employed them "as such healers." The third count declares against them generally as physicians and surgeons, without more. No claim is made in argument that osteopathy is not a distinct school of practice, and could

not well be, for the statute recognizes it as such, by making special provisions regulating it. There was no testimony tending to show that the defendants treated the intestate otherwise than as osteopaths, nor that any other kind of treatment was contracted for, expected, desired, or given. But the court, after giving the jury the rule as to the care and skill the defendants were bound to exercise if they treated the case as osteopaths, went on to give them the rule applicable to the profession generally, if they found that the defendants did not treat the case as osteopaths. This was error, for there being no evidence that they treated the case otherwise than as osteopaths, and osteopathy being a distinct school of practice, the treatment was to be tested by the principles and practice of that school, and not by the principles and practice of any other school, nor of the profession generally; and the testimony on the part of the defendants tended to show that the treatment complained of was according to the principles and practice of osteopathy, and also tended to show what those principles and that practice are. It was also error because it submitted an issue dehors the evidence. Indeed it is not really contended that this was not error, but claimed that there is no exception sufficiently explicit to be available. But one quite sufficient is pointed out in the transcript.

The gist of the petition for a new trial on the ground of newly discovered evidence is that the condition of the intestate after her last treatment was not due to that, as the plaintiff claimed, but due to a fall she got

in alighting from the electric car on her return from that treatment, about which nothing was shown on trial. The defendant's counsel say in their brief that if it be held that the testimony objected to should have been excluded for the reasons assigned, perhaps the newly discovered evidence would not be material, because there would be no occasion to show the true cause of that condition; but that even then there would remain the plaintiff's testimony of a conversation he and the intestate had with Brock, in which she claimed that he hurt her at the last treatment, and that the newly discovered evidence would be applicable and pertinent to that, and so would stand for consideration. But that testimony did not tend to show malpractice, for the most that can be claimed for it is an implied admission by Brock that he might have hurt her then by reason of overrating her strength to endure the treatment. But error of judgment is not enough, unless it is so gross as to be inconsistent with due care; and there is nothing to show that, for it could not be inferred from results alone. Therefore there is nothing left to which the newly discovered evidence can apply, and hence there is no ground for considering the question of its sufficiency.

In cases like this the bringing of such a petition might sometimes well be deferred until the case is disposed of on the exceptions, as it can be brought at any time within two years after the rendition of the original judgment.

Judgment reversed, petition dismissed with costs, and cause remanded.

(221 Pa. 128)

**MCCOY v. NIBLICK et al.**

(Supreme Court of Pennsylvania. May 4, 1908.)

**1. ESTOPPEL—ACQUIESCENCE.**

A married woman employed an agent to sell her land at public sale, and at the sale she heard the agent read the conditions of the sale and accepted a portion of the price and gave possession to the vendee and suffered him to make improvements on the land. *Held*, that she could not subsequently set up that the sale was void under the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 260-263.]

**2. HUSBAND AND WIFE—SALE OF LAND BY WIFE—RECOVERY—CONDITIONS.**

Under Act June 8, 1893 (P. L. 344), a married woman, who sold land without her husband joining in the sale and delivered possession of it to the vendee, cannot recover it back without paying the portion of the money which she had received and reimbursing him for expenses incurred under the contract of sale.

**3. SAME.**

A married woman, who has sold her land without her husband's consent, knows that her contract is a valid one, even if neither she nor the vendee may be able to have it specifically enforced, and whatever the vendee may pay on it, or expend in pursuance of it, must be returned to him by her when she finds she cannot specifically perform.

**4. TRIAL—OPENING CASE.**

In ejectment the court properly permitted plaintiff to reopen his case, after he has closed it, on intimation that a nonsuit will be directed.

Appeal from Court of Common Pleas, Bucks County.

Action by Mary J. McCoy against Samuel Q. Niblick and William M. McCormick. Judgment for plaintiff, and defendants appeal. Reversed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Herman Yerkes, for appellants. Wm. Stuckert and Wm. B. Stuckert, for appellee.

**BROWN, J.** There was sufficient shown by the appellants to take appellee's sale of her farm out of the statute of frauds. Wishing to sell it, she sent for Charles F. Vandegrift, a real estate agent, and asked him to expose it to public sale on March 13, 1906. He did so on that day, after reading the conditions of sale signed by himself as her agent. She was present at the sale, and, after a conference with Vandegrift, authorized him to sell the property to McCormick, one of the appellants, at his bid of \$10 per acre, subject to an annuity charge. The property was thereupon knocked down to him, and he signed the agreement to purchase it in the presence of the appellee. On the same day he paid her agent, \$120, 10 per cent. of the purchase money, in accordance with the conditions of sale, and the agent procured from her and handed over to him the title papers to the property. Shortly before April 1, 1906, when possession of the farm was to be given to the purchaser, the appellee vacated it, and McCormick took possession.

He paid the annuity of \$100 due April 1, 1906, as well as that due the following year. On April 2, 1906, he tendered the balance of the purchase money and demanded his deed, which the appellee refused to give him. Subsequently he paid fire insurance tax on the barn and contents and expended \$400 in improving the farm. This ejectment was brought on August 28, 1906, and a verdict directed for the plaintiff, on the ground that her contract for the sale of her farm was void, because she was a married woman when she signed it, and her husband had not joined in it. The case was tried upon that theory alone, and it is the only one advanced on this appeal in asking that the judgment on the verdict be sustained. The effect of sustaining it would be to drive the appellants from the farm and restore it to the appellee without repayment by her to McCormick of the percentage of the purchase money which he paid her agent, or reimbursement for what has been paid for annuity dues, fire insurance tax, and improvements.

There was a time when there would have been no relief for McCormick, as the vendee of the appellee, from what he has shown to be her unconscionable conduct, for, until recent years, a married woman, under her plea of coverture, could retake land from her vendee in possession of it without refunding a dollar of the purchase money, though all of it had been paid to her, and without reimbursement for any improvements made, if the land had not been sold or conveyed in the precise mode pointed out by the statute; but this was when her incapacity to contract at all in relation to her real or personal estate was the rule and her capacity the rare exception. Now her capacity to contract in all respects as if she were unmarried is the rule, and her incapacity the exception. As to her real estate the words of Act June 8, 1893 (P. L. 344), are: "A married woman shall have the same right and power as an unmarried person to acquire, own, possess, control, use, lease, sell or otherwise dispose of any property of any kind, real, personal or mixed and either in possession or expectancy, and may exercise the said right and power in the same manner and to the same extent as an unmarried person, but she may not mortgage or convey her real property, unless her husband join in such mortgage or conveyance." A married woman may therefore no longer repudiate her contract for the sale of her real estate, in which her husband has not joined, on the ground that it is void, and keep what has been paid to her on account of it or expended by her vendee in pursuance of it. *Gildden v. Strupler*, 52 Pa. 400, *Grim's Appeal*, 105 Pa. 375, and other cases cited by counsel for appellee, are not now authority for permitting a married woman to profit by her moral dishonesty, except when she

undertakes to do what the act of 1893 says she still may not do. For the consequences of not doing that which she undertakes to do by virtue of the powers conferred upon her by that act she is as answerable for damages as if unmarried.

Under the act of 1893 a married woman may "sell" her real estate and make any contract "necessary, appropriate, convenient or advantageous" to the exercise of her right to sell; but she may not perform her contract to sell without the joinder of her husband in the conveyance. She therefore knows when she enters into a contract to sell that she takes the chances, as well as her vendee, that her husband may not join in the deed, and that neither can compel specific performance if he refuses to join; but she knows that her contract or agreement to sell is a valid one, even if neither she nor her vendee may be able to have it specifically enforced, and therefore whatever the vendee may pay on it or expend in pursuance of it must be returned to him by her, when she finds that she cannot specifically perform. The words of the act would be meaningless if any other effect should be given to them. The appellee contracted to sell under the power conferred upon her by the statute to make the contract; but, if not able to perform it, she must place her vendee in the same position he was in before he contracted with her. This is the rule as to all persons sui juris, and married women, who now are of this class in the acquisition, ownership, possession, control, use, lease, and sale of their real estate, except when they actually convey, are subject to it. "The act of 1893 gives a married woman the same power that a feme sole has to sell her real estate, except that she may not make a valid conveyance unless her husband joins in the deed." *Jenkins v. Railroad Co.*, 210 Pa. 134, 59 Atl. 823. Our Brother Stewart, when on the common pleas, properly said of the act of 1893, in *Reed's Estate*, 3 Pa. Dist. R. 503: "The act makes a clear distinction between the executory contract of sale and the actual conveyance of the wife's land, so far as regards the manner of their execution. It gives her the right to contract for its sale in the same manner, and to the same extent, as an unmarried person; but, when she comes to convey, she may do so only by her husband joining in the deed. If her right to contract for its sale be qualified, in like manner with her right to convey, she is no better off with respect to her real estate than she was under the act of 1848. It is this right to contract, and her personal liability in connection therewith, that marks the advance made. The refusal of the husband to join in the wife's deed cannot operate to relieve her from liability under her contract, any more than her refusal to join in the husband's would relieve him from liability under his. Can there be any doubt that the damages in both cases would be measured by the same

standard? The only possible difference between the two as to result is that the husband could be required to perform specifically, so far as his own estate in the land is concerned, while performance could not be decreed against the wife on her contract since her individual deed would be ineffectual for any purposes. This difference emphasizes the distinction found in the act. The wife's contract, unlike that of the husband, conveys no interest in the land, legal or equitable, but creates a personal liability only."

The appellee is entitled to regain possession of her land only after paying McCormick what a jury may find is due him for the purchase money, the annuity, and the fire insurance tax paid by him, and for whatever expenditures he made for improvements before he was notified that the contract would not be specifically performed because the husband of the appellee would not join in the deed. This equitable result would have been reached by a conditional verdict which the jury ought to have been directed to render, if they believed the facts testified to by the appellants and their witnesses.

As to the first assignment of error, which complains of the court's permission to the appellee to reopen her case after she had closed, and there was an intimation that a nonsuit would be directed, nothing more need be said than that it was not an improper exercise of judicial discretion.

The first, second, and third assignments of error are overruled. The fourth, fifth, sixth, seventh, eighth, and ninth are sustained, and the judgment is reversed, with a venire facias de novo.

(221 Pa. 149)

DELAWARE, L. & W. R. CO. v. DANVILLE  
& B. ST. RY. CO. et al.

(Supreme Court of Pennsylvania. May 4, 1908.)

1. STREET RAILROADS — GRADE CROSSING —  
QUESTION TO BE DETERMINED.

In determining whether a street railroad shall be allowed to cross a railroad at grade, the question is whether it is reasonably practicable to avoid such crossing, and the extent to which the risk may be reduced by care and the cost of an overhead crossing are not to be considered.

2. SAME.

Under Act June 19, 1871 (P. L. 1361, § 2), providing that, if in the judgment of the court it is reasonably practicable to avoid a grade crossing, it shall by process avoid a crossing at grade, a grade crossing should be prohibited, unless it is impracticable to avoid it, and unless such crossing is an imperative necessity.

Appeal from Court of Common Pleas, Montour County.

Bill by the Delaware, Lackawanna & Western Railroad Company against the Danville & Bloomsburg Street Railway Company and another. From a decree dismissing the preliminary injunction, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, ELKIN, and STEWART, JJ.

H. M. Hinckley and A. H. McClintock, for appellant. R. H. Koch, for appellees.

FELL, J. The bill in this case was for an injunction to restrain the defendant, an electric passenger railway company, from crossing at grade the tracks of the defendant's road in the borough of Danville. The proposed crossing was upon the main street of the borough, which was 36 feet in width between the curb lines, and closely built up on both sides. At this place 14 regular trains cross the street daily, and a full view of the plaintiff's tracks cannot be had, in either direction, at a point more than a few feet from them. An order dissolving a preliminary injunction was reversed, and the injunction reinstated to maintain the status quo until final hearing. See 211 Pa. 591, 61 Atl. 80. On final hearing, on the same testimony, the injunction was dissolved, and a grade crossing allowed, subject to regulations imposed by the court.

The conclusion reached by the court that it is not reasonably practicable to avoid a grade crossing is not founded on a finding that it is impracticable to construct an overhead crossing at this place, and to operate the defendant's cars upon it, but upon the findings that "the preponderance of the evidence establishes that an overhead crossing on Mill street would be more dangerous to life and limb to operate than the present grade crossing," and that "the crossing is not so dangerous as to warrant equitable interference by the court." In reaching this conclusion the wrong test was applied. The question was not as to the comparative dangers of an overhead and a grade crossing, nor as to the extent of the danger of the latter, but whether it was reasonably practicable to avoid a crossing at grade. The clear and explicit mandate of the act of June 12, 1871 (P. L. 1361, § 2), is that, "if, in the judgment of the court, it is reasonably practicable to avoid the grade crossing, they shall by their process avoid a crossing at grade." The policy of the state, as here declared, has been given the fullest effect in an unbroken line of cases extending from Pittsburgh, etc., Railroad Co. v. S. W. Penna. Ry. Co., 77 Pa. 173, the first case that arose under the act, to Penna. Railroad Co. v. Bogert, 209 Pa. 589, 59 Atl. 100. The extent to which the risk may be reduced by the exercise of care and the cost of constructing an overhead crossing are not elements in determining the question. President, etc., Delaware & Hudson Canal Co. v. St. Ry. Co., 180 Pa. 636, 37 Atl. 122; Penna. Railroad Co. v. Street Railway Co., 188 Pa. 74, 41 Atl. 331. The act is, in effect, a mandate to the courts to prohibit grade crossings, unless it is impracticable to avoid them, and unless crossing is an imperative necessity. Chester

Traction Co. v. P., W. & B. R. R. Co., 188 Pa. 105, 41 Atl. 449, 44 L. R. A. 269. What is reasonably practicable is determined largely by what is physically practicable. Williams Valley Railroad Co. v. Railway Co., 192 Pa. 552, 44 Atl. 46. In Pittsburgh, etc., Railroad Co. v. Lawrence County, 188 Pa. 1, 47 Atl. 955, where the cases on the subject are considered, it was said, by the present Chief Justice: "It must therefore be accepted as the settled policy of the state, as administered by this court, that wherever the subject comes within its jurisdiction and control, no grade crossing of a railroad, over another railroad or a common highway, will be permitted, except in case of manifest and unavoidable necessity." In the later case of B. & O. Railroad Co. v. Butler Pass. Railway Co., 207 Pa. 406, 56 Atl. 959, our Brother Mestrezat said: "In all cases of proposed grade crossing, therefore, the only question is whether it is reasonably practicable to avoid it; and, if so, the statute is mandatory to prevent it. In determining this question, the main purpose of the statutes, to protect life and property, is not to be ignored or disregarded. Experience teaches, with absolute certainty, that a grade crossing is unsafe, and that its existence is a standing menace to human life. This fact should be kept constantly in mind in adjudicating the rights of railway companies in proceedings under the act of 1871."

The decree is reversed, at the cost of the appellee, and it is directed that an injunction issue restraining the defendant, its officers, agents, and employes, from constructing a crossing at grade of the plaintiff's tracks on Mill street, in the borough of Danville.

(221 Pa. 112)

#### IN RE SHOENBERGER'S ESTATE.

#### Appeal of ST. MARGARET MEMORIAL HOSPITAL.

(Supreme Court of Pennsylvania. May 4, 1908.)

#### 1. TAXATION—INHERITANCE TAX—PROPERTY SUBJECT—REAL ESTATE OF NONRESIDENT.

Where testator, a nonresident, directed his executors to sell his real estate, the proceeds of the sale of the same in Pennsylvania is not subject to a collateral tax in such state, as the real estate was converted into personality and its situs was, at the time of testator's death, within the state of his domicile.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1683, 1686.]

#### 2. EXECUTORS AND ADMINISTRATORS—DISTRIBUTION—RIGHTS OF LEGATEES.

A nonresident testator appointed an executor in the state of his domicile, and executors in Pennsylvania as to his estate there provided for sale of all his real estate, except certain lands specifically devised, and directed the executor of his domicile, after paying legacies, to pay any balance over to the Pennsylvania executors, who, without objections by the residuary legatees, paid to the state a collateral tax on real estate in Pennsylvania. Held, that after several accounts had been filed, and distribution made without deduction for a collateral tax, and there remained only one legacy to be paid, and the residuary estate to be distributed, 5 per cent.



cannot be deducted from such legacy as its proportion of the collateral tax paid to the state; such collateral tax having been paid improperly by the executors without any hearing granted to the legatees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 439.]

**Appeal from Orphans' Court, Philadelphia County.**

In the matter of the estate of John H. Shoenberger. From an order sustaining exceptions to adjudication, the St. Margaret Memorial Hospital appeals. Reversed.

The following is the opinion of Penrose, J., in the court below:

"When *Miller v. Com.*, 111 Pa. 321, 2 Atl. 492, decided that lands in another state of which a Pennsylvania testator died seised were made subject to collateral inheritance tax, under the doctrine of *mobilia sequuntur personam*, if his will worked a conversion and gave the proceeds of sales to collaterals (though the conversion, of course, did not take place during his lifetime), it necessarily followed, conversely, that when lands in Pennsylvania are converted by the will of a nonresident owner, the proceeds are free from tax. But, unfortunately, in the present case, this was not affirmatively decided by the Supreme Court until 1893 (*Coleman's Estate*, 159 Pa. 231, 28 Atl. 137), and in the meantime, in 1891, tax upon the lands of the decedent in Pennsylvania was demanded, upon a valuation of \$515,000, although he was a citizen of New York, and his will, proved in 1889, directed that they should be sold. The tax thus paid amounted to \$25,750. There have been eight previous accounts, all of which were duly adjudicated, and, following the decision of Judge Strong in *Kintzing v. Hutchinson*, 7 Wkly. Notes Cas. 226, Fed. Cas. No. 7,834, which had always been accepted as settling the law that the personal estate of one domiciled out of the state was not subject to collateral inheritance tax in Pennsylvania, payments to the various pecuniary legatees were awarded without deduction of tax. No exceptions to any of these adjudications, of which the last was in September, 1897, were filed by the commonwealth. Five years later, however, in *Lewis' Estate*, 203 Pa. 211, 52 Atl. 205, it was decided, by a per curiam, adopting the opinion of the court below (orphans' court of Luzerne county), that when the 'executors, legatees, and creditors of one domiciled in another state agree that there shall be a complete distribution' in Pennsylvania of the assets actually in the state, 'the commonwealth is entitled to the collateral inheritance tax.'

"The present account, which was filed in February, 1907, and came before the court for adjudication in the following June, is of the residuary estate of the testator given to his executors in trust to hold 'and as soon as practicable convert the same into money and to pay over to "The St. Margaret Memorial Hospital," hereinbefore provided to be

incorporated, the sum of \$250,000, to be added to the permanent fund of the corporation for the maintenance of said hospital as a free institution,' the residue to be divided among his brothers and sisters and their children, etc., as there set forth. Neither the hospital (which, as the will shows, was one of the chief objects of the testator's bounty) nor the commonwealth was represented before the auditing judge, and there being nothing at the time to show that the legatee had joined in the request for distribution, and no demand for tax being made for the commonwealth, the legacy was awarded without deduction. The effect of this is that the entire tax on real estate paid in 1891, \$25,750, to which the commonwealth was not entitled, falls upon the final distributees of the residuary estate, while the legacy of \$250,000, which, under *Lewis' Estate*, is subject to tax (the legatee now coming, by counsel, before the court and asking for payment in full), is relieved altogether. As between the legatee and the other distributees of the residuary estate, there is not sufficient evidence of intention afforded by the will to exempt the former from the burden and cast it upon the latter, and the exceptions which have been filed must therefore be sustained; so much of the amount already received by the commonwealth, in 1891, as equals the tax on this legacy, \$12,500, being applied as if now awarded, and the award to the legatee being reduced accordingly.

"The exceptions are sustained, and the adjudication and schedule of distribution modified in conformity with this opinion."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William R. Blair and George O. Burgwin, for appellant. John G. Johnson, for appellees Horace Smith and others. James E. Hood, for appellees Alice E. Shoenberger and others. William Early Rhein, for appellee Charles Chauncey, assignee of Ethelbert Watta.

BROWN, J. John H. Shoenberger, a resident of the city of New York, died there in November, 1889, possessed of a large estate. He was childless; but left a widow, to whom, by his will, executed March 10, 1887, he devised certain real estate and gave all of his personal property in his residence and stable. In addition, he gave her certain securities of the value of several hundred thousand dollars and any balance that might remain of a deposit to his credit in a New York bank, after the payment of his funeral expenses, just debts, and the costs of the administration of that portion of his estate given to his wife. After making this provision for her, he made the following appointment of executors by the third clause of his will: "I hereby nominate and appoint my beloved wife, Alice, executrix, and my nephew, Alexander T. Mason, executor of this

my will, in relation to the portion of my estate mentioned in the second clause of this my will; and of whatever portion of my estate may be situate at the time of my decease in the state of New York, and I direct that neither of them shall be required to give security for the performance of their duties. And I hereby order, authorize and direct my executor, above named, to pay and hand over any portion of my estate, whether moneys in bank, bonds, mortgages, certificates of stock, notes or other securities which may be in the city of New York at the time of my decease, and which are not hereinbefore specifically bequeathed, to the trustee and executors hereinafter appointed for the state of Pennsylvania, Ohio, Kentucky and Illinois, the said portion so paid over to form part of my general estate to be administered by them." The trustee and executors referred to in the foregoing clause were appointed by the following: "I do hereby constitute and appoint the Pennsylvania Company for the Insurance on Lives and the Granting Annuities of the City of Philadelphia, Pennsylvania, my trustee and executors, and my friends, Andrew Long, Esq., now cashier of the Exchange National Bank of Pittsburg, Pennsylvania, J. M. Brownson, Esq., now in the employment of Messrs. Shoenberger, Speir and Co., of Pittsburg, Pennsylvania, and Anthony J. Antello, Esq., of Philadelphia, Pennsylvania, as co-executors of this my last will and testament, for all that portion of my estate, real and personal, and effects and interests in the states of Pennsylvania, Ohio, Kentucky and Illinois, and of any property that may be transferred to them upon the close of the administration of my estate in the state of New York by my executors hereinbefore appointed by me for that state." The entire personal estate of the decedent remaining after the provision for his wife, together with the proceeds of his real estate, which he directed his Pennsylvania executors to convert into money, passed into their hands. They filed nine accounts in the court below; the last involving nothing but the residuary estate. All of the pecuniary legacies, except those given in the residuary clause, were paid on the adjudications of the prior accounts; the eighth having been adjudicated on December 10, 1897. At that time there was a balance of \$81,832.39, and it was directed to be held for a further account. It is included in the last account, showing a fund in the hands of the accountants of \$272,276.63, out of which they are directed to pay to the appellant a bequest of \$250,000.

Though the bulk of the personal estate of the testator, including the proceeds of the sale of the real estate, passed into the hands of the Pennsylvania executors, the commonwealth made no claim for collateral inheritance tax on the legacies heretofore paid by them, amounting to \$1,328,000. In October, 1891, a collateral inheritance tax of \$25,750

was paid "as per compromise" on \$515,000, the appraised value of testator's real estate, situated in this state, and, on the final distribution of the residuary estate, the court below deducted \$12,500, or 5 per cent., from the bequest to the appellant, holding that, though the commonwealth had not been entitled to the tax of \$25,750 paid on the real estate, the appellant's legacy of \$250,000 was liable to tax under Lewis' Estate, 203 Pa. 211, 52 Atl. 205, and deducted the same from it, to the relief of the final distributees of the residuary estate. The single question before us is the correctness of this ruling. From all that appears the collateral inheritance tax of \$25,750 may have been paid upon the real estate of the testator, which he specifically devised; but, assuming it to have been upon that sold by the executors, the learned judge of the orphans' court correctly held that the commonwealth was not entitled to collateral inheritance tax upon it (Coleman's Estate, 159 Pa. 231, 28 Atl. 137), and, this being so, Lewis' Estate is not authority for relieving the final distributees at the expense of the appellant.

The final distributees of the residuary estate having permitted the tax of \$25,750 to be paid to the commonwealth, they cannot now ask that \$12,500 be deducted from appellant's legacy, to their relief. They ought to have protected themselves at the proper time. Even if the tax had been properly paid, there is no reason why appellant's legacy should bear the burden of nearly half of it, instead of its just proportion, as one of many legacies amounting in the aggregate to more than \$1,500,000.

The liability of the property of a decedent to collateral inheritance tax is to be determined by its situs at the time of his death. The words of our collateral inheritance tax act of May 6, 1887 (P. L. 79), are: "All estates, real, personal and mixed, of every kind whatsoever, situated within this state, whether the person or persons dying seised thereof be domiciled within or out of this state, and all such estates situated in another state, territory, or country, when the person, or persons, dying seised thereof, shall have their domicile within this commonwealth, passing from any person, who may die seised or possessed of such estates, either by will, or under the intestate laws of this state, or any part of such estate, or estates, or interest therein, transferred by deed, grant, bargain or sale, made or intended to take effect, in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to bodies corporate or politic, in trust or otherwise, other than to or for the use of father, mother, husband, wife, children and lineal descendants born in lawful wedlock or the wife, or widow of the son of the person dying seised or possessed thereof, shall be and they are hereby made subject to a tax of five dollars on every hundred dollars of the clear value of such estate or estates." The

situs of the personal property of this testator at the time of his death was in New York, for it was all actually "situated" there, except the proceeds of the real estate which he directed to be converted into money, and this must be regarded as part of his personal estate situated in his domicile, for the status of property at the instant of death must govern the question of tax. *Handley's Estate*, 181 Pa. 339, 37 Atl. 587. At the instant of the testator's death, his real estate, which he had directed to be converted into money, became, by operation of law, so converted, and all of the personal estate belonging to him was therefore either actually or by legal fiction within the state of New York. None of it having been "situated" here at the time of his death, the commonwealth had no claim upon it for collateral inheritance tax. The domicile of the testator, at the time of his death, was the situs of his personal estate, and that situs, and not what he directed to be done with his estate, is the sole test of the right of this sovereignty to tax it. The state taxes, and can tax, only what is within it at the time of the death of the owner of it. *Lewis' Estate*—not a convincing authority—was decided upon its own peculiar facts, and is not to be stretched, as it manifestly was by the court below, in extending it to the present case. The actual situs of the property of *Harriet E. Lewis*, which she directed to be distributed among collateral legatees, was, at the time of her death, and had been for many years prior thereto, within this state, in the custody and control of her agents here, empowered to invest and reinvest it, and the executor, legatees, and foreign creditors requested that there should be in Luzerne county, through its orphans' court, "a complete administration and distribution of the whole estate comprehended in the account." No such situation is presented here, and there is not even the analogy which the learned judge below seemed to think existed of "the legatee now coming, by counsel, before the court and asking for payment in full." The appellant did not even appear before the adjudicating judge to claim the legacy, according to the appearances noted by him. Its first appearance by counsel, so far as can be gathered from the record, was before the court in banc on exceptions to the adjudication, to resist the attempt of the appellees to have \$12,500 deducted from its legacy.

The decree of the court below is reversed, the exceptions to the adjudication are overruled, and the same is confirmed; the costs on this appeal to be paid by the appellees.

(221 Pa. 131)

In re CRAWFORD'S ESTATE.

Appeal of COLLEGE TRACT RESIDENCE CO.

(Supreme Court of Pennsylvania. May 4, 1908.)

1. EXECUTORS AND ADMINISTRATORS—SALE OF DECEDENT'S LAND—PETITION.

Where a petition for the sale of decedent's real estate avers that it was subject to the lien

of debts not of record, and is not accompanied by an inventory of the debts, as required by Act March 29, 1832 (P. L. 190), the petition will be regarded as having been presented under Act April 18, 1853 (P. L. 503), even without an averment in the petition to that effect.

2. SAME—CONFIRMATION—LACHES.

A trustee made a sale of decedent's real estate within two years of his death, under an order given under Act April 18, 1853 (P. L. 503), to relieve the estate from debts not of record. *Held*, that such sale could not be confirmed after two years from his death, there being no sale until confirmation, and after expiration of the two years the debts had ceased to be a lien, so as to render the sale inoperative.

3. SAME—CONSENT OF HEIRS.

Where a sale was made under Act April, 1853 (P. L. 503), to pay debts of decedent not of record, but was not confirmed within two years, so that such debts ceased to be a lien, the consent of the heirs to the confirmation of the sale will not give the court power to confirm it.

Appeal from Orphans' Court, Delaware County.

In the matter of the estate of *Cornelius C. V. Crawford*, deceased. From a decree confirming the sale of real estate, the College Tract Residence Company appeals. Reversed.

Argued before MITCHELL, O. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Lewis Lawrence Smith, for appellant.  
Garrett E. Smedley, for appellee.

BROWN, J. *Cornelius C. V. Crawford* died August 16, 1905, intestate, and without issue, leaving a widow and collateral heirs. On October 1, 1906, the widow and one of the heirs presented a petition to the court below for the sale of the real estate of which he was seised at the time of his death. The petition averred that it was presented under Act April 18, 1853 (P. L. 503), but without such an averment it must be regarded as having been presented under that act. The order of sale was asked for because the real estate was "subject to the lien of debts not of record, including among others, funeral expenses, costs of settling the estate, taxes, book debts, paying lien," etc. No inventory of the personal estate of the decedent nor a schedule of his debts accompanied the petition, and, as it lacked the jurisdictional averments required by Act March 29, 1832 (P. L. 1831-32, 190), authorizing a sale of a decedent's real estate for the payment of debts, an order could not have been awarded on it under that act. By Act Feb. 24, 1834 (P. L. 1833-34, '70), an executor or administrator is directed to apply to the orphans' court for an order to sell the real estate of his decedent whenever it satisfactorily appears that the personal estate is insufficient to pay all the just debts and expenses of the administration; but the act of 1853 does not authorize a sale for either of these purposes. The only averment in this petition upon which the court had authority to order a sale was that the real estate was "subject to the lien of debts not of record." Debts not of record were debts of the decedent.

dent, for the debts of the heirs not of record were not liens upon their interests in the land that descended to them. To pay funeral expenses, the costs of settling the estate, taxes, and paying liens, an order of sale could not have issued, for neither of these items is mentioned in the act of 1853 as one for which the orphans' court can order a sale.

On the presentation of the petition on October 1, 1906, a citation was directed to the heirs who had not signed it, to show cause why the order of sale should not be awarded, and on October 27, 1906, it was awarded. No sale was made under it, and on June 15, 1907, an alias order was issued, under which one of the properties of the decedent was knocked off at public sale to the appellant on July 18, 1907. Return was made to the alias order on September 16, 1907, and the court was asked to confirm the sale. Exception was filed to its confirmation by the appellant, for the reason that on September 16, 1907, more than two years had expired from the death of Crawford, and, as his debts not of record were no longer liens upon his real estate, the court was without authority to confirm a sale of it for their payment. This exception was dismissed, and the sale confirmed. On this appeal the single question is whether a public sale of real estate of a decedent, made within two years of his death by a trustee in pursuance of an order awarded under the act of 1853 to relieve the land from the lien of the decedent's debts not of record, can be confirmed after the expiration of two years from his death.

Act June 14, 1901 (P. L. 562), provides: "That no debts of a decedent, except they be secured by mortgage or by judgment entered or revived by scire facias within five years prior to the death of such decedent, shall remain a lien on the real estate of such decedent longer than two years after the decease of such debtor, unless an action for the recovery thereof be commenced, and be indexed in the judgment index as other liens are indexed against such decedent, his heirs, executors or administrators, within the period of two years after his decease, and duly prosecuted to judgment." Crawford having died on August 16, 1905, his debts not of record ceased, after August 16, 1907, to be liens on the real estate which descended to his heirs. Neither the order of sale issued on October 27, 1906, nor the alias issued on June 15, 1907, continued their lien beyond the statutory period of two years. *Bindley's Appeal*, 69 Pa. 295. When the alias order was issued, the debts of the decedent not of record were liens on the real estate of which he was seised at the time of his death, and on July 18, 1907, when the trustee exposed a portion of it to public sale and accepted the bid of the appellant as the purchaser of it, they still were liens; but no sale of the real estate was affected on July 18, 1907, and none could have

been effected on that day by the trustee. All that he then did was to take the bid of the appellant as an offer made to the court which it might, or might not, accept in its discretion. *Hamilton's Estate*, 51 Pa. 58. Though the court's order had gone out for the sale of the real estate, until it approved the appellant's bid, there was no sale. The proceedings were in fieri until this was done, for the act of 1853 declares that the sale of a trustee "shall be subject to the approval of the court." *Brown's Appeal*, 68 Pa. 53. "It is well settled that an orphans' court sale does not divest the title of the heirs until after confirmation thereof and conveyance delivered under the order of the court. In ordinary sales under articles of agreement between private parties, the sale, as to the vendor, works a conversion. Equity regards that as done which the parties to the agreement have the power to do, and which they have agreed to be done. *Richter v. Selin*, 8 Serg. & R. 440. But orphans' court sales are made under the authority of the court. Indeed, the sale is the act of the court; the administrator being only the hand of the court in making it. *Armstrong's App.*, 68 Pa. 409, and it is therefore subject to the approval and confirmation of the court. Such sales 'are liable to be vacated,' says Mr. Justice Strong, in *Demmy's App.*, 43 Pa. 155, 'by a power superior to the purchaser, and against his will. The sale, even after confirmation, does not divest the title of the heirs of the decedent, for it remains in the power of the court until a deed has been executed and delivered. Until then, the heirs' right to maintain ejectment, even against the purchaser, has not gone. *Leshey v. Gardner*, 3 Watts & S. 314, 38 Am. Dec. 764. Until then, no conversion takes place, and if the heir of the decedent die, even subsequently to the confirmation of the report of sale, but before the deed, his interest descends as land, and not as money. *Erb v. Erb*, 9 Watts & S. 147; *Biggert's Estate*, 20 Pa. 17. These cases recognize a clear distinction between sales made under order of an orphans' court and private sales. The latter are exclusively acts of the parties, and are beyond the control of any other power. The former are not the acts of the decedent or his heirs or devisees. They are the acts of the court, and they require no consent of the owners. In substantial fact, the purchaser buys from the court through its agent. The court reserves the power to decline his bid, and to disannul the act of its agent, until the sale has been fully consummated.' To the same effect is *Overdeer v. Updegraff*, 69 Pa. 110; *De Haven's App.*, 106 Pa. 612. The bid of the buyer at an orphans' court sale is but an offer to the court, which the court may or may not accept at its discretion. *Hays' Appeal*, 51 Pa. 58. If accepted, however, the title of the buyer may for some purposes, perhaps, have relation to the date of his purchase. An administrator's sale of land, under an order of the orphans' court for pay-

ment of debts, is worthless without confirmation, for the act of 1832 expressly requires it. *Morgan's App.*, 110 Pa. 271, 4 Atl. 506." *Greenough v. Small*, 137 Pa. 132, 20 Atl. 553, 21 Am. St. Rep. 859. And so a sale of land by a trustee under the Price act, made for any one of the reasons mentioned in it, is worthless without the "approval of the court."

Under our cases there could have been no valid sale of the decedent's real estate under the alias order of sale before September 16, 1907, the first day the court was asked to approve the bid of the appellant; but on that day there were no liens of debts not of record, on the real estate, and, if not, the court was without authority to order it to be sold to the appellant and a deed acknowledged to it as purchaser. Jurisdiction of the court, so far as it could have ordered a sale of the real estate of the decedent to relieve it from the lien of his debts not of record, had ended. If the lien of these debts had been continued in the way pointed out by the act of 1901, the orphans' court, on a petition presented under the act of 1832, could have ordered and approved a sale which would have passed a good title to the purchaser and allowed creditors to come in on the proceeds; but this is not the situation before us.

In dismissing appellant's exception to the confirmation of sale, the learned court below said: "An orphans' court sale made for the purpose of divesting the lien of unrecorded decedent's debts, under an order issued and a sale had within the statutory period of two years, where return of sale is not made until after the expiration of said period, will be confirmed, notwithstanding the purchaser objects to the confirmation, where the heirs or devisees do not object." The error of this is that the question is not one of the heirs not objecting to the sale, but of the authority of the court to approve it. It has no authority to order or approve a sale except as given by the statute, and a sale made or approved by it without such authority is void. Consent of the heirs can give it none. They may sell the lands themselves after two years from the death of their ancestor, discharged of all his debts not of record, but the act of 1853 gives no authority to the court to do so for them.

The assignment of error is sustained, and the confirmation of the sale by the court below is set aside; the costs on this appeal to be paid by the appellee.

(81 Conn. 252)

#### AMERICAN SURETY CO. v. PACIFIC SURETY CO.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

##### 1. FRAUD—PLEADING—SUFFICIENCY.

Fraud is a fact to be specially pleaded.

##### 2. SAME — ACTIVE FRAUD — "CONCEAL" — "CONCEALMENT."

An answer, in an action on an indemnity bond to save harmless a surety on a contract-

or's bond, which alleges that the surety, to induce the indemnitor to furnish the indemnity, falsely represented that the contract was an advantageous one, and that the contractor was solvent, that the contractor was insolvent, and known to be so by the surety, "which said fact was willfully concealed"; and that by virtue of the fraudulent misrepresentations "and concealments" the indemnitor was greatly damaged, etc., charges fraud through the suppression of truth by falsehood, and not its secretion by silence; the words "conceal" and "concealment" expressing an idea in consonance with the allegations of the defense of active fraud.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1377-1382.]

##### 3. SAME—PASSIVE FRAUD—EVIDENCE—ADMISSIBILITY.

A defendant, setting up the defense of fraud by actual misrepresentations, cannot, on failing to prove the falsity of the representations relied on, avail himself of a defense of fraud by silence alone.

##### 4. BONDS—ACTIONS—RECOVERY—INTEREST.

Recovery, in an action of debt on a bond, is not limited to the amount of the penalty, and interest on the debt after its maturity may be allowed, though the total sum exceeds the penalty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bonds, § 243.]

##### 5. SAME—TIME OF COMPUTATION—MATURITY OF PRINCIPAL.

The interest recoverable in an action of debt on a bond is limited to interest from the time of breach, for that is the date when the debt accrues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bonds, § 243.]

##### 6. INDEMNITY—OBLIGATION OF INDEMNITOR.

An indemnitor, agreeing to indemnify the surety of a city contractor, and save it harmless from every claim, judgment, etc., and place it in funds to meet every claim, judgment, etc., is not required to place the surety in funds until requested; and, where no demand was made by the surety until the rendition of a judgment against it, after it and the indemnitor had defended the action on the theory of nonliability, there was no breach of obligation until the rendition of judgment, and interest became recoverable from that time only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indemnity, § 21.]

Appeal from Superior Court, New Haven County; George W. Wheeler, Judge.

Action on an indemnity bond by the American Surety Company against the Pacific Surety Company. From a judgment for plaintiff, defendant appeals. Conditionally affirmed.

The plaintiff was surety upon a bond given by the National Steam Economizer Company, as principal, to the city of New Haven, to secure the faithful performance, by said principal, of its contract with said city for the installation of certain heating and ventilating apparatus in a city building. The facts relating to the giving of this bond, and those which led up to a suit by the city thereon, are fully stated in the case of *New Haven v. National Economizer Co.*, 79 Conn. 482, 65 Atl. 959. That action finally resulted in a judgment against the plaintiff rendered May 24, 1906, for the sum of \$14,907.56 damages. The cause of action therein was found to have accrued July 27, 1903, and interest from

that date was included in the judgment. This judgment the plaintiff subsequently paid, as also the costs of suit and expenses involved.

Shortly after the delivery of the bond to the city, the Economizer Company gave to the plaintiff its written order upon the city for the first \$5,000 to become due under said contract. Subsequently the plaintiff released this order, and in part consideration therefor the defendant, on September 11, 1902, executed and delivered to the plaintiff the indemnity bond in suit. This instrument was, in its pertinent parts, as follows: "American Surety Company of New York, hereinafter called the surety, having, at the request of the National Steam Economizer Company, executed that certain bond, dated November 11, 1901, in the sum of fifteen thousand dollars, conditioned, in substance, for the faithful performance by the National Steam Economizer Company, of a contract with the city of New Haven for the construction of a heating and ventilating apparatus in the new high school building in York Square in the city of New Haven, a copy of which bond is hereto annexed, and at or about the time of the execution thereof, there having been delivered to the said American Surety Company of New York certain collateral, and the said National Steam Economizer Company having requested the said American Surety Company of New York to release the said collateral: Now therefore, in consideration of the said American Surety Company of New York releasing said collateral and continuing as surety upon the said bond, the said National Steam Economizer Company, as principal, and the Pacific Surety Company, a corporation organized under the laws of the state of California, as surety, do hereby undertake and agree: (1) That they will at all times indemnify and save harmless the said American Surety Company of New York from and against every claim, demand, liability, cost, charge, expense, suit, order, judgment and adjudication whatsoever, and will place the said American Surety Company of New York in funds to meet every claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication against it by reason of such suretyship and before it shall be required to pay the same. (2) That upon the making of any demand, or the giving of any notice or the institution of any proceeding, preliminary to determining or fixing any liability which the said American Surety Company of New York may be called upon to discharge by reason of such suretyship, they will immediately notify the said American Surety Company of New York thereof in writing at its office No. 100 Broadway in the city of New York. \* \* \* (5) That the liability of the Pacific Surety Company herein shall be limited to the sum of seventy-five hundred dollars (\$7,500.00); it being understood that the American Surety Company of New York shall be entitled to full indemnification, as

hereinbefore provided, from such Pacific Surety Company, up to said amount."

The defendant was duly notified by the plaintiff of the claim made upon it by the city, and counsel for the defendant were, in correspondence with plaintiff's counsel relative to the action upon the bond, aided in the preparation of its answer, were present during a portion of the trial, and were kept advised of the progress of the action. This conduct on the part of the defendant was accompanied with a statement that it was without prejudice to its claim of nonliability. Upon the rendition of the judgment the plaintiff made demand upon the defendant for reimbursement pursuant to the obligation of the bond. At the time of the commencement of the city's action against the plaintiff the Economizer Company was and has since remained insolvent. The defendant's answer contained two defenses in form. The first admitted the first paragraph of the complaint, which set up the execution and delivery of the bond, and pleaded want of knowledge or information as to the remaining allegations, which set up the breach. The second, which was double, contained a defense which played no part in the trial, and the defense of fraud inducing the contract outlined in the opinion. This embodied the defendant's real defense, in support of which its evidence was offered, and to which its evidence was confined.

Walter J. Walsh and Frederick H. Nash, for appellant. George D. Watrous and Henry F. Parmelee for appellee.

PRENTICE, J. (after stating the facts as above). The defendant offered evidence to prove that the plaintiff, in order to induce the defendant to give the bond in suit, made to the defendant certain false and fraudulent representations material to the risk assumed by the terms of the bond and relied upon by the defendant. The defense of fraud, thus attempted to be established, was within the allegations of the special defense, and the evidence offered in support of it was received and submitted to the jury with instructions which are not complained of. What is complained of is the instruction of the court, in substance, that while the defense of fraudulent concealment of truth, resulting from false representations, was before the jury under the pleadings, one of fraudulent concealment resulting from passive silence only was not, so that, if the defendant should fail to establish the making of false representations as charged, it could not assert the claim of defense that the plaintiff had been guilty of fraudulent conduct in remaining silent with respect to facts within its knowledge material to the risk, when it was its duty to disclose them to the defendant.

Fraud is a fact to be specially pleaded. Practice Book, 1908, p. 250, § 160. The fraud pleaded in this case is active fraud, and

none other. The allegations setting up a fraud are confined to the following: First, there are those which aver that the plaintiff, in order to induce the defendant to furnish to the former the bond in suit and the indemnity thereby provided, made to the latter a variety of statements and representations about the risk, to wit, that the contract for the performance of which the plaintiff had become surety was an advantageous one, that there had been no default thereunder, that the contractor was all right in every particular, including solvency and business ability, that the plaintiff was perfectly satisfied with the risk incurred by it under its bond, that it was a safe risk, and that there were no reasons why an indemnity bond to be given by the defendant would not be a safe risk. It is then alleged that each of said representations was material, that the defendant believed and acted upon them and each of them in entering into its obligation, and that each was false and known to be false when made. Then follows a statement of the alleged fact in respect to each of said representations by which it would appear that each was false and known to be false. In connection with one of these statements, and one only, it is said that the fact was that the contractor, whose contract was the subject-matter of the indemnity, was wholly insolvent at the time of the representation of his solvency, and known to the plaintiff to be so, and it is added: "Which said fact was willfully concealed." Following these several statements is the conclusion that, "by virtue of said fraudulent misrepresentations and concealments, the defendant was greatly damaged and would not have given said indemnity bond had the true state of facts been disclosed and had the plaintiff not been guilty of making said fraudulent misrepresentations and concealments."

The defendant hangs its right to avail itself of the defense of fraud by silence where there is a duty to speak, upon the slender thread of the use of the words "conceal" and "concealment," as stated, and the reference to the absence of a disclosure of the true state of facts in the closing sentence. It is, however, too plain for argument that the pleader had in mind only active fraud. He was complaining of misrepresentations of fact, and the concealment of truth referred to was not a concealment by silence, but concealment resulting from the assertion of a contrary fact. The fault found with the plaintiff was, not that it did not speak, and thus passively concealed truth, but that it uttered falsehood, and thus actively concealed it. It was thus that the true state of facts was claimed to have been undisclosed and not, as the defendant now urges that he had the right to show, by the passive act of silence. That this is so is removed from the domain of doubt when it is borne in mind that the fact which alone is alleged to

have been concealed relates to a matter concerning which a statement—a false statement—is alleged to have been made. The fact alleged to have been concealed was, the Economizer Company's insolvency. The prior averment is that it was expressly represented to be solvent. There was no room here for passive concealment by mere silence, and the pleader manifestly and necessarily had no thought of charging any fraud otherwise than by the representations already set up, and he charged none. He was charging fraud through the suppression of truth by falsehood, and not its secretion by silence. The presence in the answer of the isolated words upon which so much reliance is now placed was, it is quite apparent, simply an accident resulting from a choice of language. They were properly used to express an idea in consonance with the allegations of the defense, but not the idea now sought to be imported into the answer through them. The court was therefore right in not permitting the defendant, failing in his proof of false representations, to avail himself of a defense of fraud by the passive means of silence alone. This being the case, we have no occasion to consider the question, discussed at length in argument, as to the rule of duty in the matter of disclosing information possessed which is applicable to a party in the position which the plaintiff occupied.

The cause of action upon which judgment was rendered against the plaintiff in favor of the city of New Haven accrued on July 23, 1903, and in that judgment, which was for the sum of \$14,907.56, interest from that date was included. In the present case, the jury was told that if a verdict was rendered for the plaintiff it should be for the sum of \$7,500, with interest thereon to date from July 27, 1903. The defendant justly complains of this instruction. Recovery in an action of debt on a bond is not limited to the amount of the penalty. Interest upon the debt after it is due may be allowed, although the total sum is thereby made to exceed the penalty. *Lewis v. Dwight*, 10 Conn. 95, 102; *Carter v. Carter*, 4 Day, 80, 4 Am. Dec. 177. The interest which may thus be recovered is, however, limited to interest from the time of breach; this being the date when the debt is said to accrue. *Carter v. Carter*, supra. The theory upon which this recovery of interest is permitted is that there has been an unlawful detention of money after the duty to pay it came into existence, and the interest is allowed as damages therefor. *Selleck v. French*, 1 Conn. 82, 83, 6 Am. Dec. 185; *Jones v. Mallory*, 22 Conn. 386, 392. As between the plaintiff and the city of New Haven, it was found that the debt from the former to the latter upon the bond then in suit became due July 23, 1903. It does not follow, as the court below seems to have assumed, that this defendant's bond to the plaintiff was broken at the same time. The test inquiry

is: When did this defendant, by the terms of its obligation to the plaintiff, come under the duty of paying to the latter the principal sum which it has become holden to pay? Its agreement was to indemnify the plaintiff and save it harmless from and against every claim, demand, cost, charge, expense, suit, order, judgment, and adjudication whatsoever, and place the plaintiff in funds to meet every claim, demand, liability, cost, charge, expense, suit, order, judgment, or adjudication against it by reason of such suretyship and before it shall be required to pay the same. It can scarcely be said that the latter portion of this obligation required the defendant to place the plaintiff in funds until requested, and in this case no such request is claimed. No demand of any sort was made until the judgment in the suit by the city was rendered. Until that time the plaintiff was acting in harmony with this defendant in contesting its liability, and, as the corollary of its assertion of nonliability, was assuming a position in which there was no liability to it on the part of the defendant, and therefore no duty on the latter's part to pay it anything. Until the judgment was rendered which negatived this contention and established the plaintiff's liability to the city, there was no duty on the part of the defendant to indemnify the plaintiff by the payment of the \$7,500 or any part thereof. Interest, therefore, was not recoverable on said sum as money unlawfully detained from the plaintiff. The instruction for the inclusion in the verdict of interest upon \$7,500, from July 27, 1903, to May 24, 1906, the date of the judgment in the city's suit against the plaintiff, was therefore erroneous, and the verdict upon which judgment was rendered too large by the separable and ascertainable sum of \$1,271.25. There is error, and a new trial is granted, unless the plaintiff files a remittitur as of the date of the judgment for \$1,271.25. All concur.

(21 Conn. 97)

### STATE v. FERRIS.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

#### 1. RAPE—ELEMENTS—"CARNAL KNOWLEDGE" AND "ABUSE."

In a prosecution under Gen. St. 1902, § 1148, providing that any person who shall carnally know and abuse any female under 16 years of age shall be punished, etc., the terms "carnal knowledge" and "abuse," in the statute, mean carnal knowledge, and "carnal knowledge" means sexual bodily intercourse, and the term "abuse" should not be construed independently, as requiring proof of injury to the genital organs in addition to intercourse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 7.

For other definitions, see Words and Phrases, vol. 1, pp. 49-50, 975-976.]

#### 2. INDICTMENT AND INFORMATION—VARIANCE—TIME AS ESSENCE OF OFFENSE.

Time is not of the essence of the offense of rape, and proof that it occurred a week before

or a week after the time charged in the information would be a substantial proof of the date as alleged; it being competent for the state to prove that the offense was committed on any date within the statute of limitations prior to the filing of the information.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 548.]

#### 3. CRIMINAL LAW—DEFENSES—ALIBI.

After the state had offered testimony fixing the date of the crime as the date charged in the information, and no evidence was offered to show it was committed on any other day, defendant could prove an alibi by showing it was impossible for him to commit the crime on that date.

#### 4. RAPE—TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where the defense was an alibi, the court instructed that it was not essential to a conviction that the criminal act be committed on the exact date charged in the information, a substantial compliance being sufficient, and thereafter the defense of alibi and the evidence were fully called to the jury's attention. Defendant claimed that as the state had offered evidence to prove the crime was committed on July 2d, as charged, and there was no evidence it was committed on any other date, and as defendant had offered evidence of an alibi on the date charged, the first part of the court's instruction was erroneous. *Held*, that the jury could not have placed defendant's construction upon the instruction so as to disregard the defense of alibi, and the instruction was not erroneous in that respect.

#### 5. CRIMINAL LAW—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In a prosecution for rape, defendant was not harmed by the court's remarks, after calling attention to the evidence tending to show that the girl was under 16 years of age, that so far as he knew there was no evidence from which they could infer she was over 16.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3160.]

Appeal from Superior Court, Fairfield County; George W. Wheeler, Judge.

Frederick Ferris was convicted of carnally knowing and abusing a female under 16 years of age, and he appeals. Affirmed.

Frederic A. Bartlett, Frederick D. Keeler, and Israel J. Cohn, for appellant. Stiles Judson, State's Atty., for the State.

THAYER, J. Section 1148 of the General Statutes of 1902, under which the information was filed, provides that any person who shall carnally know and abuse any female under the age of 16 years shall be punished. The court instructed the jury that the terms "carnal knowledge" and "abuse," when applied to a female under the age of consent in such a statute, mean carnal knowledge, that "carnal knowledge" means sexual bodily connection or sexual intercourse, and that the term "abuse" is not to be construed independently and as compelling proof of injury to the genital organs in addition to carnal knowledge. The jury were then instructed that the state must prove an act of intercourse as charged, but need not prove, in addition, any injury to the genital organs. The defendant's first assignment of error questions the correctness of this portion of the charge. The charge was correct. The precise question here raised was before us



and fully considered in a recent case. *State v. Sebastian*, 81 Conn. 1, 69 Atl. 1054. It is unnecessary to further consider it here.

The court properly instructed the jury that, as time is not of the essence of the offense charged, it was not essential to a conviction that the criminal act should be proved to have been committed on the precise day laid in the information, that a substantial compliance with the date was enough, and that a week before or a week after would be a substantial compliance with the proof as to time. The defendant objects to this portion of the charge both upon the ground that it is not a correct statement of the law and that as the state had offered evidence to prove, and claimed to have proved, that the criminal act was committed on the 2d day of July, as charged in the information, and no evidence had been offered to prove that it was committed on any other day, and as evidence of an alibi as to that date had been introduced by the defendant, the charge was unfair to him. The defendant claims that the state should have been confined to proof of an act committed on the precise day alleged in the information, because, as he claims, he was only bound to be prepared to defend against an act committed on that day; but he was bound to meet any evidence admissible under the allegation which might be offered, and under the allegation it was competent to prove that the crime was committed on any day prior to the filing of the information and within the statute of limitations; but after the state had offered its testimony fixing the date of the crime as the day alleged in the information, and no evidence had been offered tending to show that it had been committed on any other day, it was a good defense for the defendant to show that it was impossible for him to commit the act on that day. This he might do by proving an alibi. If, therefore, the charge is susceptible of the construction which the defendant puts upon it, namely, that it instructed the jury that they might without evidence find that the act was committed on some other day than that fixed by the state and supported by the evidence, it was erroneous; but we think that the charge as a whole is not susceptible of this construction. In the portion selected by the defendant for criticism, the court was speaking of the allegations of the complaint and what might be proved under them and what questions were thereby presented. Later, the claims of the parties, the defendant's defense of an alibi, and the evidence in the case were fully and fairly called to the attention of the jury and commented on, and the jury were told that it was for them to find whether the girl or the defendant had told the truth, and that the jury were to examine the two statements in the light of the other evidence in the case searching for such corroboration of the respective statements as might be found in the evidence, and after such search to say whether

the state had proven the accused guilty as charged beyond a reasonable doubt. We think that the jury could not have understood from the charge that they might from the evidence find that the criminal act was committed on some other day than that testified to and so disregard the defendant's defense of alibi.

It is within the province of the court to call the attention of the jury to the evidence or lack of evidence bearing upon any point in issue in the case and to comment upon the weight of the evidence, so long as he does not direct or advise the jury how to decide the matter. *State v. Duffy*, 57 Conn. 525, 529, 18 Atl. 791; *State v. Rome*, 64 Conn. 329, 337, 30 Atl. 57; *State v. Fetterer*, 65 Conn. 287, 289, 82 Atl. 394. The defendant was not harmed by the judge's suggestion to the jury in which, after calling their attention to the evidence tending to prove that the girl was under 16 years of age, he said to them that, so far as he knew, there was no evidence from which they could infer that she was over 16.

There is no error. All concur.

(81 Conn. 134)

**CLARK v. STAR OF HOPE LODGE NO. 12,  
ORDER OF SHEPHERDS OF  
BETHLEHEM.**

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

**1. BENEFICIAL ASSOCIATIONS — BENEFITS —  
SUSPENSION OF MEMBER.**

Though a by-law of a beneficial society provides that a member who is 13 weeks in arrears for dues shall stand suspended from sick benefits, yet there being another by-law that a member, while sick and entitled to benefits cannot be suspended for nonpayment of dues accruing during such illness, suspension for nonpayment of dues, accruing during the sickness and more than 13 weeks after the recovery of the member, does not debar her of right to recover benefits for the time of her sickness.

**2. SAME — NOTICE OF SICKNESS — WAIVER OF  
DEFECTS.**

The evident purpose of the by-law of a beneficial society that the member shall report his sickness, being to enable the society, through its relief committee, charged with the duty of recommending benefits, to ascertain the real condition of the member, and to prevent imposition on the society, any defect in the form, manner, or time of giving the notice of report is waived by such committee, with the sanction of the society, acting on it.

Appeal from City Court of New Haven;  
Richard H. Tyner, Judge.

Action by Lillie Clark against the Star of Hope Lodge No. 12, Order of Shepherds of Bethlehem. Judgment for plaintiff. Defendant appeals. Affirmed.

Charles S. Hamilton and George A. Tyler, for appellant. Carl A. Mears, for appellee.

HALL, J. The plaintiff brings this action to recover benefits she claims to be entitled to receive under the by-laws of the defendant society, on account of her sickness from De-

ember 10, 1906, to March 11, 1907, amounting, at \$4 per week, to \$52.

These provisions are among the by-laws of the society: "A member who is thirteen weeks in arrears for dues shall stand suspended from sick benefits. \* \* \* Any member of this lodge becoming ill, or disabled, desiring benefits, must report in writing to the scribe, stating the nature of illness or disability, the benefit to date from the time of said report, and failure to make such report will forfeit the right to benefits. \* \* \* All benefits must be recommended by the relief committee and voted by a majority of all present." The defendant contends that these provisions forbid a recovery by the plaintiff upon the facts found. First, it is said that it appears that on the 8th of July, 1907, the plaintiff was suspended from all benefits on account of her failure to pay dues since January 27, 1907; but there is a provision of the by-laws that a member, while sick and entitled to benefits, cannot be suspended for the nonpayment of dues accruing during such illness. The suspension of the plaintiff for the nonpayment of dues accruing after March 11, 1907, would therefore not debar her from recovering benefits for illness before that date.

Next, it is claimed that the plaintiff failed to give the required notice or report of her illness. It is found that prior to December 10th a lady wrote (we may assume at the plaintiff's request) to the accountant of the defendant lodge notifying her of the plaintiff's sickness; that the contents of such letter were communicated to the scribe; that thereafter the relief committee, whose duty it was to visit sick members and report their condition, visited the plaintiff until after March 11, 1907, and reported to the lodge at every meeting night. As the evident purpose of the required notice was to enable the society, through its relief committee, to ascertain the real condition of a member claiming to be ill, and so prevent imposition upon the society by a feigned illness, such action of the relief committee, sanctioned by the lodge, was a waiver of any defect in the form of the manner or time of the giving of the plaintiff's notice or report of her illness.

Finally, it seems to be claimed that it appears that no benefits were recommended by the relief committee, and none were "voted by a majority of all present," but that the report of said committee and the vote of the lodge were adverse to the plaintiff, and that the plaintiff failed to appeal therefrom. The finding discloses no such facts. On the contrary, it is found that the relief committee reported that the plaintiff was entitled to benefits, but no minute of such recommendation was entered in the record by the scribe. If the report and vote thereon had been that she was not entitled to benefits, notice of such action would have been given the plaintiff to enable her to appeal from such decision if she desired to. While it is not expressly found that the recommendation of the committee

was adopted by a majority vote, such was the only notice given to the plaintiff. The defendant denies in its answer that benefits were recommended by the relief committee or voted by the lodge, as required. The judgment file shows that the issues so raised by the pleadings, as to the recommendation of benefits by the relief committee, and the adoption or approval of such recommendation by the lodge by "a majority vote of all present," were found for the plaintiff. We find nothing in the finding of facts inconsistent with that conclusion.

There is no error. All concur.

(81 Conn. 123)

#### SEARLES v. DE LADSON et ux.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

#### 1. ADVERSE POSSESSION—HOSTILE CHARACTER OF POSSESSION—CLAIM OF OWNERSHIP—INTENT TO DISSEISE.

Where one enters and takes possession of land as his own and performs acts of ownership, his possession is adverse and a disseisin, the act of entering being an assertion of his own title and a denial of title in all others, and it is immaterial that he was mistaken and would not have entered if he had known the facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 865.]

#### 2. CHAMPERTY AND MAINTENANCE—GRANT OF LAND HELD ADVERSELY.

Gen. St. 1902, § 4042, provides that all conveyances of land, of which the grantor is ousted by entry and possession of another, unless to the person in actual possession, are void. The predecessors in title of defendant's grantor claimed the land in controversy and the house thereon and held adverse possession thereof. Thereafter plaintiff's grantor conveyed to defendant's grantor another tract, with intent to establish a line between their property which would leave the disputed land in possession of defendant's grantor, and the latter remained in possession of the disputed tract and the house until he conveyed it to defendants, who entered into possession both being ignorant that it was on the land of plaintiff's grantor. *Held*, that plaintiff's grantor was ousted of the land upon which the house was situated, and, when he subsequently conveyed to plaintiff, the deed was void under the statute in so far as it attempted to convey that land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Champerty and Maintenance, §§ 52-61.]

Appeal from Court of Common Pleas, New Haven County; William L. Bennett, Judge.

Action in the nature of ejectment by Eunice N. Searles against Edwin S. De Ladson and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

Henry F. Parmelee and Seth W. Baldwin, for appellant. E. P. Arvine and William F. Alcorn, for appellees.

THAYER, J. It appears from the finding that on July 2, 1898, Frank P. Clark, the predecessor in title of the plaintiff, and Wallace E. Clark, the predecessor in title of the defendants, owned adjoining lots of land, known respectively as lot 4 in block 5 and lot 1 in block 1 on a map of building lots at Morris Cove in New Haven. Prior to that date

a house had been built upon lot 1, one corner of which extended westerly across the line between the two lots and occupied the land here in controversy, a small triangular section of lot 4. Prior to that time the house and the land upon which it stood had been in the actual, open, notorious, and exclusive possession of the predecessors in title of the defendants, who had taken the rents and profits thereof to themselves under a claim of ownership and in the belief that the same were situated within the boundaries of lot No. 1. On July 2, 1898, a quitclaim deed was given by Frank P. to Wallace E. Clark of a triangular piece of land adjoining and extending the entire length of the westerly boundary of Wallace E. Clark's lot. In negotiating and making this conveyance, it was the expressed intention of both parties to the deed to establish a line between their properties which should so run as to leave the house and the land on which it stood on Wallace E. Clark's side of the line, and both parties believed that the deed did establish a line between their properties running to the west of the land covered by the house and clearing the same. Whether it did so in fact the court does not find, but assumes, in accordance with the plaintiff's claim, that it did not. After the deed was given, Wallace E. Clark remained in possession of the house and the land covered thereby, claiming to own the same and taking the rents and profits thereof until July 3, 1900, when he conveyed the premises with the house thereon to the defendants, and they took possession thereof. At this time both said Wallace E. and the defendants were ignorant that the house projected over the boundary line, and they believed that it stood wholly upon the land of Wallace E. Clark, and the defendants bought the premises and occupied the same in the belief that the land covered by the house was a part of the land purchased by and conveyed to them. Since July 3, 1900, they have remained in open, actual, and notorious possession of said house and the land covered thereby, claiming to own the same and taking the rents and profits thereof. On May 1, 1905, while the defendants were so in possession of the land in controversy, Frank P. Clark delivered to the plaintiff a warranty deed of the land now claimed to belong to the plaintiff and, as claimed by the plaintiff and assumed as a fact by the court, of the land in controversy. Upon these facts the court ruled that, in so far as the deed purported to convey the land in controversy to the plaintiff, it was void under the statute against the sale of pretended titles. Gen. St. 1902, § 4042. The correctness of this ruling is the only question presented by the appeal.

It is the plaintiff's claim that at the time he received his deed his grantor, Frank P. Clark, upon the facts found, was not ousted of the land in controversy by the entry and possession of the defendants; that entry and possession being under a mistaken belief as

to the true boundary line between them and Clark. The claim is that to make the possession adverse and constitute an ouster there must be an intent to dislodge the owner, and that the belief that they owned to the line to which they occupied negatives such an intent, and their occupation will therefore be presumed to be in subordination to the title of the true owner. There are authorities which sustain this view. We had occasion to examine the question here presented in the case of *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680, where a similar claim was made. After a consideration of the authorities, it was there held, following the earlier case of *Bryan v. Atwater*, 5 Day. 181, 5 Am. Dec. 136, and cases in other jurisdictions, that to render possession adverse it is not necessary that it should be with a wrongful intent to dislodge the true owner, or accompanied with a denial of his title, or with a claim of title in the person entering, and that where a person enters and takes possession of land as his own, taking the rents and profits to himself and managing with it as an owner manages with his own property, the possession is adverse and a dislodge. The very act is held to be an assertion of his own title, and thus equivalent to a denial of the title of all others, and it does not matter that he was mistaken, and that, had he been better informed, he would not have entered on the land. This has since been adhered to as the law in this state and still has our approval. There is no necessity therefore for a discussion of the arguments advanced by the plaintiff and the cases which he cites by which a different view is claimed to be sustained.

The court correctly held that the plaintiff's grantor was ousted of the land upon which the defendants' house was situated at the time he gave the plaintiff the deed under which he claims title. The deed therefore, so far as it purports to convey the land in controversy, was void under section 4042 of the General Statutes of 1902, and the plaintiff failed to prove that he had a cause of action against the defendants. Judgment was properly rendered against him.

There is no error. All concur.

(81 Conn. 241)

#### HINKLEY v. CITY OF DANBURY.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

##### 1. MUNICIPAL CORPORATIONS — DEFECTS IN STREETS—ACTION FOR INJURIES—NEGLIGENCE OF FELLOW TRAVELER.

In an action against a city for injuries, under the statute rendering a city liable to travelers injured by a defect in the highway, if the culpable negligence of a fellow traveler was the proximate cause of the injury plaintiff cannot recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1670.]

##### 2. CARRIERS—PASSENGERS—DUTIES OF MOTOR-MAN TO PASSENGERS.

As a representative of the street car company, the motorman owes to every passenger ex-

traordinary care, and the highest reasonable degree of care consistent with the operation of the road is due from the company to any passenger who might be on the running board, and such passenger should be given warning by the motorman, or conductor, of possible danger from an obstruction which might injure him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1087–1106.]

### 3. MASTER AND SERVANT—FELLOW SERVANTS—CARE REQUIRED TO EACH OTHER.

The conductor and motorman of a street car, being fellow servants, owed to each other a much less degree of care to prevent injury from obstruction in the street than they owe to passengers.

### 4. MUNICIPAL CORPORATIONS — DEFECTS IN STREET—ACTION FOR INJURIES—PROXIMATE CAUSE.

A barrier was erected by the city in the street near the street car track to protect an excavation, the barrier extending close to the running board of the car as it passed, and the motorman on the first trip in the morning, noticing that it was near the running board, slowed up, plaintiff, the conductor, being then on the rear of the car, and on the return trip the motorman's attention was directed to a wagon on the street, and he did not see if any one was on the running board or given any warning of the obstruction, and plaintiff, who was then on the running board, was struck by the obstruction and injured. *Held*, in an action against the city for the injuries sustained, that the motorman's principal duty was to the passengers, and he was not bound to assume that the conductor did not observe the obvious danger of the obstruction, and hence his failure to warn the latter thereof was not negligence constituting the proximate cause of his injuries so as to bar a recovery.

### 5. TRIAL—TAKING QUESTION FROM JURY—SUFFICIENCY OF EVIDENCE.

When the proof relied on to support the claim of liability is so weak that a verdict for claimant would be properly set aside, it is within the court's discretion to instruct the jury not to consider such evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 381–389.]

Appeal from Court of Common Pleas, Fairfield County; Howard B. Scott, Judge.

Personal injury action by George W. Hinckley against the city of Danbury. From a judgment for plaintiff, defendant appeals. No error.

J. Moss Ives, for appellant. John R. Booth, for appellee.

BALDWIN, C. J. Workmen employed by the defendant city, having made an excavation in one of its streets to connect private premises with its water main and sewer, erected, at the close of the day, a barrier for the protection of travelers, part of which came near a street railway track. The plaintiff was a conductor on the street car which made the first run past this point the next morning. As it approached the barrier on this trip, the motorman, thinking it was pretty close to the running board and might come over it, slowed up, but got by without hitting it. At this time there were no passengers on the car but the conductor, who, as he knew, was on the rear platform attend-

ing to his duties, and he did not speak to him of the incident or give him warning. On the return trip, as the car approached the barrier, the motorman forgot its existence, his attention being attracted by a team on the other side of the street, which he feared might be driven on the railway track, and did not look at the place of the excavation, nor turn to see if any one was on the running board, nor give any warning of danger to any one. The plaintiff, at this time, was on the running board, and his left leg was broken by coming in contact with the barrier. These were practically undisputed facts. The defendant claimed that the proximate cause of the injury was the negligence of the motorman in not giving some warning to those who were or might be on the running board; but the court charged the jury that no act of omission on his part had been shown which could prevent a recovery, if they found that the plaintiff was struck by the barrier while standing with both feet on the running board.

It is open to question whether the cause of action stated in the complaint is one upon the statute rendering municipal corporations liable to travelers injured by a defect in a highway. We shall assume, however, that it is, and therefore that, if the culpable negligence of one traveling with the plaintiff was a proximate cause of the injury, there is no cause of action. *Bartram v. Sharon*, 71 Conn. 686, 43 Atl. 143, 46 L. R. A. 144, 71 Am. St. Rep. 225; *Upton v. Windham*, 75 Conn. 288, 291, 53 Atl. 660, 96 Am. St. Rep. 197. We shall assume also (without deciding) that the motorman was, as respects the plaintiff, a fellow traveler within the meaning of this rule.

The trial court, however, was right in the instructions given. The only facts in proof regarding the acts and omissions of the motorman are those which have been stated. These showed no failure to do his duty. Having exercised due caution in approaching the barrier on the trip out, and having found that the car cleared it, he was not bound, as respects the plaintiff, to keep his eye upon it or upon him on the return trip. It was a patent obstruction, which the conductor, as well as he, had an opportunity to see. As the representative of the street car company, the motorman owed to every passenger on the car extraordinary care. As to any of them who might be on the running board, the highest reasonable degree of care, vigilance, and forethought, which was consistent with the mode of conveyance and the practical operation of the road, was due from the company, and this required that they should be given warning of the possible danger, as they came near the barrier. A duty to give it may have rested upon him, if it were not given by the conductor; but the conductor and motorman were fellow serv-

ants, and owed each other a much less degree of care. The motorman was not bound to assume that the conductor had not observed or would not observe what was obvious to any one who looked about him. On the contrary, the slowing up of the empty car on its trip out, as it passed the barrier, would naturally have called the conductor's attention to the cause of the delay. The prime duty of the motorman on the trip back was to the passengers. He was right in keeping his eye on the team in front, so as to avoid a possible collision with it. That in so doing, and by reason of his safely passing the barrier a few minutes before, he forgot for the moment that it existed, and gave no warning to the plaintiff, could furnish no sufficient ground for an imputation of negligence, constituting a proximate cause of the injury to the latter.

When the proof relied on in support of a claim is so weak that, if a verdict were rendered in favor of the claimant, it would be properly set aside by the court, it is within the discretion of the trial judge to instruct the jury to give such evidence no consideration. The case at bar fell within this rule.

There is no error. All concur.

(81 Conn. 143)

**BRETHAUER v. SCHORER et al.**

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

**1. APPEAL AND ERROR — CLAIMS NOT MADE BELOW.**

Claim that the title was not in the remaining plaintiff, made for the first time on appeal, in an action on a note, brought by the sole heir of intestate and his administratrix, the name of the administratrix, on her death, being dropped as party, by stipulation, and the answer setting up the sole defense of limitations, comes too late.

**2. WITNESSES—CREDIBILITY—EQUALITY.**

There is no such thing as a legal equality of credibility between witnesses; but the testimony of each is to be weighed for what it seems to the trier to be worth, in view of its character, the demeanor of the witness, and the probability or improbability that what he says is true.

**3. PRINCIPAL AND AGENT—EVIDENCE.**

A payment by the wife of interest on a note given by her and her husband warrants, without further proof of authority, a finding of payment by both, preventing the bar of the statute.

Appeal from Superior Court, New Haven County; Milton A. Shumway, Judge.

Action by Frederick H. Brethauer against Pauline Schorer and husband. Judgment for plaintiff. Defendants appeal. Affirmed.

Benjamin Slade, for appellants. David M. Fitzgerald and Walter J. Walsh, for appellee.

**BALDWIN, C. J.** The note in suit was given by a man and his wife in 1876, payable on demand, with interest semiannually, and secured by a second mortgage of real estate. The payee died in 1878. In 1903 the administratrix of his estate turned it over, without indorsing it, to the sole heir at law, who has since had it in his possession. This suit was brought soon afterwards by him and the administratrix. In May, 1907, she died, and in November her name was dropped as a party, by stipulation. The answer had set up as the sole defense the statute of limitations.

No claim was made before or at the trial that the title to the note was not in the remaining plaintiff, and the court found that it was. Such a claim is made on this appeal, but it obviously comes too late.

The other grounds of error which are assigned rest on exceptions to the special finding of facts in regard to the payments of interest within six years. The plaintiff testified that he had received from Mrs. Schorer the interest accruing on the note down to and including that due in the spring of 1898, and the court so found. It is contended that this is a finding against the evidence. There was certainly much testimony to the contrary, but we see nothing in the record (which brings up that of all the witnesses) to indicate that the court was not warranted in coming to the result which it did.

Mrs. Schorer testified that she made no interest payments after 1893, and the defendants claimed on the trial that the credibility of her testimony "was entitled to the same weight" as that of the plaintiff. This claim was properly overruled. Apparently, its meaning was that her testimony, as matter of law, stood on an equal footing, as to credibility, with his. There is no such thing as a legal equality of credibility between witnesses. The testimony of each is to be weighed for what it seems to the trier to be worth, in view of its character, the demeanor of the witness, and the probability or improbability that what he says is true.

It was undisputed that whatever interest was paid was received from Mrs. Schorer. Mr. Schorer contends that her acts cannot bind him. Their relation was such as, without other proof of authority, to warrant the finding of payments within six years by both, and the judgment against both, accordingly.

There is no error.

(51 Vt. 579)

VAN DYKE et al. v. COLE.<sup>†</sup>

(Supreme Court of Vermont. Essex. Aug. 12, 1908.)

1. EQUITY—"CROSS-BILL."

A motion to strike the cross-bill, as being based on matters irrelevant to the case made by the original bill, is properly overruled; the real basis of the bill to enjoin waste pending orators' action of ejectment being a claimed forfeiture of the contract of purchase, under which, if in force, defendant has rights paramount to those of orators on the case made by their bill; and defendant by his answer denying a forfeiture in equity, and by cross-bill praying that the contract be performed, and that further prosecution of orators' action of ejectment be enjoined, so that the cross-bill is a proceeding to procure a complete determination of a matter already in litigation, and the new facts introduced by it being such only as are necessary to have before the court in the decision of the questions raised in the original suit, to enable it to do full and complete justice to all parties in respect to the cause of action on which orators rest their right to aid or relief.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1758-1761; vol. 8, p. 7624.]

2. VENDOR AND PURCHASER—FORFEITURE OF CONTRACT.

Even if time be of the essence of a contract of sale of land, nonperformance of the conditions of payment does not ipso facto work a forfeiture; forfeiture being made optional with the vendor by the provision that, if the vendee shall fail in the performance of any of the agreements on his part to be performed, the vendor may, if he sees fit, declare the contract forfeited.

3. SAME—CONVEYANCE TO THIRD PERSON.

A vendor, by his conveyance to a third person of the land sold, does not elect to rescind his contract of sale; the conveyance being expressly made subject to the vendee's rights under the contract, and in connection therewith the note of the vendee for the purchase money being transferred to the grantee in the conveyance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 177.]

4. SAME—TIME FOR DECLARING FORFEITURE.

The right of a vendor under a contract of sale to forfeit it for nonperformance of conditions must be exercised promptly on the occurrence of a default.

5. APPEAL AND ERROR—PRESUMPTION.

The trial court having found facts from which it could legitimately infer waiver of forfeiture of a contract of purchase of land, it will, in favor of the decree, be presumed that such inference was made by it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3764.]

6. VENDOR AND PURCHASER — FORFEITURE OF CONTRACT—WAIVER OF RIGHT.

Failure to make payments at the times provided in a contract of sale of land, and the commission of waste prohibited by the contract, being acquiesced in or waived, cannot afterwards furnish ground for forfeiting the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 374.]

7. SAME—BURDEN OF PROOF.

Parties seeking to avail themselves of the optional privilege of the vendor to forfeit the contract of sale for violation of its provision that the vendee shall not, before payment of purchase money, commit any waste, by cutting trees, other than shall be necessary in clearing the land and for his use for buildings, fences, and fuel, have the burden of showing that the cutting done was not for the permitted purposes.

8. SPECIFIC PERFORMANCE—EVIDENCE—ADMISSIBILITY.

Testimony of B., in an action by the vendee for specific performance, that he went to the persons representing the vendor and informed them he was ready to pay the amount due on the purchase price, cannot be said to have been improperly admitted, on the ground that they were not obliged to accept payment of a stranger; it not appearing that in his testimony as to such interview he did not show that he stated to them that he was sent by the vendee to make the payment.

9. SAME—TENDER.

To support a suit by the vendee for specific performance, and this though the relief is sought by cross-bill, it is not necessary that he shall have made a formal tender of the amount due, where the assignees of the vendor have brought ejectment against the vendee for the land, thereby at least attempting to rescind the contract, and have thereafter brought a bill under oath to enjoin waste by him pending the injunction suit, thereby in effect asserting that the contract had been terminated, as under such circumstances a formal tender would have been useless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 285.]

10. SAME—EFFECT OF BREACH OF CONTRACT.

Though the vendee has not justified his cutting of timber on the land after notice that the assignees of the vendor intended to insist on their legal rights under the contract in case of future breaches, the contract giving the vendor a right to declare it forfeited in case of cutting of timber except for use on the premises, this will not deprive him of the right to specific performance; he having the equitable title and the rightful possession of the land, and; though the assignees of the vendor have the legal title, the extent of their interest in equity being as security for the amount due, and the right of forfeiture being only in aid of the security, and the value of the amount cut being only \$70, and, while the amount due on the contract is \$700, the place, with the improvements made by the vendee, being worth from \$2,500 to \$3,000, and the vendee if denied specific performance, being without adequate remedy.

11. SAME—LACHES.

The vendee having taken and retained uninterrupted possession under the implied terms of his contract, ever by his acts showing a fixed, marked intention to carry the contract into execution, without any declaration or act by the vendors, or their assignees before bringing ejectment against him, other than in recognition of a continuance of the contract in force, mere lapse of time will not prejudice his right to specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 325-337.]

12. SAME—GRANTEES OF VENDOR.

Persons taking a deed of land with full knowledge that another held a contract of its purchase from their grantor, and subject to his rights under it, stand with reference to it as did the vendor, and will be compelled to perform by a conveyance of the land in the same manner and to the same extent as would he, had he retained the legal title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 53.]

13. SAME—PARTIES.

A vendor, having conveyed the land to others than the vendee, is not a necessary party to a suit by the vendee against them for specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 344.]

14. NOTICE—CONSTRUCTIVE NOTICE—RECORD OF SUBSEQUENT DEED.

The record of a deed is not constructive notice to one who is the equitable owner of the

<sup>†</sup> For opinion on rehearing, see 70 Atl. 1108.

land and in possession under a prior contract of purchase from the grantor, subject to which the deed is made.

Appeal in Chancery, Essex County; Wm. H. Taylor, Chancellor.

Suit by Thomas H. Van Dyke and another against Damon L. Cole for injunction. Defendant had a decree under his cross-bill for specific performance, and orators appeal. Affirmed and remanded, with mandate.

Some time in the summer of 1885, the defendant bought the land in controversy, known here as the "Cole Land," of Florian Harriman, the owner, for the agreed price of \$315, of which the defendant then paid \$10 in cash and gave his note for the balance, \$305, dated June 10, 1885, and payable to the vendor, or order, in installments; \$30 one year from date, \$25 two years from date, and five annual installments of \$50 each thereafter, all with interest annually. At the same time they mutually executed under seal a contract, or bond, whereby the party of the first part (vendor) "for the consideration hereinafter mentioned, hereby agrees to sell to the said party of the second part (the defendant), who hereby agrees to purchase," the lands here in question. "The said party of the second part hereby agrees to pay to said party of the first part, for the said premises, the sum of:" Then follows the consideration, and provisions for the payment of the installments in the note which is described. The contract was always in the defendant's possession until in January, 1900, when it was burned with his dwelling, and no copy or record of it was found. The master finds that it contained provisions as follows: "And the said party of the second part also agrees to pay all taxes and assessments which have been imposed on said premises during this current year, and all of which shall henceforth be imposed on said premises; and not to commit or suffer any waste or damage on said land, by cutting down, carrying off, or destroying any timber or trees, growing or being thereon, other than shall be necessary in clearing said land for cultivation, or for making necessary buildings and fences on the same, or for necessary fuel. And the said party of the first part does hereby agree that on payment of the purchase money and interest, and the performance of the agreements and stipulations as aforesaid, by and on the part of the said party of the second part, he will, by a good and sufficient warrantee deed, convey or cause to be conveyed to the party of the second part, his heirs or assigns, the aforesaid hereditaments and premises. And it is hereby agreed that if the said party of the second part shall fail in the performance of any of the aforesaid agreements or stipulations on his part to be performed, then it shall be lawful for the said party of the first part, at any time after such default, if he sees fit, to declare this contract forfeited and vacated, and to re-enter upon and take possession of said premises, and all buildings

and improvements thereon, and to sell and dispose of the same to any person or persons whomsoever; and the said party of the first part shall and may retain all sums of money paid by the said party of the second part, or any subsequent purchaser, as and for liquidated damages for such failure."

On the making of this contract the defendant immediately went into the actual possession of the land under it, and from that time hitherto has been in possession thereof and occupied it as his home. The note was not paid according to its terms, but payments have been made thereon as follows: Before October 5, 1889, the defendant performed labor for the vendor and let him have a harness, total in value \$38.50, which amount was agreed upon on that date and indorsed on the note by the consent of both parties; a payment of \$18 by way of work in haying by defendant's son, in 1890; in 1891, a payment of \$18.50, by similar work of defendant's son; in March, 1895, a payment in money, \$50, by the Averill Lumber Company at defendant's direction; and in the fall of 1895, a payment of \$30 by way of work by the defendant. On September 5, 1896, the vendor gave a warranty deed to the orator Warren E. Drew of lots 100 and 101, of which lots the Cole land was a part, together with other lots of land, "except \* \* \* 100 acres sold to Cole." The 100 acres there excepted is the Cole land, and the Cole referred to is the defendant. On the same day Drew quitclaimed back to the vendor lots 100 and 101, with other land. April 12, 1898, the vendor quitclaimed to Drew an undivided half interest in "100 acres on which said Harriman had given Damon Cole a land contract." February 15, 1900, the vendor conveyed eight lots, including lots 100 and 101, to Drew, "excepting \* \* \* and subject to any right Cole \* \* \* may have by land bond." On the 5th day of March, 1900, Drew and wife quitclaimed to the other orator, Thomas H. Van Dyke, an undivided one-half of the same eight lots, with the same exception and subject to the same right of the defendant "by land contract." Again on October 24, 1905, just before the bringing of the suit in ejectment hereinafter mentioned, the vendor executed a quitclaim deed to Drew of the same eight lots, with the same exception, and subject to the same rights in the defendant. This deed states that it is given in confirmation of the former deed given by the vendor to Drew on the 15th day of February, 1900, "and to cure a defect in title existing at that time, to wit, an undischarged mortgage from the vendor to Gilbert Harriman dated November 28, 1881; \* \* \* said mortgage having been subsequently discharged on the 10th day of March, 1900." On the same 24th day of October, 1905, Drew quitclaimed to Van Dyke one undivided half of the same eight lots, with the same exception and subject to the same right in the defendant.

At the time of the defendant's purchase,

the soft wood timber had nearly all been cut off the land; the stumpage then being worth from 75 cents to \$1 a thousand feet, while hard wood stumpage was worth but very little. No land had then been cleared. The defendant fixed up a vacated lumbermen's shanty thereon to live in, later building a dwelling house and barn. The house was burned in January, 1900, and in 1901 he built a new house. This house and the barn above mentioned are now on the place. The defendant has cleared some 25 acres of land, and cuts on it annually from 16 to 20 tons of hay. The soft wood trees on the place in the time of the defendant's occupancy have grown rapidly in size and value, which fact was well known to all of the parties to this suit. At the present time the greatest value of the place is in its timber; there being some 300,000 to 350,000 feet of soft wood worth from \$6 to \$8 a thousand feet, stumpage, and 50,000 feet of hard wood, worth from \$2 to \$3 a thousand feet, stumpage. The present value of the place is from \$2,500 to \$3,000. Since 1885, and prior to November 1, 1905, the defendant from year to year cut in all from 140,000 to 150,000 feet of soft wood lumber from the place; but there was no evidence that he cut any prior to 1887, except some for the buildings. The master reports that it did not appear when between 1885 and 1905 timber was cut by the defendant, nor did it appear how much was cut during that period for necessary buildings, fuel, and fencing, although it did appear that some of the timber used for building the two houses and the barn was cut on the place. From the fall of 1885 to March 5, 1900, Gilbert Harriman was the agent of the vendor to collect and receive payments on the note against the defendant, who was so informed, and acted accordingly. About 1888 the vendor moved some miles away from the Cole land, leaving Gilbert in charge "to see that no waste was committed," etc.

It is found: That Gilbert, as such agent, knew, or ought to have known, of the cutting of timber from year to year up to 1900, and that the orators from the time they or either of them had any title to that land knew, or ought to have known, of it; that in fact Gilbert did know of it, for as early as 1894 or 1895 he told the vendor that the defendant was trespassing and committing waste. Yet neither Gilbert, the vendor, nor the orators ever made any remonstrance to the defendant against it in any way before the latter brought their suit in ejectment. When the orators took their deeds of the land in question, they both knew that the defendant was in the occupancy thereof; that after the house was burned in January, 1900, they knew, or ought to have known, that the defendant was rebuilding in 1901, yet they made no objection and gave defendant no notice of their ownership nor of the claims they now make. It is further found:

That neither the vendor nor either of the orators ever demanded payment of the sum due on the land contract; that the vendor never demanded possession of the land for any noncompliance with the conditions of the contract; that neither the vendor nor the orators ever entered upon or attempted to take possession of the land for any alleged failure of the defendant to fulfill the contract up to the bringing of the suit in ejectment; and that the defendant always recognized the validity of the note as a claim on the land, but at the time he took his contract, and ever after when clearing up the land and cultivating it, erecting the various buildings thereon, and when cutting down the timber and selling it, he supposed he had a good title to the fee, and was never notified nor knew that any one claimed otherwise till the bringing of that suit. Other than whatever effect the bringing of that action may have had, no notice was ever given to the defendant by the vendor or by the orators of any rescission of the contract, nor of fixing a certain or reasonable time within which the defendant would be required to perform to save a rescission. The suit in ejectment was brought about November 1, 1905, was duly entered in Essex county court, and is still pending. January 5, 1906, the orators, having learned that the defendant was then engaged in cutting timber on the disputed land, brought their bill in this case. Defendant made answer and filed a cross-bill. Other material facts appear in the opinion.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Amey & Hunt and E. W. Smith, for appellants. Harland B. Howe and Herbert W. Hovey, for appellees.

WATSON, J. The orators moved to strike the cross-bill from the files for that it is based on matters irrelevant to the case made by the original bill, and it is urged that the motion should have been granted. The determination of this question requires an examination of the original bill with reference to subject-matter and relief sought, and a relative similar examination of the cross-bill. The orators brought their action of ejectment to recover the possession of the land in question and damages. The declaration alleged that on the 12th day of April, 1898, the orators were seised and possessed of the land in their own right in fee, and so continued until the 13th day of April, 1898, when the defendant, without law or right, and contrary to the will of the orators, thereinto entered and ejected, etc., the orators therefrom, and ever since has kept, and still keeps, them out of said premises, etc. In their bill the orators allege the bringing of the suit at law, recite the declaration, and allege the facts set forth therein to be true, that they are the sole owners of the land in question, that from the day of



the bringing of that suit the defendant has been and still is despoiling, wasting, and irreparably damaging said land by cutting down and removing therefrom valuable timber, and that he intends to continue so to do unless restrained by injunction, and praying for an injunction restraining the defendant from further cutting down and removing or selling timber on or from said land during the pendency of the action at law and until final judgment therein, and for general relief. A temporary injunction was obtained according to the prayer. The defendant made answer alleging and relying upon his purchase of the land and his bond or contract executed in connection therewith, and his thenceforth continuous possession of the property under the contract to the present time. The answer further alleges: The part payment of the consideration in money by the defendant, at the time of the purchase, the giving of his note for the balance, and the making of payments on the note from time to time; the condition of the contract, among other things, that on payment of the note by the defendant the vendor would execute and deliver to him a good and valid warranty deed to convey to him a good and valid title to the land in fee simple; that he has made valuable improvements on the land by way of clearing and making a portion of it arable, erecting buildings, etc.; that he always has been, and now is, ready and willing to pay the amount due and owing on said note and accept such a deed of the land; that the vendor subsequently quitclaimed all his right, title, and interest in said lands to the orators subject to the rights of the defendant under his contract, and indorsed and delivered to them the said note, which conveyance and note the orators took with full knowledge of the land contract from the vendor to the defendant and of the latter's rights thereunder. The cross-bill contains substantially the same allegations as the answer, and praying for specific performance of the contract, that the orators be enjoined from further prosecuting their action at law, and for general relief. The contract impliedly shows that under it the defendant was immediately to take and thereafter have possession of the property, and the master finds that he did so take possession and thus continued to have it openly, notoriously, exclusively, and undisturbedly up to the time of the bringing of the suit at law, subject to such liabilities as the facts reported imposed.

In making out a case under their bill, the orators are obliged to show title derived from Florian Harriman subsequent to his contract with the defendant, and subject to the latter's rights under it. It devolves upon them to show not only a nonperformance of the contract by the defendant, but also a declaration of forfeiture by the party having such optional right. Indeed, the basis of the orator's claimed right to relief is that all

rights of the defendant under the contract had been forfeited, and consequently that any further cutting of timber by him would be a commission of waste and an irreparable damage to the land, and upon their prayer he was temporarily enjoined from "further cutting down, removing, or selling any timber or lumber on or from the land and premises described," regardless of the purpose of cutting or the use to be made of the timber or lumber when cut. No question is made but that the case is properly in equity for the purpose of an injunction to stay waste, and any relief agreeable to the case made by the bill, though not within the special prayer, may be had under the prayer for general relief. The court having jurisdiction of the case for one purpose, it will be retained for a final disposition of the whole matter. *Hastings v. Perry*, 20 Vt. 272; *Whipple v. Fair Haven*, 63 Vt. 221, 21 Atl. 533. Thus it appears that the real basis of the orators' case is a claimed forfeiture of the contract under which, if in force, the defendant has rights paramount to those of the orators on the case made by their bill. The defendant by his answer in effect denies a forfeiture in equity, and by cross-bill prays that the contract be performed, and that further prosecution of the action of ejectment be perpetually enjoined. The cross-bill is a proceeding to procure a complete determination of a matter already in litigation, and the new facts introduced by it are such, and only such, as are necessary to have before the court in the decision of the questions raised in the original suit, to enable it to do full and complete justice to all the parties before it in respect to the cause of action on which the orators rest their right to aid or relief. Consequently in overruling the motion there was no error. *Rutland v. Paige*, 24 Vt. 181; *Krueger v. Ferry*, 41 N. J. Eq. 432, 5 Atl. 452.

It is urged that time is of the essence of the contract, and that by its terms the defendant's acts in breach of covenant changed the legal relation of the parties, permitting the vendor and his assigns to take possession, sell the property with all improvements, and retain all sums of money paid as liquidated damages for failure to perform, and that, even though it be thought that the contract does not expressly make time essential, yet here the subject-matter—principally, growing timber the value of which has materially increased—is such that time will be considered material, and the defendant will not be allowed to lie by until the change in his favor and then ask for specific performance. Assuming, but not deciding, that time is of the essence, the effect of the contract is not such that nonperformance *ipso facto* works a forfeiture. A forfeiture was made optional with the vendor, and, if he did not see fit to declare it, the contract by virtue of its own provisions continued in full force.

It is further urged that the vendor, by his

conveyance to Drew, in effect elected to rescind his contract with the defendant; but this is not so, since, as before seen, in each instance the conveyance to Drew was expressly made subject to the defendant's rights under the contract, and the note was transferred to the orators in connection therewith. Instead of these conveyances indicating a rescission, the vendor thereby recognized the contract and note as subsisting obligations. The same recognition was made by Drew in his conveyances to Van Dyke, and as grantees neither of them could take greater rights than were possessed by his grantor. Not only does the record show that no declaration of forfeiture in fact or effect was ever made prior to instituting proceedings at law to eject the defendant in November, 1905, and then only as the effect of that action, but, in addition thereto, it is found that a payment of \$50 in cash was made on the note by the defendant and accepted by the vendor in March, 1895, between two and three years after the last installment was due, and that a further payment of \$30, by way of work by the defendant for the vendor, was made in the fall of the same year. The receiving of these payments manifested not only the vendor's assent to previous delays, but also his understanding that the contract was still in full force. Again, the conveyances by the vendor to Drew and by the latter of one undivided half to Van Dyke, subject to the rights of the defendant under his contract, were severally in 1898, in 1900, and finally as late as October 24, 1905.

In *Hunter v. Daniel*, 4 Hare, 420, the covenants and agreements were such that, in case the plaintiff failed to perform, "then, and in any such case, it should be lawful for the defendants, or for any of them, by writing to rescind the agreement," etc. It was held that each breach on the part of the plaintiff in nonpayment of money was a new breach of the agreement, and that, time being of the essence of the contract, such breach gave defendants a right to rescind the contract, but that right should have been asserted the moment the breach occurred, and that the defendants were not at liberty to treat the agreement as still subsisting, and to take the benefit of it at the expense of the plaintiff, if they meant to insist that it was at an end. In *Gaughen v. Kerr*, 99 Iowa, 214, 68 N. W. 694, the action was for specific performance of a contract for the sale of land. The vendee executed his several promissory notes for the agreed price, payable at different times in a period of nearly three years, and, in addition thereto, the vendee assumed the payment of the taxes on the land for the previous year and the subsequent taxes. The contract provided that, in case the vendee should fail in strict literal performance thereof, the vendor "shall have the right to declare this agreement null and void," etc. Later, when one of the notes was more than six months overdue and unpaid, and the taxes for two years

were long since due, the vendors, not having exercised their right to declare a forfeiture, assigned the notes and contract, and conveyed the land to one of the defendants in that case, after which the assignee, claiming the right of strict forfeiture, entered a cancellation on the contract. It was held that such an option must be exercised by election at the time of default to be of any effect; the court saying: That a different rule would leave the matter entirely at the mercy of the seller; that, if the land should appreciate in value, it would be within his power at any time to declare a forfeiture, take possession, and reap the benefits of the enhanced value, while, if there should be a depreciation he could insist on the enforcement of the contract; that such a construction would not be upheld unless the clear import of the contract required it; that it was a reasonable construction and more in harmony with equity and good conscience to hold that the parties intended not only that prompt payment should be made, but also that the right to forfeit, to be available, should be exercised promptly. To the same effect are *Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57; *Fergusson v. Talcott*, 7 N. D. 183, 73 N. W. 207; *Pier v. Lee*, 14 S. D. 600, 86 N. W. 642; *Fulcher & Co. v. Daniel & Son*, 80 Ga. 74, 4 S. E. 259. In *Battell v. Matot*, 58 Vt. 271, 5 Atl. 479, it is said: "The essentiality of time is matter of intention, and may be waived by the party entitled to insist upon it, and is waived by conduct on his part that shows he could not consistently have intended to insist upon it, or that he intended to treat the contract as still subsisting notwithstanding the delay, and, when the essentiality of time has been waived, it cannot be revived again without notice to the party in default, fixing a certain and reasonable time within which he is required to perform, in which case the time thus allotted becomes essential, and, if the party neglects to perform within it, a court of equity will not aid him to enforce the contract, but will leave him to whatever legal remedy he may have."

It is unnecessary to decide how far, if at all, the rule requiring prompt exercise of the optional right of forfeiture is affected by the provision of the contract that it shall be lawful "at any time after" default, nor is it necessary to consider whether, as a matter of law, there was a waiver of forfeiture by the vendor or by the orators, for facts are found from which the court below could legitimately infer such a waiver in fact by the vendor as long as he had the legal title, and by the orators thereafter, if there were any new acts of default by the defendant, until the bringing of their action of ejectment, and to sustain the decree this court will presume that such inference was there made. This is conclusive that the orators cannot now base any right of forfeiture on the defendant's failure to pay at the original times appointed, nor afterwards, since nc

notice was ever given him by the vendor nor by the orators subsequently fixing a certain and reasonable time within which payment must be made. It is also conclusive against them regarding all acts of the defendant in committing prohibitive waste before the proceedings at law, for such acts once acquiesced in or waived cannot afterwards afford a ground for terminating the contract.

The question then is whether the findings of the master show such subsequent cutting of timber as constitutes waste for which the optional right of forfeiture is given. The contract contemplates that the defendant might necessarily cut down and carry off growing timber in clearing land for cultivation, and by its terms such cutting does not constitute waste or damage thereunder. It does not appear that the cutting referred to in this paragraph was not lawfully done under that provision of the contract, and the orators, seeking to avail themselves of the optional privilege, must be held strictly within the limits of the authority giving the right. The result is that on the facts found the orators are not entitled to relief under the original bill.

Should the defendant be granted relief under the cross-bill? That he has shown himself ready, desirous, and eager to perform by making full payment since the waiver of time as an essential part of the contract, there can be no question, in view of the facts found that the defendant has always been ready to pay the amount due on the note, and, as late as 1896, told the vendor that, if he would meet defendant and ascertain the amount, the latter would pay it, he not then knowing that the legal title had been conveyed to the orators, and that, after the service of the original bill, but before either the answer or cross-bill was filed, the defendant's solicitor and one E. M. Bartlett went to the office of the orators' solicitor and informed him that they were ready to pay the amount due and asked to see the note. The orators' solicitor did not then have the note, and so did not show it. The master finds that the defendant's solicitor and Bartlett were then ready, and are now, to pay the sum due. Exception was taken because Bartlett was allowed to testify that he was then ready to make such payment; it being argued that the orators were under no obligation to accept payment of him, a stranger. It appears that Bartlett testified concerning that interview, and for aught before us he may have stated that he and the solicitor were sent there by the defendant to pay the note and so informed the orators' solicitor. We cannot say the testimony was improperly received.

It is said, however, that no formal tender was ever made by the defendant, and that this was necessary; but in bringing their action of ejectment the orators at least attempted to rescind the contract, and thereafter, in bringing their bill under oath and

procuring the injunction, they in effect asserted that the contract had been terminated. In these circumstances a formal tender would have been useless, for which reason, if for no other, it was not required in order to support an action for specific performance. *Hunter v. Daniel*, 4 Hare, 420; *Oakey v. Cook*, 41 N. J. Eq. 350, 7 Atl. 495; *Baumann v. Pinckney*, 118 N. Y. 604, 23 N. E. 916. Nor does it make any difference in this respect that the relief is sought by cross-bill. *Fergusson v. Talcott*, cited above.

Assuming that in seeking specific performance it devolves on the defendant to show that he has done or offered to do, or is ready and willing to do, all the essential and material acts required of him by the contract, except so far as they are shown to have been waived, will the fact that the defendant has not justified the cutting of timber after the action of ejectment was brought prevent such relief? It is argued by the orators, though not set up as a defense in their answer to the cross-bill (the necessity of which we do not consider), that this unjustified act precludes him from obtaining a decree in his favor. Yet this does not necessarily follow. By the contract the defendant has the equitable title to the land and the rightful possession thereof. The orators have the legal title, but the extent of their interest in equity is as security for the payment of the amount due on the note; such contracts having always been regarded in equity as analogous to equitable mortgages. The right of forfeiture for breach of covenants against waste was only in aid of the security. If the orators are paid the amount due on the note with the costs allowed them, they will receive full compensation and have no reason to complain of that cutting of timber, even though it constituted waste. On the other hand, in addition to sundry payments, the defendant has made valuable and permanent improvements, intending to occupy the premises, as he has, for farming purposes and as a home. The cutting of timber after notice to him by way of the action of ejectment that the orators intended to insist upon their legal rights under the contract in case of future breaches—treating the bringing of that suit as such an unequivocal act as unmistakably showed that intention, although there may be some doubt whether the orators could rescind the contract without first returning or tendering the unpaid note to the defendant—was in no just sense an impairment of the security, and the orators were not injured thereby. Indeed, that this act was comparatively of very little consequence to the orators is manifest from the facts: That the stumpage value of the timber so cut, 9,962 feet, was only \$69.73; that the amount due from the defendant to the orators as of October 2, 1906, was \$699.93; that there is still on the land some 300,000 to 350,000 feet of soft wood timber and 50,000 feet of hard wood; and that the place

is worth from \$2,500 to \$3,000. In these circumstances, specific performance should be decreed, for thereby the orators will receive justice by way of full compensation, while a denial of such relief would leave the defendant without any adequate remedy on his contract and result in great hardship and injustice to him. *Hagar v. Buck*, 44 Vt. 285, 5 Am. Rep. 368; Pom. Con. § 358.

It is said that the defendant's delay in asking has been unreasonable, and hence such relief should not be granted. Yet the case stands with the essentiality of time waived, and since the defendant took and has retained the uninterrupted possession of the premises under the implied terms of his contract, ever by his acts showing a fixed, marked intention to carry the contract into execution, without any declaration or act by the vendor, or by the orators before instituting their ejectment suit, other than in recognition of a continuance of the contract in force, equity will not now allow the lapse of time to prejudice his remedial right. Pom. Con. § 404; *Waters v. Travis*, 9 Johns. (N. Y.) 450; *Bruce v. Tilson*, 25 N. Y. 194; *Ely v. McKay*, 12 Allen (Mass.) 323.

It is further urged: That, since the orators are not parties to the contract, they should not be compelled to perform; that the contract is personal with the vendor, otherwise there is no force in the last part of the provision therein that he will "convey, or cause to be conveyed," etc. It is a sufficient answer to this position to say that, whatever the force of this provision may be as against the vendor, it does not affect the equitable rights of the defendant against the orators. They took their deeds of the property with full knowledge of the defendant's contract and subject to his rights under it. In these circumstances, they stand in equity with reference to the contract as did the vendor, and will be compelled to perform by a conveyance of the land in the same manner and to the same extent as he would have been liable to do, had he retained the legal title. *Wilkins v. Somerville*, 80 Vt. 48, 66 Atl. 893, 11 L. R. A. (N. S.) 1183. Nor is it necessary to the granting of such a decree that the vendor be a party to the suit, for he has no interest in the land, and no relief is sought against him. *Bridgman v. St. Johnsbury & Lake Champlain R. R. Co.*, 58 Vt. 198, 2 Atl. 467.

Exception was taken to the master's report wherein he states that there was no proof that the defendant knew the vendor had sold to orator Drew, or that the orators or either of them had any interest in the Cole land until a little time before the ejectment suit was begun, on the ground that the orators' deeds admitted in evidence show that they were of record. But this position is without force, since the record of these deeds was not constructive notice to the defendant; he being the equitable owner and in possession under a prior contract to which

the deeds were made subject. *Leach v. Beattie*, 33 Vt. 195; *Howard v. Clark*, 71 Vt. 424, 45 Atl. 1042, 76 Am. St. Rep. 782.

The exceptions to the report relied upon in argument, but not herein particularly noticed, are in effect overruled, so far as they are material in disposing of the other questions in the case.

Decree affirmed, and cause remanded, with mandate.

(81 Vt. 358)

**DROWN v. NEW ENGLAND TELEPHONE & TELEGRAPH CO. et al.**

(Supreme Court of Vermont. Orleans. Aug. 12, 1908.)

**1. APPEAL AND ERROR.—PROCEEDINGS IN TRIAL COURT—OBJECTION—SPECIFIC OBJECTION—NECESSITY.**

Where an objection to the admission of evidence was not made at trial, it cannot be urged on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1258-1272.]

**2. EVIDENCE—OPINION EVIDENCE—WHEN ADMISSIBLE.**

In an action against defendant telephone company and a lighting company for injuries sustained while working on the telephone poles by coming in contact with the lighting company's wires, testimony by the foreman of defendant's linemen that the lighting company's poles could have been placed farther away or made several feet higher so as to have insured safety, without first stating the facts on which he based his opinion, was improperly received, as the proper location of the poles was a question of physical conditions to determine which no experience was necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2292.]

**3. APPEAL AND ERROR—DISCRETION OF TRIAL COURT—ADMISSION OF EVIDENCE—DEMONSTRATIVE EVIDENCE.**

In an action for injuries received by coming in contact with electric wires strung above a telephone pole on which plaintiff was working, a request by defendants to suspend wires over a model of the telephone pole on which plaintiff was injured, erected in the courtroom, to illustrate the situation, was a matter of discretion for the trial court, and its refusal will not be disturbed on appeal.

**4. MASTER AND SERVANT—ACTION FOR INJURIES—RISKS ASSUMED—KNOWLEDGE OF DANGER—OBVIOUS DANGER.**

In an action against defendant lighting company and defendant telephone company for injuries sustained while working for the latter by coming in contact with the wires of the lighting company which were strung above those of the telephone company, the evidence showed that plaintiff knew the wires were just over the pole, and that they were of high voltage, and the current was transmitted in the daytime and was dangerous, and that the only safe way was to keep away from them. *Held*, that the evidence was not sufficient to defeat plaintiff's recovery, as it could not be said as a matter of law that he comprehended the danger, or that it was so obvious that he should have known it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1072-1077.]

**5. SAME—ACTIONS—ASSUMPTION OF RISK—QUESTION FOR JURY.**

In an action for injuries caused by coming in contact with the electric wires of a lighting company which were strung near the wires of a telephone company for which plaintiff worked,

whether plaintiff's testimony that he had to stoop while standing on the cross-arm of the telephone pole to keep from being "tangled among the wires" referred to the lighting company's wires, so as to show knowledge of their proximity, or to the telephone wires, *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1068-1088.]

#### 6. SAME.

In an action for injuries caused by coming in contact with electric wires of a lighting company, strung near the pole and wires of a telephone company for which plaintiff worked, whether plaintiff assumed the risk of injury from such cause *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1068-1088.]

#### 7. SAME—PLACE FOR WORK—MASTER'S NEGLIGENCE.

In an action for injuries received while working for defendant telephone company by coming in contact with a lighting company's wires strung above the telephone company's poles, the evidence being sufficient to sustain a finding that plaintiff did not assume the risk of injury from the lighting company's wires, the telephone company's contention that it was not negligent in permitting the wires to be so near its poles because the danger was obvious was untenable.

#### 8. SAME—CONTRIBUTORY NEGLIGENCE.

In an action for injuries received while working for defendant telephone company by coming in contact with electric wires strung over the telephone poles, whether plaintiff's negligence contributed to his injury *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

#### 9. APPEAL AND ERROR—EXCEPTIONS—NECESSITY OF SPECIFIC EXCEPTIONS.

Where defendant submitted 12 requests to charge and excepted to the court's refusal to charge on the first 9 of them, and to the charge as given on the subjects thereof instead, the exceptions were too general, unless the charges were entirely erroneous.

#### 10. MASTER AND SERVANT—INJURIES TO SERVANT—MASTER'S KNOWLEDGE OF DEFECT.

In an action for injuries while working on defendant telephone company's pole by coming in contact with the sagging wires of defendant electric company, which were strung just above the telephone poles, it being defendant telephone company's duty to see that the wires were a safe distance from its poles, an instruction that plaintiff could not recover, unless the telephone company knew or should have known the condition of the lighting wire, was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1154.]

#### 11. SAME—CARE REQUIRED OF MASTER.

In an action by a servant against a telephone company for injuries received by contact with a lighting company's wires of high voltage which were strung just above the telephone pole, the lighting wires having sagged somewhat, it was the telephone company's duty to see that the lighting wires were a safe distance from its own poles so as to prevent injury to its employees.

#### 12. APPEAL AND ERROR—BRIEF—FAILURE TO SET OUT POINTS.

Where the brief stated that an exception to a portion of the charge was considered under point 5, but it was not there considered, unless in the ground stated for another exception, the exception will not be considered.

#### 13. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK—EXTRAORDINARY RISKS.

Plaintiff, a lineman, was injured while adjusting wires on defendant telephone company's pole by contact with an electric wire of a light-

ing company, which had sagged somewhat, and was five feet above where plaintiff stood on the cross-arm. Plaintiff's duties as a lineman did not require him to inspect the poles. *Held*, that the risk was not incident to plaintiff's work, but was an extraordinary risk which he did not assume unless he knew of it, or it was so obvious that he should have observed it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 584-592.]

#### 14. SAME — INSTRUCTION — SAFE PLACE TO WORK.

Defendant requested a charge that a safe place to work means a place free from all dangers that can be perceived by the senses by such observation as a prudent man would make in the circumstances, which the court refused, but charged instead that a servant assumes not only the ordinary risks of the employment, but also the extraordinary risks that he knows and comprehends, or as a prudent man should know. *Held*, that the charge given was a substantial compliance with the requested charge.

#### 15. SAME — CONTRIBUTORY NEGLIGENCE OF SERVANT.

Charge that a servant assumes not only the ordinary risks of his employment, but the extraordinary risks which he knows and comprehends, or which as a prudent man he should know, was a substantial compliance with defendant's request to charge that it was plaintiff's duty to look out for himself as well as he could and observe such dangers as a prudent man would have seen.

#### 16. DAMAGES—PERSONAL INJURIES—AMOUNT OF DAMAGES.

A requested charge that in assessing damages the question was, not what the jury would suffer the injury for, but what sum would fairly compensate plaintiff, was substantially complied with by the court's charge that in assessing damages it must be governed by the evidence, and the amount of damages should be such as would fairly and reasonably compensate plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 548-555.]

#### 17. SAME — PERSONAL INJURIES — CORPORATE CHARACTER OF DEFENDANT.

A requested charge that in fixing damages the jury should not consider the fact that defendants were corporations; nor the wealth of the parties, even if the court was bound to charge it at all, was substantially complied with by reminding them that they were bound to try the issues submitted according to the evidence and the law, and render true verdicts.

#### 18. TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.

In charging as to the light in which plaintiff's testimony should be weighed, the court was not bound to call particular attention to the testimony of doctors as to plaintiff's inability to remember; it being sufficient that the court covered it in a general way, without special mention thereof.

#### 19. ELECTRICITY—INJURIES INCIDENT TO PRODUCTION—ACTIONS—INSTRUCTIONS—PROXIMATE CAUSE.

In an action against a telephone company and a lighting company by an employee of the former for injuries received while adjusting wires on a telephone pole by contact with the lighting company's wires, a requested charge by the lighting company that it was not responsible unless it knew or should have known that employees of the telephone company would, in the course of their work, come in contact with its wires, was properly refused, as it was sufficient if it was so probable that they would do so that the company should have foreseen it.

#### 20. SAME—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

A requested charge by the lighting company that it was not liable for the sag or injury resulting therefrom, unless it had knowledge there-

of, or the sag had existed so long that its ignorance was the result of negligence, was properly refused, where there was nothing to show the extent of the sag or that it was sufficient to increase the danger.

**21. MASTER AND SERVANT—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—ORDINARY CARE AND PRUDENCE—"ORDINARILY PRUDENT."**

In a personal injury action by a servant, the court told the jury that it would refer during the charge to "the prudent man, and reasonable care" and they would understand thereby "the care and prudence of an ordinarily careful and prudent man in like circumstances," and would measure plaintiff's conduct by that standard, that care of a prudent man under some circumstances might be negligence under others, and they should apply the test with their general knowledge of the degree of care that a man of ordinary prudence would exercise and, in directing attention to the question of plaintiff's care, told them to consider whether he exercised the care and prudence "of an ordinarily prudent man and was without fault on his part." *Held*, that the standard of care stated as the measure of plaintiff's conduct was too low; the words "ordinarily prudent man" suggesting mediocrity of care, if not carelessness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1181.]

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, p. 5062.]

Exceptions from Orleans County Court; Wm. H. Taylor, Judge.

Action by Chauncey Drown against the New England Telephone & Telegraph Company and another. From a judgment for plaintiff, defendants bring exceptions. Reversed and remanded.

W. M. Wright, Frank D. Thompson, and John Redmond, for plaintiff. Hunton & Stickney, for defendant New England Telephone & Telegraph Company. Dunnett & Slack, for defendant Consolidated Lighting Company.

**ROWELL, C. J.** This is an action for negligence. It was here once on demurrer to the declaration, and is reported in 80 Vt. 1, 68 Atl. 801. The alleged negligence of the lighting company is the erection of a line of electric light and power wires of high voltage above, and in dangerous proximity to, the telephone company's line, by reason of which the plaintiff, an employé of the telephone company, in the performance of his duty as lineman, in adjusting wires to the cross-arms on a telephone pole, below and near the power wires, came in contact with them and was burned and injured. The alleged negligence of the telephone company is that it suffered that condition to remain, neither causing the lighting company to remove its wires, nor removing its own.

The plaintiff's evidence tended to show: That on the day of the accident a gang of linemen in the employ of the telephone company was running a line of four wires, attaching them to the lower arms of a line of poles extending along the highway from Williamstown to Graniteville, which intersected at nearly a right angle a highway from Barre

to Graniteville. The accident happened on the corner pole at the intersection of said highways. That the telephone poles were set on the left side of the highway going towards Graniteville from the Williamstown road. That on the road from Barre, extending past the intersection of the Williamstown road and on to Graniteville on the same side of the highway as the telephone poles, was a line of the lighting company's poles, on which at the time in question were cross-arms, attached to which were three uninsulated electric light and power wires, each carrying a deadly current of 12,000 volts, transmitted in the daytime, and present at the time of the accident. That the telephone poles carried 2 6-pin cross-arms about 4 inches wide; one, from 5 to 8 inches from the top of the pole, and the other about 20 inches below it in the clear. That the corner pole, on which the accident happened, had 4 of these cross-arms, 2 upper and 2 lower, set with the ends towards the road nearly together, and the ends towards the fence spread a little, the better to bear the strain of the wires, turned at that point. That the upper arms were 5 or 6 inches from the top of the pole, and the others 20 inches below in the clear. That there were 6 wires on the upper arms, and 2 on the lower arms, attached to the insulators on the pins nearest the pole, called pole pins. That the linemen were engaged in attaching the 4 wires, 2 on each side the pole, to the second and third pins on either side of the pole pins, which was done by reeling off the wire, laying it along the highway on either side of the poles, and then hanging it; the linemen climbing the poles, adjusting the insulators to the pins, and placing the wires in position for tying to them, the groundman hauling the wire taut, and, when taut, the lineman on the rear pole giving the word to tie, and all tying at the same time. It appeared that there was some slack in the power wire at the time of the accident, but how much the wire directly over the telephone pole in question was lowered thereby did not appear, nor what caused the slack, nor how long it had existed. The telephone line was constructed in that locality in 1902, and the poles and wires of the lighting company placed in 1903 where they were at the time of the accident.

There was nothing to show what knowledge, if any, the lighting company had of how repairs were made or other work done on the telephone line, nor whether, after the poles were erected, it was necessary or not to use any space above the upper cross-arm. The accident happened about noon on May 4, 1905. At that time there was a man on the pole south of the corner pole, and a man on the pole north of the corner pole. Jesse Haycock, a lineman, had gone up the corner pole to tie the wires to the two outside pins towards the highway, to do which he took his position on the lower cross-arm, with one leg thrown over it and the other through the

brace, with his spur sticking in the pole. This pole was regarded as difficult because it was a corner pole, and guyed on the fence side; the guy extending about to the lower cross-arms. The plaintiff was trying to assist Haycock, which was proper and in the line of his duty. Owing to Haycock's position on the pole, the plaintiff, who was to tie the wires to the outside pins towards the fence, could not work upon the lower cross-arms, so he climbed to the upper cross-arms, bestrode one of them, placed his feet on one of the lower arms, leaned over, head down, tied the wires, and in straightening himself to go down came in contact with one or more of the power wires, and was shocked and injured. One of those wires was directly over, and only 27 inches from, the top of the telephone pole, and only 59 inches from the lower cross-arm on which the plaintiff stood, and he was 67 inches tall. There was no controversy as to the situation, nor as to the way the accident happened, and no question as to the character and extent of the plaintiff's injury, which was most serious.

The plaintiff was allowed to show the respective duties of the different members of the gang of linemen with which he was working at the time of the accident, and to show that it was the duty of the foreman of the gang to warn the men of any danger that came to his knowledge, and that he did not in this instance know of any danger to a workman in the position occupied by the plaintiff at the time of his injury. The lighting company alone insists upon this exception, and its only claim is that it had a right to rely upon the exercise of due care by the plaintiff, but that the effect of this showing was to lead the jury to believe that the plaintiff had a right to rely on his foreman to inform him of danger, and that, as long as he heard nothing from him, he had a right to assume that he was safe; but this objection was not made below, and therefore cannot be made here. *Massucco v. Tomassi*, 80 Vt. 186, 67 Atl. 551.

The plaintiff was permitted to elicit the opinion of the foreman of the telephone company's linemen, without stating the claimed facts on which it was based, to the effect that the lighting company's poles near the place of accident could have been placed three feet nearer the fence, or have been five feet taller, and thus have insured safety. The plaintiff justifies the ruling, for that it was largely a question of practical experience, and likens it to *Morrisette v. Canadian Pacific*, 76 Vt. 267, 56 Atl. 1102, in which the plaintiff, a practical railroad man, with experience and knowledge in that line, was permitted to testify his opinion that the switch in question could have been set in another place and been safe; but that case differs from this, for there it was not a question of physical conditions merely, but of convenience and efficiency as well, while

here, as the exceptions show, it was a question only of physical conditions and physical practicability. This called only for observation and knowledge on the part of the witness, to the making and acquisition of which no experimental qualification was necessary. Hence the rule contended for by the defendants applies, namely, that opinion is not admissible in such cases, unless based on facts testified to by the witness that are incapable of adequate presentation to any one but the observer himself.

For the purpose of reproducing conditions such as the plaintiff's evidence indicated them to have been at the time and place of the accident, the defendants asked leave to suspend wires over a model of the telephone pole on which the plaintiff was injured, erected in the courtroom, answerable to the power wires with which he came in contact. This was denied as matter of discretion, and that it was such matter cannot be doubted.

The telephone company moved for a verdict for want of evidence of negligence on its part, or that it owed the plaintiff any duty, and for that the testimony showed contributory negligence and assumption of risk. The lighting company moved for a verdict on its last two grounds. The testimony shows beyond reasonable doubt that the plaintiff knew that the electric line was there, and that its wires ran over the pole in question; knew, by having been told, of their high voltage; knew that the current was transmitted in the daytime, and was dangerous, though insulated; and knew that the only safe way was to regard the wires as alive, and to keep away from them. But this does not defeat him, for it does not follow therefrom as matter of law that he knew and comprehended the danger, nor that it was so plainly observable that he will be taken to have known and comprehended it. It does, however, present the case in this respect as it is presented by the declaration, for that does not negative knowledge on the part of the plaintiff that the electric line was there, but only knowledge of the close proximity of its wires to the pole, and that the pole was an unsafe place to work, both of which allegations were admitted by the demurrer, and the case ruled accordingly; whereas, now they stand for consideration on the testimony, which the plaintiff claims does not essentially vary the case from what it was on demurrer, and therefore that the rulings then are controlling now, while the defendants claim the contrary. It is to be noticed that the lighting company's motion raises no question as to its duty to the plaintiff nor as to its breach of duty, but is based solely on contributory negligence and assumption of risk, and that motion and the telephone company's motion will be considered together as far as they are based on the same grounds, as the questions are essentially the same as to both defendants; but



first we will consider that part of the telephone company's motion relating to want of evidence of duty or negligence on its part.

As to duty: The company does not claim, as a general proposition, that it owed the plaintiff no duty, but only that the danger was so obvious that he assumed the risk, and thereby absolved the company from any duty to him in respect of the dangerous situation complained of. This necessitates consideration of the testimony pertinent to the question. And first it is said that the linemen were inspectors, but this does not appear with sufficient certainty to permit it to be so held as matter of law. As to assumption of risk, the testimony shows that standing at the foot of the pole and looking up, as the plaintiff testified he had no doubt he did, the power wires were plainly visible; but the testimony also tends to show that you could not calculate very accurately the distance they were above the pole, but that they appeared to be far enough above to "give a good clearance all right," though near, and "looked safe" to the foreman of the gang, and that, even after one had ascended the pole, he could not tell exactly then whether a man could clear on top of it or not. The plaintiff testified on cross-examination that, when he got his feet onto the lower cross-arm, he had to be stooped to keep himself in position, or else he would "be tangled amongst the wires." This defendant contends that there were no wires that he could avoid being "tangled amongst" by stooping but the power wires, and therefore that he must have meant those wires, and that that defeats him, as it shows conclusively that he knew and comprehended the danger, and therefore assumed the risk. That that testimony is exceedingly capable of that construction cannot be doubted, and, if reasonably capable of no other, the effect claimed for it might follow; but we are not certain that the plaintiff did not mean the telephone wires and not the power wires, for he testified on redirect examination that the position a lineman would be in to do what he was to do would be to have both hands on the upper cross-arm, and both feet on the lower cross-arm between the pole and the pole pin, and then, in order to get his foot up over the wires that were stretched right out straight almost at the same height as the top of the pole, he would have to throw himself nearly on his stomach at the top of his pole, and lift his foot up there (indicating), and that that drew his knees up in good shape to swing around after he gets his boot up and throws it over, and then he would be looking down to the ground; that that was the position he took, though men have different ways of getting into position. The exceptions show that, when he was tying in the wires, he was leaned over, head down. Though this does not show with much certainty that the plaintiff did

not mean the power wires, yet it casts sufficient doubt upon his meaning to make it a question of fact and not of law.

When the case was here before, we classed it on this question of assumption of risk with *Morrisette v. Canadian Pacific R. Co.*, 74 Vt. 232, 52 Atl. 520, where a brakeman was swept from the side of a moving freight car by a switch standing near the track, which he had never passed before on the side of a car, and had never been told and did not know that it was near enough to the track to endanger one passing it on the side of a car, and held that here, as there, the danger was not so plainly observable that the law would say that the plaintiff assumed the risk, but that the question was for the jury, and the case is still to be classed with the *Morrisette* Case on the testimony, and consequently the ruling before must be the ruling now. This disposes of the question of want of negligence on the part of the telephone company, for that is urged only on the grounds that its duty was limited to making the place as safe as it looked to be, and that the danger was so obvious that it carried its own notice. This ground failing, the proposition itself fails. The question of contributory negligence must be ruled now, as it was before, to be for the jury, for the testimony is no more decisive of it than is the declaration, especially as the element of forgetfulness is now present, by which the defendants account for the accident.

The telephone company submitted 12 requests to charge, and excepted to the refusal to charge according to the first 9 of them, and to the charge as given on the subjects thereof. We have often held that such exceptions are too general to be available, unless the charge on the subjects of them is wholly wrong, which is not claimed here. The court charged the company with knowledge of the situation as matter of law. To this the company specifically excepted, and claims: That it depended on the linemen for information as to any dangerous condition along its line that might affect the safety of its workmen; that, if the plaintiff's knowledge of the risk was an open question, the company's knowledge of it was equally so, as its business was conducted; that in the circumstances there was no necessary inference of knowledge on its part from the length of time the condition had existed; and therefore that it was entitled to have its first and second request complied with, which were to the effect that there could be no recovery against it under the first count, unless knowledge of the condition was brought home to it, and none under the second count, unless it knew, or had reason to know, the condition. But the basis of these requests, as the exception is argued, is the assumption that the linemen were inspectors, which the court could not



assume on the testimony, as we have said, and therefore it could not comply with the requests without saying, in effect, and as a general proposition, that the company's duty in respect of a safe place was in abeyance until it knew, or had reason to know, the danger. But this could not be said, for it had already been held in the case that it was the duty of the company to see to it that the electric wires were a safe distance from the pole, and the testimony does not vary the case in that respect.

The telephone company excepted to the charge respecting the right of the plaintiff to assume that the defendants had performed their duty. Its brief says that the exception "is considered under point fifth"; but there is no consideration of it under that point, unless it is contained in an exception to what the court said in another part of the charge about the company's duty to maintain a safe place, and being chargeable with knowledge; but whether the ground of that exception stated therein is the consideration of this exception referred to we do not know, and therefore pretermitt the question.

The telephone company requested the court to charge that, if the plaintiff knew of the existence of the electric line, then, in view of his experience as a lineman, the risk was not an extraordinary risk, but, as matter of law, an obvious risk, which the plaintiff must be taken to have assumed if he ascended the pole neglecting to inform himself or to observe the distance of the electric wires above the pole. But the court assumed and charged that the risk, as disclosed by the evidence, was not a risk ordinarily incident to the plaintiff's employment, but a risk that is known to the law as an extraordinary risk—one not incident to the business as it ordinarily exists. To the charge that the risk was not ordinarily incident to the business, the company excepted, and submits that whether a risk is ordinary or extraordinary depends upon the circumstances of the case, and that the circumstances of this case are such that it could not be assumed as matter of law that the risk was extraordinary, and that in characterizing it as such the court ignored the claim that the risk was obvious, a necessary incident to the conduct of the business, and assumed by the plaintiff as matter of law in his contract of employment. But it cannot be said that the risk was a necessary nor an ordinary incident of the business in which the plaintiff was engaged; nor, as we have said, that it was so plainly observable that the plaintiff can be taken as matter of law to have assumed it. The case stands on this question as it stood before, when we held that the risk was not ordinary, and therefore assumed by the plaintiff, but extraordinary, and therefore not assumed by him, unless he knew and comprehended it, or it was so plainly observ-

able that he would be taken to have known and comprehended it.

Both defendants excepted, in effect, to the submission of the case to the jury at all, but that question is virtually disposed of by the holdings on the motion for a verdict.

The lighting company requested the court to charge that a "safe place to work" means, in law, a place free from all dangers that cannot be perceived by the senses by such observation as a prudent man would make in the circumstances of the plaintiff. The company excepted that this was not complied with; but we think it was, substantially, for the court charged that a servant assumes not only the ordinary risks of his employment, but all the extraordinary risks thereof that he knows and comprehends, or that, as a prudent man, he ought to know and comprehend in the circumstances. This instruction was also a substantial compliance with the company's request to charge that it was the duty of the plaintiff to look out for himself as well as he could, and to see all such dangerous things as a prudent man would have seen, and, if he did not do it, and his failure contributed to the happening of the accident, he could not recover.

The court also substantially complied with the company's request to charge that in assessing damages the question was, not what the jury would suffer the injury for, but what sum would fairly compensate the plaintiff, for the court told the jury that in the matter of assessing damages it must be governed wholly by the evidence given in court, and that the amount of damages should be such a sum as would fairly and reasonably compensate the plaintiff.

The company claims that the court failed to comply with its request to charge that in fixing damages the fact that the defendants were corporations was not to be considered, nor the wealth of any of the parties, but that the question was to be settled precisely as if it was between two individuals. All this the jury would know without being told, if they were mindful of their oath, and the court reminded them of it at the commencement of the charge, by telling them that by it they were bound to try each and every issue submitted to them, according to the evidence given in court and the laws of the state, and true verdicts give. This was a sufficient compliance with the request, if the court was bound to comply with it at all, as to which we say nothing.

The request to charge as to the light in which the plaintiff's testimony should be weighed was sufficiently complied with. The court was not bound to call particular attention to the testimony of the doctors concerning his inability to remember. It was enough that the court covered that in a general way, though without special mention of it.

The company excepted to the refusal to charge that it could not be held responsible

unless it knew, or ought to have known, that the employes of the telephone company would, in the course of their repairs, be in position to come in contact with the electric wires; but such a charge would have gone too far, for it was enough, certainly, if such a thing was so natural and probable that the company ought to have foreseen that it might happen, which is quite different from knowing that it would happen. This virtually disposes of the exception to the charge that it was the duty of the company to construct and maintain its lines so as not to injure the employes of the telephone company while in the discharge of the duties of their employment; the ground of the exception being that the charge should have measured the company's duty by what it knew, or ought to have known, of the employes' duties.

It is claimed that it was error not to charge that the company was not liable for the sag in the wire, nor for any injury resulting therefrom, unless it had knowledge of the sag, or it had existed so long that its ignorance was the result of its own negligence; but the court well refused such a charge, because, if for no other reason, there was nothing to show the extent of the sag, nor that it was enough to increase the danger perceptibly.

The court told the jury: That it should have occasion at different times during the charge to refer to "the prudent man, to reasonable care," and words of the same import; that they would understand, when those words were used, "the care and prudence of an ordinarily careful and prudent man in like circumstances"; that that was the standard by which they would measure the care of the plaintiff when they came to consider the question of whether he had acted carefully and prudently ("the care and prudence of an ordinarily prudent man under the circumstances of the case"); that this was not an absolute standard; that the care and prudence of a prudent man under one set of circumstances might be negligence under another set of circumstances; that that was why the court had told them that it must be the care and prudence of a prudent man acting in similar circumstances; and that, in determining any question where that standard had to be applied, they would apply it with their knowledge as men of affairs of the degree of care that the "prudent man, the man of ordinary prudence," would exercise under such circumstances as they were considering. When the court came to direct the attention of the jury to the question of the plaintiff's care, it told them to consider whether he was in the exercise of the care and prudence of "an ordinarily prudent man—that is, whether he was without fault on his part"—that he must satisfy them by a fair balance of the evidence that he was in the exercise of due care at the time of the injury; and that, if they could say he was in the exercise of the care and prudence of "an ordinarily prudent man,"

then he would make out that part of his case, but, if he failed to reach that standard, and fell short of it, and his negligence contributed to his injury, he could not recover. Thus it appears that the standard erected by which to measure the conduct of the plaintiff in respect of care and prudence was that of the "ordinarily careful and prudent man." This standard was too low to meet the requirements of the law.

In *Briggs v. Taylor*, 28 Vt. 181, an officer was sued for not taking good care of personal property attached by him on meane process. The court charged that it was the duty of the officer to use "ordinary care and prudence" in that behalf, and defined that degree of care and prudence to mean "such care and prudence as men of ordinary care and prudence usually exercise over their own property." This court held the charge to be erroneous, because calculated to mislead the jury. The court said: That the language used did not signify a fixed quality of mediocrity even; that "ordinary," "middling," and "mediocrity," when applied to character, import to the mass of men a very subordinate quality or degree—something quite below what we desire in an agent or a servant, and what we have a right to require in a public servant especially—that a man who is said to be "middling" careful, "ordinarily" careful, is understood to be careless, and sure not to be wanted. This doctrine was approved and applied in the highway damage case of *Folsom v. Underhill*, 36 Vt. 580. There the defendant requested the court to charge that the plaintiff's conduct in driving upon the bridge must have been that of "a careful and prudent man." The court refused to charge as requested, but charged that the plaintiff must have exercised "ordinary care and prudence" in that behalf. This court said that the words "ordinary care and prudence" are sometimes liable to misconstruction, though when rightly understood they express the requisite degree of care and prudence; yet that the rule should have been expressed in terms more definite and less liable to be misunderstood, and that the request should have been complied with. So in *Reynolds v. Burlington*, 52 Vt. 300, which was also for injury on a highway, the court charged, as requested, that if want of care on the plaintiff's part contributed to his injury he could not recover, but, in charging as to the degree of care the plaintiff was bound to exercise, said it was that measure of care and attention that "persons of ordinary care, men generally, ordinarily prudent men," would exercise under similar circumstances. It was held: That the charge failed to convey to the jury the true sense and force of the rule, but that the subject was presented in manner and effect held in the cases above referred to not to be answerable to the requirement of the law; that the entire exposition by the court of

"ordinary care," "ordinary prudence," "ordinarily prudent men," was calculated to leave an impression upon the jury of a very different kind and degree of prudence from that which the language and expositions in the cases above referred to would make, the last of which was expressly held to be authoritative in this respect, and the other was commended as having done excellent service towards giving definiteness and practical usefulness to the legal idea of the care to be exercised in such cases. The court went on to say that a man of ordinary care, of ordinary prudence, as expressed in common parlance, is not regarded by the law as being to the common understanding the same as characterized by the expressions "a prudent man," "prudent men." In *Fassett v. Roxbury*, 55 Vt. 552, it is said, following *Folsom v. Underhill*, that the words "ordinary care and prudence," and the like, when rightly interpreted, convey the true idea and doctrine of the law on this subject, and import that degree of care and prudence that careful and prudent men would exercise in the same circumstances, and it was held that the court rightly interpreted those words to the jury, and that the expression complained of, taken in connection with the whole charge, did not detract therefrom nor mislead the jury; but this cannot be said of the charge in this case, for the court barred this way of escape by telling the jury to start with that it should have occasion at different times during the charge to refer "to the prudent man," "to reasonable care," and words of the same import, and, when it did, that they would understand that they meant "the care and prudence of an ordinarily careful and prudent man in like circumstances," and this instruction was not changed nor modified, but was the refrain of the charge on this point throughout. As said of *Briggs v. Taylor* in *Reynolds v. Burlington*, so it may be said of all the cases to which we have referred, that in no case since those has this court designed to modify the rule as there stated and established. The very recent, and as yet not officially reported, case of *Williams v. Norton Brothers*, 69 Atl. 146, which was by a servant against the master for negligence, is referred to as modifying the rule; but certainly it was not intended to be such, and when attentively considered it is not such, but belongs to the same class as *Fassett v. Roxbury*, for though the words "ordinary care" were used in the charge in respect of providing a safe place, yet the court further charged that the defendants were required to use the care of careful and prudent men; and though this court did not discuss the question, but said that that was a correct statement of the law, it must be taken to have said that in view of the whole charge, for there the court was not precluded, as it is here, from construing the charge as a whole.

Judgment reversed, and cause remanded.

(74 N. J. E. 702)

**DIOCESE OF TRENTON v. TOMAN et al.**  
(Court of Chancery of New Jersey. June 22, 1908.)

**1. EASEMENT—CONSTRUCTION.**

A right of way appurtenant to a lot cannot be used for the purposes and benefit of another lot to which no such right is attached, even though such other lot be adjoining and within the same inclosure and in the same ownership as that to which the easement belongs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 116.]

**2. SAME—SUBDIVISION OF DOMINANT PROPERTY.**

If a lot to which a right of way appurtenant is attached be subdivided, each subdivision is entitled to all legitimate rights, by way of easement, which appertain to the entirety of the original lot.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 69.]

**3. SAME — CONSTRUCTION — AUTOMOBILES — "CARRIAGE."**

An automobile is a "carriage," within the meaning of a covenant in a deed reserving a strip of land for a carriage way forever.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 976-978; vol. 8, p. 7596.]

**4. NUISANCE—WHAT CONSTITUTES.**

An automobile garage is not a nuisance per se.

**5. SAME—EVIDENCE.**

Facts examined, and held not to show that a certain automobile garage is so conducted as to constitute a nuisance.

(Syllabus by the Court.)

Bill by the diocese of Trenton against John F. Toman and Jeremiah P. Toman. Injunction granted for part of the relief asked.

The controversy in this case relates to the extent of an easement in an alleyway leading from the easterly side of North Warren street, in the city of Trenton, between the property of the complainant on the north, the St. James Day Nursery No. 136 North Warren street, and the Turkish Bath House on the south, No. 132 North Warren street. The easement in question was reserved in a deed from Samuel Evans and wife and the executors of Joseph H. Reading to William F. Pitcher, March 30, 1858. The Trenton Turkish & Russian Bath Company has succeeded to the title of Pitcher, as to part of No. 132 North Warren street, but is not a defendant and is not concerned in the present controversy. The defendants the Toman Bros., are now the owners of the rear portion of the Pitcher tract, No. 132 North Warren street, which also abuts on the alleyway. They also own No. 130 North Warren street adjoining No. 132 on the south, which lot, No. 130, runs back to the rear line of the portion of No. 132, which they own, and together the two lots form an L. The defendants, on acquiring the title to the land in the rear of 132 North Warren street, which was part of the Pitcher lot, razed an old barn and fences which existed thereon, and, upon acquiring the premises No. 130 North Warren street, they razed the build-

† For opinion on application for costs, etc., see 79 Atl. 881.

ing in the rear thereof, thus obliterating the division line between the two properties, and erected on both of them a two-story automobile garage, covering the entire rear of No. 132 and a portion of the rear of No. 130, which building is used for the repair and store of automobiles. No. 130 North Warren street, which the defendants own, and upon a portion of which they have erected a portion of their garage building, was never parcel of either of the properties between which the alleyway is situate. When the defendants were about to commence the erection of their garage building, the complainant served written notice upon them that it would dispute their right to use the alleyway as an entrance to their garage.

The bill alleges, and the answer admits, that the garage building is so constructed that persons entering the same may, at pleasure, leave by way of either entrance, and not only that they may, but do, use both entrances for ingress, egress, and regress. The bill further alleges: That the defendants, their customers and patrons, are using the alleyway for the purpose of entering and leaving the garage with their automobile machines at all hours of the day and night; that the machines are propelled by means of power generated from gasoline, and when in operation they emit the odor of gasoline and volumes of smoke, which permeate the atmosphere and enter the doors and windows of the complainant's dwelling, the side of which looks out upon the alleyway through some 30 windows and doors; that the automobiles while passing through the alleyway constantly make a variety of loud, disturbing, and objectionable noises, interspersed with frequent explosions of gases, generated in the machines; and that the constant mechanical noises of machinery while in motion affect and disturb the peace, quiet, and comfort of the complainant's building and create a nuisance. The bill further alleges: That the defendants, by the joining of their two properties, have increased the traffic over the alleyway not only from the lands to which the alleyway is appurtenant, but also from the other lands, 130 North Warren street, whereby they have increased the servitude of the alley, which is not, never was, and cannot be made servient to the premises No. 130 North Warren street, or any part thereof; that the defendants not only have increased the servitude by extending the limits of the land, and by increasing the traffic, but by subjecting the alleyway to the burden of an easement in favor of automobiles when the right reserved was for carriages drawn by horses only. The defendants admit, practically, all of the allegations of the complainant's bill, and such denials as they make are quite immaterial for present purposes, because, coupled with their denials, they claim the right to do all of the things which the complainant alleges they are doing.

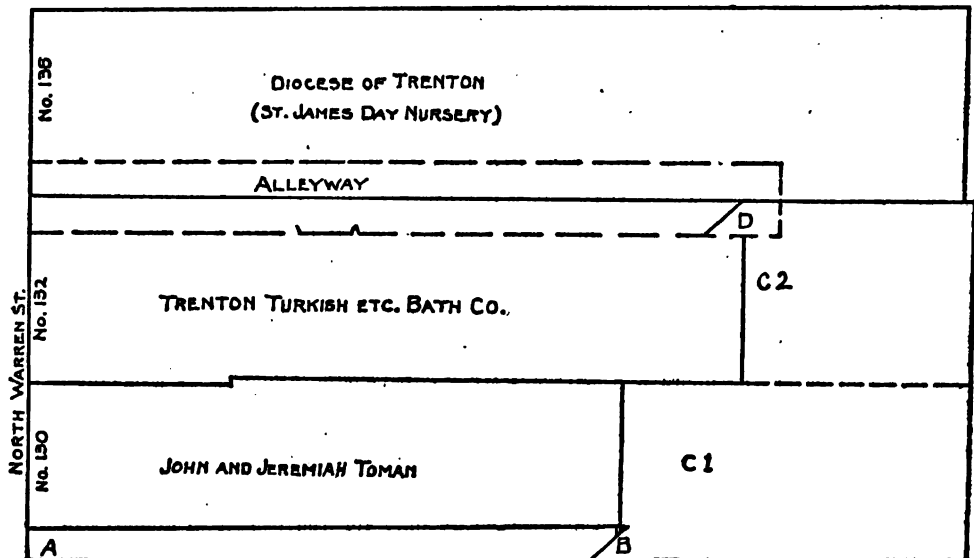
The alleyway in question was carved out by the reservation in the deed from Evans and wife and the executors of Reading to Pitcher, above mentioned, in 1858, and reads as follows: "The whole of the vacant lot between the brick house hereby conveyed, and the house on the said lot late of said Phillip F. Howell, deceased, which said last mentioned house is now occupied by George G. Roney, is to be appropriated for a carriage way forever, for the benefit of the two properties between which it is situate, and running back to within thirty-five feet of the rear line, which said carriage way or alley is to be kept free at all times from all description of rubbish whatever, not anything to be thrown therein, but clear water, and each of the before mentioned properties, to wit, the house and lot of land hereby conveyed, and the house and lot of land where the said George F. Roney now resides, to have a private side alley, with gates affixed to them, and double gate is to be made to the entrance of the wagon or carriage alley, which said alterations or improvements are to be made as soon in the ensuing spring or summer as the parties to this deed may deem expedient. The work thereof to be done by the said William F. Pitcher, and each party to pay a proportion of keeping the same in repair." The complainant insists and contends that the defendants have no right to use the alleyway as a means of ingress, egress, and regress to their garage, with automobile machines, because: (1) The use which was to be made of the alleyway and which is the subject of the express reservation in the deed was for a carriage way only for the benefit of the two properties between which it is situate; (2) because the defendants are now using it in connection with their other property, which was never a part of either of the two properties between which the alleyway is located; (3) because, the use being restricted to a carriage way, the servitude only extends to carriages or vehicles drawn by horses, the term "carriage" as used by the parties to the conveyance not extending to automobiles; and (4) because the defendants are creating a nuisance by using the alleyway for an automobile passage.

The foregoing statement of the situation of the parties and the premises in question may be better understood by reference to the diagram hereto annexed. The properties of the complainant the Turkish & Russian Bath Company and of the defendants are thereon delineated and given their appropriate numbers on North Warren street. The alleyway in question is labeled with the word "alleyway," and, as will be seen, it lies between the property of the complainant on the north and the Trenton Turkish & Russian Bath Company on the south, with the defendants' rear portion of 132 North Warren street binding upon the alleyway for a short distance in the extreme rear thereof. A is the alley leading

from North Warren street to the garage on south side of the defendants' property No. 130 North Warren Street. B is the doorway into the garage from the alley A. C<sup>1</sup> is that part of the defendants' property covered by the garage building which comprises the rear of No. 130, and C<sup>2</sup> is that part of the defendants' property covered by the garage building which comprises the rear of No. 132, and which (C<sup>2</sup>), it will be remembered, is the rear portion of the Pitcher lot for the benefit of which and the complainant's lot the alleyway was originally carved out. D is the doorway into the alleyway from that part of the garage building which binds upon the alleyway.

the alleyway as appurtenant to their lot in the rear of No. 132 North Warren street for carriages drawn by horses. If, as urged, the defendants have no right to use the alleyway for vehicles which enter their garage through the alley on the south side of their property, No. 130 North Warren street, they are, by so using it, subjecting the servient tenement, namely, the alleyway, to an additional and unauthorized burden, which is illegal and should be restrained. That the law is with the complainant on this question seems to me to be perfectly well settled by a long line of decisions both in England and in this country.

In *Allan v. Gomme*, 11 A. & E. 759, it was



- A.—Alley into garage along south side of Tomans' lot No. 130 North Warren St.  
 B.—Doorway into garage from the alley A.  
 C<sup>1</sup> & C<sup>2</sup>.—Garage lot or lots.  
 D.—Doorway into garage at rear of alleyway in which easement exists.

Peter Backes, for complainant. Richard O. Chamberlain and Hugh H. Hamill, for defendant.

**WALKER, V. C.** (after stating the facts as above). The complainant's bill prays for an injunction restraining the defendants the Toman Bros. from using the alleyway between the lands of the complainant, No. 136 North Warren street, and the lands of the bath company, No. 132 North Warren street, as a passageway for automobiles entering or leaving their garage building, through which, admittedly, they have the right of ingress, egress, and regress over the alleyway for horse-drawn vehicles in connection with their lot in the rear of the bath company's premises, and which was formerly a part of the same lot. The first and second grounds upon which the complainant rests its claim to an injunction are really one, and may be succinctly stated as follows: Because the defendants have a right of way only through

held that a conveyance to A. of certain premises reserving a right of way and passage over the locus in quo to a stable and loft in the same and a space or opening under the loft, to be used in common by both occupiers as tenants thereof had been accustomed to theretofore use them, that the reservation did not authorize B., who afterwards built a cottage on the site under the loft, to use the passage as a way to the cottage. *Lawton v. Ward*, 1 Ld. Raym. 75, holds that under a right of way to a particular place a man cannot justify going beyond that place. *Colchester v. Roberts*, M. & W. 769, involved a question of pleading, but Baron Parke observed, at page 773: "A license, therefore, to use a way to and from Black Acre, would not have included permission to go to or come from beyond." One of the older cases, and probably the leading one in England upon this question, is that of *Howell v. King*, 1 Mod. 190, which was in trespass for driving cattle over the plaintiff's ground. It was thus re-

ported: "The case was: A. has a way over B.'s ground to Black Acre, and drives his beasts over B.'s ground to Black Acre and then to another place lying beyond Black Acre. And whether this was lawful or no was the question upon a demurrer. It was urged that, when his beasts were at Black Acre, he might drive them whither he would. Roll. 391, Nu. 40. 11 H. 4. 82. Brook, Tit. Chimin. On the other side, it was said that by this means the defendant might purchase a hundred or a thousand acres adjoining to Black Acre, to which he prescribes to have a way, by which means the plaintiff would lose the benefit of his land, and that a prescription presupposed a grant, and ought to be continued according to the intent of its original creation. The whole court is agreed to this. And judgment was given to the plaintiff." *Davenport v. Lamson*, 21 Pick. (Mass.) 72, was this: By the partition of a farm the right of passing and repassing across an eight-acre lot, belonging to the plaintiff, became appurtenant to a three-acre lot belonging to the defendant, who also owned a nine-acre lot which was beyond the three-acre lot, but was adjacent and not separated from it by any fence. The defendant, having loaded his cart with produce taken in part from each of his lots, passed with it from the three-acre lot over the plaintiff's close, and it was held that the defendant had no right to use the way as a way from the nine-acre lot, although in so doing he passed last from his three-acre lot onto the plaintiff's close, and that trespass would lie for such abuse of the defendant's right. In *Evans v. Dana*, 7 R. I. 306, it was held that an express grant of the right of access to and to take water from a well in close No. 1, as appurtenant to close No. 4, confers no such right upon close No. 3 adjoining, because not the same ownership as No. 4, as to authorize the owner to pass through his close, No. 4, to the well, and take water therefrom for the use of his close No. 3. The court observed: "In regard to the right claimed to exist as appurtenant to close No. 3, to take water from the plaintiff's well over and across No. 4, it is sufficient to say that an easement is a burden upon the servient, and a right only in the dominant estate, and, when created and declared by an express grant, cannot be extended beyond its plain language or clear intent. The easement appurtenant to close No. 4 confers therefore no rights upon close No. 3, and it makes no difference that they are now owned by the same party." *Id.*, 311.

A right of way appurtenant to a lot cannot be used for the purposes and benefit of another lot to which no such right is attached, even though such other lot be adjoining and within the same inclosure with that to which the easement belongs. *Farley v. Bryant*, 32 Me. 474. See, also, *Albert v. Thomas*, 73 Md. 182, 20 Atl. 912; *French v. Marstin*, 32 N. H. 316; *Webber v. Vogel*, 159 Pa. 235, 28 Atl. 226; *Greenmount Cemetery Co.'s Appeal* (Pa.) 4 Atl. 529; *Coleman's Appeal*, 62

Pa. 252; *Shroder v. Brenneman*, 13 Pa. 348; *In re Private Road*, 1 Ashm. (Pa.) 417; *Greene v. Canny*, 137 Mass. 64; *Brightman v. Chapin*, 15 R. I. 166, 1 Atl. 412; *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664; *Springer v. McIntire*, 9 W. Va. 196; *Relse v. Enos*, 76 Wis. 634, 45 N. W. 414, 8 L. R. A. 617; *Stearns v. Mullen*, 4 Gray (Mass.) 151. In the case of *Shroder v. Brenneman*, *ubi supra*, the Supreme Court of Pennsylvania remarked that the rule is stated in *Howell v. King* and runs through the subsequent cases, and that if the law were not so the owner of the close to which the right is appurtenant might purchase an indefinite number of adjoining acres and annex the right to them, by which the grantor of the way might be entirely deprived of the benefit of his land; a reason which applies with all its force to a private alley like that in respect to which the suit (*Shroder v. Brenneman*) was brought. The case of *French v. Marstin*, *ubi supra*, was this: M. owned what he called his "mountain pasture," consisting of the Bean, the Brown, and the Scheafe lots. He contended that he had the right of way to this pasture over the land of F., but there was no evidence that he had any such right to the Brown and Scheafe lots. It was held that, notwithstanding he might have the right to cross the land of F. to go to the Bean lot, and notwithstanding the three lots might all be embraced in one pasture, he could not extend the right to the other lots, and that in crossing the land of F. to go to the "mountain pasture" he would be a trespasser, and that F. would have the right to use sufficient force to prevent his crossing. In this case (*French v. Marstin*), the Supreme Court of New Hampshire remarked, at page 329 of 32 N. H.: That the doctrine of the books upon this question is undoubtedly sound; that if a right of way to one lot be extended at will, by the tenant, to another lot that may adjoin it, then it may be extended to a third, and so on to any limits that the tenant may choose. *Greene v. Canny*, *ubi supra*, is strongly analogous to the case at bar. In that case A. owned a lot abutting on a private way to which was annexed a right of way therein, also, another lot abutting on the way, and a third lot which adjoined the first-named lot. The two lots last named did not have annexed to them any right in the way. A. removed a fence between the second lot and the way, also a wall between the first lot and the third, and used the way for the benefit of the second and third lots. It was held that the owners of other lots on the way, and having rights therein, could join in a bill of equity against A., and that, on such bill, the court would compel A. to rebuild the fence, but would not compel him to restore the wall, although A. had no right to use the way passing to it from the third lot over the first.

Although the portion of the defendant's premises in the rear of the bath company's property has been severed from that remain-

ing to the bath company, which remaining portion is the front of lot No. 132 North Warren street, all legitimate rights, by way of easement, which passed to the entirety of No. 132, by the grant from Evans' and Reading's executors, still reside in the rear or subdivided portion. In fact, this is not disputed by the complainant. Among the cases illustrative of this doctrine are the following: *In re Private Road*, 1 Ashm. 417; *McMakin v. Magee*, 13 Phila. 105.

From the above authorities, it clearly appears that the easement of the Toman Bros. in the alleyway in question is appurtenant only to their lot in the rear of No. 132 North Warren street, and that the way is servient only to its use as a carriage way to and from the lot, and that they cannot enter upon the lot through the alleyway for the purpose of going beyond the lot to their premises No. 130 North Warren street, nor can they, after passing from the latter premises to the rear of 132, pass out through the alleyway.

This brings us to the third ground upon which the complainant rests its bill, namely, that the servitude extends only to horse-drawn vehicles, and that the word "carriage way," as used by the parties to the conveyance, does not admit of an "automobile way." To this proposition I am unable to assent. The words "carriage way," and "wagon or carriage alley" are those in the deed designating the use to which the alleyway may be put. No particular kind of carriage or wagon is mentioned. Although automobiles had not been invented at the time the easement was created, yet the language of the grant is unrestricted, and must be held to include any vehicle on wheels then or thereafter to be used. A "carriage" is defined to be "that which carries, especially on wheels; a vehicle." 5 Am. & Eng. Ency. of Law (2d Ed.) p. 157.

A case entirely in point, on principle, is that of *Taylor v. Goodwin*, 4 Q. B. Div. 228, in which it was held that a person riding a bicycle on a highway at such a place as to be dangerous to the passers-by might be convicted of furiously driving a carriage under St. 5 & 6 Wm. IV, c. 50, § 72. Lush, J., concurring with Mellor, J., made the following observations: "The mischief intended to be guarded against was the propulsion of any vehicle so as to endanger the lives or limbs of the passers-by. It is quite immaterial what the motive power may be. Although bicycles were unknown at the time when the act was passed, it was clear that the intention was to use words large enough to comprehend any kind of vehicles which might be propelled at such a speed as to be dangerous." As the English statute referred to comprehend any kind of vehicle under the denomination of carriage, so the words in the covenant in the deed in question are large enough to comprehend any kind of vehicle, and, to my mind, it is quite immaterial what the motive power may be. Mr. Huddy, in his Law

of Automobiles (page 3), speaking of the machines which he calls automobiles, or self-moving carriages, says that the only definition he has been able to find of them is that in English's Law Dic. p. 78, which states that the term means "all motor traction vehicles capable of being propelled on ordinary roads. Specifically, horseless carriages."

Automobiles were held to come within the definition of "carriages" in *Baker v. Fall River*, 187 Mass. 53, 72 N. E. 336, and in *Commonwealth v. Hawkins*, 14 Pa. Dist. R. 592. *Baker v. Fall River* was a tort action by one for damages resulting from an injury sustained while traveling in an automobile by a defect in a street in Fall River. The action was brought under a statute of Massachusetts which permitted recovery by a person traveling with horses, teams, and carriages. 1 Rev. Laws Mass. c. 51, p. 524, § 1. The defendant requested an instruction that the act did not apply to one driving an automobile, which was not a "carriage," within the meaning of the statute, but was more like a "machine." The instruction was refused, and the trial judge said to the jury that he did not feel at liberty to instruct them that an automobile cannot be considered a carriage, and that, if the other elements of liability were established, he was entitled to recover. A recovery was had, and the Supreme Court, on appeal remarked, at page 56 of 187 Mass., and page 337 of 72 N. E.: "Plainly, an 'automobile' is a vehicle which can carry passengers or inanimate matter, and so is such a carriage as the decision in *Richardson v. Danvers*, 176 Mass. 413, 414 (57 N. E. 688, 50 L. R. A. 127, 79 Am. St. Rep. 320), said that the Legislature had in view, in the use of that word in the statute. \* \* \* The automobile is a vehicle in common use for transporting both persons and merchandise upon public ways, and its use is regulated by statute. \* \* \* We think that the plaintiff was not precluded from a recovery because of the nature of the vehicle in which he was riding, and that the instruction to that effect was right." In *Richardson v. Danvers*, cited in *Baker v. Fall River*, although a bicycle was held not to be a carriage within the provisions of a certain Massachusetts statute, it was nevertheless observed: "We have no doubt that for many purposes a bicycle may be considered a vehicle or a carriage. \* \* \* The statute in question was passed long before bicycles were invented, but, although, of course, it is not to be confined to the same kind of vehicles then in use, we are of opinion that it should be confined to vehicles ejusdem generis." *Commonwealth v. Hawkins* was this: Defendant was arrested, charged with operating an automobile in Pittsburgh without first having obtained a license provided for in an ordinance of March 30, 1905. Frazer, P. J., remarked, on page 593 of 14 Pa. Dist. R.: "While auto-

mobiles are not specifically named in the act of assembly (P. L. 1868, p. 567, § 7), they are certainly carriages. Webster's definition of carriage is: 'That which carries or conveys; a wheeled vehicle for persons.' In *Snyder v. City of North Lawrence*, 8 Kan. 82, the court said: 'Carriages are vehicles used for the conveyance of persons.' In *Conway v. Town of Jefferson*, 46 N. H. 521, the Supreme Court of the state, in passing upon the right of a municipality to license vehicles, said: "'Carriages" mean whatever carries a load, whether on wheels or on runners.' Automobiles are wheeled vehicles used for the conveyance of persons. In view of these definitions, and of our general knowledge of such cars, they may undoubtedly be considered as carriages within the meaning of the act of 1868. That they were unknown when the act of 1868 was passed, is not material."

Being of opinion that automobiles are carriages within the meaning of the words in the grant of the way, I come now to the consideration of the fourth and last contention of the complainant, namely, that the defendants are creating a nuisance by using the alleyway for an automobile passage. It must be conceded that, even if automobiles are carriages within the meaning of the covenant under consideration, nevertheless the alleyway may not be used for their passage if in such use a nuisance is created. Upon this question of nuisance my judgment is also against the complainant's contention. Mr. Huddy lays it down that a garage does not constitute a public nuisance, and that an automobile station constructed on land abutting on a boulevard does not constitute a common-law nuisance, quoting Mr. Justice Woodward of the Appellate Division of the Supreme Court of New York, who, in *Stein v. Lyon*, 91 App. Div. 593, 87 N. Y. Supp. 125, declared that the business of a garage keeper appears to be perfectly lawful, observing, on page 596 of 91 App. Div., and page 127 of 87 N. Y. Supp.: "It was argued by the plaintiff \* \* \* that the maintenance of an automobile station along this boulevard \* \* \* was a common-law nuisance; but the learned court has found to the contrary, and we have no doubt of the correctness of this conclusion. The business of the defendant appears to be perfectly lawful and legitimate." In treating of what are and what are not nuisances per se, it is stated, in 21 Am. & Eng. Ency. of Law (2d Ed.) p. 684, that, since there must be some place where every lawful business or erection may be lawfully located or carried on, the better rule would seem to be that a lawful business or erection is never a nuisance per se, but may become a nuisance by reason of extraneous circumstances, such as being located in an inappropriate place, or conducted or kept in an improper manner. This I understand to be, in effect, what was decided in *Well v. Ric-*

ord, 24 N. J. Eq. 169, in which it was held that the city of Newark could not absolutely prohibit the carrying on of a lawful business (salting and curing hides) not necessarily a nuisance, but which might be conducted without injury or danger to the public health, and without public inconvenience. Another case illustrative of the doctrine that a business lawful in itself is not a nuisance, but may be made a nuisance by the way in which it is carried on, considering the place where it is carried on, is *Demarest v. Hardham*, 34 N. J. Eq. 469.

These garages occupy, with relation to automobiles, the same place that stables do with regard to horses, and stables have not been held to be nuisances. *Flint v. Russell*, 5 Dill. (U. S.) 151; Fed. Cas. No. 4,876; *St. James Church v. Arrington*, 36 Ala. 546, 76 Am. Dec. 332; *Stilwell v. Buffalo Riding Academy* (N. Y. Sup. Ct. Spec. T.) 21 Abb. N. Cas. 472, 4 N. Y. Supp. 414. In *Flint v. Russell*, it was said that a livery stable in the residence portion of a city is not, as a matter of law, necessarily to be considered a nuisance to the improved property adjoining or near it. Said the court, at page 157 of 5 Dill. (Fed. Cas. No. 4,876), quoting Lord Chancellor Brougham: "Where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere." In *St. James Church v. Arrington*, a bill was filed to enjoin the erection of a stable at the side of a church building and in close proximity to it containing 16 stalls; the allegation being that it would of necessity create a nuisance so aggravated as to militate materially against the welfare and usefulness of the church. The chancellor sustained a demurrer to the bill for want of equity, on the ground that a stable is not per se a nuisance, and the decree was assigned for error. The Supreme Court, on appeal, affirmed the decree. In *Stilwell v. Buffalo Riding Academy*, the Supreme Court of New York held that, although whatever may be obnoxious or offensive to the senses, either of sight, hearing, or smell, or which will render the enjoyment of life or property unwholesome or uncomfortable, is a nuisance—the erection and use of a building for the stabling of horses, or even the business of a livery stable is not in and of itself a nuisance.

Of course, an automobile garage may be so conducted as to become a nuisance, and this brings us to an investigation of the facts relied upon as showing that the use of the alleyway for automobile traffic constitutes a nuisance. On that subject the bill alleges, as already remarked: That the defendants, their customers and patrons, are using the alleyway for the purpose of entering and leaving the garage with their respective automobile machines at all hours of the day and night; that the machines are propelled



by power generated from gasoline, and when in operation they emit the odor of gasoline and volumes of smoke, which permeate the atmosphere and enter the door and windows of the complainant's building, which look out upon the alley; that the automobiles, while passing through the alley, constantly make a variety of loud, disturbing, and objectionable noises, interspersed with frequent explosions of gas generated in the machines; and that the constant mechanical noises of propelling machinery while in motion affect and disturb the peace, quiet, and comfort of the complainant's building.

Depositions were taken before a master by consent for use upon the hearing. Two witnesses were sworn for the complainant, namely, Anna Bergin, known as Sister Michael, and Harry Lehey, and two for the defendants, namely, John F. Toman and Marx E. Cohen. Sister Michael says: That she is a sister at St. James Day Nursery, and has been with the nursery as long as it has been in Trenton; that there are about 35 windows on the entire side of the building facing the alley; that they have small children, from babies a few weeks old up to 12 years, some stay in the house, which is occupied as a convent by seven sisters, the third and fourth floors being occupied for sleeping apartments; that the building is occupied daily by from 35 to 45 children, up to 12 and 13 years old; that the garage building had been erected since January 1, 1907, automobiles using the alleyway and going in sometimes as many as 18 times a day, between day and night; that she never counted them; that she has noticed them go through as late as 11 o'clock at night; that they retire at 9 o'clock, and have been disturbed by automobiles going through; that she has been disturbed about three times, and the other sisters have complained about being disturbed, but she cannot say how many times; that they have not been very much disturbed by the machines going through in the daytime, but have been with the noise they make before going through; that the noises would wake the little children up, and they would start screaming; that they have always been annoyed by the smell of gasoline and smoke from automobiles; that they could smell the gasoline in every back room and every room facing the alley; that before the garage was built there were gates on the front of the alleyway which were always closed, always except when being used; that the gate, though closed by the sisters as late as 9 o'clock at night, has been found open the next morning; that they do not close the gate at all now, as it is too heavy for a woman to lift.

Harry Lehey testified: That he was an attendant at the Turkish Bath, and has been for a year; that the alleyway leading between the two properties (Day Nursery and Turkish Bath) is used by Turkish Bath people, and an automobile goes through there oc-

asionally; that the number that go through varies; that he could not tell the number; that he never saw any go through after 8 or 9 o'clock at night; that when they go through they make a mechanical noise, a noise like a cannon shot once in a while; that as to gasoline, at times they get it, but not always; that the patrons of the bath house complained sometimes when they wanted to sleep, the same as when the children next door make a noise; that they have not lost any patronage so far as he knows.

John F. Toman, one of the defendants, swore: That there may be two or three machines going through the alley a day, some days none, some days maybe four or five, according to the jam they have in the garage. They use it for an outlet in case of congestion; the main entrance (to the garage) being on the south of their building, No. 130 North Warren street. That he never heard any machine make any more noise going through the alleyway than in passing along the street. That he did not think the smell of gasoline would last five minutes after a machine passes, if smelt at all. That, as to smoke, very little comes from the machines as they pass through the alley; most of them not leaving any smoke behind. That he never heard any explosions in the alleyway. That he did not know of any explosions in the alleyway, none such as the sister spoke of, unless from a racing car with its muffler off. That they had two racing cars there for the Fair (Great Interstate Fair of 1907), whose mufflers were off when they went out, but they did not pass through the alley in question. He says there is a gasoline tank at the end of the alleyway from which automobiles are supplied.

Marx E. Cohen testified: That he lived at 128 North Warren street, which is on the south side of the main alley leading into Toman's Garage (not the alleyway in question); that his bedroom faces on the alley; that the passing of an automobile would not wake him up unless it was unduly noisy.

Of the seven sisters who occupy the Day Nursery, only one, namely, Sister Michael, was called. That she has been more or less disturbed by the automobile traffic through the alleyway is apparent. However, her testimony does not show a very serious condition of disturbance by reason of the passing of automobiles. While she says that automobiles go through the alley sometimes as often as 18 times a day, she has never counted them, but has noticed them go through as late as 11 o'clock at night. She says distinctly that they have not been very much disturbed by the machines going through in the daytime. As to the smell of gasoline which annoys them, I am satisfied that that must come from the tank which Mr. Toman says is at the entrance of the garage at the end of the alleyway. While Sister Michael says that other sisters have complained about being disturbed, the fact is none were called

to give their knowledge upon the subject. Harry Lehey, who works in the Turkish Bath House next door to the Day Nursery, said he never saw any automobiles go through the alley after 8 or 9 o'clock at night, he heard the noises, and that the patrons of the bath house complained sometimes when they wanted to sleep, the same as the children in the nursery made a noise. His likening the disturbance made by the automobiles to the noise made by the children would indicate that the noise made by the machines was not very great. The testimony of John M. Toman and Marx E. Cohen make in favor of the contention that as matter of fact the automobile traffic in the alley does not constitute a nuisance.

In *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490, Vice Chancellor Bird observed, at page 485 of 43 N. J. Eq., and page 493 of 11 Atl.: "My attention has been called to the case of *Penna. R. R. Co. v. Angel*, 41 N. J. Eq. 816 (7 Atl. 432, 56 Am. Rep. 1). The principle there laid down is of great value in every such case. The defendant was engaged in a lawful business, but so used its tracks in making up its trains and distributing the cars in front of the complainant's dwelling that, by reason of stench, noises, smoke, steam, and the dirt thereby occasioned, the comfort of the complainant's home was seriously impaired. The court below allowed an injunction against such use of the road; but the court did not pretend to hold that the company must abandon the use of its tracks altogether. It was only decided that the company had no right to allow its engines or its cars to remain in the presence of, or near by, the house of the complainants, making hideous noises, emitting smoke and steam and unwholesome odors, to the great discomfort of the complainant in his home. The judgment of the court simply looked to the proper exercise of the lawful rights of the defendant, and in the lawful exercise of those rights what inconvenience or annoyance the complainants might suffer they must submit to. Engines in passing might whistle or emit smoke, steam, and dirt, cattle might bellow, sheep bleat, and hogs squeal; but to that extent the complainants must yield to the general demand. To this extent the court was sustained on appeal. I can find nothing in that case to lead me to say that the business of an undertaker is a nuisance per se." The third syllabus in *Westcott v. Middleton* may be applicable to *Sister Michael*, especially in view of the fact that none of the other sisters were called as witnesses. It reads as follows: "If a single person, of a most sensitive taste on the subject, is seriously disturbed thereby, and no others are called who have been annoyed, a case is not made requiring the interference of the court."

In *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374, Vice Chancellor Pitney had before him a question of nuisance said to arise from two machines called "whizzers" used in

the drying of dyed materials, and he held: "There is a distinction between injuries which affect the air merely by way of noises and disagreeable gases resulting in personal discomfort, and those which injuriously affect the land itself or structures upon it. As to the former, each person living in society must submit to a degree of discomfort depending in some measure upon the circumstances of his residence. As to the latter, the owner or occupant of land is entitled to enjoy it free from any direct injury which will appreciably affect its value."

My attention has been called by counsel for the complainant to the case of *First M. E. Church v. Cape May Grain & Coal Co.* (N. J.) 67 Atl. 613, in which Vice Chancellor Leaming granted an injunction to restrain the defendant from operating a roller skating rink in a building adjacent to a church; it appearing that the noise from the rink was so great as to render it impossible to hold services in the church while skating was in progress. This case, in my judgment, is not an authority for the granting of an injunction in the case at bar. That case (*First Church v. Cape May*) properly held that no person is justified in establishing a business adjacent to a church, the noise of which will render the continuance of the customary religious services practically impossible, or which will interfere with such services to the extent of rendering it at times impossible for worshippers to hear the words of the preacher or the prayers which form part of the services, or which will render the occupancy of the church parsonage a burden.

Vice Chancellor Van Fleet in *Demarest v. Hardham*, ubi supra, adopted, as perhaps the most accurate statement of the rules to be observed in deciding the question of nuisance, this language used by Mr. Justice Mellor in charging a jury at the Liverpool Assizes in 1863, viz.: "The law does not regard trifling inconveniences. Everything must be looked at from a reasonable point of view. \* \* \* In determining whether a nuisance exists or not, the time, locality, and all the circumstances should be taken into consideration." This direction of the learned justice was approved by the Court of Queen's Bench, and afterwards by the Exchequer Chamber, and finally by the House of Lords. *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642. The English case just mentioned was an action for injuries done to property, but nevertheless, in my judgment, the substantive law pronounced in that case is, on principle, applicable to this case.

The facts, in my opinion, do not make a case of nuisance against the defendants on the question of the operation of their garage. My conclusions therefore are that the defendants of right may use the alleyway as a means of ingress, egress, and regress to their garage with automobile machines, but that they may not, after having gone upon that part of their property covered by the garage

building which comprises the rear of lot No. 132, and which is marked C<sup>2</sup> on the diagram, go beyond that lot and on to C<sup>1</sup>, which is that part of their property covered by the garage building which comprises the rear of No. 130; nor can they, with automobile machines or vehicles of any description, go from the lot C<sup>2</sup> out through the alleyway in question having first entered C<sup>2</sup> with their machines or carriages from lot C<sup>1</sup> adjoining, to which there is access from North Warren street on the south side of No. 130 through the alley marked A, and the door to the garage building marked B. I conclude, further, that the defendants are not creating a nuisance by their use of the alleyway as an automobile passage.

An injunction will be issued restraining the defendants from going upon the lot C<sup>1</sup> with automobiles or carriages through the alleyway and across C<sup>2</sup>; also, from going out through the alleyway with automobiles or carriages from C<sup>2</sup> which were gotten onto C<sup>2</sup> from and off C<sup>1</sup>. The deed provides for a double gate at the entrance of the alleyway. This provision for a gate presupposes that it is kept closed. Sister Michael says that before the garage was built the gates were nearly always closed, always except when being used; that the gate, though closed by the sisters as late as 9 o'clock at night, has been found open the next morning. In my opinion the complainant is entitled to have this gate kept closed, and may include in the injunction an appropriate mandate requiring the defendants always to close it on each occasion of its use by them.

(81 Conn. 169)

#### HARRIS v. COLEDEZKY.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

#### APPEAL AND ERROR—REVIEW—FINDINGS OF COURT — WEIGHT OF EVIDENCE — CONCLUSIVENESS.

Under Gen. St. 1902, § 788, permitting either party to appeal upon any question of law arising upon trial, if aggrieved, and regulating the remedy by appeal, where the record showed that an appeal was not taken on any question of law, but because of the court's findings upon the credibility of witnesses and the weight of the evidence, the questions were not appealable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955-3969.]

Appeal from Court of Common Pleas, Hartford County; John Coats, Judge.

Action by Helman Harris against Ozias Coledezky. From a judgment for plaintiff, defendant appeals. Affirmed.

Samuel C. Kone, for appellant. John F. Forward and Morris Older, for appellee.

HAMERSLEY, J. No question of law is properly presented by this appeal. The record discloses no ground for any correction of the finding. It does not show that the defendant thinks himself aggrieved by the decision of the trial court upon any question

of law arising in the trial, but plainly shows that he feels aggrieved at the court's conclusion of fact dependent on the credit given to witnesses and the weighing of conflicting evidence. Such grievance is not a ground of appeal to this court. Had the defendant examined section 788 of the General Statutes of 1902, which defines appeals to the Supreme Court of Errors, and the rules of this court defining and regulating the remedy by appeal, and the decisions there cited upon which those rules are based (Conn. Practice Book, pp. 265-271), this appeal would doubtless not have been taken.

There is no error in the judgment of the court of common pleas. All concur.

#### ROOT v. LATHROP.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

#### 1. APPEAL AND ERROR—FINDINGS BY COURT—CORRECTION—EXTENSION OF TIME.

Gen. St. 1902, § 794, provides if either party desires to correct the findings he shall, within one week after notice of filing same, file a motion specifying the desired corrections, etc. Section 795 provides the form and contents of findings and the manner of excepting thereto, and section 796 provides that, if the findings do not present the questions of law decided, the Supreme Court of Errors shall correct the same, and, if the findings are erroneous as to the facts, shall grant a new trial. Section 797 provides, also, that either party may, within one week after notice of filing such findings, file with the clerk a copy of the evidence and rulings, with a motion that they be made a part of the record on appeal, and ask the Supreme Court of Errors to correct such findings. One of the corrections requested by defendant being made, but others refused, more than a week after the finding was filed but within a week after the correction was made and the finding refiled, defendant moved to have the evidence and rulings incorporated in the record, under section 797. Held, that defendant could not proceed under both methods to correct the findings and extend the time for filing his motion, under section 797, by first proceeding under the other sections, and the court was not bound to certify the evidence, but, it having done so, it may be assumed that the time for filing the motion to correct was extended without a motion for that purpose, which the court could do, so that defendant's motion was in time.

#### 2. LIMITATION OF ACTIONS — ACCRUAL OF RIGHT OF ACTION—DEATH AND ADMINISTRATION—APPOINTMENT OF ADMINISTRATOR.

In an action by an administrator for money converted after intestate's death, but before the administrator had been appointed, where the money was converted more than six years before the action was commenced, but the administrator was appointed less than a year before the commencement thereof, the cause of action did not accrue, so that limitations ran against it until the administrator was appointed, and hence the action was not barred by the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 427.]

Appeal from Superior Court, New Haven County; Alberto T. Roraback, Judge.

Action for conversion by Charles G. Root, administrator, against Edwin N. Lathrop. From a judgment for plaintiff, defendant appeals. Affirmed.

Lucien F. Burpee and Terence F. Carmody, for appellant. Charles W. Evarts, for appellee.

THAYER, J. The defendant proceeded under Gen. St. 1902, §§ 794, 795, 796, to obtain a correction of the finding by the trial court. One of the corrections asked for was made by the court, and the others were refused. He then, more than one week after the finding was filed, but within one week after the correction was made and the finding refiled, moved to have the entire evidence and rulings in the case made a part of the record under section 797, and asks this court to correct the finding. The plaintiff objects upon the ground that the motion was made too late.

Section 797 requires that the motion shall be made within one week after the party moving has received notice that the finding has been filed. It is provided in this section that a party may, in lieu of proceeding under the three preceding sections, proceed under this to have the finding corrected. He could not therefore proceed under both to obtain the corrections sought. Nor could he be permitted to extend his time for filing his motion and the evidence and commence proceedings under this section by first proceeding under the earlier sections to have the finding corrected. Any such extension must be obtained from the court. The court was not bound therefore to certify the evidence. It has done so, however, and we may treat this as indicating that the time for filing the motion was extended. It was within the power of the court to do this without motion. An examination of the evidence shows that it justifies the finding as made and does not warrant this court in making the changes which are asked for.

The only question in the case is whether the action is barred by the statute of limitations. The money sued for was taken and appropriated by the defendant after the death of his wife, the plaintiff's intestate, and before any administrator upon her estate had been appointed. The money was so appropriated more than six years before the action was commenced. There had been no administrator until the plaintiff was appointed, and his appointment was on October 8, 1906, less than a year prior to the commencement of the suit. The cause of action did not accrue during the life of Mrs. Lathrop, and under the decisions of this court did not accrue so that the statute of limitations could run against it until the administrator was appointed. *Hobart v. Connecticut Turnpike Company*, 15 Conn. 145, 148, *Andrews v. Hartford & New Haven Railroad Company*, 34 Conn. 57, 59. The court therefore correctly overruled the defendant's claim that the action was barred by the statute.

There is no error. All concur.

(81 Conn. 249)

# HUBLEY MFG. & SUPPLY CO. v. IVES.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

## 1. SET-OFF AND COUNTERCLAIM — SUBJECT-MATTER—UNLIQUIDATED DEMANDS.

Practice Act 1879 (Laws 1878-79, p. 43, c. 83, § 5; Gen. St. 1902, § 612) provides that in all cases not before a justice, where the defendant has either in law or equity a counterclaim or set-off, he may have the benefit of such claim by pleading it in his answer, and section 613 permits a plaintiff to include in his complaint both legal and equitable causes of action. Section 532 provides that all courts vested with legal and equitable jurisdiction may administer legal and equitable rights and remedies. The original statute of set-off (Rev. St. [Ed. 1821] p. 43, § 32) provides that in actions to recover a debt, wherein the plaintiff lives outside the state, and where there are mutual debts between the parties, one debt may be set off against another, and Gen. St. 1902, § 649, provides that in actions to recover a debt, if there are mutual debts between plaintiff and defendant, they may be set off against each other. *Held*, in a suit by plaintiff, a nonresident, on a Rhode Island judgment, defendant could plead any counterclaim to enforce the substantial equities between the parties under the practice act, though not founded on any debt which was mutual according to the earlier statutes, and could set off his claim, though it was an unliquidated claim for damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 58-62.]

## 2. ACTIONS—JOINDER—NECESSITY.

Two suits should not be brought for the determination of matters in controversy between the same parties, whether relating to legal or equitable rights, when such determination can be effectually had in one suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 549-564.]

## 3. SET-OFF AND COUNTERCLAIM — EQUITABLE SET-OFF.

Equity recognizes rights of set-off which go far beyond those recognized by the early legislation of England and of Connecticut in actions at common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 9-11.]

Appeal from Court of Common Pleas, New Haven County; William L. Bennett, Judge.

Action by the Hubley Manufacturing & Supply Company against Charles W. Ives. From a judgment for plaintiff and judgment on demurrer dismissing defendant's counterclaim, defendant appeals. Reversed and remanded, with instructions to overrule demurrer.

Hobart L. Hotchkiss and Harry W. Asher, for appellant. Edmund Zacher, for appellee.

BALDWIN, C. J. The sole question in this cause is whether a claim for unliquidated damages for breach of contract can be set off, in a suit by a nonresident upon a judgment of a sister state, against a citizen of Connecticut.

The defendant, admitting in his answer that the judgment was duly rendered in 1899, and that \$123.74 remains unpaid upon it, pleaded, by way of counterclaim, that in May, 1904, the defendant agreed to buy of the

plaintiff, and the plaintiff agreed to sell and deliver to the defendant, certain goods at a certain price, but that the plaintiff refused to deliver them as agreed, to the damage of the defendant in the sum of \$300, which sum he offered to set off, asking, also, a judgment for the balance that would then remain due. The demurrer was upon the ground that the damages thus claimed by the defendant were unliquidated, and his claim not of the nature of a mutual debt. Under the practice act of 1879 (Laws 1878-79, p. 43, c. 83, § 5), in all cases not brought before a justice of the peace, "where the defendant has either in law or in equity, or in both, a counterclaim, or right of set-off, against the plaintiff's demand, he may have the benefit of any such set-offs or counterclaims by pleading the same, as such, in his answer, and demanding judgment accordingly; and the same shall be pleaded and replied to, according to the rules governing complaints and answers." Gen. St. 1902, § 612. That act also provided that in any such action "the plaintiff may include in his complaint both legal and equitable rights and causes of action, and demand both legal and equitable remedies," that several causes of action on contract express or implied might be so united, and that "in all cases where several causes of action are joined in the same complaint, or as matter of counterclaim or set-off, in the answer, if it appear to the court that they cannot all be conveniently heard together, the court may order separate trials of any such causes of action, or may direct that any one or more of them be expunged from the complaint or answer." Gen. St. 1902, § 613. Both these sections are in furtherance of the fundamental purpose of the practice act, that "all courts which are vested with jurisdiction both in law and in equity may, to the full extent of their respective jurisdictions, administer legal and equitable rights and apply legal and equitable remedies in favor of either party, in one and the same suit, so that legal and equitable rights of the parties may be enforced and protected in one action." Gen. St. 1902, § 532.

The defendant in the case at bar was therefore at liberty to file any counterclaim adapted to enforce the substantial equities between him and the plaintiff. *Norwich Printing Co. v. Kloppenberg*, 50 Conn. 295, 301. In so doing he would be following what for nearly 30 years has been the established principle of our law, "that two suits shall not be brought for the determination of matters in controversy between the same parties, whether relating to legal or equitable rights, or to both, when such determination can be had as effectually and properly in one suit." *Welles v. Rhodes*, 59 Conn. 498, 503, 22 Atl. 286. It appeared from the complaint that the defendant was a citizen of Connecticut, and the plaintiff a Massachusetts corporation, suing on a judgment rendered by a court of Rhode Island. The counterclaim stated, and the demurrer

necessarily admitted, that this corporation owed the defendant, as damages for a breach of contract, more than the amount of the judgment. It would not comport with the principles of equity, under such circumstances, to allow the plaintiff to use our courts to force the defendant to pay its claim against him upon the judgment, while refusing to satisfy his equally valid claim against it on the contract of sale, and leaving him, so far as appears, no remedy for its recovery except by a new suit brought in another state. See *Rowan v. Sharps' Rifle Co.*, 29 Conn. 282, 330. Our original statute of set-off provided that "in all actions brought for the recovery of a debt, before any court in this state wherein the plaintiff lives or resides out of this state, or is a bankrupt, or insolvent, and where there shall be mutual debts between the plaintiff and defendant in such action, one debt may be set off against the other." Rev. St. (Ed. 1821) p. 43, § 32. In the Revision of 1902, this appears in the following form: "In all actions brought for the recovery of a debt, if there shall be mutual debts between the plaintiff or plaintiffs, or either of them, and the defendant or defendants, or either of them, one debt may be set off against the other." Gen. St. 1902, § 649. This statute must be taken in connection with the broader provisions of the practice act. The court, on proper pleadings, is to settle the contractual relations of the parties in such a way as to do equity, and full equity, between them. Equity recognizes rights of set-off which go far beyond those which the early legislation of England and of Connecticut introduced in actions at common law. *Goodwin v. Keney*, 49 Conn. 563, 569. Such rights may be the proper subject of a counterclaim, under the practice act, although not founded on any debt, which could be called "mutual" according to the definitions established under these statutes. *Boothe v. Armstrong*, 76 Conn. 530, 532, 57 Atl. 173; *Id.*, 80 Conn. 218, 223, 67 Atl. 484; *Betts v. Conn. Life Ins. Co.*, 78 Conn. 442, 450, 62 Atl. 345.

The plaintiff contends that the judgment appealed from was warranted by our opinion in *Harral v. Levery*, 50 Conn. 46, 60-65, 47 Am. Rep. 608. That was an action to foreclose a mortgage given by one Levery, who held the legal title, but was under an obligation to convey the property, for a sum much less than its value, to one McDonald. A foreclosure was granted against Levery as the legal owner and McDonald as the equitable owner; the decree providing that a redemption by McDonald should operate to vest in him the legal title. McDonald had filed a counterclaim against Levery for damages for fraud in refusing to make the stipulated conveyance, and also for the difference between the amount of the plaintiff's mortgage and the sum for which Levery had agreed to convey to him. We held that there was no error in refusing to McDonald the relief thus

sought, since the matter which he set up was not so connected with the mortgage that its consideration was necessary to a full determination of the rights of the parties, and could furnish no ground for a set-off against the plaintiff. He had an equity against Levarty, but none against Harral.

There is error, the judgment of the court of common pleas is reversed, and the cause remanded, with instructions to overrule the demurrer. All concur.

(81 Conn. 129)

**GRAND LODGE A. O. U. W. OF CONNECTICUT v. GRAND LODGE A. O. U. W. OF MASSACHUSETTS.**

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

**1. ACCOUNT—NATURE OF REMEDY—PLEADING—RELIEF.**

The complaint, in an action between Grand Lodges of a fraternal insurance order, plaintiff being the Grand Lodge of Connecticut and defendant the Grand Lodge of Massachusetts, alleged: That under the constitution and laws of the order Grand Lodges are organized in such states, districts, etc., as are determined by the Supreme Lodge, and territory comprising a Grand Lodge, having jurisdiction over more than one state, can be divided by the Supreme Lodge into two or more Grand Lodge jurisdictions; that the Grand Lodge of Massachusetts, formerly having jurisdiction over that state, Connecticut, and several other states, was divided by the Supreme Lodge into the Grand Lodge of Connecticut, consisting of members of the order residing in that state, and the Grand Lodge of Massachusetts; that thereafter plaintiff, for the purpose of adjusting the financial relations between itself and defendant, adopted resolutions embodying a plan by which it should assume its proportionate share of the obligation of the former Grand Lodge up to the time of their separation, and should receive its proportionate share of the several funds after such obligations were satisfied, the resolution stating in detail the disposition to be made of the funds and the share to which each was entitled, which resolutions defendant accepted as a contract between plaintiff and itself; that defendant refused to pay over to plaintiff its proportionate share of the beneficiary fund to which it was entitled under the resolutions as interpreted and understood by plaintiff, claiming that plaintiff by the agreement relinquished its right thereto; and that defendant knew plaintiff had this understanding when the contract was made, and itself so understood the agreement, or failed to inform plaintiff that it did not. The relief prayed was that defendant pay plaintiff the amount claimed by it, if it was entitled thereto under their agreement, and, if not, that the contract be reformed so as to express the intention of plaintiff which was known or concurred in by defendant when assenting to the contract. Defendant demurred to the complaint on the grounds, among others, that it had no authority under the laws of Massachusetts to enter into the contract, and there was no consideration therefor, and that the complaint stated no cause of action by reason of any contract. *Held*, that the breach of a contract obligation was not the gist of the action stated, and, while the contract was incidentally recited, the complaint was based upon the existence of relations and facts alleged as entitling plaintiff to an equitable proportion of certain funds, and the relief demanded was none the less equitable because it asked a money judgment.

**2. INSURANCE — MUTUAL BENEFIT ASSOCIATIONS — POWER TO DIVIDE SUBORDINATE LODGE—EFFECT OF INCORPORATION.**

Where, under the constitution and laws of a fraternal insurance order, the Supreme Lodge had authority to divide the territory of a Grand Lodge into two or more grand lodge jurisdictions, the fact that a Grand Lodge, whose territory was so divided, was incorporated under the law of a state comprised within its jurisdiction, did not exempt it from the operation of the laws of the order under which the division was made.

**3. SAME—ASSENT TO DIVISION OF LODGE.**

Such action of the Supreme Lodge in dividing an existing Grand Lodge into two separate Grand Lodges was binding upon every subordinate body and individual member thereof, and did not require the assent of the Grand Lodge to make it operative, and, if such assent were needed, the acceptance by one of such separate Grand Lodges of a proposal made by the other, after their separation, for the adjustment of their rights and obligations as to the funds held by the Grand Lodge at the time of separation, was a sufficient assent.

**4. EQUITY—JURISDICTION—PROPERTY RIGHTS — MEMBERSHIP IN FRATERNAL INSURANCE ORDER—FUNDS OF ORDER.**

Plaintiff and defendant were Grand Lodges of a fraternal insurance order, in which formerly plaintiff's members had been a part of defendant Grand Lodge, but had been made a separate Grand Lodge by the Supreme Lodge of the order, acting under its constitution and laws. *Held*, that the rights of the members of plaintiff Grand Lodge in the funds in defendant's hands at the time of separation were property rights, which courts of equity would protect and enforce, as partaking of the character of trust funds.

**5. CORPORATIONS — PROPERTY—SUCCESSION TO RIGHTS OF UNINCORPORATED ASSOCIATION—ACTIONS—PLEADING.**

Plaintiff and defendant were Grand Lodges of a fraternal insurance order, in which formerly plaintiff's members had been a part of defendant Grand Lodge, but had been made a separate Grand Lodge by the Supreme Lodge of the order, acting under its constitution and laws. After the separation, while plaintiff was unincorporated, it and defendant entered into an agreement, by which each was to receive its proportionate share of the funds held by defendant after all obligations were paid. Thereafter plaintiff was incorporated. In an action for an accounting, plaintiff's complaint alleged these facts, and that immediately upon the separation it became the representative of the members of the order within its jurisdiction, and on its incorporation, under the laws of the order, succeeded to the rights of the existing voluntary organization. *Held* sufficient on demurrer, as against the objection that plaintiff corporation was not identical with the voluntary organization with which the agreement was made, and that, in the absence of an allegation of an assignment or transfer to it, it had no right or interest in the funds of defendant, to enable it to maintain the action.

**6. INSURANCE — MUTUAL BENEFIT ASSOCIATIONS — DIVISION OF LODGES — EFFECT ON INTEREST OF MEMBERS IN FUNDS.**

Plaintiff and defendant were Grand Lodges of a fraternal insurance order; plaintiff being the Grand Lodge of Connecticut, and defendant the Grand Lodge of Massachusetts. The latter formerly had included the members of the order in Connecticut and other states, but plaintiff had been created a separate Grand Lodge by the Supreme Lodge of the order, acting under its constitution and laws. The funds of the order were collected from the individual members thereof through the various Grand Lodges, and were used for the payment of death benefits and other purposes of the order, under its laws. *Held*, that as plaintiff Grand Lodge was not created

by voluntary action, but by the authority of the Supreme Lodge, and the funds which defendant grand lodge had collected prior to plaintiff's separation from it were trust funds held for the benefit of all the members of the order, when the Connecticut members were created into a new Grand Lodge their equitable interest in the funds of defendant Grand Lodge still continued and would be protected by a court of equity.

**7. CORPORATIONS — FOREIGN CORPORATIONS — CARRYING ON BUSINESS — WHAT CONSTITUTES — SUBDIVIDING RESIDENT INSURANCE ORDER — "DOING BUSINESS."**

Rev. Laws Mass. c. 119, § 11, relating to fraternal benefit corporations conducting business under the provisions of the chapter, provides that an agreement for the transfer of membership of such corporations shall be approved by a two-thirds vote of the certificate holders of each corporation, etc. Plaintiff and defendant were Grand Lodges of a fraternal insurance order; plaintiff being the Grand Lodge of Connecticut, and defendant the Grand Lodge of Massachusetts. The latter formerly had included the members of the order in Connecticut and other states, but plaintiff had been created a separate Grand Lodge by the Supreme Lodge of the order, acting under its constitution and laws. Thereafter plaintiff and defendant had entered into an agreement for the proportionate division of the funds held by defendant at the time of the separation, and plaintiff brings this action for an accounting thereof. Defendant demurred to the complaint because, besides other reasons therefor, it did not appear that plaintiff had authority to carry on its business in Massachusetts, or that two-thirds of the certificate holders of defendant had consented to the contract alleged between plaintiff and defendant. *Held*, that as it did not appear that plaintiff had ever undertaken to do business in Massachusetts, and as the division of territory by the Supreme Lodge, a foreign corporation, and creating plaintiff a Grand Lodge in another state, was not the "doing of business" in Massachusetts within the meaning of the statute, its provisions, under the circumstances, had no application.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol. 8, pp. 7040, 7041.]

**8. ACCOUNT—PLEADING—RIGHT TO ACCOUNT.**

Plaintiff and defendant were Grand Lodges of a fraternal insurance order, in which formerly plaintiff's members had been a part of defendant Grand Lodge, but had been made a separate Grand Lodge by the Supreme Lodge of the order, acting under its constitution and laws. Thereafter plaintiff and defendant entered into an agreement by which plaintiff was to receive its proportionate share of the beneficiary fund and other funds, after the obligations of defendant Grand Lodge up to the time of the separation had been satisfied. Plaintiff, suing for an accounting, alleged in its complaint that defendant refused to pay over its proportionate share of the funds, above the amount sufficient to pay the obligations of the order. Defendant demurred to the complaint, asserting, as one reason therefor, that it did not appear that all death claims accruing prior to the separation had been paid. *Held* that, since the amount claimed to be shared represented a balance over and above the total amount of such death claims, defendant's neglect to pay its matured obligations could not defeat plaintiff's recovery.

**9. SAME.**

Defendant further asserted, as reasons for such demurrer, that it did not appear that the funds in question were not held for the benefit of and needed by the beneficiaries and certificate holders of defendant, or that they had not been expended, necessarily, under the contracts made by defendant with its members. *Held*, that this did go to the merits of plaintiff's contention, since it appeared that such funds were not, after the separation, held for the benefit of defendant's

former members within plaintiff's jurisdiction, were not needed to meet any demands of such members already accrued, and had not been expended in the satisfaction of such demands.

**10. SAME—ALLEGATION OF REFUSAL TO ACCOUNT.**

Plaintiff's complaint further alleged that defendant had paid to plaintiff, on account of plaintiff's interest in a certain fund, a specified sum, which was one-half of the amount to which plaintiff claimed to be entitled, and had refused to pay the balance. *Held*, that the complaint sufficiently averred defendant's delict, and objections, as reasons for demurrer, that it did not appear that defendant refused to make arrangements for the disposal of the funds, were untenable.

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Action for accounting by the Grand Lodge of the Ancient Order of United Workmen of Connecticut against the Grand Lodge of the Ancient Order of United Workmen of Massachusetts. From a judgment for defendant on demurrer to the complaint, plaintiff appeals. Judgment set aside and remanded, with directions to overrule demurrer and for further proceedings.

The following is the complaint, including the prayers for relief:

"(1) The Ancient Order of United Workmen is a fraternal insurance organization with a membership extending throughout the United States, or the greater portion thereof.

"(2) The Supreme Lodge of the Ancient Order of United Workmen is a corporation which was organized under the laws of the state of Texas on January 2, 1900.

"(3) Prior to its corporate organization, said Supreme Lodge had existed for more than 20 years as the Supreme Lodge of said Ancient Order of United Workmen.

"(4) By authority of the Supreme Lodge, and subject to the constitution and general laws of the order, Grand Lodges are organized and exist in such states, districts, territories, and countries as have been or as may be determined by the Supreme Lodge.

"(5) The defendant was organized as a Grand Lodge of said order on February 25, 1879, and had jurisdiction over the members of said order in the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut.

"(6) The defendant was organized as a corporation under the laws of Massachusetts on February 9, 1883, and in 1897 appointed the insurance commissioner of this state its attorney for the receipt of service of process, in order to obtain lawful authority to take risks and transact business in this state.

"(7) By the constitution and general laws of said order, it is provided that the territory comprising a Grand Lodge jurisdiction, having jurisdiction over more than one state, may be divided by the Supreme Lodge at a stated meeting into two or more grand lodge jurisdictions.

"(8) On October 17, 1901, the territory comprising the jurisdiction of the defendant, as



aforesaid, was divided by the Supreme Lodge at a stated meeting in accordance with the laws of the order, into the jurisdiction of the Grand Lodge of Connecticut and the jurisdiction of the Grand Lodge of Massachusetts, and the members of said order within the state of Connecticut were placed under the jurisdiction of the Grand Lodge of Connecticut.

"(9) Said Grand Lodge of Connecticut thereupon became the representative of the Connecticut members of the order, and as such representative became equitably entitled to the share of the property of the defendant to which the members of said order within the state of Connecticut were entitled at the date of the separation of said Grand Lodge of Connecticut.

"(10) For the purpose of adjusting the financial relations between said Grand Lodge of Connecticut, representing the members of the order in this state, and the defendant, representing the remaining members of said order under the jurisdiction of the defendant, the plaintiff at a stated meeting held October 17, 1901, adopted the following resolutions as a proposal for the settlement of its financial relations with the defendant, and thereafter submitted a copy of said resolutions to the defendant as an offer of settlement. Said resolutions were as follows: 'Grand Lodge of the Ancient Order of United Workmen of Connecticut. To all Workmen to Whom These Presents Shall Come, Fraternal Greeting: Know ye that at the first stated meeting of the Grand Lodge of the Ancient Order of United Workmen of Connecticut, held in the city of New Haven on October 17, 1901, the following resolutions were unanimously adopted: Resolved, that following be and is hereby adopted by the Grand Lodge of Connecticut, as the basis of the settlement and adjustment of the financial affairs between it and the Grand Lodge of the Ancient Order of United Workmen of Massachusetts: Guaranty Fund. All liability to this fund prior to the date of separation is to be paid by the Grand Lodge of Massachusetts for the beneficiary fund, and all liability to said guaranty fund for and on account of the Grand Lodge of Connecticut on and after the date of separation is to be paid by the Grand Lodge of Connecticut. Beneficiary Fund. The Grand Lodge of Connecticut shall be responsible to the Grand Lodge of Massachusetts for all calls for the beneficiary fund made necessary by deaths occurring and by deductions for the guaranty fund on or before the date of separation, and all death claims in the jurisdiction of the Grand Lodge of Connecticut up to and including said date of separation shall be paid by the Grand Lodge of Massachusetts, and all death claims occurring after said date shall be paid by the Grand Lodge of Connecticut. The Grand Lodge of Connecticut shall not be entitled to any portion of the surplus in the beneficiary fund of the Grand

Lodge of Massachusetts after the death claims occurring prior to date of separation have been paid. General Fund. The Grand Lodge of Massachusetts is to receive from the Grand Lodge of Connecticut as many sixths of its proportion of the semiannual per capita tax as there have been months elapsed from the beginning of said semiannual term up to and including the date of separation; the fractional part of a month, if any, to be considered as one month. The Grand Lodge of Connecticut is to pay to the Grand Lodge of Massachusetts its proportion of any deficit in the general fund of the Grand Lodge of Massachusetts on June 30th; the proportion to be based on a per capita computation. The disposal of all other funds or property in possession of or held by the Grand Lodge of Massachusetts, at the date of separation, is to be subject to such arrangements with the Grand Lodge of Connecticut as may be made by the Grand Lodge of Massachusetts at a session thereof. Resolved that the executive committee of this Grand Lodge be and it is hereby authorized to act in behalf of the Grand Lodge of Connecticut with the Grand Lodge of Massachusetts, or such officers or committees as it may appoint for that purpose, in adjusting the details of all financial matters arising out of the institution of the Grand Lodge of Connecticut and the separation of its membership from the jurisdiction of the Grand Lodge of Massachusetts. In witness whereof, I have hereunto set my hand and affixed the seal of the Grand Lodge, this twenty-first day of February, A. D. 1903. James A. Knox, Grand Recorder. [Seal.]'

"(11) At a stated meeting of the defendant held on February 25 and 26, 1902, the foregoing resolutions of the said Grand Lodge of Connecticut were presented and were accepted by the defendant as a contract between said Grand Lodge of Connecticut and the defendant for the settlement of their financial relations.

"(12) The date of separation referred to in said resolutions was November 1, 1901, and the separation of the financial affairs of the two lodges took place upon that date.

"(13) The moneys collected by the defendant were collected by means of assessments levied from time to time upon the members of the order within the jurisdiction of the defendant, which assessments were collected by the subordinate lodges within such jurisdiction, and were called by the grand recorder of the defendant from such subordinate lodges.

"(14) Assessment No. 284, amounting to \$45,980, was called from the treasuries of the subordinate lodges to the treasury of the defendant by call No. 17, made September 2, 1901.

"(15) On January 1, 1901, the defendant had on hand a balance of \$50,521.

"(16) By receipts from arrearages and from assessments during the year 1901, up to and



including said assessment No. 264, the defendant received \$1,008,646.

"(17) The claims for the year 1901, paid by the defendant to September 23d, amounted to \$800,000. The claims due from the defendant to October 31, 1901, amounted to \$154,000, and the guaranty fund to October 31, 1901, amounted to \$97,221.73.

"(18) The balance in the beneficiary fund of the defendant therefore, after the payment of said assessment No. 264, amounted to \$2,945.27.

"(19) In using the following language in the foregoing resolutions, to wit: 'The Grand Lodge of Connecticut shall not be entitled to any portion of the surplus in the beneficiary fund of the Grand Lodge of Massachusetts after the death claims occurring prior to the date of separation have been paid'—it was understood by both the Grand Lodge of Connecticut and the defendant that the surplus referred to meant only the surplus remaining in the hands of the defendant from the last assessment which was necessary for the purpose of paying the required amount to the guaranty fund, and of paying death claims due to October 31, 1901, and that is the legal meaning of the language used in said resolution; or, if such is not the legal meaning of the language used, the Grand Lodge of Connecticut used such language in the sense above set forth, and the defendant knew that the Grand Lodge of Connecticut used said language in such sense.

"(20) On October 1, 1901, the grand recorder of the defendant made another call, to wit, call No. 18, requiring the payment of the money in the treasuries of the subordinate lodges realized from the payment by the members of assessment No. 265, in compliance with which call the subordinate lodges in the state of Connecticut paid into the treasury of the defendant in October, 1901, the sum of \$11,763.

"(21) The money received from said assessment was paid in the first place by the individual members of the order in the state of Connecticut to their local lodges, and by their local lodges to the defendant, for the purposes of said order, and only for the purposes of said order, to wit, for the payment by the individual members of the Grand Lodge of Massachusetts prior to the separation of the Connecticut members of the order into the Grand Lodge of Connecticut.

"(22) By the constitution and general laws of the Supreme Lodge of the order, it was provided, and had been provided for many years prior to the separation of the Grand Lodge of Connecticut from the Grand Lodge of Massachusetts, that Grand Lodges might be set apart from the Supreme Lodge as separate beneficiary jurisdictions, and in such cases it was provided that 'said Grand Lodge shall not be entitled to any surplus which may remain in the beneficiary fund of the Supreme Lodge after paying the beneficiary claims arising prior to the date of separation.'

"(23) By the constitution and general laws of the Supreme Lodge it was provided, and had been provided for many years prior to 1901, that calls and assessments should be made as follows: 'Calls and Assessments. Whenever the beneficiary fund in the Supreme Lodge treasury shall have been reduced to a sum less than two thousand dollars, or when, by reason of unavoidable delay in the payment of beneficiary claims the balance of beneficiary fund in the Supreme Lodge treasury would, by the payment of said claims, be reduced to a sum less than two thousand dollars, then it shall be the duty of the supreme recorder to call upon the subordinate lodges to forward the beneficiary fund in their respective treasuries, and, at the time of making such call, to make one assessment upon each member of the order who received the Workman degree previous to the date of the death upon which the assessment is made. Calls, When and How Made. Every call made upon subordinate lodges to forward beneficiary funds shall be dated upon the first day of the month; shall contain a list of all deaths occurring since the last call was made which have been officially reported to and received by the supreme recorder; all necessary instructions relative to forwarding the funds called for, and shall, in every case receive the approval of the chairman of the Supreme Lodge finance committee. The issuing of such call shall constitute the making of an assessment.'

"(24) Under the provisions of said law of said Supreme Lodge for calls and assessments, the surplus which might remain in the beneficiary fund of the Supreme Lodge after paying the beneficiary claims arising prior to the date of separation of any Grand Lodge could not exceed the balance remaining from the last assessment necessary for the purpose of paying the beneficiary claims arising prior to the date of separation.

"(25) The defendant was well acquainted with the aforesaid provisions of the constitution and general laws of said Supreme Lodge.

"(26) Under said constitution and general laws of said Supreme Lodge, various Grand Lodges had been set apart from said Supreme Lodge, as the defendant well knew.

"(27) It was the intention of the Grand Lodge of Connecticut, and of the officers representing said Supreme Lodge, in connection with the adjustment of the financial relations between the Grand Lodge of Connecticut and the defendant, that such adjustment should be made in a fair and equitable manner without giving any substantial advantage to the Grand Lodge of Massachusetts, or its members, as against the Grand Lodge of Connecticut, and its members, and it was the belief of the Grand Lodge of Connecticut, and of said officers representing the Supreme Lodge, that by the language used in the contract expressed in the aforesaid resolutions the Grand Lodge of Connecticut did not relinquish, or agree to relinquish, any interest

in the beneficiary fund of the defendant except as to the surplus of the last assessment necessary to pay death claims occurring prior to the date of separation, to wit, the surplus resulting from assessment No. 264, and that the contract was so understood by the defendant.

"(28) The defendant well knew the belief and understanding of the Grand Lodge of Connecticut and of the officers of said Supreme Lodge with reference to the meaning of said resolutions, as set forth in the preceding paragraph, and either used or intended to use the language of the contract contained in said resolutions in the sense intended by the Grand Lodge of Connecticut and the officers of said Supreme Lodge, or knew that the Grand Lodge of Connecticut and the officers of said Supreme Lodge supposed that the defendant intended to use such language in said sense; and yet, notwithstanding such knowledge, the defendant failed to inform the Grand Lodge of Connecticut or the officers of said Supreme Lodge that the defendant had any different understanding of the meaning of the contract from that of the Grand Lodge of Connecticut before the contract was made.

"(29) After the making of said contract, the defendant refused to repay to the Grand Lodge of Connecticut the said sum of \$11,763 collected by the defendant, as aforesaid, under assessment No. 265, and not needed for the payment of any claims for which the Grand Lodge of Connecticut was liable, as aforesaid, and set up the claim that the said sum of \$11,763 was included in that surplus in the beneficiary fund of the defendant to which the Grand Lodge of Connecticut by said contract relinquished all claim.

"(30) By the last clause of the aforesaid contract: 'The disposal of all other funds or property in possession of or held by the Grand Lodge of Massachusetts at the date of separation is to be subject to such arrangements with the Grand Lodge of Connecticut as may be made by the Grand Lodge of Massachusetts at a session thereof.'

"(31) No arrangements have been made between the Grand Lodge of Connecticut and the defendant with reference to the funds and property held by the defendant, and referred to in the preceding paragraph.

"(32) Such funds and property so held by the defendant at the date of separation of the defendant from the Grand Lodge of Connecticut were as follows: Charity fund, \$13,022.82; trust fund, \$10,416.56; building, 12 Walnut street, Boston, assessed value, \$22,000—making a total of \$45,439.38 or more.

"(33) The property described in the preceding paragraph equitably belonged to the members of said order in the jurisdiction of the defendant prior to the date of separation.

"(34) The total number of members within the jurisdiction of the defendant prior to and at the date of separation was 56,865.

"(35) The total number of members within

the jurisdiction of the defendant prior to the separation residing in the state of Connecticut, and transferred to the jurisdiction of the Grand Lodge of Connecticut at the date of separation, was 11,943.

"(36) Upon the separation of the Grand Lodge of Connecticut and the defendant, the Grand Lodge of Connecticut, as the representative of the Connecticut members of the order, became equitably entitled to <sup>11943/56865</sup> of the aforesaid property, amounting to \$45,439.38, then held by the defendant, as aforesaid, amounting to \$9,543.38.

"(37) The defendant paid to the Grand Lodge of Connecticut the sum of \$4,771.68 on account of said Grand Lodge's interest in the aforesaid fund, and has refused to pay the balance, amounting to \$4,771.68.

"(38) The Grand Lodge of Connecticut, at the time of its separation from the defendant, was unincorporated, but became incorporated as the plaintiff on January 27, 1902, under the laws of this state under the plaintiff's corporate name, and the plaintiff thereupon as a corporation succeeded, under the laws of the order, to all the rights of the previous unincorporated Grand Lodge of Connecticut as the representative of the members of the order within the jurisdiction of Connecticut.

"The plaintiff claims, by way of equitable relief, a decree: (a) That the defendant pay to the plaintiff the sum of \$4,771.68, with interest from November 1, 1901. (b) If the court shall be of opinion that the amount received by the defendant from said assessment, No. 265, to wit, the sum of \$11,763, is money to which the plaintiff is equitably entitled by the terms of said contract, that the defendant pay to the plaintiff said sum of \$11,763, with interest from November 1, 1901. (c) If the court shall be of opinion that the plaintiff is not entitled by the terms of said contract to the amount received by the defendant from said assessment No. 265, to wit, the sum of \$11,763, that said contract be reformed by the correction of the mistake in said contract in failing to express the intention of the Grand Lodge of Connecticut concurred in or known to the defendant, as set forth in the complaint, in providing for the relinquishment by said Grand Lodge of Connecticut of any interest in said beneficiary fund beyond the surplus arising from said assessment No. 264, and that the defendant pay the plaintiff said sum of \$11,763, with interest from November 1, 1901."

Edward A. Harriman, for appellant. William H. Ely and Harrison S. Sleeper, for appellee.

PRENTICE, J. (after stating the facts as above). The plaintiff's complaint is met by a demurrer sustained, which assigns 19 grounds of demurrer. In the defendant's brief these grounds are consolidated into four, which are stated as follows: First, the Texas corporation had no authority or power in the premises; second, the defendant had no power or

authority under the laws of Massachusetts to enter into said contract; third, there was no consideration for the contract; and fourth, the plaintiff has no cause of action against the defendant by reason of any contract or claimed contract set forth in the complaint.

The last three of the objections thus urged to the complaint are based upon an entire misconception of it. They rest upon the assumption that the plaintiff is seeking relief for the violation of some contract obligation which the defendant has entered into. That is not the gist of the action, and, in so far as the complaint suggests the existence of any express undertaking on the part of the defendant, it is only as one of the incidents in the story told—a fact which it is conceived fortifies and strengthens the plaintiff's right to have the relief sought. The plaintiff asks for equitable relief only. It is none the less equitable because it is sought in the form of a money payment. The complaint attempts to set up a state of facts which entitles the plaintiff, as representing its members who were formerly members of the defendant, to the relief prayed for. It does not rest upon any contract between the parties, but upon the existence of relations and a series of facts and events which it says justifies it in its claim to an equitable proportion of certain funds in the defendant's hands, and this whether or not the parties ever entered into direct contractual relations with each other. The second, third, and fourth of the consolidated reasons of demurrer are therefore inadequate to meet the situation presented by the complaint.

The remaining reason assigned for the inadequacy of the complaint calls for the further explanation of its meaning found in the demurrer itself, as follows: "(5) It does not appear that the Supreme Lodge of the Ancient Order of United Workmen had any authority or right to carry on its business in the state of Massachusetts, or, under the laws of Massachusetts, had any control over the Grand Lodge of the state of Massachusetts, or that the defendant ever recognized, or submitted to, the authority of the Supreme Lodge of the Ancient Order of United Workmen. (6) It does not appear that the Grand Lodge of Massachusetts, or its members or its beneficiaries, agreed to the separation of the Grand Lodge of Connecticut from the Grand Lodge of Massachusetts." A sufficient answer to this claim is found in the fact that the Supreme Lodge has never undertaken, as far as appears, to carry on any business in the state of Massachusetts, that it does appear that it had control over the Grand Lodge of Massachusetts in respect to the matter in which control was attempted to be exercised, that it does appear that the defendant recognized and submitted to the authority of the Supreme Lodge in that wherein authority was assumed, and that it appears that it was wholly unnecessary that the members or beneficiaries, who were the members, of the

Grand Lodge of Massachusetts, should agree to the division of its territory which was made when the plaintiff was organized in order that such division and organization should be effectual as to all parties concerned.

If we examine the complaint, we learn: That both the plaintiff and the defendant are subordinate bodies of the Ancient Order of United Workmen; that this order is a fraternal insurance organization with a membership extending throughout the greater part of the United States; that the order has a constitution and body of general laws for the conduct and government of its affairs; that the supreme representative authority is vested in a body known as the "Supreme Lodge"; that by authority of the Supreme Lodge, subject to the constitution and laws of the order, Grand Lodges are organized and exist in such states, territories, and districts as the Supreme Lodge may determine; that subordinate in turn to Grand Lodges are local lodges; that within the local lodges are grouped the members of the order; and that the constitution and general laws of the order provide that the territory comprising a Grand Lodge having jurisdiction over more than one state may be divided by the Supreme Lodge. Here we have outlined the familiar scheme of organization usually resorted to where bodies of persons, widely scattered or numerous, are associated for a common purpose. The ultimate source of authority is found in the individual members, who are gathered into the lowest organic groups and exercise their right of government by representative methods. There is a body of organic law which defines what the details of organization shall be and the powers committed to the governmental agencies thus created. To this body of organic law the whole organization, its agencies of government and members, are alike subject, and under it all the powers which are exercised within and in the name of the organization are exercised, and all its rights and privileges enjoyed. This law, which is the expression of the will of the membership, enters into all the relations created by the organization and operates to define and limit them and the rights and privileges which the organization bestows. By this organic law there is created, as a part of the chosen system of government, a representative body in which is reposed a supreme authority as respects organization, government, regulation, and discipline, which is defined by the fundamental law. Between it and the individual units of membership are one or more intermediate bodies, subordinate to the supreme body, also existing by the fundamental law, and all exercising authority (and in the event of two or more, gradations of authority) which is conferred under and defined by that law. These various bodies, supreme or subordinate, are in no sense separate and independent. They are only interrelated parts of a single, com-

prehensive, unified system existing as the result of the will of the membership of the general body, under a common law which comes from that membership, subject to a common authority created by that membership, and seeking common ends which are the concern of every member.

In the situation before us, the organic law of the order is written in what is known as the constitution and general laws. The Supreme Lodge has been made the repository of the supreme power defined by and subject to this law. The Grand Lodges are by the provisions of this law its subordinates in the scheme of government, and, to a certain extent at least, its creations. We have no means of knowledge afforded us in the complaint as to all the provisions of the constitution and general laws of this order; but we are told that the Supreme Lodge has therein been given authority to divide the territory over which the defendant was given Grand Lodge jurisdiction prior to October 17, 1901, and that suffices to inform us that the action of the Supreme Lodge which created the present situation was one in the execution of a power conferred by the will of the membership of the order, and in respect to a subordinate agency of the order subjected by that will, which is the law of its being, to the exercise of that power. This, and not the laws of Massachusetts, is the source of the authority exercised. The defendant seems to rely upon the fact that the defendant has been incorporated under the laws of Massachusetts as affording it an exemption from the operation of the laws of the order, or at least, that one with which we are now concerned. It is as difficult to see why this result would necessarily flow from the mere act of incorporation, regardless of its terms, as it is to discover how, if that was the result, it could retain its appointed place in the organization to which it belongs and serve its allotted purposes as an agency of that organization. It also relies upon certain statutes of that state regulating the operation of benefit insurance associations as prohibitive of the exercise by the Supreme Lodge of the authority in question, with the results claimed for it. We have occasion later to notice that this reliance is not well placed. The situation thus presented possesses striking analogies in many respects to that which frequently exists in general church organizations, where the individual church is the member of a larger body, with gradations of authority which finally rests in some central body or authority, which has the general ultimate power of control, more or less complete, over the whole membership and its organized parts. Such an organization was under consideration by the United States Supreme Court in *Watson v. Jones*, 80 U. S. 679, 20 L. Ed. 666, and the principles there laid down as to the position and power of the central authority and the conclusive effect

which must be given to its action have a distinct pertinence to the situation here presented.

This analysis of the conditions found in the organization of this order has an important bearing upon several aspects of this case; but, when considered in connection with the authority conferred upon the Supreme Lodge, it establishes beyond question that when it took its action dividing the territory over which the jurisdiction of the defendant extended, and took from that territory the state of Connecticut and organized the Connecticut members of the order into a newly created Grand Lodge, which should thenceforth have jurisdiction within the territory of the latter state and over the members of the order who should be resident therein and did no more, it was acting with respect to the internal affairs and concerns of the order, and was in no sense carrying on business within the state of Massachusetts. Acting as it did pursuant to the organic law of the order, its action was binding upon every subordinate body and individual member and needed no assent on the part of the defendant to make it operative. If assent, however, were needed it is to be found in the action of February 25, 1902, recited in the complaint.

The complaint alleges that the order is a fraternal insurance organization. The rights of its members are, accordingly, something more than that of social association. Rights of property are attached to membership. A foundation for the intervention of courts of equity is thus laid. *Rigby v. Connol*, 14 L. R. Ch. Div. 482. It also appears that the defendant has in its hands certain funds held for the protection of its members in their pecuniary rights. These funds partake of the character of trust funds, and equity will therefore see that the trust is enforced. *Fawcett v. Iron Hall*, 64 Conn. 170, 184, 29 Atl. 614, 24 L. R. A. 815; *Burke v. Roper*, 79 Ala. 138; *State Council v. Sharp*, 38 N. J. Eq. 24, 27. The relation of the parties to each other as subordinate bodies of an order of which the Supreme Lodge stands at the head, as already indicated, and with the powers and authority already indicated, is set up. It is alleged: That the defendant for more than 20 years prior to October 17, 1901, had existed as an organized Grand Lodge forming a part of this system and having jurisdiction conferred upon it for Grand Lodge purposes by the authority which was over it and over the members of the order resident in the New England States, and among these were many residents of Connecticut; that on October 17, 1901, while this situation continued, action was taken by the Supreme Lodge, to which attention has already been directed, dividing the territory embraced within the jurisdiction of the defendant, and thereby separating from the defendant Grand Lodge the members thereof resident in Connecticut, many in number and

gathered into local lodges, and organized such members and lodges into the plaintiff Grand Lodge thus newly created; and that this division and separation took effect November 11, 1901. It is alleged: That at this time the defendant had in its hands certain funds and property enumerated in paragraph 32, which equitably belonged to the members of the order within its jurisdiction as it was prior to the separation, and including therefore the Connecticut members; that it also held moneys which had been recently paid into what is known as the beneficiary fund by the members of the order within the territory of the defendant under a call issued by it pursuant to the rules of the order for the purpose of meeting anticipated death claims and as the equitable payment of the individual members of their equitable share of the liabilities of the defendant for beneficiary claims due at the date of separation; that a considerable sum was thus paid by the Connecticut members who were organized into the plaintiff; and that said sum so paid in and on hand was not needed for the payment of death claims or beneficiary liabilities maturing prior to said date, but inured to the benefit of the defendant thereafter. These facts, more fully set out in the complaint, are the essential ones of the plaintiff's claim for an equitable accounting. Other facts are alleged in aid of the case thus presented, but the substance of the plaintiff's claim, save in one respect hereafter noticed, is to be found in the situation which is thus outlined.

The plaintiff says that under its allegations it is entitled to represent the rights of its members who by the action of the Supreme Lodge became separated from the defendant Grand Lodge. We do not understand the defendant to deny this proposition, save as it, as an incident to its assumption that the complaint is one upon a contract, urges that the plaintiff, being a corporation organized in January, 1902, is not identical with the voluntary organization made in October, 1901, and not the party to whom the contract ran, and that therefore, in the absence of an allegation of an assignment or transfer to it, it has no right, title, or interest in or to any of the funds in question which will enable it to maintain the action. The allegations that the newly created Grand Lodge of Connecticut, immediately upon its creation, became the representative of the Connecticut members of the order, and that the Grand Lodge of Connecticut which before January, 1902, had been unincorporated, was then incorporated, and thereupon under the laws of the order succeeded to all the rights of the pre-existing voluntary organization, when read in connection with the other allegations of the complaint properly interpreted, dispose of this contention. All the funds and property which the defendant as a benefit association had gathered together prior to the separation and held at that time were trust funds. They

were held in trust for the purposes designated by the laws and rules of the order, and every member had an interest therein of some kind. *State Council v. Sharp*, 38 N. J. Eq. 24, 27. The complaint alleges that this interest, as respects the funds and property enumerated in paragraph 32, was that of an equitable ownership. It was entitled to establish this fact, which might well be true, and to establish it by showing that they were held for the protection of the members as insurance beneficiaries or for the security or prompt payment of the claims of the members as such beneficiaries. In the case of the beneficiary fund, the allegations as to its purpose and use and the sources from which the moneys in it at the date of separation were derived establish most directly the equitable interest therein of every member. *Fawcett v. Iron Hall*, 64 Conn. 170, 184, 29 Atl. 614, 24 L. R. A. 815.

When the separation was accomplished by the supreme authority of the order pursuant to power vested in it by its organic law, which defined and limited the relations of all the members and subordinate bodies to each other and to the order itself, and the Connecticut members were gathered into a newly created Grand Lodge, whatever equitable ownership or interest in the funds or property of the Grand Lodge of Massachusetts the members so separated had would not, upon the facts alleged, and in the absence of other facts which might put a different aspect upon the situation, be lost to them, but would go with them into their new relations. It is well settled, in consonance with reason, that, when individuals or a portion of a corporate body secede from the main body, they leave behind them all its rights and funds and can successfully urge no claim thereto. *Goodman v. Jedidjah Lodge*, 67 Md. 117, 126, 9 Atl. 13, 13 Atl. 627; *Smith v. Smith*, 3 Desaus. (S. C.) 557. But the situation presented by the allegations of the complaint is a radically different one. The Connecticut members took no voluntary action. They were the subjects of the action of the order to which they belonged and continued to belong. They were taken out of their former Grand Lodge associations and into others by the power which was alike over them and over their former associations and pursuant to the organic law of the order to which all concerned had become subject. The Grand Lodge of Massachusetts, with which by the commandment of the order they had been affiliated, had in gathering its benefit funds been simply a part of the machinery of the order provided by its constitution and laws to carry out its purposes and the better secure its privileges to the members committed to its Grand Lodge jurisdiction. The trust which it was executing in respect to these funds was a trust being executed by it as an agency of the order. To hold, under these circumstances, that the exercise by the Supreme Lodge of its authority to divide the territory over which a

subordinate jurisdiction had been committed to the Massachusetts Grand Lodge was attended with the result, in the absence of law or regulation of the order to that effect or other facts not appearing, of depriving the separated members of what had been in equity theirs and giving it to these who remained, would be the height of injustice and inequity—an injustice and inequity which the law will not sanction. *Merrill Lodge v. Ellsworth*, 78 Cal. 166, 20 Pac. 399, 400, 2 L. R. A. 841. Equity will see to it that such result is not accomplished and will accord to the separated members an accounting for the funds and property in the hands of the defendant at the time of the separation in so far as they may be able to establish an equitable interest therein in them at that time.

The complaint sets out certain votes of the parties hereto passed subsequent to the separation, by force of which it is said that they then, for the consideration of their mutual undertakings, agreed upon the basis upon which this accounting should be made in so far as the moneys in the beneficiary fund are concerned, and that upon this basis, in view of other facts alleged, the plaintiff is entitled to receive the amount of the payments of the Connecticut members made under call No. 265, to wit, \$11,763. A question is presented as to the true interpretation of the language of the votes which express this claimed agreement. This question we have no occasion to consider, since it concerns only a portion of what the plaintiff claims to recover, and a reformation is prayed for in the event of an interpretation unfavorable to the plaintiff's contention.

It remains to notice certain of the reasons of demurrer, the consideration of which has not been directly involved in what has already been said, to discover if any of them as addressed to the complaint rightly interpreted contains a valid objection to the plaintiff's recovery. One of them is to the effect that it does not appear that either the unincorporated Grand Lodge of Connecticut or the plaintiff has or ever had any authority to carry on its business in the state of Massachusetts, or that two-thirds of the certificate holders of the defendant ever consented to, voted to make, or ratified the contract claimed to have been entered into between the Grand Lodge of Connecticut and the defendant. This statement involves an appeal to a statute of Massachusetts. 2 Rev. Laws, c. 119, § 11. In so far as the doing of business is concerned, it is sufficient to observe that it does not appear that either the plaintiff or its unincorporated predecessor has ever undertaken to do business in Massachusetts, or that the doing of business within that state was or is involved in, or will result from, the division of the defendant's territory by the Supreme Lodge. In so far as the statute appealed to may be said to have or have had a wider application to the situation created by the division and to the rights of the Connect-

icut members, if it be assumed that the court might, upon demurrer, take judicial notice of the existence and provisions of foreign statutes not pleaded, and thereupon determine what the law of such jurisdiction is, we are unable to discover in the statute to which we are referred anything which made the act of the Supreme Lodge in dividing the territory over which jurisdiction for the purposes of the order was for the time being confided to the defendant a prohibited one, or which attempts to say that in such an event equity might not be done to all who were affected.

It is asserted that it does not appear that the defendant had any right, power, or authority to pay over to the plaintiff any of the moneys collected from assessments, or to give to it any portion of the funds which the defendant held. It certainly does not appear that the defendant is absolved from the duty of rendering unto others that which belongs to them in right and equity, and that is enough.

The assertion of one of the reasons, that it does not appear that all the claims by reason of deaths occurring prior to November 1, 1901, had been paid, possesses no significance. It does appear that, whether actually paid or not, the amount claimed to be shared represents a balance over and above the total amount of such claims. If the defendant has neglected to pay its matured obligations, that fact cannot stand in the way of the plaintiff's recovery.

As for the assertions of other reasons, that it does not appear that the funds and property belonging to the defendant were not held for the benefit of and were not needed by the beneficiaries and certificate holders of the defendant, were not held for the sole purpose of paying such beneficiaries and certificate holders, and have not been expended, and necessarily expended, for the purposes of and under the contracts made by the defendant with its members, they do not go to the merits of the plaintiff's contention, since it does sufficiently appear that they were not, after the division, held for the benefit of its former Connecticut members, were not needed to meet any demands in favor of such members thereafter accruing or demands in favor of any members already accrued, and have not been expended in the satisfaction of such demands. It appears that, in so far as they may have been held, needed, or used for the benefit or in the interest of its membership, membership was exclusive of its former Connecticut members, and that, whatever membership contracts were protected thereby or satisfied therefrom, those of the separated Connecticut members were not among them.

It is said that it does not appear that the defendant has ever refused to make arrangements with the plaintiff or its unincorporated predecessor for the disposal of the funds and property enumerated in paragraph 32 of the

complaint, that it does not appear that the plaintiff or its said predecessor ever attempted to make any arrangement with the defendant for the disposal of such funds and property or requested the defendant to make any such arrangement, and that it does not appear that the defendant has the power to make such arrangement. It is alleged, however, that the defendant, having paid one-half of the amount claimed on account of these funds and this property, has refused to pay the claimed balance, and this is a sufficient averment of the defendant's delict. The matter of power has already been sufficiently noticed.

There is error, the judgment is set aside, and the cause remanded, with direction that the demurrer to the complaint be overruled, and the case proceeded with according to law. All concur.

(81 Conn. 137)

# ALDERMAN v. CITY OF NEW HAVEN.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

## 1. LICENSES — MUNICIPAL CORPORATIONS — CONSTRUCTION OF SEWERS OVER LAND OF INDIVIDUALS.

A city intended to obtain land for a street along a route selected for a sewer. The owner orally proposed to give the city the right to construct and maintain the sewer if it would abandon the project of laying out the street, and he was not assessed benefits, and was allowed to connect with the sewer. The city accepted the proposition and constructed the sewer with the acquiescence of the owner. No writing was executed by the owner. *Held*, that the city did not construct the sewer under a mere naked license from the owner uncoupled with an interest in the subject, but under an agreement, which, if reduced to writing, would have been enforceable as against the owner and his successors in title, and equity would impose on them an obligation as effective as a contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 117.]

## 2. EASEMENTS—ACQUISITION—ADVERSE USE.

An easement may be acquired by adverse use during 15 years.

## 3. SAME.

The use by a city of the land of an individual for the maintenance of a sewer laid through it is none the less adverse as against the individual because it began under a contract with him, where the city claimed a right resulting therefrom and the attending circumstances, or from the circumstances themselves.

## 4. SAME.

A claim of right by a city to maintain a sewer through the land of an individual is effectual to create an adverse holding, though the foundation of the claim was in equity based on an oral contract whereby the city was to have the right to construct and maintain the sewer on specified conditions, which were complied with.

## 5. ADVERSE POSSESSION—POSSESSION—SUFFICIENCY.

It is sufficient for the creation of an adverse possession that the possessor enters and possesses the land as if the same were his own.

## 6. EASEMENTS—ACQUISITION—USE—KNOWLEDGE.

A city constructed a sewer through the land of an individual under a proposition made by him, and continuously maintained it for 7 years during the life of the individual and 17 years

immediately thereafter. During the period, the visible connections with the sewer were such that its existence, location, and character would become known to any person making such an inspection of the premises as an ordinarily prudent person would make. The city from time to time entered by its employees on the premises to clean and repair the sewer. *Held*, that the possession and use were so open that knowledge thereof would be imputed to the individual and his successors in title.

## 7. SAME.

An owner gave a city the right to construct and maintain a sewer through his land, and the city constructed the sewer without any written agreement therefor and maintained it under a claim of right until the owner's death, 7 years later, and for 17 years thereafter its possession and use were open and under a claim of right. *Held*, that it acquired an easement by prescription to maintain the sewer.

## 8. SAME.

On the issue of the right of a city to maintain a sewer through the land of an individual, it appeared that the son of the remote grantor made on behalf of the grantor a proposition to the board of public works to give the city the right to construct and maintain a sewer on specified conditions, which the city accepted and constructed and maintained the sewer for over 24 years. The grantor acquiesced in the construction of the sewer. *Held*, that evidence of what occurred at the meeting of the board of public works when the son of the grantor made the proposition was admissible as a part of the history leading up to the construction of the sewer.

## 9. EVIDENCE—RECORDS OF COMMON COUNCIL OF CITY—ADMISSIBILITY.

The records of the council of a city disclosing a report to it of the board of public works, and its action thereon, are admissible to show its doings.

## 10. SAME.

On the issue involving the right of a city to maintain a sewer through the land of an individual, the records of the council of the city, disclosing a report to it of the board of public works with a reference to a proposition by the owner of the land to give the city the right to construct and maintain the sewer, and its action thereon, were admissible to show the city's acceptance of the proposition, and that it acted on the strength of it.

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Action by Annie Alderman against the City of New Haven for damages and for an injunction, relying on the alleged unlawful maintenance by defendant of a sewer across plaintiff's land. From a judgment for defendant, plaintiff appeals. Affirmed.

George E. Beers and Harry W. Doolittle, for appellant. Edward H. Rogers, Corp. Counsel, and Leonard M. Daggett, for appellee.

PRENTICE, J. The relief sought in this action, whether legal or equitable, is asked by reason of a claimed invasion by the defendant of a legal right of the plaintiff. The right alleged to have been invaded is the plaintiff's right of property in the lands described in the complaint. The claimed invasion results from the maintenance, past and present, of a sewer through and over those lands. The defendant in its behalf asserts its unqualified right to do what it has done.



The sewer in question is an underground trunk line. It was built in 1881. The route chosen for it by the city lay through land of Robert M. Burwell and an adjoining owner, named Tuttle. The city's original plan was to obtain a right of way over these lands by laying out a street along the projected route in extension of an existing street and to build the sewer within it, and proceedings to that end had, in 1881, been begun and were pending before the board of public works. At a public hearing appointed by that board upon the subject, Burwell, acting by his son Merritt, who had authority to act for his father, together with Tuttle, appeared and opposed the opening of the proposed new street. Each then made the proposition that he would give to the city the right to construct and maintain the sewer over the proposed route, which is that of the existing sewer, if the project of laying out the street was abandoned, he be not assessed benefits for such construction, and be allowed to connect with the sewer. This proposition was thereupon referred to the common council, approved, the proceedings for the lay out of the street discontinued, and the board of public works authorized to secure from the landowners the proposed right of way. It did not appear that any writing was ever executed by Burwell, but the minds of the parties met upon the proposition made by him, and the city proceeded to construct the sewer as proposed. All this was with the knowledge and assent of Burwell, who was present almost daily during the progress of the work and gave such directions as he wished as to branch connection provisions, which were complied with, and in all things in relation to the construction of the sewer, the assessment of benefits, and the use of the sewer when built, the parties conformed to and acted in pursuance of the terms of Burwell's proposition. Burwell continued to own said land and to make use of the sewer in connection therewith until his death, in 1888, leaving the land to his widow, who in 1895 conveyed a portion of it, being one of the pieces of land described in the complaint, to her son Robert, who in turn conveyed the same to one Stiles in 1898. Another son, Merritt, in 1897 conveyed another portion, being the other piece described in the complaint, to Stiles in 1897. The chain of title to this piece from Mrs. Burwell to Merritt is not given in the record. February 17, 1903, Stiles quitclaimed both pieces to the plaintiff. Stiles at the time of the acquisition of his titles was fully advised by his grantor, Merritt, who was the son who represented his father in making the proposition recited, of the existence of the sewer, and during the whole period of its existence the visible and apparent building connections therewith and other outward manifestation of its presence have been such that its existence, location, and character would become known to any person making such inspection of the prem-

ises as an ordinarily prudent person would make, and the city has from time to time by its employes entered upon the premises for the purposes of cleaning and repairing the sewer, which since its construction has been continuously in use by the city as a part of its general sewer system. The connections with the buildings on the plaintiff's premises, which were made shortly after the sewer was built, have ever since continued, and said buildings have continued, to be served by said sewer. It did not affirmatively appear that the owners of the property from Robert M. Burwell to Stiles, except Merritt Burwell, had actual knowledge of the location of the sewer. It is found, however, that the visible indications of its location were such, and the acts of the city in connection therewith such, that they were all chargeable with knowledge of its existence, location, and character, and of the claimed right of the city to its maintenance.

It thus appears that the defendant did not construct, and for the seven years of Robert M. Burwell's life and ownership of the property after 1881 maintain, the sewer under a mere naked license from him; that is, under an authority or power to do so uncoupled with an interest in the subject. *Foot v. New Haven & N. Co.*, 23 Conn. 214, 223. It acted under an agreement, or the assumption shared by both parties of an agreement, entered into between it and Burwell, for a valuable consideration, whereby, in return for certain concessions and privileges, it was to have the right to build the sewer where it was placed and now is and to there perpetually maintain it. Such an agreement, reduced to writing, signed and duly recorded, would have constituted an enforceable one as against Burwell and his successors in title. None such having, as far as appears, been embodied in a writing, there was nothing which of itself would create obligations which the law would enforce; but, when the parties acted as they did in the situation which had developed, conditions arose which equity would not ignore. The finding is to the effect that there was an agreement of the minds—an agreement in form. It matters little whether or not this was so. It was at least true that the city assumed the existence of such an agreement and acted in reliance upon that assumption, and that Burwell must have known that such was the fact. When therefore, with this knowledge, he stood by and not only saw the city expend its funds in the belief it held, but also actively assented to, encouraged, and participated in its action—when he saw the city conforming in all things to the terms of his proposition and accepted all his days the benefits which were to come to him by its terms—he placed himself in a position where, agreement in form or no such agreement, equity and good conscience would impose upon him obligations as effective as those of any contract. We have, then, for these seven years, however the situation is



viewed, all the elements of a user by the city adverse to Burwell. An easement will in this state be acquired by an adverse use of 15 years. *Coe v. Wolcottville Mfg. Co.*, 35 Conn. 175, 177; *Legg v. Horn*, 45 Conn. 409, 415. The user of the city was actual, continuous, known to Burwell, and exclusive of and adverse to him. It was none the less adverse for having been begun under a contract in form, or the assumption of the existence of such a contract, since there was a claim of right resulting therefrom and the attending circumstances or from the circumstances themselves. *Comins v. Comins*, 21 Conn. 413, 416; *Legg v. Horn*, 45 Conn. 409, 415. The claim of right was no less effective to create an adverse holding for the reason that its foundation was in equity. So it was in the case last cited, and here, as there, it was one which a court of equity would have enforced. *Williams v. Morris*, 95 U. S. 444, 445, 24 L. Ed. 360; *Legg v. Horn*, 45 Conn. 409, 415. It is sufficient for the creation of an adverse possession that the possessor enters and possesses as if the land were his own. *Johnson v. Gorham*, 38 Conn. 513, 520; *Carney v. Hennessey*, 74 Conn. 107, 111, 49 Atl. 910, 53 L. R. A. 699, 92 Am. St. Rep. 199.

Passing now to the 17 years which immediately followed Robert M. Burwell's death and bring us down to the plaintiff's acquisition of title, we find that essentially the same condition of things continued during this entire period. The defendant's possession and use remained an actual and exclusive one. It was under a claim of right, the same claim as before Burwell's death, and therefore adverse. *French v. Pearce*, 8 Conn. 439, 443, 21 Am. Dec. 680. The possession and use were so open, visible, and apparent, and of such a nature, that, in the absence of actual knowledge thereof and of their adverse character on the part of the successive fee owners, such knowledge will be imputed to them. *School District v. Lynch*, 33 Conn. 330, 334; *Carney v. Hennessey*, 74 Conn. 107, 111, 49 Atl. 910, 53 L. R. A. 699, 92 Am. St. Rep. 199; *Clark v. Gilbert*, 39 Conn. 94, 97. The continuity of these conditions was unbroken from the beginning. Such conditions have therefore attended the maintenance by the defendant of this sewer along its present route that a legal right to so maintain it was perfected, and an easement therefor created by prescription long before the plaintiff became the owner of her land. *Legg v. Horn*, 45 Conn. 409.

The plaintiff objected to the testimony of Merritt Burwell as to the proposition which he made on behalf of his father at the meeting of the board of public works, upon the ground that his authority to make the proposition and enter into an agreement with the city was not sufficiently established by his statement that for a number of years prior to his father's death he had had practical charge of the latter's affairs, and that his father told him to appear at the meeting and

object to the lay out of the sewer as proposed. The story of what occurred at the meeting was clearly admissible as a part of the history which led up to the construction of the sewer, and the authority of the son to fully represent the father in what he proposed, either originally or by ratification, is too apparent to admit of question.

The records of the court of common council disclosing the report to it of the board of public works, and its action thereon, were admissible to show its doings. *Wigmore on Evidence*, § 1861. The subject-matter was relevant, since it tended to show the city's acceptance of the Burwell proposition, and that it acted upon the strength of it.

Other rulings objected to were too unimportant to call for discussion, or the objections thereto have been waived.

There is no error. All concur.

(81 Conn. 213)

#### LEW et ux. v. BRAY.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

#### 1. BOUNDARIES—EVIDENCE—WEIGHT AND SUFFICIENCY.

Plaintiff sued to recover a triangular strip about 110 feet long and 1 foot 9½ inches wide on the westerly end extending to a point at a street at the easterly end from defendant, owning the land on the north of such strip. The point in dispute was the location of the northerly terminus of the plaintiff's westerly boundary line. Plaintiff was the earliest purchaser of a lot 168 feet deep. The ground was rough, and the surface at a point intermediate between the two ends of the boundary line of plaintiff's lot was about 12 feet below the level of the ground at the ends. *Held*, that the evidence showed that, in making the survey on the purchase by plaintiff, the parties did not follow the surface of the ground, but measured on a horizontal line, which carried plaintiff's boundary to the north-westerly corner of the strip, which was 168 feet from plaintiff's front line.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 184-194.]

#### 2. STATUTES—RETROACTIVE OPERATION—COSTS—TIME OF VESTING OF RIGHT.

Act 1907, p. 652, c. 97, amending Gen. St. 1902, § 769, enacted after the present action was begun, but before trial, provides that in tort actions tried in the superior court, court of common pleas, etc., if the damages found do not exceed \$50, plaintiff shall recover no more costs than damages, unless title to property is involved. Gen. St. 1902, § 1, provides that the repeal of an act shall not affect any action then pending. *Held*, that Act 1907 was broad enough to affect cases then pending and thereafter tried, as well as those brought subsequently, and Gen. St. 1902, § 1, concerning the construction of statutes, was not intended to limit the power of the Legislature in enacting laws, nor affect the construction of laws when the legislative intent was clear, and even if it was, being a mere legislative act, it must yield to later enactments.

#### 3. COSTS—NATURE OF RIGHT—STATUTORY PROVISIONS.

The right to costs is created by statute and depends upon the statutes in force at the termination of the action, and not those in force at its commencement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 5.]

**4. CONSTITUTIONAL LAW — RETROSPECTIVE LAWS—LAWS RELATING TO PROCEDURE.**

The Legislature has the power to enact laws relating to procedure which affect pending cases.

**5. COSTS—STATUTES—NATURE OF REMEDY.**

The taxation of costs relates to procedure only.

Appeal from Court of Common Pleas, New Haven County; William L. Bennett, Judge.

Action in the nature of ejectment by John Lew and wife against Thomas M. Bray. From a judgment for plaintiffs, defendant appeals. Affirmed.

The plaintiffs and the defendant own adjoining lots, which were purchased by them from the same grantor. The defendant's lot is located north of that of the plaintiffs. The land in dispute is a triangular strip about 110 feet long and 1 foot and 9½ inches wide on the westerly end extending to a point at a street at the easterly end. The plaintiffs claim the northerly line of this triangular strip as their north line, and the defendant claims the southerly line of the triangle as his south line. The point in dispute between the parties is the location of the northerly terminus of the plaintiffs' westerly boundary line. Their deed calls for a line 168 feet long measuring northerly from a street, which is their southerly boundary. They were the earlier purchasers. Before their deed was given, the westerly boundary was measured by them and a representative of the grantor, and a stake driven at a point 168 feet north of the street. The land over which the measurement was made is rough and uncultivated, and the surface at a point intermediate between the two ends of the boundary line is about 12 feet below the level of the ground at the ends. After their purchase the plaintiffs and their grantor, before the defendant had purchased his lot, erected a fence extending from the stake to the northeasterly corner of the plaintiffs' lot. The defendant claims that in making the measurement the parties followed the surface of the ground, and that this brought the point at which the stake was driven at the southwesterly corner of the triangular strip in question. By measurement on a horizontal line the northwesterly corner of the strip is the point 168 feet from the plaintiffs' front line. The defendant, having removed the fence and erected a stone retaining wall along the southerly line of the triangle, claims that the wall is upon the line occupied by the fence. The court found that the measurement was made on a horizontal line through the air and sustained the plaintiffs' claim as to the location of their northwesterly corner. From this finding, and from the court's action in taxing full costs, the defendant appeals.

Talcott H. Russell and Harry W. Doolittle, for appellant. El. P. Arvine, Henry G. Newton, and Frank J. Kinney, for appellees.

THAYER, J. (after stating the facts as above). We perceive no reason why the finding of the trial court should be corrected. The case turned upon the location of the northwesterly corner of the plaintiffs' land. The parties derive title from the same grantor; the plaintiffs' being the earlier purchase. By the terms of their deed, their northwesterly corner would be 168 feet, measured along their westerly boundary line, from a street on the south of their lot. Just before the deed was given, the plaintiffs and their grantor measured said westerly line and drove a stake at the northerly end of the line as thus fixed. Shortly after the deed was given, they jointly erected a fence from the point so fixed easterly along the plaintiffs' northerly line to a street upon the east of their lot. This was before the defendant purchased. It is agreed by the parties that, if the defendant's present wall stands upon the site of the fence thus erected, the judgment below was erroneous. There was conflicting evidence as to the precise location of this fence when erected, and the court has found that it did not stand upon the line now occupied by the defendant's wall, but that the defendant some time prior to building said wall took up a portion of the fence at the eastern end and replaced the same, setting it over upon the premises of the plaintiffs, and that when he built his wall he took up the westerly end of the fence and placed the westerly end of his wall 1 foot 9½ inches southerly of the fence line. The court also finds that the original measurement, made before the plaintiffs' deed was given, was made horizontally through the air, and did not follow the contour of the ground. The defendant claims that this finding is inconsistent with the evidence which has been certified, and with the finding of the court based thereon, that "the measurement was made with a tape measure about 50 feet long held a little way from the ground, perhaps a foot or so, and sometimes down on the ground." The distance in a horizontal line could be accurately arrived at, although measured in sections with the measuring tape kept near the ground and at a different elevation in the different sections, provided in each section it was held at right angles to the plumb line passing through the starting point. There is no such inconsistency between the different parts of the finding or between the finding and the evidence as to warrant this court in making the changes asked for.

The defendant assigns as error that full costs were taxed in favor of the plaintiffs. It does not appear in the record that the matter of the taxation of costs was brought to the attention of the court in the regular way by appeal from the clerk's taxation, or in any other way. As the plaintiffs raise no question on this ground, it will be assumed that the matter was properly brought to the court's attention. Under section 769,

Gen. St. 1902, which was in force when this action was begun, the plaintiffs could recover no more costs than damages, since the value of the property sought to be recovered is found to be less than \$50, and the damages were assessed at less than \$50, and the action was not brought to the court of common pleas by appeal. By an act (chapter 97, p. 652, Acts 1907) passed and in force before the case was tried, section 769 was amended, the provision as to the value of the property omitted, and the section, as amended, reads as follows: "In all actions founded on a tort tried in the superior court, of common pleas, or the district court of Waterbury, or any city court, and not brought to that court by appeal if the damages found do not exceed fifty dollars the plaintiff shall recover no more costs than damages unless the title to property or a right of way or to the use of water is in question, or unless the damages were reduced below said amount by reason of some act of the defendant pending the suit; in either of which cases the plaintiff shall recover full costs." As amended, the statute permits full costs in cases where the title to property is in question although the value of the property and the damages assessed are each less than \$50. The language is broad enough to include, and evidently was intended to include, cases thereafter tried, whether pending at the time the act took effect or thereafter brought. The right to costs is created by statute and depends upon the statutes in force at the termination of the action, and not those in force when it was commenced. *Taylor v. Keeler*, 30 Conn. 324, 326; *Supervisors of Onondaga v. Briggs*, 3 Denio (N. Y.) 173, 174; *Ellis v. Whittier*, 37 Me. 548, 550; *Brigham v. Dole*, 2 Allen (Mass.) 49, 51; *Fessenden v. Nickerson*, 125 Mass. 316, 317; *Begbie v. Begbie*, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141. The Legislature unquestionably has the power to enact laws relating to procedure and affecting pending cases. *Atwood v. Buckingham*, 78 Conn. 423, 427, 62 Atl. 616. The taxation of costs relates to procedure only. *Taylor v. Keeler*, supra; *Fessenden v. Nickerson*, supra. The provisions of title 1, c. 1, § 1, of the General Statutes of 1902, concerning the construction of statutes, was not intended to limit the power of the Legislature in the enactment of laws, nor to affect the construction of the laws when enacted where the legislative intent is clear. If they were so intended, being only legislative enactments, they must yield to the later expression of the legislative will. *Atwood v. Buckingham*, supra, 426. The defendant's contention that these provisions of the general statutes prevent the application of the act of 1907 to the present case is therefore without foundation. The costs were properly taxed in accordance with section 769, as amended.

There is no error. All concur.

(81 Conn. 101)

# DUNNING v. CROFUTT.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

## 1. ANIMALS—OWNERSHIP OF COLTS.

In replevin for a mare and three colts, the ownership of the dam by defendant carried the title to the three colts, which were conceded to be her offspring.

## 2. NEW TRIAL—GROUNDS—VERDICT AGAINST EVIDENCE—CONDITIONS.

Where, in replevin, plaintiff had verdict for three colts, together with other property, but the court ordered the colts, which were not the property of plaintiff, returned to defendant as a condition precedent to permitting the verdict to stand, on plaintiff's refusal to do so he may not complain of the verdict being set aside, and of being compelled to retry the question of ownership of all the property.

Appeal from Superior Court, Fairfield County; George W. Wheeler, Judge.

Replevin by Samuel S. Dunning, trustee, against Frederick B. Crofutt. From an order setting aside a verdict for plaintiff upon the latter's failure to surrender at the court's suggestion, the possession of part of the goods erroneously awarded him by the verdict, plaintiff appeals. Affirmed.

Howard W. Taylor, for appellant. Samuel A. Davis, for appellee.

HALL, J. The officer serving the writ replevied to the plaintiff one gray mare, three colts, and a quantity of hay, corn, and tobacco. The verdict was for the plaintiff for all said property except the gray mare, which was by the verdict directed to be returned to the defendant. The defendant having filed a motion that the verdict be set aside, and a new trial granted, upon the ground that the verdict was against the evidence, the trial judge filed with the clerk this writing: "The within motion may be granted, unless plaintiff shall give up to defendant the possession of the bay colt, the gray colt, and the sucking colt described in the verdict, and file notice of his so doing within one week from date." The plaintiff having failed to file such notice, the verdict was set aside, and upon the plaintiff's appeal and motion all the evidence was certified to this court.

The two questions presented by the appeal are whether the court erred (1) in deciding that the verdict awarding the three colts to the plaintiff was against the evidence, and (2) in setting aside the entire verdict, when only that part of the verdict relating to the ownership of the three colts was found to be against the evidence. All the property described in the writ was, shortly before the commencement of this action in 1906, attached by the defendant officer as the property of William W. Foote, in an action in favor of Edward E. Harrison against said William W. Foote. Regarding the ownership of said property at the time of such attachment, the evidence discloses these facts: Sherman Foote, the father-in-law of the plaintiff and

the father of William W. Foote, died in 1888. By his will he left all his estate to the plaintiff with power to sell and invest the same and the income thereof, "but upon the following trusts, namely: \* \* \* Fourth. In his discretion to devote from time to time the income arising from all the lands I possess lying east of Brookfield Center, with the buildings thereon (which land includes the farm upon which the goods replevied were attached by the defendant) and all the stock and implements belonging thereto, for the support and maintenance of my son William W. Foote. Should my said son William W. Foote desire to live on that farm, he is to be allowed to do so, accounting to my said trustee for the income from said farm. My said trustee is also empowered to transfer the said farm to my said son, with all the stock and implements thereon whenever the said trustee shall deem it proper or advisable to do so." The plaintiff has never filed any account as trustee of said farm, or the income or proceeds thereof; nor has he kept any account of the same, or had any accounting with said William W. Foote. Since more than 10 years before the commencement of this action he has received none of the income or proceeds of the farm and has practically turned the farm over to William W. Foote, under an arrangement by which one Swanson has worked the farm on shares, paying over to William W. Foote, by direction of the plaintiff, one-half the proceeds. The property, when attached as aforesaid, was on said farm under said arrangement. Without repeating here the evidence before us regarding the purchase of the gray mare and the payment of the expense of getting her colts, it is sufficient to say of it that we deem it ample to sustain the conclusion manifestly reached by the jury in ordering the gray mare returned to the defendant, that she was not purchased by the plaintiff, that he had no interest whatever in her, but that she was bought and placed upon the farm by William W. Foote, and that the question of the title to the mare having been thus settled, by the verdict, and evidently, in the only manner thought by the trial judge to be justifiable upon the evidence, it followed, in the absence of evidence showing that any other than the general rule should be applied, that the ownership of the dam carried the title to the three colts, which were conceded to be her offspring. 2 Am. & Eng. Ency. Law, 348. The trial court therefore committed no error in holding that the verdict awarding the three colts to the plaintiff was against the evidence.

The order setting aside the entire verdict was not rendered erroneous by the fact that a part of it was supported by the evidence. The power of a trial court to set aside a verdict which is against the evidence, and to grant a new trial, is not limited to cases where the entire verdict is against the evidence. Whether, when several issues are

presented by the pleadings, a trial court may set aside a verdict as against the evidence and grant a new trial as to one issue only, as may be done by this court under section 803, Gen. St. 1902, we have no occasion to decide, since in this case but one issue regarding the ownership of all the property replevied is raised by the pleadings. The practice ordering a new trial of the entire case, unless that part which is found to have been erroneously included in the judgment or verdict shall be remitted or surrendered, has been sanctioned in this state as one beneficial to both parties to an action. *Noxon v. Remington*, 78 Conn. 296, 61 Atl. 963. But the plaintiff has no good ground to complain because he must retry the question of the ownership of property which the jury has properly found belonged to him. He could have avoided such retrial if he had surrendered that which the jury unlawfully awarded to him. To secure a further opportunity of contesting the question of ownership of the colts, he was willing to risk the expense and uncertain result of a new trial of the entire case.

There is no error. All concur.

(81 Conn. 76)

#### PARK CITY YACHT CLUB v. CITY OF BRIDGEPORT.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

##### 1. MUNICIPAL CORPORATIONS — SPECIAL ASSESSMENTS.

In an action to have an alleged illegal assessment for a public improvement set aside, evidence held insufficient to show that the assessment was unfair and unreasonable.

##### 2. SAME—GROUNDS FOR ASSESSMENT.

In assessing special benefits upon the owner of land adjoining a public improvement, the assessing authority must find that the whole effect of the contemplated improvement is to increase the value of the owner's property, and this result must be reached by weighing the facts tending to show injury, as well as special benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1061.]

##### 3. SAME—REVIEW BY COURT.

Charter of City of Bridgeport, § 2, authorizes the common council to lay out new highways and to alter, extend, or enlarge or discontinue the same, etc. Section 47 provides that the board of public works shall have exclusive jurisdiction of appraising benefits and damages. Section 48 requires it to ascertain what persons will be damaged by such improvement and the amount thereof above any special benefits. Section 59 permits any person aggrieved to apply to the superior court for relief. When an avenue was enlarged and altered, in widening the highway and extending it, the city removed a causeway, so that plaintiff could not get from its premises to the city thereby, and built a bridge north of the causeway, so that plaintiff could not have access from his property to the bridge by reason of intervening water without going some distance. Held, that the superior court, under section 59, in determining the question of special benefit, could consider the effect upon plaintiff's property of such improvement and any injurious effect upon the value of plaintiff's property resulting from the peculiar con-

struction of the highway, as well as any beneficial effect from other causes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1175.]

#### 4. SAME—APPLICATION FOR REVIEW.

An application to the court to set aside a special assessment, referring to the improvement, and describing it in the language used in the order of the common council and also as the one which the common council on July 5, 1901, ordered, sufficiently designates the improvement.

Appeal from Superior Court, Fairfield County; Edwin B. Gager, Judge.

Application by the Park City Yacht Club against the city of Bridgeport to have an alleged illegal assessment of special benefits for a public improvement set aside and for damages, etc. From a judgment for the city, plaintiff appeals. Judgment reversed and remanded for further proceedings.

John W. Banks, for appellant. James A. Marr, for appellee.

HAMERSLEY, J. Section 42 of the charter of the city of Bridgeport authorizes the common council, as they shall deem needful, to lay out new highways and to alter, extend, or enlarge any highway, and to discontinue or exchange the same for other highways, and to make and cause to be executed all such orders relating thereto as they shall judge proper. Section 45 requires the common council, before it shall determine to make any such public improvement referred to in section 42, to cause reasonable notice to be given of a meeting of the common council, at which meeting the common council shall hear all parties in interest who may appear and desire to be heard in relation thereto. Section 46 provides that, if after such hearing, the common council shall resolve to make any such public improvement, they shall appoint a committee or authorize the board of public works, whose duty it shall be to make a layout of such public improvement, and to report their doings to the common council, which report shall embody a survey and particular description of such public improvement, and, if such report shall be accepted and approved by the common council, it shall be referred to the board of appraisal of benefits and damages for action by them. On September 23, 1901, a special committee duly appointed to make a layout of the public improvement which is the subject of this proceeding reported to the common council that they had "laid out, altered, exchanged, discontinued, enlarged" Stratford avenue from Pequennock river to Seaview avenue, in accordance with the particular description, etc., submitted with and made a part of the report, and the common council thereupon accepted and approved said report and referred the same to the board of appraisal of benefits and damages to estimate damages and benefits resulting from said changes. This action of the common council completed a layout of the public improvement previously resolved upon by the common council by

which Stratford avenue was altered, exchanged, discontinued, and enlarged, as set forth in the report.

Section 47 of the charter provides that the board of appraisal of benefits and damages shall have exclusive jurisdiction of appraising, assessing, and apportioning all benefits and damages accruing or resulting to any persons from such public improvement mentioned in section 42. Section 48 provides that said board, at a meeting duly held, "shall ascertain and determine what person or persons will be damaged by such taking of land, or such public improvement, as aforesaid, and the amount thereof, over and above any special benefits such person or persons may receive therefrom; also what other person or persons will be especially benefited by such taking of land or public improvement, as aforesaid, and the amount thereof over and above any damages such person or persons may receive therefrom; also what other person or persons will receive an equal amount of damages and benefits thereby. But the whole amount of benefits assessed for any particular public improvement shall not exceed the whole amount of damages assessed on account of the said public improvement," and report the amounts thus ascertained and the names of the persons affected to the common council. Section 49 provides that, upon the acceptance of said report by the common council, certain proceedings shall take place, and that the common council shall fix the time within which such public improvement shall be opened for the public use, and at the expiration of the time so fixed may make and cause to be executed all such orders as they deem necessary and proper to appropriate the same to the public purposes for which the same are made. On January 6, 1902, the board of appraisal of benefits and damages reported to the common council on said layout, alteration, exchange, etc., of Stratford avenue a statement of damages and benefits to the owners of property adjoining said avenue, in which statement said board estimated and appraised the benefits of the plaintiff, the Park City Yacht Club, at \$138.61. On April 7, 1902, the common council adopted said report and confirmed the assessments therein made.

Section 69 of the charter provides that any person aggrieved by any act of the board of appraisal of benefits and damages, or of the common council, in making assessments as authorized may, within 30 days after public notice is given of acceptance by the common council of the report of said board, make application for relief to the superior court, and, said application having been duly made and served, the superior court "may, by committee or otherwise, inquire into the allegations of such application duly made as aforesaid, and may confirm, annul, or modify the said assessments or make such order in the premises as equity may require, and may allow costs to either or neither party, at its dis-

cretion and said court may inquire into the validity of all of the proceedings upon which said assessment is based." Within the time limited the plaintiff made this application to the superior court for relief. The application alleges, in substance, that the improvement in question, namely, the layout, alteration, exchange, discontinuance, and enlargement of Stratford avenue contemplated such a construction and working of the highway established in place of the one previously existing that the plaintiff would be largely shut off from free and direct access from its adjoining property to the main traveled path of the highway, also, that the improvement thus established does not benefit, but, on the contrary, injures, the plaintiff's property, and that the assessment of \$188.61 made upon the plaintiff is unfair, unreasonable, and therefore illegal. The application prays that said assessment may be set aside, and the plaintiff allowed just damages, or other and further relief. The application appears to have been tried to the court upon the denial of these allegations. The judgment finds these issues for the defendant and adjudges that the assessment of benefits as made be confirmed, without costs to either party. This judgment must stand, unless the finding for appeal discloses such material error in the decision of questions of law as requires a new trial.

The situation as disclosed by the evidence and found by the court appears to be this: At the time of the establishment of the improvement, Stratford avenue in front and north of the plaintiff's property had a width of 58 feet and consisted, in part at least, of a causeway which extended westerly across an arm of Bridgeport Harbor, by which causeway access was had to the city proper. North of this causeway there was open water. The south line of the new highway is coincident with the south line of the old highway in front of the plaintiff's premises, and the north line is 120 feet distant therefrom, so that the lines of the new highway included the causeway adjoining the plaintiff's property and beyond that land covered by water. In opening the new highway for public use, the city removed the causeway extending across the arm of the harbor, so that the plaintiff could not get from its premises to the city proper by the causeway, and in place of and north of the old causeway the city build an iron bridge within the lines of the highway, 60 feet in width, the south line of which bridge, in front of the plaintiff's premises, is several feet north of the north line of the former highway. This bridge constitutes the portion of the new Stratford avenue used by the traveling public, and is so constructed that a gap of water is left upon its southerly side, so that the plaintiff cannot get access from its property to the bridge, for the purpose of going west, without going some little distance east on a narrow remnant of the old causeway which still

adjoins its premises. These changes were made by the city subsequent to the confirmation of the assessment upon the plaintiff.

There is nothing in these facts to indicate error in the judgment. Evidence of them was admitted without objection, and witnesses were introduced by the plaintiff to prove that the effect of a highway thus constructed was to depreciate the value of the plaintiff's property, and witnesses were introduced by the defendant (among whom was a member of the board of appraisal which made the assessment in question), who testified that the effect of a highway thus constructed was a benefit. The court might well find, as it appears by its judgment it did find, that the plaintiff had failed to prove its essential allegation, namely, that the assessment upon it was unfair, unreasonable, and therefore illegal. But the trial judge also states in the finding that he ruled and held, as a matter of law, that "the only question open upon this proceeding is the effect of the widening of Stratford avenue," and that in consequence of this ruling he "did not in fact estimate the effect of said changes other than the widening of said highway upon the value of appellant's property. For the purposes of this appeal I do not find, however, that such changes did have a material effect upon said value." The only reason of appeal assigned by the plaintiff is that the court erred in making this ruling.

It is well settled that, in assessing special benefits upon the owner of land adjoining a public improvement, the assessing authority must find that the whole effect of the contemplated improvement is to increase the value of the owner's property, and this result must be reached by weighing the facts tending to show an injury, as well as those tending to show a special benefit. *Nichols v. Bridgeport*, 23 Conn. 189, 211, 60 Am. Dec. 636; *Naugatuck R. Co. v. Waterbury*, 78 Conn. 193, 196, 61 Atl. 474; *Cook v. Ansonia*, 66 Conn. 413, 430, 34 Atl. 183. The public improvement in this case was of a very peculiar nature, and one which the common council thought called for the exercise of all its charter powers in respect to highways. Its main purpose was to open and construct a public street across a sheet of water, and the particular description of the public improvement in the vote establishing it indicates a method of construction necessarily involving an effect upon the plaintiff's property such as that which might follow from the physical changes proved before the trial court, and we cannot doubt that in such a case the city board of assessment and the superior court were bound to consider any injurious effect upon the value of the plaintiff's property which might result from the contemplated (peculiar) construction of the highway, as well as any beneficial effect which might result from other causes, in determining whether or not the whole effect of the improvement

was to specially benefit the plaintiff. The finding does not state directly whether or not the court found to be true the allegation of the complaint that the improvement ordered by the city contemplated a construction such as that proved upon the trial. It would, perhaps, appear from the memorandum of decision, that the fact alleged was a fair inference from the facts proved. The precise scope of the ruling may not be quite clear; but it seems evident that the court held that it had no jurisdiction, under section 59 of the charter, in determining the question of special benefit, to take into account the effect upon the value of the plaintiff's property of a public improvement which contemplated and required a construction such as that actually carried out and proved upon the trial. The provisions of the charter do not so limit the jurisdiction of the court.

The action of the special committee defining the public improvement and making a "layout" of the same, as stated in their report to the common council, is, under the charter, the layout of the improvement, as stated in the report, and in this case that improvement, as established in front of the plaintiff's premises, was a highway involving an alteration, extension, and practical discontinuance for public use of portion of a previously existing highway, and this improvement is sufficiently referred to in the application as the one which the common council on July 15, 1901, ordered to be laid out. It would seem from the record that the board of appraisal, in assessing the plaintiff's property as specially benefited by this improvement, took into consideration the possible damage to that property by reason of the peculiar nature of this improvement and the physical changes involved in its construction and necessarily contemplated in its layout, and found that the whole effect of the improvement upon the plaintiff's property was a special benefit. It may be that the trial judge would have reached the same conclusion had he felt at liberty to take into consideration the evidence produced by both parties upon the trial; but that he did not do so is an error, and the terms of the finding compel us to treat it as a harmful error.

There is error, the judgment of the superior court is reversed, and the cause remanded for further proceedings according to law. All concur.

(81 Conn. 111)

**MOLINE JEWELRY CO. v. DINNAN.**

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

**1. SALES — VALIDITY OF CONTRACT — WHAT LAW GOVERNS.**

Where a manufacturing company in Iowa, soliciting in Connecticut through an agent, obtained an order for jewelry to be delivered free on board transportation companies in Iowa, the sale was made in Iowa, and Gen. St. 1902, §

1381, making it a misdemeanor to sell any article having thereon a mark that the gold therein is different from or better than the actual quality used is not applicable, and did not invalidate the sale.

**2. SAME — RESCISSION BY BUYER — FRAUD — BREACH OF CONDITIONS—RIGHT TO RETURN GOODS.**

If jewelry purchased from plaintiff complied with the written order therefor, defendant could not, the sale having been made in Iowa, return it to plaintiff because such jewelry could not lawfully be sold in Connecticut because of fraudulent stamping, defendant being liable for the agreed price, in the absence of fraud, if the goods received were what he bought; but if the sale was procured by fraud, or if the goods received did not in kind or quality, or in being stamped in a certain manner, substantially conform to defendant's order, he could refuse to accept them.

**3. SAME—RENDERING GOODS UNSALABLE—EFFECT.**

Where defendant purchased jewelry from plaintiff in Iowa, even if the goods conformed to defendant's order in all other respects, yet if plaintiff, without defendant's authority, caused the goods to be so stamped as to render their sale in Connecticut unlawful, defendant could refuse within a reasonable time to accept them, and could return them to the vendor, and statements in the printed order that the latter would buy, replace, or exchange goods did not deprive him of this right.

**4. EVIDENCE — EXTRINSIC EVIDENCE AFFECTING WRITINGS—CONTRACT OF SALE.**

In an action for the price of jewelry, the defense being misrepresentation and that plaintiff had the goods so stamped as to render their sale illegal in this state, letters passing between plaintiff and defendant, including those written by and to defendant's attorney, relative to defendant's refusal to accept the goods and his reasons therefor, were admissible to show the conduct of the parties, but not to change the written order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1787-1793.]

**5. SAME — OPINION EVIDENCE — IDENTITY OF ARTICLES.**

In an action for the price of jewelry, the defense being fraud and misrepresentations, the printed order therefor and all the jewelry being before the jury, defendant was properly allowed, as a witness, to indicate the articles covered by the different items of the order, if it did not require an expert to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2234.]

**6. SAME—SUBJECTS OF EXPERT TESTIMONY—QUALITY OF JEWELRY.**

In an action for the price of jewelry, the defense being misrepresentations as to quality and that the goods were fraudulently stamped to indicate a superior class of goods, expert testimony that the jewelry was marked so as to indicate that they were made of a better quality of gold than that actually used in them was admissible to prove either that such goods were inferior in quality to those ordered, or that they were rendered unsalable from being so marked without defendant's order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2328.]

Appeal from Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Action by the Moline Jewelry Company against John J. Dinnan. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

George E. Beers and Fred C. Russell, for appellant. Osborne A. Day, for appellee.

HALL, J. The plaintiffs are copartners and manufacturers and wholesale dealers in jewelry in Iowa City, Iowa, with an office also in Moline, Ill. It appeared in evidence in the trial court that at the solicitation of the plaintiffs' agent, in this state, the defendant, who has a store at New Haven, on April 18, 1906, sent them an order for certain jewelry. The order was upon a printed form, furnished by the plaintiffs' agent, and which is made a part of the complaint. At the head of the form are these words: "Following is a list of goods and terms for our \$322.25 order." There follows an agreement of the plaintiffs to buy back unsold goods; a list of various kinds of described jewelry, with their prices, amounting to \$322.25; "the terms of payment," either by cash or by four acceptances; a statement, under the title of "Warranty," that the plaintiffs will replace any article not wearing satisfactorily; and a provision for the exchange of goods purchased for other styles or patterns. The following is the language of the order signed by the defendant: "Moline Jewelry Co., Moline, Illinois—Gentlemen: On your approval of this order, please deliver to us at your earliest convenience, f. o. b. transportation companies, either at distributing point or at factory point, \$250 worth the above-described goods, and no others, on the terms and conditions herein set forth, and no others, all of which I have read and found complete and satisfactory." Under the defendant's signature was the name of the salesman who solicited the order. On April 20, 1906, the plaintiffs delivered the jewelry in conformity with the order, as they claim, addressed to the defendant at New Haven to the United States Express Company, and on the same day sent the defendant an invoice of the same, upon which was printed: "All claims of any nature must be made on receipt of this bill." "All bills payable at Moline, Illinois." "No freight or express charges allowed." The defendant claimed to have proved: That, after having received the goods and caused them to be examined by a competent jeweler, he on the 12th of May wrote the plaintiffs as follows: "The Moline Jewelry Co.—Gentlemen: I hold your goods subject to your disposal. The terms are not according to agreement. Consequently I don't care to have anything further to do with them. They await your instructions." And that upon receiving a reply from the plaintiffs that they had no orders to give, the defendant, on May 19th, reshipped the goods to the plaintiffs, who refused to receive them, and that they were returned to the defendant, who still holds them, subject to the plaintiffs' order. In his substituted answer the defendant avers that the goods sent did not comply with the order, that the plaintiffs fraudulently substituted worthless and imitation goods for those or-

dered, and that he refused to accept them, and he claimed to have proved that among the goods not complying with the order were certain rings, marked "E. 14 K," indicating that they were solid 14-karat gold, which were not solid gold, and other goods so marked, either upon the articles themselves or upon the cards to which they were attached, as to render the manufacture, sale, or possession of them a misdemeanor under section 1381 of the General Statutes of 1902 of this state.

The trial judge charged the jury regarding the effect of such claimed facts in part as follows: "I desire to call your attention to the claim made by the defendant that the goods sent to him by the plaintiffs, or a considerable portion of them, at least, are unmerchantable for the further reason that they are of such a character, because of the marks thereon, \* \* \* that it would be in violation of the statute law of the state for him to have them in his possession for sale, and that it was equally unlawful for the plaintiffs to sell to him such goods in the state of Connecticut, as he says was done in this case; the contract having been entered into in New Haven." The court then stated to the jury the provisions of section 1381, and said: "If therefore the plaintiffs sent to the defendant goods which in this state it is unlawful for one to sell or have in his possession for the purpose of sale, then such goods are unmerchantable, and the defendant would have the right, as soon as he discovered such fact, if it be a fact, to refuse to receive the same." The court further said to the jury: "If therefore the plaintiffs substantially failed to fulfill their agreement to furnish goods of the character thus agreed to be furnished, or if the defendant has shown that the goods delivered to him contained articles that could not be sold or held in one's possession with intent to sell without subjecting him to the liability of a criminal prosecution, then the defendant had the right, upon the receipt of the goods, to hold them for the purpose of examination, and if he found they were not in substantial conformity with the contract, or were marked in such a way as to be violative of the statute I have quoted, he had the right to return them to the plaintiffs, provided \* \* \* the examination and return were within a reasonable time."

From this language the jury must have understood the court to hold that the contract of sale was made in New Haven, and that our statute rendered the sale by the plaintiffs to the defendant illegal, if the goods were stamped or marked in the manner prohibited by section 1381. This was error. The jury should have been instructed that the sale by the plaintiffs was not made in this state, and that therefore it was not rendered illegal by the provisions of section 1381. *Johnson County Savings Bank v. Walker*, 80 Conn. 509, 69 Atl. 15. It was also error to instruct the jury, as the court in effect did, that the



defendant might return the goods, if they were not salable under section 1381, even if they were in conformity to the defendant's order. The goods themselves are not before us. Those which counsel endeavored to exhibit in this court were not properly certified or marked as parts of the evidence. If the goods received by the defendant comply with the written order in kind and quality, as well as in the stamping or marking complained of, the defendant had no right, having bought them in Iowa or in Illinois, to return them to the vendors, because they could not lawfully be sold in Connecticut. If the defendant received just what he bought, he is, in the absence of fraud, liable for the agreed price. If, however, the sale was procured by the plaintiffs' fraud, or if the goods received by the defendant did not either in kind or quality, or in being stamped or marked in the manner claimed, substantially conform to the defendant's order, the defendant could properly refuse to accept them, and would not be liable to pay for them. Even if in all other respects the goods received conformed to the defendant's order, yet if, without the authority of the order, the plaintiffs caused them, or a considerable part of them, to be so stamped or marked as to render it unlawful to sell them in this state, the defendant was justified in refusing, in within a reasonable time, to accept them, and in returning them to the plaintiffs. And whether the goods were so marked without authority, or were deficient in kind or quality, the statements in the printed order that the plaintiffs would buy back, or replace, or exchange goods did not deprive the defendant of the right to refuse to accept and to return the goods.

We find no error in the admission in evidence of the letters between the plaintiffs and defendant, including those written by and to defendant's attorney, for the purpose of showing the conduct of the parties, and not for the purpose of changing the written order.

The printed order and all the jewelry having been before the jury, we perceive nothing irregular in permitting the defendant as a witness to indicate the articles covered by the different items of the order, assuming that it did not require an expert to do so.

Expert testimony that articles of jewelry were marked so as to indicate that they were made of a better kind or quality of gold than that actually used in them was admissible to prove either that such goods were inferior in quality to those ordered, or that they were rendered unsalable from being so marked without the defendant's order.

We deem it unnecessary to discuss the ruling of the court upon the plaintiffs' motion to set aside the verdict, or the other numerous assignments of error.

There is error, and a new trial is ordered. In this opinion the other Judges concurred.

(31 Conn. 229)

## NICHOLS v. CITY OF ANSONIA.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

## 1. APPEAL AND ERROR—RIGHT OF REVIEW—PARTIES OF RECORD—MUNICIPAL CORPORATIONS—APPEAL BY TAXPAYER.

A citizen and taxpayer of defendant, in an action against a city, having appeared for defendant before judgment and submitted to the jurisdiction of the court without objection from any party, and the court having recognized him as a party interested, and permitted him as such party to take and perfect an appeal, it cannot be said that such appeal is on the face of the record so manifestly outside the jurisdiction of the appellate court as to require it to grant a motion to dismiss.

## 2. EVIDENCE—JUDICIAL NOTICE.

The court takes judicial notice of the charter of a city of the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 41.]

## 3. MUNICIPAL CORPORATIONS — CORPORATION COUNSEL—CONTROL.

The charter of a city (Sp. Laws 1901, p. 1051, § 75) provides that the corporation counsel shall be the legal adviser of the city, and that it shall be his duty to represent the city in all civil actions wherein it is interested, except as otherwise provided, and that he shall, when so directed by the mayor or board of aldermen, represent the city in all matters affecting its interests pending before the General Assembly, and shall perform all other legal services which may be required of him by the board of aldermen or by law or ordinance. Section 85, p. 1055, provides that the board of aldermen shall exercise all the powers conferred on the city, except as otherwise provided. Section 15, p. 1038, provides that the mayor may, whenever in his judgment the interests of the city demand such action, employ additional counsel to assist the corporation counsel in the trial of any case in which the city is a party, except with reference to any matter pending before the General Assembly. *Held* that, in the absence of any other provision by which the city's power in the direction of its corporation counsel can be exercised, the power and duty of the corporation counsel as agent of the city to conduct an action pending in court against the city, and to determine according to his best judgment whether or not it is for the interest of the city that it should attempt to make a defense, can be controlled only by the board of aldermen, and cannot be so controlled by the mayor appointing special counsel to make a defense, notwithstanding the corporation counsel's determination that there was no defense; section 15 merely permitting the mayor to authorize an expenditure for the assistance of the corporation counsel, and not vesting in him the power of the city to control or supersede such officer in the exercise of his charter powers and performance of his charter duties.

Appeal from Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Action by Charles H. Nichols against the city of Ansonia for services rendered. On failure of defendant to satisfy the court that a bona fide defense would be made, and its neglect to file an answer, judgment was rendered for plaintiff. Stephen Charters, a citizen and taxpayer of defendant city, having before judgment entered an appearance in that capacity for defendant, appealed from the judgment. Plaintiff moves to dismiss the appeal. Motion denied, and judgment affirmed.

It appears from the printed record that in the latter part of the year 1906 the plaintiff, a civil engineer, rendered services for the defendant city under an agreement with Alton B. Farrel, then mayor of Ansonia, made under a vote of the city board of aldermen claimed to authorize such employment. January 3, 1907, the plaintiff presented to the city his bill for the services so rendered, amounting to \$684.50. January 14, 1907, the board of aldermen of said city approved said bill and ordered its payment. Upon the passage of said order the city clerk drew a check for the amount so due the plaintiff and presented it to the mayor (the mayor then being Stephen Charters) to be countersigned by him, as provided by the city charter; but the mayor refused to countersign the same. Thereafter, on May 23, 1907, the plaintiff commenced this action, returnable to the court of common pleas on June 4th. Robert L. Munger, as corporation counsel, duly entered an appearance and represented the city in the action. June 14th the court heard a motion, made by the plaintiff, for a disclosure of defense and for judgment in said cause. At this hearing the plaintiff, the corporation counsel, and Walsh & McCarthy, who had entered an appearance as attorney for the defendant, appeared. The corporation counsel stated that the city had no defense to the action. Walsh & McCarthy stated that they had been appointed by Mayor Charter to appear, and that the city had a defense. The court, without then passing upon the question of authority to represent the defendant, ordered that the defendant, if it had an answer in the cause, should file the same by June 18th. The subsequent hearing and interlocutory proceedings are referred to in the opinion. January 13, 1908, the court decided that the corporation counsel represented the city for the purpose of determining whether the city would or would not make a defense, that he having stated that in his judgment the city had no defense, and having failed to file an answer, his action was that of the defendant, and directed that a paper filed with the clerk, signed by Walsh & McCarthy as attorneys for the defendant and purporting to be the answer of the defendant, be struck from the files. January 24th, judgment was rendered for the plaintiff. Prior to the judgment Stephen Charters notified the clerk that in the capacity of taxpayer and citizen of Ansonia he entered his appearance for the defendant. The court allowed Charters to take this appeal. The main reason of appeal assigned is the alleged error of the court in ruling and deciding that Walsh & McCarthy had no authority from the city to conduct a defense on its behalf against the judgment and in opposition to the action of the corporation counsel, and that the paper filed by them with the clerk was not the answer of the defendant. At the opening of this court the plaintiff moved that the appeal be dismissed.

Denis T. Walsh, for appellant. Edmund Zacher, for appellee.

HAMERSLEY, J. (after stating the facts as above). Did the trial court err in recognizing Robert L. Munger, the corporation counsel of the defendant city, as the authorized agent and attorney of the defendant for determining whether or not the defendant should file an answer to the complaint and attempt to make a defense to the action, and in refusing to recognize Walsh & McCarthy, attorneys, as having any authority from the defendant by which they were entitled, as agents and attorneys of the defendant, to supersede the authority of its corporation counsel, or, by filing an answer without his consent against his directions and for the purpose of nullifying his action in the conduct of the cause, to commit the defendant to an attempted defense of the action? This is the only real question presented by the appeal. The plaintiff has raised a preliminary question by his motion to dismiss the appeal for want of jurisdiction apparent on the face of the record. The two questions are somewhat related and were argued at the same time. The arrangement of the printed record and the peculiar nature of the question involved in the interlocutory ruling of the court, as well as the unprecedented application to an interlocutory motion of the rules regulating pleadings, stating the cause of action and defenses thereto, renders it difficult to treat separately the questions raised by the appeal and by the motion to dismiss.

There were no pleadings in this action except the complaint and bill of particulars. This appears from the judgment file, which is as follows: "This action, by writ and complaint, claiming \$800 damages, as on file, was duly served on the defendant, as appears by the officer's return indorsed thereon, and came to this court on the first Tuesday of June, 1907, when the plaintiff appeared, and thence by continuance to the present time when the plaintiff appeared, but the defendant stated that it had no defense thereto. The court, having heard the plaintiff, finds that he has sustained damages, as alleged in his complaint, to the amount of \$726.59 damages. Whereupon it is adjudged that the plaintiff recover of the defendant \$726.59 damages and its costs, taxed at \$73.06."

The action was returned to court June 4, 1907. The judgment was rendered January 24, 1908. Between these dates the court gave the contending attorneys an opportunity to be heard as to who represented the defendant in court for the purpose of determining whether the defendant would make a defense or not, and decided that the defendant was represented for this purpose by its corporation counsel, and not by Walsh & McCarthy, attorneys. The course of this hearing may be briefly stated, according to its legal substance, as follows: Prior to June 14, 1907,

the plaintiff, in pursuance of the rules of court (Connecticut Practice Book, p. 225), moved that the attorney for the defendant be required to state to the court whether a bona fide defense would be made to the plaintiff's action. If upon such a motion the court is not satisfied that a bona fide defense will be made, it may order judgment to be entered for the plaintiff. *Jennings v. Parsons*, 71 Conn. 413, 42 Atl. 76. On June 14, 1907, a hearing was had upon this motion. At this hearing the corporation counsel appeared and stated that the city of Ansonia had no defense to the action. At the same time Walsh & McCarthy, having previously entered their appearance for the defendant with the clerk, stated that they had been appointed by Mayor Charters to appear in the suit, and that the city had a defense thereto. It became a question for the court to decide whether the corporation counsel or the appointee of the mayor represented the defendant in this matter. The court postponed this decision and further hearing and inquiry, and ordered that the defendant—leaving open the question as to who represented the defendant—if it had an answer to the cause, should file the same by June 18, 1907. On June 18th another hearing was had, at which the plaintiff, the corporation counsel, and Walsh & McCarthy appeared. The latter filed with the clerk a paper signed by them as attorneys for the defendant and purporting to be the answer of the defendant. The corporation counsel filed no answer on behalf of the defendant, and objected to the filing of said paper upon the ground that the city had no valid or legal defense to the action, that the paper was filed without his consent and against his wishes and judgment, and that Walsh & McCarthy had no authority to file said paper. The plaintiff moved to strike the answer of Walsh & McCarthy from the files on the ground that the same was not the answer of the defendant city. The action of each of the parties at this hearing—of the corporation counsel in declaring that the city had no valid defense and insisting that he alone represented the city and was authorized to speak for the city in this matter, of Walsh & McCarthy in claiming that, as an appointee of the mayor, they were authorized by the defendant to conduct its defense independently of the wishes and against the will of the corporation counsel, and of the plaintiff in moving that the paper filed by Walsh & McCarthy without authority from the defendant be stricken from the files—presented to the court the same question, namely: Was the corporation counsel the agent and attorney of the defendant for the purpose of determining whether the defendant should make a defense or not? For the determination of this question there was no call for the demurrer and answer to the plaintiff's motion which the court permitted Walsh & McCarthy to file. On July 19, 1907, the court announced that upon the statements then made by counsel it was of

opinion that the corporation counsel had full control of the case on behalf of the defendant, and that the paper filed by Walsh & McCarthy is not the answer of the defendant. Subsequently, the court permitted the parties to have a further hearing and to produce evidence claimed to have a bearing upon the question of the authority of the corporation counsel, and again held that the answer of Walsh & McCarthy was not the answer of the defendant, and granted the plaintiff's motion to strike it from the files, and thereafter, upon motion of the plaintiff, the judgment was rendered. On January 13, 1908, the last day of the hearing upon the conflicting claims of the corporation counsel and Walsh & McCarthy, Stephen Charters, being the same person as the mayor under whose appointment Walsh & McCarthy claimed to represent the city, filed with the clerk a request to enter his (Stephen Charters') appearance for the defendant in the capacity of a taxpayer, citizen, resident, and inhabitant of the city of Ansonia. After such appearance, Charters, taxpayer, took no part in the proceedings until after the rendition of judgment; but three days after the date of the judgment, upon a hearing upon motion of the plaintiff that execution issue immediately, he objected to the granting of that motion upon the ground that he desired to appeal from the action of the court. Subsequently Charters, taxpayer, presented to the court his request for a finding upon his appeal as a defendant, with which request the court complied, and this appeal was duly perfected and allowed by the court.

We think the motion to dismiss the appeal should be denied. Every taxpaying inhabitant of a municipal corporation may have an interest in an action against the corporation. Judgment against the corporation may be enforced by a tax for the payment of which his property is liable, but under our practice this interest is a more direct one. We have always held, on grounds of public policy, that each inhabitant of a town and of other quasi corporations established for purposes of local government shall not only be liable through taxation to contribute a proportional sum to the payment of a judgment against the corporation, but that his property may in the first instance be liable for the whole amount of the judgment, putting upon him the burden of enforcing his reimbursement by the corporation of the amount that may be thus paid by him beyond his just proportion, and for the enforcement of this policy we have held that execution upon a judgment against a town may be levied on the property of any one of its inhabitants. *Beardsley v. Smith*, 16 Conn. 368, 376, et seq., 41 Am. Dec. 148. We have applied by statute the same rule of policy to chartered cities, and have doubtless recognized the rule as applicable to all cities unless altered by a particular charter or statute. It follows, from this direct person-

al interest of each taxpaying freeman of a city, that he is entitled to be heard in a suit against the city which may involve an execution that may be levied upon his property, and we have held in the case of a town that any inhabitant may appear upon the return day of a suit against the town and defend on behalf of the corporation. *Union v. Crawford*, 19 Conn. 331, 333. This practice, however, is in reality a practical substitute for authority that may be vested in the court to compel a municipal corporation to lay and collect a tax and apply the proceeds to the satisfaction of a judgment against it. The main value of either practice consists in the affirmance of a power whose existence renders its execution rarely necessary. It is manifest that every inhabitant of a town and every freeman of an incorporated city is not the defendant to an action against the corporation in the same sense as the defendant in an action between two individuals, and he has been held not to be a defendant for all purposes. *Kinne v. New Haven*, 32 Conn. 210, 215. The relation of such a defendant to the action against the corporation, in view of the possibility of the corporation appearing by its duly constituted agent and all its corporators appearing individually, evidently calls for special rules regulating that relation. The position of such a defendant may doubtless be affected by provisions of particular charters, of the practice act, and of other existing statutes. It is not, however, necessary for the disposition of this motion to dismiss to consider how difficulties which might arise should be dealt with under our existing law. It is sufficient that Mr. Charters might have appeared as an interested party defendant upon the return day of the writ, and, failing to appear then, he might subsequently be permitted to appear upon complying with appropriate regulations. This being so, and he having in fact appeared before judgment and submitted to the jurisdiction of the court without objection from any party to the suit, and, the court having recognized him as a party interested and permitted him as such party to take and perfect an appeal to this court, we cannot say that the appeal thus taken is upon the face of the record so manifestly outside our jurisdiction as to require us to grant this motion to dismiss.

As to the only reason of appeal properly assigned, namely, the action of the trial court in recognizing the corporation counsel as the agent of the city for the conduct of the cause, and in refusing to recognize Walsh & McCarthy as authorized by the city to supersede the corporation counsel, or to file an answer and conduct a defense on behalf of the city without the authority and against the directions of the corporation counsel, we think the ruling of the trial court was correct. The question is practically settled by the charter of Ansonia, of which the court

takes judicial notice. The charter establishes, as agents of the city in the execution of its powers, certain boards and officers whose powers and duties are defined by and derived from the charter. Among these is the corporation counsel. The charter provides: "Sec. 75. There shall be in said city a corporation counsel, who, at the time of his appointment, shall be an attorney and counselor at law of this state. He shall hold no other office in the city government during his term. He shall be the legal adviser of the city and its departments, and it shall be his duty to represent said city in all civil actions in any court wherein said city is interested, except as otherwise provided, and to give his written opinion upon any legal question which may be submitted to him by the mayor or by the board of aldermen, or by any department, or by any public official with the written consent of the mayor. All opinions so given by him shall be recorded in an indexed book, which book shall be kept in the office of the corporation counsel and shall be the property of the city, and such opinions as the mayor may direct shall be published in the year book issued next after such opinions are given. He shall, when so directed by the mayor or board of aldermen, represent the city in all matters pending before the General Assembly affecting the interests of said city, and he shall perform all other legal services which may be required of him by the board of aldermen or by law or ordinance. He shall annually, on or before the tenth day of October, make a written report to the mayor of his doings for the year ended on the thirtieth of September next preceding, showing the condition of all unfinished business in his hands." *Sp. Laws 1901*, p. 1051. In addition to the powers pertaining to the corporation counsel of a city in accordance with our known and settled practice, and in addition to the powers involved in constituting the corporation counsel the legal adviser of the city government, in which he shall hold no other office, and of every department and officer of that government, this section confers upon the corporation counsel the power and imposes upon him the duty to represent the city in all civil actions in any court wherein the city is interested, except as otherwise provided. There is in the charter no other provision affecting his power to represent the city, except that which provides that in matters pending before the General Assembly he shall represent the city only when so directed by the mayor or by the board of aldermen. The power and duty of the corporation counsel, as the agent of the city, to conduct an action pending in court against the city and to determine according to his best judgment whether or not it is for the interests of the city that it should attempt to make a defense in that action, can be limited and controlled only by the city itself acting through its board of aldermen. By the express terms of

the charter (section 85) the board of aldermen "shall exercise all the powers conferred upon the said city, except as otherwise provided." There is no provision in the charter by which the city's power in the direction of its corporation counsel can be otherwise exercised. When therefore it appeared to the trial court that Mr. Munger was the corporation counsel of the defendant city, and that his power as such officer had not been limited or modified by any action of the city through its board of aldermen or otherwise, the court was authorized to accept the statement of Mr. Munger that the city had no valid defense and did not intend to make a defense, as the statement of the defendant itself, and, being satisfied as to these facts, it was authorized to order judgment for the plaintiff.

The claim of Walsh & McCarthy upon the interlocutory hearing, and the claim of the appellant upon this appeal, is this: The charter vests in the mayor the power of controlling the action of the corporation counsel in the conduct of any case in court by appointing special counsel in that case, who thus become for the conduct of that case the special agent of the city to whose authority the corporation counsel must yield. The argument is that the corporation counsel is only the general agent of the city, subject at any time to have his agency limited or superseded by the appointment of a special counsel for the conduct of a particular case, and that the exercise of this power of the city is vested in the mayor. The claim is thus summed up in the appellant's brief: "All the power in the city with respect to the hiring of additional or other counsel, as the case may be, is vested by the express provisions of the charter in the mayor." This claim is based upon the language of the concluding sentence of section 15 of the charter, which reads as follows: "The mayor shall assign one or more patrolmen to act as truant officers in enforcing the general statutes regarding school attendance \* \* \* and may, whenever in his judgment the interests of the city demand such action, employ additional counsel to assist the corporation counsel in the trial of any case in which the city is a party, except with reference to any matter pending before the General Assembly." We think this language recognizes the power of the corporation counsel, as conferred in section 75, to represent the city in all civil actions, and requires him to conduct every action without paid assistance, unless in a particular case the interests of the city may justify an expenditure for assistance, and in such case permits the mayor, if in his judgment the interests of the city demand such action, to employ additional counsel to assist the corporation counsel in the trial. The purpose is to permit the mayor to authorize and control an expenditure for the assistance of the corporation counsel, and not to vest in

the mayor the power of the city to control or supersede that officer in the exercise of his charter powers and performance of his charter duties. This clause of section 15, whether read by itself or in connection with general expressions used in granting other powers to the mayor, or in connection with the general scheme of government established by the charter, does not expressly nor by necessary implication sustain the extraordinary claim of the appellant.

It is unnecessary to consider what might have been the duty of the court if the hearing before it had disclosed anything in the nature of collusion or other misconduct liable to result in a practical fraud upon the city, for the finding is explicit that the good faith of the corporation counsel in his conduct of the case was conceded, and his legal competency to properly represent the defendant was unquestioned.

There is no error in the judgment of the court of common pleas. All concur.

(81 Conn. 116)

#### O'NEILL v. KILDUFF et ux.

(Supreme Court of Errors of Connecticut. Aug. 8, 1908.)

#### 1. FRAUDULENT CONVEYANCES — CONSIDERATION.

By arrangement between K., his wife, and J., K., owning a half interest in land worth \$19,000, quitclaimed it to J., owner of the other half interest, receiving nothing therefor, and J. transferred the entire property to K.'s wife, receiving therefor \$10,000, raised by mortgage thereon. *Held*, in an action to compel conveyance by the wife for the benefit of the husband's creditors of the property conveyed to her by him, that the conveyance to her was without valuable consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 199.]

#### 2. SAME—RIGHTS OF SUBSEQUENT CREDITORS.

A voluntary conveyance by one continuously insolvent from the time thereof is void as against his trustee in bankruptcy, though none of his then existing debts remain.

#### 3. RECEIVERS—APPOINTMENT.

An order, made after judgment for plaintiff in an action by a trustee in bankruptcy to compel a transfer to him of real estate conveyed by the bankrupt to his wife without consideration, appointing a receiver to take charge of the property, collect the rents, pay charges against the property for maintenance, and hold the balance till further order of the court, is within the power of the court.

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Action by F. B. O'Neill, trustee in bankruptcy, against Edward G. Kilduff and wife, to compel the wife to transfer to plaintiff property conveyed to her by her husband without valuable consideration and in fraud of creditors. Judgment for plaintiff. Defendants appeal. Affirmed.

The complaint states two causes of action. No question arises as to the first cause. The other is stated in a "second count," which alleges, in substance: That on June 16, 1902, the defendant Edward G. Kilduff conveyed to

his wife, the defendant Margaret E. Kilduff, his interest in the piece of land in Waterbury described in the complaint without valuable consideration therefor; that at this time Edward G. Kilduff and his brother John H. Kilduff were partners under the firm name of E. G. Kilduff & Co., conducting a clothing store in said Waterbury, and continued this business until July 7, 1904, when Edward G. Kilduff and John H. Kilduff, as partners for the partnership and each individually, were duly adjudicated bankrupts, and the plaintiff appointed trustee; that at the time of said conveyance Edward G. Kilduff and the partnership were both insolvent, and Edward G. Kilduff made the conveyance with the intent to defraud his creditors and the creditors of the firm with the purpose of concealing said property and removing it out of the hands and reach of his creditors and the creditors of the firm; that such conveyance was a voluntary conveyance, made with the purpose of concealing said property from the creditors of Edward G. Kilduff and the firm, and of preventing the property from being taken and applied to the payment of their debts. The answer denied the allegations of the complaint, and the trial court found the issues thus raised for the plaintiff, and ordered that the defendant Margaret E. Kilduff convey to the plaintiff said piece of land, subject to an outstanding mortgage of \$10,000.

Among other evidential facts affecting the cause of action as stated in the second count, the finding for appeal states the following: The land described was purchased by Edward G. Kilduff and William S. Jones, a brother of Mrs. Kilduff, in 1889, a year and two months before said partnership was formed, and none of the money belonging to the firm went into the property. The purchase was made by Kilduff and Jones with the intention of some day transferring the land equally to their respective wives, which plan was not carried out. The transfer to Mrs. Kilduff was accomplished in this manner: June 16, 1902, pursuant to an agreement between them, the defendant Edward G. Kilduff quitclaimed his interest in the said South Main street property to the said William S. Jones, and then Jones sold and transferred the entire property to the defendant Margaret E. Kilduff, and received from her for his one-half interest the sum of \$10,000, which she obtained by giving her note and mortgage upon the entire property. For several years before this Mrs. Kilduff had managed the property, and the business was not mixed up with the partnership affairs. The only consideration paid by Mrs. Kilduff was the \$10,000 raised by the mortgage and paid to Jones. The value of the land above the \$10,000 mortgage was \$9,000. When the partnership was formed, Edward G. Kilduff put \$17,000 into the business and had a three-fourths interest. His brother furnished no money or property, but was familiar with the

business and had a one-fourth interest. The firm was in fact insolvent in the spring of 1901, and continued to be insolvent until adjudged bankrupt in July, 1904, when its liabilities were about \$27,000 and its assets about \$7,900. It did not appear that, at the time of the conveyance to Mrs. Kilduff, Edward G. Kilduff actually knew or admitted the insolvency of the firm, but full knowledge of its insolvent condition was available to him from its books and papers in the exercise of reasonable diligence, and he was chargeable with notice of such insolvency. At the time of said transfer, Edward G. Kilduff was already insolvent and chargeable with notice of his insolvency. By such transfer, property of the value of \$9,000 was voluntarily and without consideration removed from the reach of his creditors and the creditors of said partnership. It did not appear that in June, 1902, either Edward G. or John H. Kilduff owed debts other than partnership debts. No evidence was offered to show, and it did not appear, that any debt or duty of Edward G. Kilduff or of the firm of E. G. Kilduff & Co., which belonged to any other person in June, 1902, was still unpaid and unsatisfied on July 7, 1904. Upon the trial no evidence was offered to show that either of said partners had any property other than as herein stated, nor was any claim made that either owned any other property, but said case was argued and determined upon the theory that the ownership and possession of property was covered by said partnership property and said two pieces of real estate hereinbefore mentioned.

Lucien F. Burpee and Terrence F. Carmody, for appellants. John J. O'Neill and Nathaniel R. Bronson, for appellee.

HAMERSLEY, J. (after stating the facts as above). The court might lawfully infer, from the state of the evidence and the conduct of the parties in the presentation of the evidence and of their case upon argument, that from June 16, 1902, the time of the voluntary conveyance in question, until the bankruptcy proceedings in July, 1904, all the property owned by Edward G. Kilduff and his brother, both individually and as partners, was the partnership assets and the piece of land in question. The transactions in respect to the piece of land mentioned in the first count do not affect the questions before us. The essential facts upon which the judgment of the trial court is based are these: In July, 1902, Edward G. Kilduff accomplished a voluntary conveyance to his wife of property belonging to him individually of the value of \$9,000. This property, and the property of the business firm of which he and his brother were sole members and to which he had furnished all the money put into the business and in which he had a three-fourths interest, constituted all the property belonging to him and his brother individually and as partners. At this time the

partnership was insolvent, and all the property of the partnership and of the individual partners was insufficient to pay the partnership debts. Edward G. Kilduff, in the exercise of reasonable diligence in the examination of the books and papers of his firm, would have had full knowledge of this insolvent condition. The partnership and its members continued to be thus insolvent and continued the partnership business until July, 1904, when, as partners and individually, Kilduff and his brother were duly adjudged bankrupts, having then liabilities of about \$27,000 and assets of about \$7,900. Upon these facts the court correctly held that Mrs. Kilduff could not hold the property thus transferred to her by voluntary conveyance as against the trustee in bankruptcy. Our state early adopted as a part of its common law the broad principle of public policy that "every man should pay his debts with his estate, be it what it will be, either real or personal," and, if his estate be insufficient to pay all creditors, each one shall have a "suitable proportion to his debt." This principle has influenced the course of our legislation and judicial decisions in respect to insolvency and underlies our statute against fraudulent conveyances as well as against preference of creditors with a view to insolvency. It is in view of this principle that our statute against fraudulent conveyances, first enacted in 1702, has been construed, extended, and applied. *Curtis v. Lewis*, 74 Conn. 368, 50 Atl. 878; 1 *Swift's Dig.* 266, 281, 282; *Trumbull v. Hewitt*, 62 Conn. 448, 455, 26 Atl. 350. Our law is now settled that a voluntary conveyance by an insolvent is void as against his creditors as obnoxious to the principles of our common law and to the construction we have given to our statute against fraudulent conveyances. *Quinnipiac Brewing Co. v. Fitzgibbons*, 71 Conn. 80, 85, 40 Atl. 913, and cases there cited; *Whittlesey v. McMahon*, 10 Conn. 138, 142, 26 Am. Dec. 389; *Abbe v. Newton*, 19 Conn. 20, 27; *Clarke v. Black*, 78 Conn. 467, 471, 62 Atl. 757.

The defendants claim that the facts appearing in the finding are legally inconsistent with the court's conclusion that the conveyance to Mrs. Kilduff was without valuable consideration. There is plainly no merit in this claim. *Clarke v. Black*, 78 Conn. 467, 472, 62 Atl. 757.

There is only one other alleged error stated in the assignment which calls for special mention. The defendant strenuously urges that the voluntary conveyance to Mrs. Kilduff is not void as against the trustee in bankruptcy, because it does not appear that any debt or duty of her husband or of his firm which belonged to any other person at the date of the conveyance was still unpaid and unsatisfied at the time of the bankruptcy. The claim is that the voluntary conveyance of a debtor actually insolvent is not void as against subsequent creditors, unless

the subsequent debts are contracted while the particular debts existing at the date of the conveyance, or some of them, are still unpaid. This claim, as applied to this case, is not in accord with our law. In *Paulk v. Cooke*, 39 Conn. 566, it appeared that Cooke made a voluntary conveyance to his wife while largely indebted, although not actually insolvent; his assets exceeding his liabilities by a little more than the value of the property conveyed. He continued his business, and 14 months after the conveyance a trustee in insolvency was appointed; the assets, including the property conveyed, being insufficient to meet the liabilities. During the 14 months from the date of the conveyance to the appointment of the trustee, Cooke had paid all the creditors existing at the time of the conveyance except one, although his indebtedness was not thereby diminished, but continuously increased. The action was brought by the trustee in insolvency against Mr. and Mrs. Cooke. We held that the trustee was entitled to recover the property thus voluntarily conveyed, and stated the controlling principle thus: "But it is said that the debts which existed at the time that this conveyance was made, have since, with one exception, been paid, and that a voluntary conveyance can be impeached only by those who were creditors at the time, not by subsequent creditors. This principle clearly has no application where there has been a continued, unbroken indebtedness. The debts are owed, though they may be due to new creditors. It is a most unsubstantial mode of paying a debt, to contract another of equal amount. It is the merest fallacy to call such an act getting out of debt. From the time of this conveyance Mr. Cooke continued to be in debt, and at the time of this assignment that indebtedness had largely increased." This principle has been recognized in subsequent decisions (*Quinnipiac Brewing Co. v. Fitzgibbons*, supra), and applies with greater and controlling force to the present case. As applied to a case like the present one, we think the principle is sound. It assumes that the property of an insolvent trader is charged with the payment of his debts, and that a gift of any substantial part of that property, even if binding as between the donor and donee, charges the property given with the satisfaction of the insolvent's indebtedness. It is the condition of insolvency, rather than a deliberate intent to injure or defraud any particular person, that invalidates the conveyance. It is true that the insolvent may continue his business without his true condition being known so fortunately as to become entirely free from debt. He then will hold his property absolutely with a complete right to give it away, and in this way he may satisfy also the charge to which the property he gave away while insolvent was subject. Expressions have been used in the decision of cases involving a state of facts different from that in the present case, which,



if read apart from their setting, apparently give some support to the defendants' claim; but our attention has been called to no case where, upon a state of facts such as that found by the trial court, a voluntary conveyance has been held good as against the trustee in bankruptcy. An insolvent has no property he can legally give away. All, whether in his possession or that of his donee, is charged with the satisfaction of his indebtedness. Insolvency is the cause of this charge. The cause and its effect are co-existent. The charge cannot be released so long as the cause continues, and the trustee in bankruptcy takes all the insolvent's property (including that he has illegally conveyed during the insolvency) for equal distribution among the then existing creditors.

After the rendition of judgment, the court, upon application of the plaintiff, appointed a receiver to take charge of the land which was the subject of the judgment, to collect the rents, pay proper sums chargeable against the premises in connection with the maintenance of the same, and to hold the balance until further order from the court. The appeal assigns error in making this order. Such an order was within the power of the court. 2 Swift's Dig. 178. It is unnecessary to discuss the sufficiency of the application, even if that question can be regarded as properly raised by the appeal. In this case the defendants can suffer no harm.

There is no error in the judgment of the superior court. All concur.

(81 Conn. 90)

# WILLIAMS v. TAYLOR et al.

(Supreme Court of Errors of Connecticut. Aug. 8, 1908.)

## 1. EXECUTORS AND ADMINISTRATORS — SALE — WHEN AUTHORIZED — FOR PAYMENT OF LEGACIES — NECESSITY.

Where testator bequeathed 409 shares of stock equally among his children, it was not necessary to sell the stock in order to distribute the shares equally, as the administrator and trustee thereof in whose name the stock stood might transfer 136 $\frac{2}{3}$  shares to each of the children or their representatives.

## 2. SAME.

Testator bequeathed 409 shares of stock in trust, the income to be paid to his wife for her life, and on her death to his three children. The wife thereafter died, and two of the children applied for an order to sell the stock in one block, stating that they would pay \$100,000 for it, but if it was divided into three shares, and the stock itself distributed, it would be worth only \$60,000; their purpose being, with the 409 shares added to their own holdings, to have a majority of the stock and increase the value thereof to them. The other legatee had some 200 shares of the same stock, which added to the one-third she would receive if the shares were distributed, would give her a majority thereof and increase the value of her shares. Gen. St. 1902, § 352, provides that the probate court before final settlement, may order the sale of personal property if for the interest of the estate. *Held*, that since the sale of the stock would not be for the best interest of the estate, except to benefit two of the three legatees to the extent that it injured the third, the stock should not be sold, but

should be distributed equally among the three legatees.

Appeal from Superior Court, New Haven County; Howard J. Curtis, Judge.

Action by Ella S. Williams against Franklin A. Taylor, administrator, and others, for an application for order of sale of personal property held by an administrator. From a decree denying the application, plaintiff appeals. Affirmed.

Charles G. Root, for appellant. Lucien F. Burpee and Terrence H. Carmody, for appellee Mary B. R. Munson.

HALL, J. Archibald E. Rice, late of Waterbury, died testate in March, 1893, leaving a widow, Sarah H. Rice, and three children, Frederick B. Rice, Mary B. Munson, and Ella S. Williams. His estate was inventoried at \$89,726.83, consisting of the homestead described in the second clause of his will, of the value of \$15,000, and personal property of the value of \$74,591.31, which included 409 shares of the stock of the Apothecaries' Hall Company, a corporation located in Waterbury, with a capital stock of 800 shares of the par value of \$25 each, appraised in said inventory at \$30,675, and household furniture appraised at \$150.

The following are provisions of the testator's will, of which said Frederick B. Rice was the executor:

"Second. I give, devise and bequeath to my wife, Sarah Houghton Rice, the sum of thirteen hundred (\$1,300) dollars per year, the same to be paid quarterly for and during her natural life; and do further give to my said wife the personal use of my dwelling house, No. 83 Grand street, together with the household furniture, pictures and books therein contained, so long as she shall desire personally to occupy the same.

"Third. I direct that my executor hereinafter named, shall hold and possess my stock in the Apothecaries' Hall Company, and from the dividends thereon, to pay said sum of thirteen hundred (\$1,300) dollars to my said wife and the surplus of said dividends to divide annually among my three children hereinafter named, share and share alike.

"Fourth. I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, to my three children, Mary B. Munson, Frederick B. Rice and Ella S. Williams, share and share alike, to be to them and to their respective heirs and assigns forever."

Frederick B. Rice proceeded to settle said estate, and on February 8, 1894, presented his administration account to the court of probate, which was allowed and was not appealed from, showing the payment of all the debts, and the expenses of settlement of the estate, and payment to the legatees under the will of the remainder of the estate, excepting said homestead and furniture, and



said 409 shares of stock and \$58.64 in cash, which property and money are described in the account as "to be held in trust." On the 20th of May, 1895, said F. B. Rice filed an account of "F. B. Rice, Trustee, Estate of A. E. Rice," in which he charged himself with the trust property shown to have been in his hands upon the settlement of his executor's account of February 8, 1894, and on the 31st of January, 1901, filed a trustee account of said estate in which he charged himself with the Apothecaries' Hall Company stock and other trust property. Both of which accounts were accepted by the court of probate. Archibald E. Rice died March 28, 1893, and Frederick B. Rice and Helen M. Rice are his executors and sole devisees and legatees. Sarah H. Rice, the widow of the testator, Archibald E. Rice, died October, 1906. On the 17th of July, 1906, upon the application of the appellant, Ella S. Williams, Franklin A. Taylor was by the court of probate appointed administrator d. b. n. c. t. a. of the estate of said testator, Archibald E. Rice, and said Taylor thereupon caused a certificate of said 409 shares of stock to be issued to himself, as such administrator, and on the 28th of August, 1907, when ordered by the probate court, upon the application of the appellee Mary B. Munson, filed an account in which he charged himself with the 409 shares of Apothecaries' Hall Company stock at \$102,250, the homestead at \$20,000, and the furniture at \$150.

On the 20th of March, 1907, the appellant, Ella S. Williams, made a written application to the court of probate, alleging that said 409 shares of the stock of the Apothecaries' Hall Company belonged to the estate of Archibald E. Rice, that said Taylor was administrator and trustee thereof, that it was necessary to sell said stock to settle said estate, that if sold in a block it was worth \$100,000, that such a sale would best promote the interest of the owners thereof and of the estate, and asking for an order for the sale of the same, as one block of stock. This application was denied by the probate court, and said applicant appealed to the superior court. Upon the trial of the appeal in the superior court these facts appeared: At the time of the death of A. E. Rice's widow, Sarah H. Rice, the appellee Mary B. Munson, and her two daughters, and I. P. Kellogg, the husband of one of said daughters, already owned 276 other shares of the stock of said Apothecaries' Hall Company, and therefore the distribution to Mary B. Munson of one-third of the 409 shares left by her father would make her and her said family owners of a majority of all the stock of the company. Said I. P. Kellogg has for some years been a director and the president and general manager of said Apothecaries' Hall Company at a salary of \$3,000 a year. Frederick B. and Helen Rice, representatives of Archibald E. Rice, deceased, also request-

ed that the order of sale applied for should be made, and they and the appellant, Ella S. Williams, stated, in substance, at the trial, that if the 409 shares in the hands of the trustee and administrator should be sold as one block of stock, thus giving to the purchaser of them a majority of the stock of said company, they would pay \$100,000 for it, but that, if said shares should be distributed to the legatees in three parcels, they would sell the stock received by them at the rate of 409 shares for \$60,000; that is, \$40,000 for the two-thirds of said shares which they would together receive. And the trial court adopted these as the respective values of the 409 shares in the hands of the administrator and trustee if so sold as one block, and if distributed in three lots, and held uncombined with other stock, sufficient to make a majority of all the stock of the company. The trial court held that it was not necessary to sell said stock in order to settle the estate, that it was not for the best interest of the estate that it should be sold, and that it was not now subject to sale at the order of the probate court, and rendered judgment dismissing the appeal.

While we recognize the force of the arguments in support of the appellee's claims (1) that the provision of the third clause of the will, requiring the executor to hold this stock during the life of the widow, and to pay the surplus of the dividends, over \$1,300, to the children equally, read in connection with the fourth clause, giving the residue to the three children equally, indicates an intention of the testator that this particular stock should be divided equally among them upon the death of their mother, and (2) that since it appears from the executor's accepted final account that the debts and bequests, except of the remainder in the trust property, have been fully paid, and that the stock in question has been delivered by the executor to the trustee, it can no longer be subject to sale as a part of the testator's estate, we find it unnecessary, in sustaining the judgment of the trial court, to place our decision upon either of these grounds, and shall assume, for the purposes of this case, that the 409 shares of stock were not specifically bequeathed in remainder to the three children of the testator, and also that they are still a part of the estate of Archibald E. Rice. Section 352, Gen. St. 1902, under which the application for an order of sale is made, provides that courts of probate before the final settlement of any estate may order the sale of personal property if it shall find it for the interest of such estate. The trial court has held that it was not for the best interest of the estate of the testator that the sale asked for should be made. Unless this conclusion is inconsistent with the facts found, it is sufficient to support the judgment.

It is said first by the appellant that the sale asked for is for the best interest of the estate, because it is necessary that a sale

should be made to enable the administrator to distribute the 409 shares equally among the three children of the testator. This is not so. There is nothing to prevent Mr. Taylor, who is both administrator and trustee, and in whose name the stock stands, from transferring 136 $\frac{2}{3}$  shares of it to each of the two surviving children of the testator and to the representatives of the deceased child.

Again, the appellant argues that since the court has found that, if sold in a block, the 409 shares is worth \$100,000, but, if distributed and not combined with other stock, it would be worth but \$60,000, it necessarily follows that the proposed sale would be for the best interest of the estate, inasmuch as thereby the two living legatees and the representatives of the third would each receive \$13,000 more in money than they would if the stock should be distributed. This argument is fallacious. The offer to pay \$100,000 for the 409 shares is practically made by two of the legatees, the appellant, Mrs. Williams, and the representatives of Frederick B. Rice. If they make the purchase, since there are no creditors, they will, as legatees of the residue of the estate, receive two-thirds of the avails of the sale. To the extent of two-thirds of the 409 shares they will in a sense be buying what belongs to them, and they will receive back what they pay for it. If they make the purchase at the price named, they will really be only paying Mrs. Munson \$33,333.33, which is the real value, as found by the court, of one-third of the 409 shares when sold as one block. But by such so-called purchase the remaining two-thirds of the 409 shares which they receive, and which if distributed to them would be worth but \$40,000, will become worth \$66,666.66. But while these two purchasers will be thus benefited by such sale, Mrs. Munson and her family will be injured to the same extent that such purchasers will be benefited, for the reason that from Mrs. Munson's failure to obtain her one-third of the 409 shares, the value of the 276 shares, which she and her family now hold, will be worth some \$26,000 less than it would be if the 409 shares should be distributed to the three legatees. The same result would follow as to the gain of these two legatees and the loss of the other if the appellee should be compelled to purchase herself the 409 shares for \$100,000, or if some third party should buy it at that price. If the appellee should make the purchase, she would have to pay \$66,666.66 for the two-thirds of the 409 shares, which, if distributed to the two other legatees, would be worth to them but \$40,000, and which, when purchased by her, would be worth no more than the latter sum, since she would require no part of it to give her the control of the entire stock of the company. If a third party should make the purchase, the appellee would be deprived of more than the \$26,000 which would have been the increased value of her present holdings if the stock had been dis-

tributed, and the other two legatees would be gainers to the same amount.

The application for an order to sell is not made by the administrator, but by one of the legatees. If granted, it would, in effect, compel the appellee to either sell her interest in her father's estate at a loss, or buy that of the other legatees at the same loss. The sale would be for the best interest of the estate in no other way than it would benefit two of the three legatees to the extent that it would injure the third. By a distribution of the stock complete justice will be done to all the legatees. Upon the facts found, the court would not have been justified in granting the order asked for.

There is no error in the judgment dismissing the appeal. All concur.

(81 Conn. 161)

WOLFE v. HATHEWAY et al.

(Supreme Court of Errors of Connecticut. Aug. 8, 1908.)

**1. WILLS—CONSTRUCTION—INTENT OF TESTATOR—ATTENDANT CIRCUMSTANCES.**

The cardinal rule in construing wills is that the intent of the testator be discovered and effectuated, if possible, if such intent is not contrary to a positive rule of law, and in so doing all parts of the will should be taken together and examined in the light of the circumstances surrounding the testator; the question being, not what he meant to say, but what he said.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 958.]

**2. SAME—GENERAL INTENTION.**

If the leading feature of a will is equality or impartiality in making bequests, the courts will lean, in doubtful cases, to such construction as will carry out the scheme of equality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 971.]

**3. SAME—LANGUAGE OF INSTRUMENT—APPLICATION TO PARTICULAR PROVISIONS.**

The meaning of the language of a will cannot be determined by an arbitrary rule of legal definition, but depends on the peculiar provisions and character of the particular will, which must, to a large extent, interpret itself.

**4. SAME—ORDINARY OR TECHNICAL MEANING.**

While it is presumed a testator used language in its usual and legal sense, this presumption will not hold when an examination of a will in the light of surrounding circumstances shows that testator's intent will not be effectuated if so interpreted, and that the language was used in another sense; that meaning being taken which the testator himself attached to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 974, 975.]

**5. SAME—SUPPLYING OMITTED WORDS.**

Where a testator omits words necessary to express the meaning intended, and the intended meaning is clearly inferable from the whole will, the court will, by construction, supply the omitted words.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 981.]

**6. SAME—CONSTRUCTION IN FAVOR OF VALIDITY.**

If two modes of construing a will are permissible, one of which will make a bequest an illegal perpetuity, while by the other construction it would be valid, the latter must be preferred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 967.]

# 7. SAME—CONSTRUCTION AGAINST INTESTACY.

There is a presumption against testator's intent to leave any part of his estate intestate, but a construction required by the terms of a will cannot be avoided because it leads to entire or partial intestacy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 964, 965.]

# 8. SAME—CONSTRUCTION IN FAVOR OF VALIDITY—AGAINST PERPETUITY.

The codicil of testatrix's will gave a certain sum in trust, the income to be paid equally to her sons, M. and J., so long as they might live, and, at the death of either or both, to their "heirs at law," respectively, one-half to M.'s heirs, and one-half to J.'s heirs, and, "at the death of their wives and children," the property to be given directly and equally to the sons' grandchildren. Both sons had children at testator's death, but neither had grandchildren. *Held*, that it was apparent that testatrix used the words "heirs at law" as descriptive of the class thereafter defined as "wives and children," and, to avoid the creation of an illegal perpetuity, the will would be so construed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1090-1093.]

# 9. SAME—DESIGNATION OF LEGATEES—WIFE OF SON—WIFE AT TESTATRIX'S DEATH.

Where a will gave a certain sum in trust, the income to be paid equally to testatrix's two sons so long as they might live, and at their death, to their wives and children, and directed that on the death of the wives and children the property be given to the sons' grandchildren, the wives designated as beneficiaries will be construed to include only the wives of the sons at testatrix's death, and not any woman who became the wife of either of them thereafter.

# 10. SAME—CONSTRUCTION.

A will gave a sum in trust, the income to be paid equally to testatrix's two sons as long as they might live, and at the death of either or both to their wives and children, and at the death of the wives and all the children of the sons the property to be given directly and equally to their grandchildren. *Held*, that the provision giving the property to the grandchildren should be read distributively, so that the money, the income of which was payable to either son, and thereafter to his wife and children, should go to the grandchildren of that son as principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1147.]

# 11. TRUSTS—BEQUESTS IN TRUST—TERMINATION.

Where money was given in trust by a will, the income to be paid equally to testatrix's two sons until their death, then to their wives and children, and on the death of the wives and children the property to be given equally to their grandchildren, until the trust to pay over the income ceases and the time arrives to pay over the principal, the property remains in the hands of the trustees as a trust fund.

# 12. PERPETUITIES—FUTURE CONTINGENT ESTATES—WILLS—REMAINDERS.

Where a will gave money in trust, the income to be paid equally to testatrix's two sons until their death, then to their wives and children, and on the death of the wives and children the property to be given equally to the sons' grandchildren, the sons having children but no grandchildren at testatrix's death, the provisions in favor of the grandchildren are void, as in contravention of the statute against perpetuities, and the remainder given them is intestate property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, § 32.]

Case reserved from Superior Court, Fairfield County; William S. Case, Judge.

Action by Charles H. Wolfe, trustee, against Clara T. Hatheway and others for

the construction of the will and codicil of Amanda B. Trulock, deceased. Facts found and questions of law reserved. Questions answered, with directions to render judgment.

Amanda B. Trulock, late of Bridgeport, died August 20, 1891, leaving a considerable estate, both real and personal, a will, executed March 13, 1883, and a codicil thereto, executed November 23, 1889, both duly probated. She was survived by four sons, Nichols B., J. Burton, James H., and Marshall S., who, with Clara T. Hatheway, a daughter of a deceased daughter, were her only heirs at law. Nichols B. and Marshall S. still survive, as does Clara T. Hatheway. James H. died in 1907, leaving a widow and four children. Marshall S. has a wife and one child. The dates of the marriages of these two sons are not given in the record, although it would appear that James H. was married long before the testatrix's death and the making of her codicil. No grandchildren have yet been born to either of these sons. The will created a trust in favor of Clara T. Hatheway, bequeathed her the testatrix's wearing apparel and jewelry, and then gave all the rest of her estate to the four sons "to be divided equally between them and to their heirs and assigns forever." The codicil was as follows: "Whereas, by my last will and testament, dated March 13, 1883, in article fourth I gave and bequeathed the rest of my estate, real and personal, to my four sons, Nichols B., Joseph B., Marshall S., and James H. Trulock, to be divided equally between them and to their heirs and assigns forever, I do hereby revoke that part of this article fourth which gives to my sons Marshall S. and James H. Trulock absolutely one-fourth of my residuary property to each, and instead thereof, I do hereby give and bequeath the sum of one thousand dollars absolutely to each, and the remaining one-half of my residuary estate to my sister, Marcia Beardsley, and to my friend, Lucinda T. Montgomery, in trust; whom I hereby request, as they may deem necessary for counsel, to call upon Morris B. Beardsley, Esq., or B. B. Beardsley, my brother, both of this city of Bridgeport, Ct., and I hereby direct that the income of the said one-half of my residuary estate be paid equally to my two sons, Marshall and James H. Trulock, semiannually, as long as they may live and at the death of either or both, to their heirs at law respectively. One-half of said half to Marshall S. Trulock's heirs and the other half to James H. Trulock's heirs, and I hereby direct that at the death of their wives and all the children of the said Marshall S. and James H. Trulock, that the said property may be given directly and equally to their grandchildren, whenever they may become of age and whenever or as soon as in the judgment of the said trustees or their suc-

cessors with their advisor, they may think best, and I hereby request that no bond be required of my sister, Marcia Beardsley, and Lucinda T. Montgomery, as trustees, but a bond should be required of their successors." The estate was duly settled and final account accepted August 25, 1892. By this account the residue of the estate was shown to be \$109,707.77, all in personality. Distribution followed, wherein the sum of \$27,426.94 was set out to the trustees named in the codicil as trustees for the benefit of James H. Trulock and others, and a like sum in like manner for the benefit of Marshall S. Trulock and others. Said trustees accepted said trusts and qualified. April 3, 1901, they resigned, and on April 13, 1901, they were succeeded by the plaintiff, who qualified and is now acting. Other facts found, not being involved in the opinion of the court, need not be rehearsed.

Morris B. Beardsley and Samuel F. Beardsley, for plaintiff. Alfred B. Beers, for defendant Amanda L. T. Curtis.

PRENTICE, J. (after stating the facts as above). The questions presented arise out of the ambiguous language which the testatrix used in the inartificially framed codicil to her will. The principles which are to be observed in interpreting the instrument are familiar ones. The cardinal rule that the intent of the testator is to be sought after and carried into effect, if that intent can be discovered, has been sufficiently expressed and is not contrary to some positive rule of law. *Allyn v. Mather*, 9 Conn. 114, 125; *Mathewson v. Saunders*, 11 Conn. 144, 149; *Jackson v. Alsop*, 67 Conn. 249, 252, 34 Atl. 1106; *Chesebro v. Palmer*, 68 Conn. 207, 213, 36 Atl. 42. In the search for the intent of the testator, all parts of the will are to be taken into consideration. *Allyn v. Mather*, 9 Conn. 114, 125. And they are to be examined in the light of the circumstances which surrounded the testator when he made it. *Ruggles v. Randall*, 70 Conn. 44, 48, 38 Atl. 885. The question is, not what did the testator mean to say, but always what did he say. *Weed v. Scofield*, 73 Conn. 670, 676, 49 Atl. 22. If a leading feature of a will is equality or impartiality, the courts will lean, in case of a doubtful clause, to such a construction as will carry out the scheme of equality. *Farnam v. Farnam*, 53 Conn. 261, 289, 2 Atl. 325, 5 Atl. 682; *Wheeler v. Fellowes*, 52 Conn. 238, 241. The meaning of language used cannot be determined by an arbitrary rule of legal definition, but depends in each case on the peculiar provisions and character of the special will in question, which must to a large extent be its own interpreter. *Chesebro v. Palmer*, 68 Conn. 207, 213, 36 Atl. 42. While there is a presumption that the testator used language in its usual and legal sense, this presumption will be overthrown when an examination of the

instrument in the light of the surrounding circumstances clearly shows that the intent of the testator will not be effectuated by so interpreting it, and that the language was used in another sense. In such case that meaning will be attached to the language which the testator attached to it when he used it. *Gold v. Judson*, 21 Conn. 616, 625; *Gerard v. Ives*, 78 Conn. 485, 489, 62 Atl. 607. Words of an inartificially drawn will may thus have a meaning given to them which they do not ordinarily or properly possess. *Hurd v. Shelton*, 64 Conn. 496, 498, 30 Atl. 766. Where a testator has omitted words which are necessary to express the meaning intended, and the intended meaning is clearly inferable from the will taken as a whole, the court will by construction supply the omitted words. *Kellogg v. Mix*, 37 Conn. 243, 247. If two modes of construction are fairly open, one of which will turn a bequest into an illegal perpetuity, while, by following the other, it would be valid and operative, the latter mode must be preferred. *Woodruff v. Marsh*, 63 Conn. 125, 136, 26 Atl. 848, 38 Am. St. Rep. 348. There is a presumption against the intent of a testator to leave any part of his estate intestate; but a construction required by the terms of a will cannot be avoided because it leads to intestacy, in whole or in part. *Warner v. Willard*, 54 Conn. 470, 472, 9 Atl. 136; *State v. Smith*, 52 Conn. 557, 563; *Jackson v. Alsop*, 67 Conn. 249, 252, 34 Atl. 1106; *Bill v. Payne*, 62 Conn. 140, 142, 25 Atl. 354.

The testatrix in her will treated her four sons with strict equality and impartiality. Her purpose to favor no one of them to the advantage of another, in so far as her desire to secure to each the most certain assurance of the benefits of her intended bounty would enable her to do so under the law, is equally apparent in the codicil. She originally gave one-quarter of her residuary estate to each son absolutely. Circumstances apparently arose between the years of 1883, when the will was made, and 1889, when the codicil was executed, or were in the latter year foreseen as possible, which led her to the conclusion that the benefits of her bounty would be more certainly or permanently assured to her intended beneficiaries if the shares originally given to two of the sons were surrounded by the safeguards of a trust. This naturally led to provisions with respect to these shares which give the appearance of partiality, but it is only the appearance. The same quantum of property, less \$1,000 given outright, is placed under the trust in each case as was originally given absolutely, and the benefits of it are plainly intended to be confined to the son during his life, and after his death to his immediate family and stock until such stock should cease to be. The duty of expressing the testatrix's purpose in a codicil was unfortunately performed by some one who knew little of

the proper use and meaning of legal words and phraseology. Nevertheless, a careful reading of the language used to embody the trusts which were desired to be created, in the light of the accepted principles already noticed, reveals the interpretation which should be placed thereon.

The provisions which relate to the rights of the two sons Marshall S. and James H., although clumsily framed, present no questions. It is clear and conceded that to each is given the net income of one of the four equal shares into which the residuary estate is divided during his life, less \$1,000. The codicil adds: "And at the death of either or both to their heirs at law respectively." It is apparent from the immediately following context that the testatrix, in her ignorance, of legal relations and legal terms, here used the term "heirs at law" as descriptive of the class of persons more particularly defined by her immediately afterward as "wives and children," and that, to avoid the creation of an illegal perpetuity, it ought to be so interpreted. This is the group of persons who would most naturally be suggested to her mind as next to her sons in the order of her scheme of trust benefactions and as the one preceding in order the grandchildren in whose favor the next provision of the codicil ran. The wives, thus designated as co-beneficiaries of income with children, will be interpreted to include only those women who occupied that position at the death of the testatrix, and not any woman or women who since that time may have come into that position. *Beers v. Narramore*, 61 Conn. 13, 19, 22 Atl. 1061; *St. John v. Dann*, 66 Conn. 401, 405, 34 Atl. 110. The term for which the payment of income is thus directed to be made to the surviving wife and children of the sons, respectively, is defined by the immediately following provisions already referred to, to wit: "And I hereby direct that at the death of their wives and all the children of the said Marshall S. and James H. Trulock that the said property may be given directly and equally to their grandchildren," etc. This language is, of course, to be read distributively, and as though the word "respectively" had been inserted after the names of the sons as an accurate expression of the testatrix's manifest intent would have dictated, so that the net income derived from the share of the testatrix's estate of which the net income was payable to either of said sons during his life becomes, upon his death, payable to his wife at the testatrix's death, if any, and his children, and continues to be so payable until the death of the last survivor of such wife and children, whereupon the trust to pay over to anybody income derived from said share ceases, and said share stands for distribution as principal pursuant to other provisions of the codicil, or, in the event of their being ineffective, pursuant to the law. Until the trust to pay over the income derived from a share terminates, and the time

arrives when the share is ready for distribution as principal, the property which comprises that share remains in the hands of the trustee as a trust fund.

The provisions of the codicil in favor of grandchildren of the two sons is in contravention of the statute against perpetuities, which was not repealed until after the death of the testatrix, and the remainder attempted to be given to them is intestate estate of the testatrix. *Tingler v. Chamberlin*, 71 Conn. 486, 42 Atl. 718. The gifts of income in favor of the wives and children, as defined, are not within the prohibitions of the statute and are valid.

The superior court is advised to render judgment in conformity with the views above expressed. No costs in this court will be taxed in favor of either party. All concur.

(31 Conn. 105)

**MORTON TRUST CO. v. CHITTENDEN et al.**

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

**WILLS—CONSTRUCTION—VESTED REMAINDER.**

Testator, by a will, reciting that it bequeathed and devised all his property, after giving to his daughter for life the use of the B. house, provided that on the death of his wife all of his estate not disposed of by the will be divided into three equal parts, one of which he bequeathed in trust for his daughter, and in case she should die leaving minor children the trustee should apportion the income for their use, and "if after the death of my daughter and her son C. should be living, and attained to the age of 25 years, then I give \* \* \* to him an undivided half of the B. house, and the one equal half of the unexpended part of the personal estate set apart for his mother; and in like manner I give and devise to M., daughter of my daughter, when she shall attain to the age of 21, the other one half of the B. house, and the one-half of the personal estate, not used, of that part set apart in this will for her mother." By a subsequent clause he spoke of the trustee of "that part of my estate set apart for the use and benefit of my daughter and her children." *Held*, that it was testator's intention to give to his grandchildren C. and M. like interests and estates in the B. house and in the trust property, excepting as regards the age at which they should respectively receive possession and enjoyment of such estates, and that the remainder to C. vested in him at the death of testator, and was not conditioned on his attaining the age of 25.

Case Reserved from Superior Court, Fairfield County; Silas A. Robinson, Judge.

Suit by the Morton Trust Company, as testamentary trustee, against Simeon B. Chittenden and others, for construction of a will. Case reserved for the advice of the Supreme Court of Errors. Will construed.

Stoddard, Marsh & Stoddard, for plaintiff. William B. Boardman, for defendants Simeon B. Chittenden and others. Robert G. De Forest, in pro. per. and as administrator of Sherman Hartwell's estate. Samuel F. Beardsley, for defendants Comete L. H. Stead and others. Robert E. De Forest, for defendants Mary Hartwell Bonesteel and others.

HALL, J. The plaintiff trust company, organized under the laws of the state of New York, was by the probate court of Bridgeport appointed to execute the trusts created by the will of Sherman Hartwell of Bridgeport, who died in 1876. There survived said testator his widow, Sophia Todd Hartwell; a daughter, Sophia Hartwell Bonesteel, wife of John N. Bonesteel, and their two children, Charles Hartwell Bonesteel and Mary Bonesteel Knight; and also the issue of each of three deceased daughters of the testator. The widow, Sophia Todd Hartwell, died in 1882. The daughter, Sophia Hartwell Bonesteel, died in 1907. Charles Hartwell Bonesteel died intestate in 1902, having attained the age of 25 years, leaving three children. Simeon B. Chittenden, one of the defendants, is the administrator of the estate of said Charles Hartwell Bonesteel. Mary Bonesteel Knight survived her mother, Sophia Hartwell Bonesteel, and attained the age of 21 before her mother's death.

The following portions of the will of said Sherman Hartwell are material to the questions presented by this case:

"I, Sherman Hartwell \* \* \* publish and declare this my last will and testament in manner and form following giving, bequeathing and devising all my real and personal estate:"

"Fourth. I give and bequeath to my daughter Sophia H. Bonesteel at my decease during her life, the free use and improvement of my house and lot and the furniture therein, it being house and lot No. 310 Carlton avenue, city of Brooklyn, and state of New York—subject to the use, also of her husband free of rent, so long as he shall make it a residence for himself and family."

"Seventh. On the decease of my wife, Sophia T. Hartwell, I will order and direct that all that remains of my estate not disposed of in this will, be divided into three equal parts by my executors, or the survivor of them, and I will, order, bequeath and devise the same as follows: One-third part I give and bequeath in trust, for my daughter Sophia Bonesteel, the same to be safely kept by Simeon B. Chittenden of Brooklyn, state of New York, who I hereby constitute and appoint trustee of all real and personal estate set apart for the use and benefit of my said daughter Sophia Bonesteel, and for her children during their minority; said trustee to collect interest and dividends and pay taxes and insurance on house No. 310 Carlton avenue, Brooklyn, and the balance pay half yearly to my said daughter Sophia, and if circumstances should be such that my said daughter should need a part of the principal, to give her and her children a comfortable support, then said trustee is hereby authorized to furnish it. In the event that my said daughter Sophia should die leaving child or children under twenty-one years of age, then the income shall be apportioned by said trustee for the use and benefit of said children, and if it

should appear right and reasonable that one child should receive more than his proportion of the income, then he is hereby authorized so to divide it. If after the death of my daughter Sophia and her son Charles H. Bonesteel should be living, and attained to the age of twenty-five years, then I give and devise to him the one equal and undivided half of the Brooklyn house No. 310 Carlton avenue, and one equal half of the unexpended part of the personal estate set apart for his mother, and in like manner I give and devise to Mary Bonesteel, daughter of my daughter Sophia, when she shall attain to the age of twenty-one years, the other one half of the Brooklyn house No. 310 Carlton avenue, and the one half of the personal estate, not used, of that part set apart in this will for her mother. \* \* \*

"Eleventh. If an all wise providence should remove by death Simeon B. Chittenden who I have by this will made trustee of that part of my estate set apart for the use and benefit of my daughter Sophia Bonesteel and her children before said trust is fully settled. \* \* \*

The personal property constituting the principal of the trust estate created by said will, now held by the plaintiff, is of the value of about \$60,000. The plaintiff by this action propounds to the superior court this question: "To whom, under paragraph 7 of said will, and the facts as set out above, should the share of said trust fund, which Charles Hartwell Bonesteel would have taken, had he survived the said Sophia Bonesteel, be distributed by the plaintiff?"

The administrator of the estate of said Charles Hartwell Bonesteel, the latter's three children, and others claim that by said language of the seventh clause of the will an estate in remainder in fee in an undivided one-half of the Brooklyn house No. 310 Carlton avenue, and in one-half the unexpended part of the personal estate, so given in trust for the benefit of his mother during her life, vested in said Charles Hartwell Bonesteel at the death of the testator, subject to said life interest of his mother, and the interest of his father given by the fourth paragraph of the will, and that it is now a part of the estate of said Charles Hartwell Bonesteel, and should be delivered to his administrator to be so distributed. Other parties in interest claim that the estate in remainder so given Charles Hartwell Bonesteel was contingent upon his surviving his mother, and that, not having survived her, it became upon her death intestate estate of said Sherman Hartwell, and that it should be delivered to his administrator d. b. n. c. t. a. for distribution as such. These considerations support the first of the two constructions contended for.

It is clear that the testator intended by the provisions of his will to dispose of all his property, real and personal, for he has so expressly declared in the instrument itself.

While such expressed intention does not necessarily control the construction to be placed upon the language in question, giving the remainder to Charles Hartwell Bonesteel, it is of weight in determining the meaning of the somewhat ambiguous terms of such gift, and especially when considered in connection with the absence of any gift over in case Charles should not survive his mother. Again, the same seventh clause of the will, which gives an estate in remainder to Charles, gives to his sister Mary an unquestioned vested remainder in the remaining one-half of the same real estate and trust property, one-half of which is given in remainder to Charles, and such remainder is expressly described in the will as given "in like manner" with the gift and devise to Charles, which immediately precedes it. Further, in the eleventh clause of the will, the testator refers to the trust estate so given in remainder to his two grandchildren, Charles and Mary, after the death of their mother, as "that part of my estate set apart for the use and benefit of my daughter Sophia Bonesteel and her children."

The words "if after the death of my daughter Sophia and her son Charles H. Bonesteel should be living, and attained to the age of twenty-five years, then I give," etc., are ungrammatical and of uncertain meaning. If they are to be interpreted as creating a gift to Charles contingent upon his surviving his mother, there would be ground for the claim that the remainder so created was also contingent upon his attaining the age of 25 years, after he had survived his mother, a condition which it is difficult to believe the testator could have intended to impose. We think it was the intention of the testator to give to his grandchildren Charles and Mary like interests and estates in the Brooklyn house and in the trust property, excepting as regards the age at which they should, respectively, receive the possession and enjoyment of such estates; that the remainder to Charles vested in him at the death of the testator; and that, by the words just quoted of the seventh clause of the will, it was intended that Charles should have the possession and enjoyment of the estate so devised to him, when, after the death of his mother and the termination of his father's interest in the Brooklyn house, Charles had attained the age of 25 years. The Brooklyn house No. 310 Carlton avenue forms no part of the trust property described in the seventh clause of the will. The trustee has had no title to it or interest in it, excepting as he was required to pay the taxes and insurance upon it from the trust funds. The only property given in trust by the seventh clause is described in that clause as a one-third part of "all that remains of my estate not disposed of in this will." The Brooklyn house was disposed of by the gift of the life estate in it, to the testator's daughter Sophia, by the fourth

clause of the will, and of the remainder in fee to Charles and Mary by the seventh clause.

Our advice to the superior court and its direction to the trustee must be limited to the disposal of the trust property, and we advise that court to direct the plaintiff trustee to pay and deliver one-half of the same, less lawful costs and charges, to the administrator of the estate of Charles Hartwell Bonesteel, deceased, to be distributed as part of his estate. No costs will be taxed in this court.

(31 Conn. 84)

# CITY OF BRIDGEPORT v. BRIDGEPORT HYDRAULIC CO.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

## 1. WATERS AND WATER COURSES—FLOWAGE—ACTIONS FOR INJURIES—EVIDENCE.

In an action for injury to plaintiff's highways and bridges, alleged to have been caused by the breaking of defendant's dam during a flood because of a defect therein, evidence held to justify the finding of the trial court that the flood was extraordinary, unprecedented, and not reasonably to be expected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 250.]

## 2. APPEAL AND ERROR—REVIEW—TRIAL BY COURT—FINDINGS OF FACT—CONCLUSIVENESS.

In an action for injuries to plaintiff's highways by the breaking of defendant's dam during a flood, the evidence being conflicting as to the extent of prior floods, the Supreme Court of Errors will not retry such questions of fact, and the finding of the trial court thereon is conclusive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

## 3. WATERS AND WATER COURSES — INJURIES FROM FLOWAGE — PROXIMATE CAUSE — INEVITABLE ACCIDENT — ACT OF GOD.

The owner of a dam is not liable for injuries caused by extraordinary and unprecedented floods; they being unavoidable accidents resulting from vis major, or the act of God, against which no provision can be reasonably made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 233, 234.]

## 4. SAME—FINDINGS—SUFFICIENCY.

In an action for injuries caused by the breaking of defendant's dam, civil engineers testified for defendant that they had previously examined the dam and reported it safe, but it appeared upon cross-examination that, when the engineers made the examination, they were not told of freshets which had previously occurred in the river. The trial court refused to find this fact at plaintiff's request, but it found, from evidence other than that of these witnesses, that the dam was not insufficient. Held that, even if defendant was negligent in failing to inform the engineers of the prior freshets, under the court's finding, such negligence did not contribute to plaintiff's injury, and hence the requested finding was not material and was properly refused.

## 5. APPEAL AND ERROR—REVIEW—DISCRETION OF TRIAL COURT—PROCEEDINGS FOR REVIEW—ADDITIONS TO FINDINGS.

The draft finding and statement of the questions of law which plaintiff desired to have reviewed, filed with the request for a finding as required by statute, presented but one question of evidence for review, and thereafter plaintiff moved for corrections in and additions to the same, including several rulings upon questions



of evidence which arose during cross-examination, all of which were refused. *Held*, that while the court could have made the additions, if it believed their omission from the original statement was by accident and considered the questions presented thereby had merit, and defendant was not prejudiced by the delay, yet it was not bound to do so, and its refusal to do so was not reviewable, as the questions presented by the proposed additions were not included in the original statement of the questions plaintiff desired to have reviewed.

**6. WITNESSES—CONFIDENTIAL RELATIONS—ATTORNEY AND CLIENT—DOCUMENTS IN POSSESSION OF ATTORNEY.**

In an action for injuries to plaintiff's highways by the breaking of defendant's dam, where plaintiff's counsel was called as a witness by defendant and asked to compare the language of a purported copy of an engineer's report as to the condition of the dam with the original in his possession, his attorney's privilege did not protect him from disclosing the contents of the report, since, while formerly neither a party nor his attorney could be compelled to produce documents in his possession, the law being changed so that a client could be compelled to produce such documents, the rule making them privileged while in the possession of his attorney also ceased.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 762.]

Appeal from Superior Court, Fairfield County; Milton A. Shumway, Judge.

Action by the city of Bridgeport against the Bridgeport Hydraulic Company. From a judgment for plaintiff for nominal damages, it appeals. *Affirmed*.

James A. Marr and Thomas M. Cullinan, for appellant. Goodwin & Stoddard and Stiles Judson, for appellee.

**THAYER, J.** The complaint alleges, in substance: That the defendant's dam broke and discharged an immense body of water which had been collected in its reservoirs upon certain highways and bridges of the plaintiff below the dam, destroying some of them and greatly damaging and injuring others; that the dam was defective in having insufficient spillway capacity for all conditions against which the defendant was bound to provide and in other respects not necessary to be mentioned; that the defendant was negligent in permitting this defective condition to exist; and that it was by reason of the defects in the dam and the defendant's negligence in permitting them to exist that the dam gave way and the injuries complained of were received. The case was defaulted with notice that on the hearing in damages evidence would be offered to disprove these allegations and to prove that the dam gave way by reason of an extraordinary and unexpected freshet.

The defendant, as alleged in the complaint, is chartered by the state for the purpose of supplying water to the inhabitants of the plaintiff city and vicinity, and no question is made as to its right to maintain the dam in question on the Pequonnock river. The contested questions between the parties were: Whether the dam was defective; if so, whether the defendant was negligent in per-

mitting it to be in that condition; and whether the injury was caused by such negligence. The court found the allegations of the complaint untrue, and that the destruction of the dam was due to an extraordinary and unprecedented flood in the river. These findings of fact support the judgment for the defendant and, if correct, dispose of the questions of law attempted to be raised on the appeal, except those which relate to the admission of evidence. The plaintiff contends that these findings are not correct, and in its appeal asks for their correction. Its claim is that the changes asked for are warranted by the subordinate facts which appear in the finding, but, if not, that the evidence which is made part of the plaintiff's exceptions warrants them.

It is claimed that the court improperly found that the storm which carried away the dam was unprecedented. This was a question of fact. The evidence bearing upon the question is not before us. The facts from which the conclusion was drawn are these: In approximately 12 hours, on the afternoon and evening of July 29, 1905, between 11 and 12 inches of rain fell on the lower two-thirds of the watershed of the defendant's reservoir. When the storm commenced, the water in the reservoir was 3 feet below the spillway of the dam. At 7 o'clock the water was running over the spillway, and the waste gates were then opened by the defendant's engineer. The water continued to rise, and at 1 o'clock on the morning of July 30th it ran over the earthwork of the dam, shortly after undermined it, and the dam gave way. This fall of rain produced at the dam at the height of the flood not less than 200 cubic feet per second of water per square mile of watershed; the capacity of the spillway being only 155 cubic feet. The river at a point about a mile above the reservoir, which point substantially all the water flowing into the reservoir passed, was over 3½ feet higher than at any previous known flood, and the width of the river at the same point was expanded to 669 feet. In the highest previous known flood it was 330 feet. In the flood of 1874, which did not top the dam, and which was the highest previous one concerning which there was any evidence before the court, the highest point reached by the water in the reservoir was prior to the opening of the waste gates, according to the testimony of the plaintiff's principal witness, and when the gates were opened the water above the dam at once began to recede. It thus appears that when the waste gates were open the dam had ample discharging capacity for all previous known floods, while in the storm of 1905, with those gates opened as soon as the water reached the spillway, the water continued to increase in height until it rose above the earthwork, which was nearly 7½ feet above the bottom of the spillway, and destroyed the dam. We think that these facts justify the conclusion that the flood in question was extraordinary,



unprecedented, and not reasonably to be expected.

But the plaintiff claims that the evidence which is made a part of its exceptions shows that in the flood of 1874 at least, and perhaps in one or two others which occurred since the dam was built in 1853, the water topped or ran over the earthwork of the dam. There was considerable evidence bearing upon the height to which the water rose on those occasions. There was some direct evidence on the part of the plaintiff's witnesses that in the 1874 freshet the water ran over the earthwork of the dam; but there was conflicting evidence, and the principal witness for the plaintiff on this point was attacked by evidence tending to show that he had previously made contradictory statements concerning the occurrence. The case upon this point is therefore clearly within the rule repeatedly stated by us that this court will not retry questions of fact which have been determined upon conflicting testimony. *Hourigan v. Norwich*, 77 Conn. 358, 388, 59 Atl. 487, and cases cited. If therefore the law is, as claimed by the plaintiff, that it was the duty of the defendant to keep its dam safe and secure against all conditions of the stream which could reasonably be expected to occur, the finding of the court shows that the duty was performed. It is well settled that the owner of a dam is not liable for injuries caused by extraordinary, unprecedented floods. These are classed with inevitable accidents, as the result of vis major, or act of God, against which one cannot reasonably be required to provide.

It appears that during the trial two civil engineers, Senior and Hall, were called to testify in behalf of the defendant that at its procurement they made an examination of the dam in 1904 and found and reported it safe and suitable. Upon cross-examination it appeared, as claimed by the plaintiff, that the defendant at the time of their employment did not give them a history of the freshets which had previously occurred in the river. The plaintiff has excepted to the court's refusal to find this fact. The testimony of these witnesses was offered as bearing upon the question of the defendant's negligence, to show the precautions which it had taken to assure itself of the safety of the dam, and had the court found that the dam was insufficient, but that the defendant was not negligent in respect thereto, the fact requested to be found would be important as showing that the defendant was negligent in regard to the inspection; but the court has found that the dam was not insufficient, and found it not from what these witnesses reported to the defendant, which for that purpose would be inadmissible, but from the testimony of witnesses before it, including experts who had the history of prior freshets in mind as they testified. If the defendant was negligent therefore in failing to inform these engineers of the prior freshets in the river, such negligence in

no way contributed to the breaking of the dam or the plaintiff's injury, and the fact of such failure is entitled to no place in the finding. The court, for this reason, doubtless, properly refused to add the fact to the finding. For similar reasons the plaintiff was not entitled to have the fact that Engineer Schofield's examination of the dam did not relate to the sufficiency of its dimensions or capacity of the spillway added to the finding. The draft finding and the statement of the questions of law arising thereon which the plaintiff desired to have reviewed, which were filed with the request for a finding as the statute requires, presented for review only one question of evidence. After the finding had been filed, the plaintiff filed a motion for corrections in and additions to the same. Among the latter were presented several rulings upon questions of evidence which arose during the cross-examination of one Allen. No exceptions based upon a refusal to make such additions were filed. The statute requires the filing of such exceptions to support an appeal to this court for such a correction. *Walsh v. Hayes*, 72 Conn. 397, 403, 44 Atl. 725. But such exceptions, if made, would have been of no avail in support of the plaintiff's appeal in this case, for the reason that the questions presented by the proposed additions were not included in the original statement of the questions which the plaintiff desired to have reviewed. *Clark's Appeal*, 79 Conn. 136, 138, 64 Atl. 12; *Dennison Brothers v. Waterville Cutlery Company*, 80 Conn. 590, 69 Atl. 1022. The court therefore was not bound to make the additions, although it had the power to do so, if it believed that their omission from the original statement was by accident, and not for an improper purpose, and considered that the questions presented by the additions proposed had merit, and that the defendant had not been prejudiced by the delay. The requirement of the statute is highly beneficial and ought to be enforced, not only in its letter, but in its spirit. *Clark's Appeal*, 79 Conn. 139, 64 Atl. 13. The plaintiff could only ask for the additions as a matter of grace, and not as a matter of right. The court's refusal to make them affords no ground for an appeal.

The only question of evidence properly raised by the appeal is whether his attorney's privilege protected Mr. Marr, one of the plaintiff's counsel, from disclosing the contents of Engineer Bunce's report. He was called by the defendant as a witness and was asked to compare the language of a claimed copy of that report with the original, which had come into his possession as counsel for the plaintiff. This was in effect asking him to produce in evidence the document itself and was objected to by him upon the ground that it was a privileged communication which he was not bound to disclose. The court overruled the objection. Formerly a party to an action could not be compelled by his opponent to testify, and documents in his pos-

session were then protected from disclosure. To enable him to obtain the aid of counsel, it was necessary to protect such documents in the hands of the counsel; otherwise, by the employment of counsel to protect his interests, he would lay open to his opponent evidence which was protected in his own hands. That he might be free to employ counsel it was held that such documents were privileged in the counsel's hands; but the privilege belonged to the client, and not to the counsel, and could be waived by the former, and, if waived, the latter could be compelled to disclose. *Hunt v. Blackburn*, 128 U. S. 464, 470, 9 Sup. Ct. 125, 32 L. Ed. 488. When the law was changed so that the client could be compelled to produce the document (see *Banks v. Connecticut Railway & Lighting Co.*, 79 Conn. 116, 118, 64 Atl. 14), the necessity for the rule that the attorney could not be compelled to produce it ceased, and the rule fell with it. *Jones v. Reilly*, 174 N. Y. 97, 106, 68 N. E. 649. The court rightly held therefore that the report was not privileged in the hands of counsel.

There is no error. All concur.

(31 Conn. 171)

#### Appeal of GARDNER et al.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

#### 1. CONVERSION — SALE BY TRUSTEE UNDER PROVISION IN WILL.

H., having a small estate, more than a third of which consisted of real estate, provided by his will an elaborate scheme of benefaction, which would quite probably, if not certainly, require for its accomplishment the sale of portions or all of his real estate, a trust being created, and provision being made for expenditures by the trustee from the corpus of the estate for the care, support, and education of his children during minority, and division of the corpus to each of the children in repeated partial payments year by year for a period of years after majority. *Held*, that in making the provision that the trustee should at all times have full power and authority to sell any portion of the estate that should be necessary to execute the provisions of the trust, but that all investments of the estate by the trustee should be made in the safest and most careful manner, no mere power to change investments was given, but that testator contemplated the necessity of conversions as an incident of the execution of the trust, and expected and intended that his estate should be shared by his beneficiaries in its changed form, so that, as regards the descent and distribution of the estate of a beneficiary, proceeds of a sale by the trustee which had been turned over to such beneficiary was to be treated as personality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Conversion, §§ 30-34.]

#### 2. EVIDENCE—PRESUMPTION—OFFICIAL ACTS.

A trustee under a will having power to sell and convert real estate only in case it was necessary to execute the provisions of the trust, it will, in the absence of evidence to the contrary, be presumed, in favor of the regularity of the trustee's conduct in making a sale, that the necessity existed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 105.]

#### 3. TRUSTEES—SALE OF TRUST PROPERTY—ACQUIESCENCE BY BENEFICIARY.

One who during the last four or five years of his life, when he was of full age and capacity, had an interest as sole remainderman in a trust fund created by will, and made no objection to the action of the trustee in making sale of the real estate, which under the will he had power to make only in case it was necessary to execute the provisions of the will, but from time to time received from the trustee payments from the proceeds of the sale, will by his acquiescence be regarded as having expressed his approval of the change in the character of the trust fund from realty to personality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 256.]

#### 4. SAME—OBJECTION BY CLAIMANT THROUGH BENEFICIARY.

Persons who have no other interest than as claimants to the estate of the intestate, and whose right to distribution therefrom depends on personality received by him from a trustee under a will being still treated as real estate, cannot object that a sale of real estate by the trustee, the proceeds of which was the personality, was unauthorized under the power in the will, because not necessary to execute the provisions of the will; intestate having acquiesced in the sale.

#### 5. CONVERSION—SALE UNDER ORDER OF COURT.

The primal source of power exercised by a trustee under a will in making a sale of real estate being the provision in the will giving him authority to sell any portion of it that should be necessary to execute the provisions of the trust, a conversion is worked by the sale no less because made on an order of the court; the application to it being only for a determination of the fitness of the occasion for the exercise of the power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Conversion, § 8.]

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Appeal from an order of the court of probate for the district of Wallingford making distribution of the estate of Frank C. Shipman, deceased, taken to and tried by the superior court. Facts found and judgment rendered affirming the order of the court of probate, and the original appellants again appeal. *Affirmed*.

Henry A. Shipman died in Ansonia September 29, 1884, leaving a will, which was duly probated, a widow, and three sons, his only children and heirs at law. By the will all of his property was given to three trustees, who were also named as executors. This property consisted of two pieces of real estate and an undivided one-half interest in a third piece, which were together inventoried at \$13,000, and personal property which, after the payment of debts and charges, was valued at \$22,839.18. The two first-named pieces of real estate were, in the first paragraph of the will, set apart for the benefit of a son, Henry D., and the same, together with certain shares of stock, were, subject to the trust created, given to him. The second paragraph gave the wife, subject to the trust, the use, rents, and profits of the undivided half of the remaining piece of real estate, which was located in Meriden, and also the use, rents, and profits of one-fourth part of the balance

of his property for and during her natural life. The will then proceeds as follows:

"III. All the rest, residue, and remainder of my property of every description, I give, devise and bequeath, subject to the trust herein created, in equal shares, share and share alike, unto my three children, Henry D. Shipman, Frank C. Shipman, and John I. Shipman, upon the condition, however, that if at any time there shall be a failure of lineal heirs of either of said children, the heirs of the half blood shall take of the property herein devised and bequeathed equally with the heirs of the whole blood.

"IV. I direct my trustees herein named, or such others as may be appointed in their places, to take such care of my estate as prudent men would take of their own, and during the minority of my children that they expend for each minor child out of the portion of my estate belonging to such child by virtue of the provisions hereof such sums as shall be requisite for the care, support and education of such child; and upon each of said children becoming of full age, provided such child shall be of temperate, industrious, and economical habits, and in the opinion of my trustees aforesaid be capable of transacting such business as he may thereafter engage in, shall pay over to such child or transfer to him such part of his portion of my estate, not exceeding one-third of his share thereof, as may be deemed advisable by said trustees to establish said child in business; and in case such child shall evince good business management said trustees shall at his request from time to time pay and transfer to such child the balance of his share of my estate, at the rate of not exceeding one-sixth part thereof in any one year; but none of my estate while in the hands of trustees shall be taken to satisfy any liability of any of said children, except upon the written order of said trustees, given prior to the existence of such liability.

"V. If after becoming of age any of my said sons by reason of irregular or improvident habits, or lack of thrift, or otherwise, shall in the opinion of my trustees be an unsuitable person to have the custody and management of his portion of my estate, said trustee shall only permit him to use such part of his portion of my estate as shall be necessary for the current wants of such son and his family, in case he have a family."

VI. Provides for the selection of trustees in cases of vacancy.

"VII. This trust shall continue during the life of my said wife, and until my entire estate shall have been paid over or transferred to my children or to their legal representatives, or used for their benefit, and if either of said children shall die leaving any part of his portion of my estate in the hands of said trustees, and without leaving any lineal heirs, such part of his portion of my estate as shall be inherited by my other said children, or

either of them, shall remain in the hands of said trustees in the same manner as the portions of the children inheriting such deceased child's portion, and neither of my said sons shall have any power to dispose of any part of my estate while in the hands of trustees, or in any manner pledge or affect the same by contract, will, or otherwise, while in the hands of said trustees.

"VIII. My said trustees and their successors shall at all times have full power and authority to sell and convey any part or portion of my estate that shall be necessary to execute the provisions of this trust; but all investments of my estate by said trustees shall be made in the safest and most careful manner.

"IX. Upon the death of either of my sons aforesaid any part of such son's portion of my estate subject to the trust herein created, shall, except as hereinbefore provided, be discharged of such trust, and vest in such persons as are entitled to receive the same, free from all restrictions."

Charles H. Pine alone of the three persons named as executors qualified, and he filed his final account July 28, 1885. He, also alone, qualified as trustee and paid over to himself in his capacity as trustee the estate already specified. He continued to execute said trust until the same was terminated by the death of Frank C. Shipman, the intestate whose estate is now in settlement. Mrs. Shipman, the widow, survived her husband less than one year. One of the sons, John I., died February 14, 1893, intestate, unmarried, and without issue. The son Henry D. died September 13, 1901, intestate, leaving a widow but no issue. October 17, 1902, this widow conveyed all her right, title, and interest in and to the estate of her husband to Frank C. Shipman. Frank C., the last survivor of the family, and born July 29, 1875, died between June and December, 1906, intestate. During Pine's management of the trust, the three pieces of real estate left by H. A. Shipman were sold in the manner and for the cash proceeds stated in the opinion, and these proceeds were retained as a part of the corpus of the trust and reinvested. As a result of the judicious management of the fund, it increased in value to the amount of \$20,000 while in the trustee's hands. After Frank C. Shipman's death, Pine, as trustee, turned over to himself, as administrator of Frank's estate, cash and bank deposits amounting to \$21,054.53, being the amount of the trust fund then remaining in his hands, and received from other sources as Frank's estate property inventoried at \$40,798.74. Said trustee, under the provisions of the will, paid over to Frank for the year ending June 30, 1902, \$17,150, for that ending June 30, 1903, \$5,500, for that ending June 30, 1904, \$5,422.13, for that ending June 30, 1905, \$4,499.38, and for the year ending June 30, 1906, \$5,000,

making in all \$37,571.51. Frank, after arriving at full age and being *sui juris* and fully competent to manage his affairs, ratified and confirmed all of Pine's doings as trustee, including the sales of real estate made by him. All of said sales were such as a prudent man would make of his own property, and were made in fulfillment of the obligations laid upon him by the express terms of the will. The last two sentences taken from the finding are excepted to and made the subject of reasons of appeal.

William C. Mueller and Edward A. Harri-man, for appellants Minnie B. Gardner and others. Frank S. Fay and George A. Clark, for appellees Fanny Maria Colton Rust and others.

PRENTICE, J. (after stating the facts as above). The property of the estate of F. C. Shipman, deceased, awaiting distribution as intestate estate, consists of both real and personal estate. The order of distribution appealed from divides it all among the next of kin of the intestate. Certain other persons, the appellants, further removed from him in kinship, claim to be entitled to have portions of the property distributed to them by virtue of that part of section 398 of the General Statutes of 1902 which provides for the descent and distribution of such real estate of an intestate as came to him by descent, gift, or devise from a kinsman. The appellants rest this claim upon: (1) Their kinship to H. A. Shipman; (2) the ownership by H. A. Shipman at his death of certain real estate; (3) the descent by virtue of H. A. Shipman's will of such real estate, or that for which it stands, subject to created, but now terminated, trusts, directly from him to F. C. Shipman, his son; and (4) the presence in the estate of the latter awaiting distribution of certain moneys or bank deposits which as being or representing the proceeds of the sale of said real estate should, it is contended, be regarded in law and equity as the very real estate left by the testator.

In making application of the statutory provisions thus invoked, we are required "to look to the immediate descent and immediate ancestor, rather than to a remote descent and a remote ancestor." *Clark v. Shaller*, 46 Conn. 119, 123. The parties are in contention as to whether this requirement of the law is satisfied as to the larger part of the funds in controversy, whatever character be given to them, so that H. A. Shipman, through whom the appellants alone claim, and not the intestate's predeceased brothers, can be regarded as the immediate source from which the intestate received it. We have no occasion, as will later appear, to pass upon this matter. Some portion of the property did come to the intestate by the direct operation of his father's will, and a question underlying this whole case is thus presented. The property

to which the appellants lay claim is, and came to the intestate's estate as, personalty, being cash on hand or in bank. It amounts to \$14,500. Of this sum \$7,000 was, the appellants' contention assumes, the proceeds of sales by the trustee under the father's will of two pieces of real estate left by him and forming a part of the trust fund created by the will. The remaining \$7,500 was, as is similarly assumed, the proceeds of the sale by the trustee of an undivided half of another piece of real estate also left by the testator and included in said fund. The first-named pieces were sold in 1886 and 1893, without action by the court of probate. The last-named was sold in 1904, following an order of the court. As to all this money so received by the trustee from the sale of real estate and by him, upon the termination of the trust, turned over, as is said, to the estate of F. C. Shipman, it is asserted that it should be treated as the real estate sold would be treated had no sale been made, and that identical property now appeared among the assets of the intestate's estate. The general rule is that property is transmitted according to the form in which it exists at the time of the death of the owner, but the principle now invoked is a recognized one as applicable to certain conditions. *Horton v. Upham*, 72 Conn. 29, 31, 43 Atl. 492; *Chaplin*, Petitioner, 148 Mass. 591, 20 N. E. 196, 2 L. R. A. 768; *Smith v. Bayright*, 34 N. J. Eq. 424, 427. It remains to inquire if those conditions are present here.

The question which this contention first prompts is one as to whether, in view of the financial record of the fund, there is justification for the assumption, which lies at the foundation of the argument presented, that the proceeds of the sales of real estate can with reasonable certainty be traced to the funds which were turned over by the trustee after the death of F. C. Shipman. Let this fact, however, be assumed, and the argument advanced on behalf of the appellants must nevertheless fail. The will provides that the trustees thereunder should have full power and authority to sell and convey any part or portion of the testator's estate that should be necessary to execute the provisions of the trust, but that all investments should be made in the safest and most careful manner. Here is no mere power to change investments. In *Bristol v. Austin*, 40 Conn. 438, where a life beneficiary was given the power to sell, it was held that the intent of the testator was to confer the discretionary power to make a legal conversion of the estate from real to personal, and vice versa, so as to change its character for all purposes, and so to all parties interested. Here we have a case where the like intent on the part of the testator is much more strongly manifested, and this intent must govern. This testator was providing an elaborate scheme of benefaction which would quite probably, if not certainly,

require for the accomplishment of his plan the sale of portions or all of his real estate. He was providing for expenditures by the trustee from the corpus of his estate for the care, support, and education of his children during minority, and divisions thereof to each in repeated partial payments year by year for a period of years after majority. More than one-third of his not large estate consisted of realty. He must therefore have anticipated that exigencies would in the natural course of things arise, when to meet the situation presented the conversion of real estate into money would be a necessity. It was doubtless the anticipation of this fact which led him to give the trustee the power of sale so essential to the execution of this trust. Other prudential considerations may have been present in his mind, and other benefits sought; but the terms of the will point too unerringly to that which has been indicated as being the mainspring of his action and his chief end in view for his motive and intention to be undiscovered. Once discovered and the scheme of his giving being borne in mind, it is apparent that he not only contemplated the necessity of conversions as an incident of the execution of the trust, but also expected and intended that his estate should be shared by his beneficiaries in its changed form. In the situation which he created and in which he placed his trustee, it is impossible to believe that when he gave the power of sale he did not contemplate and intend that, whatever new form his estate should take on by reason of the exercise of the authority given, it, and nothing else, should for the future represent in the fullest sense his estate and express its real character in all its relations, for all purposes and as to all parties concerned. He could not have entertained the idea that his real estate was to be preserved or go to his beneficiaries as such. The situation as respects the proceeds of the sales in 1886 and 1893, which were made in the exercise of the power conferred by the will and by no other authority, is therefore one in which it would seem that the character of personalty must, for the purposes of the distribution of it as the estate of F. C. Shipman into which it has come, attach to it. *Bristol v. Austin*, 40 Conn. 438, 449; *Gray v. Whittemore*, 192 Mass. 367, 384, 78 N. E. 422, 10 L. R. A. (N. S.) 1043, 116 Am. St. Rep. 246.

But it is said that it does not appear that there was any necessity for these sales, and

therefore that it does not appear that the power was properly exercised. The contrary, however, does not appear, and the regularity of the trustee's conduct will, in the absence of countervailing proof, be presumed. *Beers v. Narramore*, 61 Conn. 13, 24, 22 Atl. 1061; *Skiff v. Stoddard*, 63 Conn. 198, 227, 28 Atl. 874, 28 Atl. 104, 21 L. R. A. 102. Moreover, F. C. Shipman during the last 10 years of his life was of full age and capacity and had an interest in the trust fund as a remainderman, and for the last four or five years of that period as the sole remainderman. During all this time he not only made no objection to the act of the trustee, but from time to time down to his death received from the trustee the fruits of his action. After this period of silence and acquiescence on the part of the intestate, those who have no other interest than as claimants to his estate cannot now be heard to raise an objection to the propriety of the trustee's action which the intestate never made. His acquiescence thus indicated must, apart from the finding of the court as to his ratification and confirmation, be regarded as expressing his approval of the change in the character of the fund and his co-operation in the destruction of the ancestral character of any of it which unconverted might have partaken of that character. *Smith v. Bayright*, 34 N. J. Eq. 424, 427.

The sale in 1904 was preceded by action of the court of probate and an order of sale issued by that court. It was nevertheless as distinctly an exercise of the power contained in the will as were the two sales which had no such accompaniment. The application to the court was not one made under the statute (Gen. St. 1902, § 253), independently of the will and to secure independent judicial authority to sell. The proceedings contain sufficient internal evidences of that fact to require no reinforcement by external considerations, which are also apparent. They were manifestly had to secure adjudication of the existence of the necessity upon which the will conditions the right to sell. The primal source of the power which was exercised is that found in the will. The fitness of the occasion for the exercise of that power was alone brought to the adjudication of the court. The sale of 1904 had therefore the same effect in accomplishing a change in the character of the estate for all purposes as did those of an earlier date.

The objections made to the finding need not, in view of our conclusions, be considered.

There is no error. All concur.

(80 N. J. E. 117)

VAN SYCKEL et al. v. JOHNSON et al.

(Court of Chancery of New Jersey. Aug. 13, 1908.)

**CHARITIES—REQUEST TO KEEP GRAVEYARD IN REPAIR—PASTOR'S SALARY—PARTIAL INVALIDITY.**

By a codicil to his will testator gave to his executors \$6,000 in trust, to be invested and the interest to be applied to keeping in good repair and condition that part of the graveyard attached to a certain church wherein his family were buried, and also the rest of the graveyard, and, if the church should fail to make up the salary of the pastor, the balance of the interest, or so much as necessary, should go toward the salary. *Held*, that the entire bequest is void, because it includes an object of charity (that is, a contribution toward the salary of the pastor of a church, which is a good bequest), and an object not charitable (that is, a provision for keeping a graveyard in order), which is void as a perpetuity, and, the gift being indivisible, the whole is bad for uncertainty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9. Charities, §§ 9-11.]

(Syllabus by the Court.)

Bill by Bennet Van Syckel, as surviving executor and trustee under the will and codicil of Aaron Van Syckel, deceased, and others, against William Johnson and others, for construction of the will. On bill and *ex parte* proofs. Decree for complainants.

Paul A. Queen and Bennet Van Syckel, for complainants.

**WALKER, V. C.** This bill was filed by the surviving executor and trustee under the will and codicil of the late Aaron Van Syckel, and by other persons beneficially interested in the estate of the testator as residuary legatees, for the construction of the second codicil to the testator's will, and for direction as to the distribution of the trust fund therein created, in case that provision of the codicil shall be held to be invalid. So much of the codicil as is pertinent to this inquiry reads as follows: "Second. I give and bequeath to my executors, or the survivors or survivor of them, the sum of six thousand dollars, in trust, nevertheless, that they or the survivors or survivor of them will invest the sum, either in good railroad securities or good and sufficient bond and mortgage on real estate as in their judgment they may think best, and pay the interest accruing thereon annually, first, to keeping up in good repair and condition that part of the graveyard attached to the Bethlehem Baptist Church, where my family are buried; second, to keeping up in good condition and repair the rest of said graveyard; third, if said Baptist Church shall fail to make up the salary of the pastor of said church, that then and in that case the balance of said interest, or so much of it as is necessary, shall go towards making up the salary of said pastor; and in case the balance of said interest shall be more than is necessary for that purpose, then the balance of said interest remaining, after the payment of the said salary, shall be added to the fund of six thou-

sand dollars from year to year, and the interest arising from such fund shall be appropriated and invested as is hereinbefore directed—the said several sums to be paid by my executors, or the survivors or survivor of them, either to the persons entitled to receive the same, or to the trustees or trustee of said church, as they shall think proper, and the receipt of the person or persons entitled to receive said interest, or the receipt of the said trustees, or any one of them, shall be a sufficient voucher for the same. And in case the said Baptist Church shall go down, or there shall be no regular Baptist Church service held in that place, then, after keeping the said graveyard in condition and repair as aforesaid, the balance of said interest shall be divided as I have directed the residue of my estate to be divided in my said will to which this is a codicil; and in case both church and graveyard, shall go down and become extinct, then it is my will and I do order and direct that the whole sum of six thousand dollars, with whatever additions may have been made thereto, shall revert, and go back, and be considered as part of my estate, and be divided as the residue of my estate is ordered to be divided by said will, to which this is a codicil."

The defendants are the trustees of the Bethlehem Baptist Church and also those residuary legatees under the testator's will who are not complainants in the cause. None of the defendants answered, and the bill was taken as confessed, to the end that such decree might be made as the Chancellor should think equitable and just. The cause was brought on for hearing by the complainants *ex parte*, and two of the defendants, Daniel Johnson and William E. Johnson, trustees of the Bethlehem Baptist Church, were examined as witnesses. They testified that David Beers, the other trustee, who was made a defendant, was not a member of the church, having taken his letter and joined another church; that there were formerly five trustees, but the others have not acted for four or five years, the last election being held about six years ago; that there were about 45 members, scattered through a farming community; that the last meeting of the board was held five or six years ago; that they have had no regular pastor since the spring of 1904, after which time they procured a supply, who preached every two weeks until the fall of that year (1904), since which time they were without a pastor or any services until the summer of 1907; that during the month of July (1907) they arranged with a pastor for preaching every two weeks in the afternoon of Sundays, at no stated salary, but whatever they could afford to pay; that on August 18, 1907, the members extended the supply pastor a call, no salary being fixed, and he accepted and was to preach Sunday afternoons every two weeks, but he has not been paid, for the reason that

they have not had funds wherewith to pay him; that the graveyard is in good shape, having been taken care of by some one other than the trustees—in fact, by one of the Van Syckel family, but not out of the fund in question; that they have no regular sexton; that the woodwork of the church, a stone one, has not been painted for about 50 years; that what work has been done to the fences has been done by the Van Syckel family; that without the income from the trust fund they cannot run the church, there not being people of sufficient means (members or not members) to do it, and very little money can be raised; that they are desirous of keeping up the church, but cannot do so without the aid of the fund, for the reason that without its aid the pastor preaching every two weeks will leave, as they cannot raise sufficient moneys to pay him; that other churches have been built (in the vicinity, presumably), and members have moved away and died since the raising of the trust fund by the late Mr. Van Syckel, leaving the church in question in a weak condition.

It is not necessary to decide whether, within the meaning of the codicil, the church has gone down, or that there are no regular Baptist Church services held there, so that, after keeping the graveyard in condition and repair, the balance of interest, arising from the fund, may be divided as the testator directed concerning the distribution of his residuary estate, or whether both the church and graveyard have gone down and become extinct, so that the whole of the trust fund, with its additions, if any, shall revert to and be considered a part of the estate of the testator, to be divided as provided for the disposition of his residuary estate, because, in my judgment, the bequest is void as a perpetuity. In *Hartson v. Elden*, 50 N. J. Eq. 522, 26 Atl. 561, Chancellor McGill held that a provision by a testator that the interest of a certain portion of his estate should be used to keep in repair the grave of his wife and himself, and that the remainder of the interest should be employed in the general improvement of the cemetery, were void under the rule against perpetuities, because neither trust was for a public charity, which ordinarily is not within the rule referred to, for the trusts under consideration extended no farther than the establishment, preservation, and improvement of private property. To the same effect is *Corle's Case*, 61 N. J. Eq. 409, 48 Atl. 1027, in which Vice Chancellor Reed held that a gift by a testator to his executor of a certain sum to apply the interest in keeping his burial lot in good order, and any surplus remaining to be used to repair fences around the graveyard, was void as an attempt to create a perpetuity, being neither a charitable bequest, nor a gift to a cemetery association, under Gen. St. 1895, p. 351, § 14.

It will be noticed that the bequest under consideration is not only for the keeping of

graves in condition and repair, which is not a charitable use, but also to be applied toward the payment of the salary of the pastor of the church, if the church shall fail to make up the salary of the pastor. This is a gift for the maintenance of religious services, and is undoubtedly a charity, and, therefore, not subject to the rule against perpetuities (*Mills v. Davison*, 54 N. J. Eq. 659, 35 Atl. 1072, 35 L. R. A. 113, 55 Am. St. Rep. 594); but there is here a mixing of charitable uses with objects not charitable, and it is therefore void (*Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 489). In *De Camp v. Dobbins*, 81 N. J. Eq. 671, a trust to a church, to aid the missionary, educational, and benevolent enterprises to which the church was in the habit of contributing, was upheld only because it was shown that the enterprises referred to were legal charities; chief Justice Beasley, who delivered the opinion of the Court of Errors and Appeals, remarking (at page 694): "It is urged that this entire trust cannot be said to be charitable, within the legal signification of that term, inasmuch as the word 'benevolent,' by its natural force, takes in objects and purposes that are not charities. That this term has this latitudinarian meaning was, upon full consideration, decided by this court in the case of *Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 489. That exposition went on the ground of the intrinsic meaning and the unchecked form of the term, for on that occasion it was considered that there was nothing present tending to hem in or narrow its import." And at page 696: "It appears in the case, by the proofs, that this church has been in the habit of making donations to certain enterprises and objects, such as the foreign and domestic missions, the Bible Society, etc., all of which enterprises are charities in the legal sense of the term. When, therefore, this will declares the trust, and directs the property to be used 'to aid the missionary, educational, and benevolent enterprises to which the said church is in the habit of contributing,' the will itself provides a standard by which the word 'benevolent' is to be measured. The fund is not to be used to aid any benevolent enterprise, but only benevolent enterprises of a certain defined character, and they are charities. The word 'benevolent' is thus, by the context and the subject-matter, cut down into legal dimensions. From the first I have seen no difficulty on this point."

Like the trust which was held bad in *Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 489, the trust in this case is for purposes charitable and not charitable, and therefore the bequest is bad for uncertainty. When an unascertainable part of a fund is given upon a void trust, and the residue upon a valid trust, the whole fails. *Kelly v. Nichols*, 17 R. I. 306, 21 Atl. 906, affirmed 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413. A deliverance precisely in point is that of the Supreme Court of Errors of Connecticut in *Colt v.*

Comstock, 51 Conn. 352, 50 Am. Rep. 29, in which the court held that bequests to two ecclesiastical societies, to be invested as a permanent fund, and the income, so far as necessary, to be applied in keeping certain burial lots in order, and the remainder to religious services in the societies, was void, remarking at page 386 of 51 Conn. (50 Am. Rep. 29): "But the bequests as they are, although some portion of the income is to be devoted to a charitable purpose, cannot be supported. If it were otherwise, it would be in the power of an individual to make a perpetuity of property to any extent, by devoting some small portion of the undivided income thereof to some charitable purpose. A little charity, in such a case, cannot preserve the entire bequest."

There will be a decree declaring the codicil to the will of the late Aaron Van Syckel to be null and void, and that the trust fund raised by the codicil be distributed as the residue of the decedent's estate is ordered to be divided by his will. As the proofs show the amount in the hands of Judge Van Syckel, the surviving executor, the decree to be entered in conformity with these views may ascertain the exact amount distributable.

(74 N. J. E. 802)

#### In re SHEDAKER.

(Prerogative Court of New Jersey. July 17, 1908.)

#### 1. DESCENT AND DISTRIBUTION—RESIDUE—NEXT OF KIN—PER CAPITA—PER STIRPES.

The surplusage of the goods, chattels, and personal estate of one dying intestate on August 30, 1902, leaving him surviving a widow and certain uncles and aunts and the descendants of deceased uncles and aunts, is to be distributed, one moiety to the widow, and the residue to the surviving uncles and aunts per capita, and to the descendants of deceased uncles and aunts per stirpes, under the statute of distribution (Act March 22, 1899 [P. L. p. 204] § 169, subd. 2) then in force.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, §§ 121, 122.]

#### 2. EXECUTORS AND ADMINISTRATORS—DISTRIBUTION OF ESTATE—COUNSEL FEE—PAYMENT FROM ESTATE.

A surviving aunt and certain first cousins of an intestate decedent appealed from an erroneous decree of the orphans' court awarding distribution of a moiety of the intestate's personal property to grandnephews, with the result that distribution will be made to 4 surviving uncles and aunts and the representatives of 14 deceased uncles and aunts, and the grandnephews will be excluded. Held that, as the services of counsel in overthrowing the decree of the orphans' court and establishing the right to participate in the distribution of the decedent's estate by this large class of kindred were rendered for the benefit of them all, his compensation should not fall upon the few who have sustained the issue for the benefit of the many, but that his fee should be paid out of the fund.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1296.]

(Syllabus by the Court.)

Appeal from Orphans' Court, Burlington County.

Proceedings for distribution of the surplus assets in the hands of Aaron Shedaker, as administrator of the estate of E. Budd Heisler, deceased. From a decree of distribution of the orphans' court, distributing one-half of the surplus to J. L. Heisler, decedent's widow, and the other half in equal portions to the guardian of two of decedent's grandnephews, Rebecca Sampson and others appeal. Reversed.

George Gilbert, for appellants. Ernest Watts, for respondents.

WALKER, Vice Ordinary. On June 5, 1903, the Burlington county orphans' court made a decree for distribution of the balance in the hands of Aaron Shedaker, the administrator of the estate of E. Budd Heisler, who died intestate August 30, 1902, which balance was the sum of \$2,921.69, and ordered that it be distributed, one-half to Jeanette L. Heisler, the widow, and the other one-half in equal portions of one-fourth each to the guardian of William Heal and Clifford Heal, grandnephews of the decedent. From this decree, Rebecca Sampson, an aunt, and William L. Heisler, Peter K. Heisler, Elizabeth Praul, John H. Adams, George H. Adams, and Elizabeth Cooper, first cousins and representatives of next of kin of the decedent, E. Budd Heisler, appealed to this court, and asked that the decree of distribution be reversed, and that they may have relief in the premises.

The decedent, E. Budd Heisler, had ten uncles and aunts on his father's side, one of whom is living, and nine of whom died in his lifetime; and he had eight uncles and aunts on his mother's side, three of whom are living, and five of whom died in his lifetime. The Heal children, to whom distribution was ordered to be made by the decree of the orphans' court, were grandnephews, children of Charles Hannah Heal, a niece of the decedent; she being a daughter of Charles Heisler, his deceased brother. The nearest relatives of E. Budd Heisler, living at the time of his death, were his aunts, Rebecca Sampson and Hope E. Adams, and his uncles, Micajah Marter and Edwin K. Marter. According to our statute of distributions, as it existed when Mr. Heisler died and when the order of distribution was made, being an amendment to the orphans' court act, approved March 22, 1899 (P. L. p. 204, § 169, subd. 2), in case there be no children, nor any legal representative of them (and there is not in this case), one moiety of the estate would go to the widow of the intestate (and there is a widow), and the residue equally to every of the next of kindred, who are in equal degree, and those who represent them. According to our present statute upon the subject, being an amendment to the orphans' court act, approved April 16, 1908 (P. L. p. 644, § 169, subd. 2), in this case (there being a widow, and no children, nor any legal repre-



sentative of them), the whole surplus fund would be allotted to the widow of the intestate. But this statute does not apply.

The act of 1899 was construed in the Essex orphans' court (*In re Estate of Cornelia B. Halsey*, 28 N. J. Law J. 114), and in this court (same case, sub nom. *Smith v. McDonald*, 69 N. J. Eq. 765, 61 Atl. 453), and in the Court of Errors and Appeals (65 Atl. 840); the decision of this court being an affirmance of the Essex orphans' court, and that of the Court of Errors and Appeals being an affirmance of this court. The act of 1899, as construed in *Smith v. McDonald*, gives, in a case such as the one under consideration, one moiety to the wife and the other to the living next of kin of equal degree and the legal representative of deceased kindred of the same class. The stock entitled to representation are the descendants of the first ancestor in the ascending line common to the intestate and all the surviving next of kin; the next of kin being of equal degree taking per capita, and the descendants of deceased members of the same class taking per stirpes. Now, in the case under consideration, the surviving uncles and aunts of the deceased intestate are his living next of kin in equal degree, being related in the third degree; whereas the grandnephews, to whom the Burlington county orphans' court ordered distribution to be made, are related in the fourth degree.

The relationship of the next of kin to the deceased is, as is well known, to be traced from the deceased to a common ancestor in the ascending line, and thence in the descending line from that common ancestor to the kindred. Thus, from E. Budd Helsler, the decedent, to his father, is one degree; from his father to his grandfather is two degrees; and from the grandfather to his children (the brothers and sisters of the decedent's father), who are the decedent's uncles and aunts, is three degrees. Therefore, as said, the uncles and aunts of the deceased are his next of kin in the third degree. The kinship of the grandnephews to the decedent, to whom the orphans' court ordered distribution to be made, is thus ascertained: From E. Budd Helsler, the decedent, to his father, is one degree; from his father to his (decedent's) brother Charles is two degrees; from his brother Charles to his (Charles') daughter, who was the niece of the decedent, is three degrees; and from her to her children (decedent's grandnephews), the distributees named in the decree of the orphans' court, is four degrees. Therefore, as said, the grandnephews of the deceased are his next of kin in the fourth degree. Having ascertained that the living next of kin in equal degree to the decedent are his uncles and aunts, it follows, under the statute and decisions referred to, that distribution is to be made to the uncles and aunts per capita, and to the descendants of those of them who are deceased per stirpes,

and that the grandnephews are to be excluded.

The decree of the orphans' court will be reversed, and the cause remitted to that court for the making of a decree in conformity with these views.

Under the ruling of this court distribution will be made to the 2 aunts and 2 uncles and the representatives of the 14 deceased uncles and aunts. The appeal in this cause was taken by one of the aunts and seven first cousins of the decedent; the latter being representatives of certain deceased uncles and aunts of the intestate. The services of counsel in overthrowing the decree of the orphans' court and establishing the right to participate in the distribution of the decedent's estate by this large class of kindred were rendered for the benefit of them all, and his compensation should not fall upon the few who have sustained the issue for the benefit of the many. Therefore a counsel fee, as well as the costs of these proceedings, will be allowed the appellants, to be paid out of the fund. *Smith v. McDonald*, 69 N. J. Eq. 765, 61 Atl. 453, 455, is a direct authority for such allowance.

The amount of the counsel fee will be fixed upon application.

(74 N. J. E. 449)

KNOUP v. CARVER et al.

(Court of Errors and Appeals of New Jersey.  
June 16, 1908.)

1. CONTRACTS—CONSTRUCTION—WHAT LAW GOVERNS—LEX LOCI.

Where the preliminary negotiations for a loan were conducted in Philadelphia, but the land mortgaged as security was located in New Jersey, where the contract was to be performed, and where the money was paid over, the papers executed, and the transaction consummated, the law of New Jersey was the *lex loci contractus*, and governed the transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 724-726.]

2. USURY—NATURE OF AGREEMENT—EVIDENCE.

Defendant C. applied to F. for a loan of \$4,500 on good mortgage security, agreeing to pay \$500 bonus. F. declined to make the loan, but directed C. to his son, with whom F. had an office. The son, who was an attorney, went across the street to the place of business of complainant, who was an auctioneer, and complainant, after listening to the son's statement, agreed to make the loan, without any independent inquiry or having the title searched. F. furnished the money to complainant at 4 per cent. interest, and complainant loaned the same to C. at 6 per cent., secured by a mortgage; F.'s son retaining the \$500 bonus. Held, that F. was the real lender, and he, through his son, had the benefit of the usury, which C. was entitled to have credited on the amount due.

Appeal from Court of Chancery.

Bill to foreclose a mortgage by William Knoup against John D. Carver and another. From a decree for complainant, crediting on the amount due a certain sum as usury, complainant appeals. Affirmed.

The following is the opinion of Bergen, V. C., in the court below:

"The defendant Carver borrowed \$4,500, and gave to the complainant a mortgage for \$5,000; and the only question is whether the \$500 was a usurious interest charge. The defendant applied to one Erasmus Freeman for the loan, and after some conversation he was referred to Edgar A. Freeman, a son of Erasmus, who had a desk or office room in the offices of his son Edgar. The result of the defendant's interview with Edgar was an application to the complainant to make the loan, which it is alleged he agreed to do. It is certain that he did produce the \$5,000 and go through the form of making a loan; but I am satisfied that the whole procedure was a mere pretense, or a cover, which it was supposed would avoid the penalty which the law imposes for taking interest in excess of the legal rate. Erasmus Freeman was called as a witness by the defendant; but he was a very unwilling witness. He admits, however, that when the defendant Carver called upon him to make the loan, and offered him a bonus of \$500, he would not make the loan, and turned him over to his son, and said that, if his son wanted to take it up, he would have to deal with him; but he testifies that he loaned the money to the complainant, to be loaned to the defendant, and, further, that he loaned this money to Knoup, the complainant, for 4 per cent., when he could have had from the defendant a mortgage, which, so far as the case shows, was a good security, and have been paid interest thereon at the rate of 6 per cent. The method pursued by the parties was an old and well-established practice for avoiding the usury law. The defendant applied to the real principal for the loan, who declined to make it, and turned him over to his son, a counselor at law, in whose office he had desk room. The son walks across the street to a place where the complainant is carrying on business as an auctioneer, and the complainant, after listening to the son regarding the merits of the loan and the character of the property, agrees to make the loan without any independent inquiry on his part or having the title searched, and thereupon the father, Erasmus, furnishes the money to make the loan, and the son keeps the \$500. Under such circumstances it is ridiculous to ask the court to consider for a moment that Mr. Knoup, the complainant, was the bona fide maker of this loan. No man is likely to furnish money at 4 per cent., when he can loan it on good security at 6 per cent.; and I am very well satisfied that the person who made this loan was Erasmus Freeman, and that he, through his son, had the benefit of the usury, and permitted his son to exact it, and in order to do so advanced the money to the complainant, with full knowledge that it was to be reloaned to the defendant at a usurious rate of interest.

"The defendant is entitled to have the in-

terest or bonus, thus unlawfully retained when the mortgage was made, credited on the amount due."

Norman Grey, for appellant. Wilson, Carr & Stackhouse, for respondents.

**PER CURIAM.** An examination of the testimony satisfied us that the transaction between the parties to this cause was executed at Manasquan in this state. While it is true that the preliminary negotiations for the loan were conducted in Philadelphia, the land involved is situated in this state, the contract is to be performed here, the money was paid here, the papers executed and the entire transaction consummated at Manasquan, and hence this jurisdiction furnishes *lex loci contractus*.

This being so, we conclude that the question of usury involved in the transaction was correctly resolved by the learned Vice Chancellor, and that the decree of the Court of Chancery should be affirmed.

(74 N. J. E. 736)

#### In re SULK.

(Court of Chancery of New Jersey. Aug. 4, 1908.)

#### 1. INSANE PERSONS — FINDINGS — SANITY — COSTS TO PROSECUTOR.

If, under proceedings on a commission in the nature of a writ de lunatico inquirendo, the subject of the inquisition is found to be of sound mind, the person petitioning for and prosecuting the commission of lunacy is entitled to costs, including counsel fee and expenses reasonably and properly incurred, provided the prosecutor of the inquisition has acted from justifiable motives and in good faith, and there is a fund under the control of the court out of which payment can be ordered to be made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, § 39.]

#### 2. SAME—RECEIVERS—COSTS AND FEES.

When, upon the application for a commission in the nature of a writ de lunatico inquirendo, a case is made which moves the court to appoint a receiver pendente lite, and afterwards upon the inquest the subject of the inquisition is found to be of sound mind, the court will, in discharging the receiver, allow him compensation for his services, and will allow the petitioner the taxed costs of the proceedings, including a reasonable counsel fee, and expenses reasonably and properly incurred.

(Syllabus by the Court.)

Proceedings by Josephine Sulk for the appointment of a lunacy commission to inquire into the alleged lunacy of her husband, Charles H. Sulk. A receiver was appointed of his property pending the hearing, and, the respondent having been found sane, petitioner applies for an order on the receiver to pay the costs and expenses of her solicitor and counsel in the lunacy proceedings, together with the physician's bill and other expenses therein. Application granted.

Clarence Kelsey, for petitioner. Marshall Van Winkle, for respondent.

WALKER, V. C. On April 21, 1908, Josephine Sulk filed a verified petition in the

above-stated matter, praying that a commission in the nature of a writ de lunatico inquisitendo might issue out of this court to inquire into the alleged lunacy of her husband, Charles H. Sulk, and, on allegations in the petition, abundantly verified by affidavits, to the effect that Sulk was improvidently giving away and wasting his money and property, John S. McMaster, Esq., was appointed receiver pendente lite, and a commission was issued to Frank P. McDermott, Esq., master in chancery, Dr. John C. Parson, and Mr. John E. Muller, in the usual form, to inquire into the alleged lunacy of Sulk. Mr. McMaster qualified as receiver and took possession of the real and personal property of Mr. Sulk. The inquisition was held on June 11 and 12, 1908; Sulk, who had escaped from the Morris Plains Hospital for the Insane, being absent. The jury impaneled in the matter found that Sulk was capable of governing himself and his affairs, and the commission has been duly returned.

The present application is for an order upon the receiver to pay the bills of the petitioner's solicitor and counsel in the lunacy proceedings and also the physician's bills and other expenses therein. The inquisition was conducted on June 11, 1908, from 10 o'clock in the morning until 5 o'clock in the afternoon, and on the next day from 10 o'clock in the morning until after 2 o'clock on the following morning. The respondent, Sulk, is the owner of real and personal property aggregating many thousands of dollars, and his estate is abundantly able to respond for the costs and expenses of these proceedings. Two questions arise: First, has the court the power to order the payment asked for? and, second, are the amounts asked for reasonable?

The solicitor and counsel of the petitioner asks for a fee of \$500, and attaches a bill of items of his services to the petition. It appears that he did a great deal of exacting work in the matter and that very much time was consumed in his labors. Dr. Baldwin has presented a bill for \$10, Dr. J. Henry Clark for \$50 (including services in court), and Dr. H. J. Bogardus \$25 (including services in court). I deem all of the bills to be reasonable, and the question, therefore, recurs: Has the court the power to order their payment out of the estate of the respondent, in view of the fact that no office has been found?

It is entirely settled that where the alleged lunatic is found to be of sound mind, or the commission is superseded before a guardian is appointed, the petitioner cannot be allowed costs and expenses, no matter how meritorious the proceeding, where there is no fund out of which payment can be made. In *re Farrell*, 51 N. J. Eq. 353, 27 Atl. 813. It appears, therefore, that the allowances asked for cannot be made, unless there be a fund out of which they can be paid. Chancellor McGill, in *Re Farrell*, commences his

opinion by the statement that Chancellor Green, in the Matter of Curtis White, 17 N. J. Eq. 274, being satisfied that the proceedings had been instituted in good faith for the benefit of the lunatic, denied the motion for costs, remarking that in such case the petitioner in justice should be allowed costs, whether the lunacy established or not; adding, however, that if the party be found of sound mind, or the commission be superseded before a guardian appointed, the prosecutor cannot be allowed costs, however meritorious his conduct, there being no fund out of which their payment can be directed.

The law in our state upon this subject is the same as that which obtained in England prior to the statute of Victoria. We have no statute upon the subject of the present inquiry, and the rule laid down in the English authorities is apposite here. In *Ex parte Ferne*, 5 Ves. 832, the subject of the inquisition was found to be of unsound mind, and, upon a traverse of the inquisition, was found to be sane, and the commission was thereupon superseded. The petitioners asked for costs, claiming to have established lunacy at the time of the inquisition. Lord Chancellor Loughborough denied the application, because there was no fund out of which payment could be ordered, and he remarked: "If I could act cum imperio, it is a very proper case, and the parties have entitled themselves to all the costs I can give them; but I have no jurisdiction." In *Sanderson v. Sanderson*, 19 Ves. 280, on application for costs after office found, but before the determination of the traverse, Lord Eldon remarked that no grant of the custody of the person or estate could be made, and the person issuing the commission, if there be no fund in his hands, cannot make an order as to costs. In the Matter of Curtis White, *supra*, there was an application by the subject of the inquisition, who was found to be of sound mind, for costs to be visited upon the party who took out the commission, who was his son, and who prosecuted it from proper motives and in good faith. Chancellor Green denied the motion, and observed (at page 277 of 17 N. J. Eq.): "A person petitioning for and prosecuting a commission of lunacy is entitled to be repaid the costs he shall have properly so incurred. But if the party be found of sound mind, or the commission be superseded before a guardian is appointed, the prosecutor cannot be allowed his costs, however meritorious his conduct may have been, there being no fund out of which the chancellor can direct them to be paid"—and further: "The proceeding being instituted for the benefit of the alleged lunatic or his estate, the petitioner is, in justice, entitled to be repaid his costs reasonably incurred, whether the lunacy be established or not. It is true that, where the party is found of sound mind, the prosecutor cannot be allowed his costs, because there is no fund out of which they can be paid."

Thus it appears that both in this state and in England we have direct and positive statements by the courts to the effect that the petitioner in a lunacy proceeding, if acting from justifiable motives and in good faith, is entitled to an award of costs and expenses out of the estate of the subject of the inquisition, even if he be found of sound mind, provided there be a fund within the jurisdiction of the court out of which the award can be made. I cannot otherwise read these expressions: "If I could act cum imperio, it is a very proper case, and the parties have entitled themselves to all the costs I could give them." Per Lord Chancellor Loughborough, *Ex parte Ferne*. "It is impossible to make any order about the costs, as there is no fund upon which they can attach." Per Lord Chancellor Eldon, in *Sanderson v. Sanderson*. "The petitioner is, in justice, entitled to be repaid his costs reasonably incurred, whether the lunacy be established or not." Per Chancellor Green, in the *Matter of Curtis White*. "There being no office found, and neither guardian nor fund in prospect, there should be no allowance of expenses in the lunacy proceedings." Per Chancellor McGill, in *Re Farrell*. If the proceedings in this matter had resulted in office found, then, under our statute and practice, it would be for the guardian, when appointed by the orphans' court, to pay the costs and expenses of the litigation. In *re Farrell*, 51 N. J. Eq. 360, 27 Atl. 813.

Now, there is a fund under the control of this court in this matter, namely, the property in the hands of the receiver appointed upon the presentation of the petition for the commission. Ought the fund to be turned back to Mr. Sulk, without being tolled for the legitimate costs and expenses of the lunacy proceedings; or should those disbursements be ordered out of the fund before it is restored to its owner? The court undoubtedly acted within its power in appointing the temporary receiver. *Matter of Runy Dey*, 9 N. J. Eq. 181; In *re Devausney*, 52 N. J. Eq. 502, 507, 28 Atl. 459. There was an abundance of proof by way of affidavits annexed to the petition to justify the appointment. In fact, counsel for the respondent, arguing here against the allowance of expenses, did not question the propriety of the appointment, and consented that the receiver be paid for his services in the matter. I take it that the court has the power to compensate the receiver, irrespective of the consent; for the right to appoint a temporary receiver presupposes that the appointment may be vacated upon full hearing. If such be the consequence—that is, if the receivership goes down upon the hearing—it does not follow that the petitioner procuring the appointment shall be met in costs. If, then, the court has the right to allow the receiver's compensation, it has, I take it, equal right to allow the costs and other expenses of the

proceedings in which the receiver was appointed; and certainly so in this class of cases, under the authorities to which reference has been made.

In *Sewell v. Cape May & S. P. R. R. Co.*, 9 Atl. 785, a receiver was appointed by this court for the defendant as an insolvent corporation on the return of an order to show cause. The defendant afterwards answered, and moved to dissolve the injunction and to dismiss the bill. The court again declared the company insolvent within the meaning of our act; but, since the company by its answer declared its ability to pay all its obligations and manage its affairs successfully, it was ordered that if it produced in court moneys sufficient to pay and discharge its liabilities, including all reasonable costs and expenses of the receiver, and his just commissions and the costs of suit, the receiver would be discharged. This was in a case in which it was shown that there was real foundation for the appointment of a receiver; but to my mind it is an authority showing that, whenever the court takes property into its custody through a receiver, it will protect him and order the payment of the costs of the proceedings. The power to appoint a receiver is at least as high, or a higher power, than the power to toll the fund in the receiver's hands for compensation and the costs of the litigation in which he was appointed. The one power, it seems to me, follows the other.

In *Baker v. Baker*, 36 App. Div. 485, 55 N. Y. Supp. 824, it was held that by the dismissal of the complaint the court does not lose jurisdiction over funds in the hands of a receiver theretofore appointed in the action. In *Whiteside v. Prendergast*, 2 Barb. Ch. (N. Y.) 471, it was held that the discontinuance of a suit does discharge a receiver appointed therein, but will entitle him to apply for his discharge and to have his accounts passed, so that he may pay over the balance, if any, in his hands, and exonerate himself and his sureties from further liability.

The petitioner will be allowed her taxed costs and the counsel fee and expenses contained in the schedule annexed to her petition therefor. The fee of the receiver will be fixed on application and upon notice.

(74 N. J. E. 564)

SARSON v. SARSON.

(Court of Chancery of New Jersey. July 16, 1908.)

DIVORCE—DESERTION—EVIDENCE.

Plaintiff's father, with whom plaintiff and defendant lived as husband and wife, forbade defendant the house until he could support his wife, whereupon defendant left, telling plaintiff he would send for her just as soon as he could support her. The parting between plaintiff and defendant was affectionate, but not so with her father. Within two to four weeks thereafter, defendant wrote plaintiff a friendly letter, and

subsequently wrote two others, to none of which plaintiff replied, on the advice of her father. Held not to show desertion by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 120-129.]

Suit by Frances Marion Sarson against John Sarson for divorce. On final hearing. Decree for defendant.

H. H. Fryling, for petitioner.

STEVENS, V. C. This is an undefended suit for divorce on the ground of desertion. The parties were married on September 25, 1901. The desertion is alleged to have occurred on June 17, 1905, and the suit was begun on July 9, 1907. It seems to me that on no reasonable view of the evidence can it be said that the desertion began on or prior to July 9, 1905. The parties were, when they were separated, living at the home of Mr. Fowler, the wife's father. According to his and the petitioner's account, the defendant had lost his position and was addicted to drink. In June, 1905, Mr. Fowler told him that he would have to do something to support himself; that he (Fowler) was not going to take care of him any longer. He left two weeks thereafter. The parting of husband and wife was friendly. The parting with the father was "sulky." It is evident that there was a quarrel. Mr. Van Nalts testifies that defendant told him, in the course of a conversation had in July, 1907, that when he left his father-in-law told him "not to come back until he had made good."

After leaving, the defendant wrote four letters—the first (which is not produced) from two to four weeks after the separation; the second, February 11, 1906; the third, June 17, 1906; and the last, July 1, 1907. The three produced are friendly in tone, and the one of February 11th is especially so. On her examination before the master, the petitioner testified that she had lost the first letter. On her examination in open court she said that she had no recollection of losing any letter; that she thought that her counsel had them all. The omission to produce this letter is unfortunate. Written so soon after the separation, it would, in all probability, have thrown considerable light upon the attitude of the parties at that time. Any one having much experience in the trial of this class of cases knows how important it is to have the correspondence, and particularly the letters written about the time of the separation. Such letters are, in general, a far more reliable index of the then situation than the oral evidence of the parties, and failure to produce them always gives rise to a suspicion that, if produced, they would not bear out the verbal statements.

The petitioner's testimony taken before the

master not being entirely satisfactory, she was examined in open court. She then testified that she and her husband parted on friendly terms, and that it was agreed (in the words of the witness) "that he would send for me just as soon as he could support me." It is more than likely that he considered himself forbidden the house. He did, however, write within two or three weeks from the time of leaving. She says the general trend of this letter was that things were looking better for him, and that he hoped soon everything would be all right again. Now, one would have supposed that, in view of the friendly parting, petitioner would have answered this letter with words of encouragement; but she says that she talked the matter over with her mother and father, and that they thought it was wise not to write, that she did not write, and that she has never written. The situation, then, was this: He was obliged to leave the house. He wrote to her, and she refused to answer his letters or to communicate with him in any way. How this could be desertion on part of the husband I do not quite understand. The separation, certainly, was not, in the first instance, willful on his part, for he was compelled to leave by his father-in-law; and it was not obstinate, in the sense that it was persisted in against the efforts of the deserted party to bring it to an end. It is true that it has been held by our Court of Appeals that a woman is not required to make such advances and concessions as a man is. The woman may be passive, and yet deserted. It has, however, never been held that she may not only be passive, but that she may also repel the advances to her, and, refusing communication with her husband, still assert that the separation is against her will.

In no view of the case could the mere act of leaving the father's house be regarded as a desertion; for the wife says that when he left it was agreed that he would send for her as soon as he could support her. Whether, after the husband had had a reasonable time to obtain re-employment and to establish a new home, the situation underwent a change, I need not decide; for it is obvious that, even if we leave out of view the conduct of the wife, a reasonable time had not elapsed prior to the beginning of the statutory period of two years.

The master in his report refers to *Coe v. Coe*, 2 Rob. 157. That case differs from this in two important particulars. In the first place, the husband left his wife of his own accord. In the second place, in the language of the Vice Chancellor: "The attitude of the wife was not that of acquiescence in her husband's prolonged absence and neglect."

(74 N. J. E. 620)

BROWN et al. v. GASKILL et al.

(Court of Chancery of New Jersey. July 10, 1908.)

## 1. ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING — PENDENCY OF ACTION — WHAT CONSTITUTES—PARTITION—JURISDICTION OF COURT—STATUTES—"PROCESS."

P. L. 1898, p. 648, §§ 9, 10, authorizes the orphans' court to entertain jurisdiction for partition of lands on "application by petition made by one or more of said coparceners, joint tenants, or tenants in common," and requires the person proposing to apply to the court for partition to give four weeks' notice to all co-tenants of the time when the petition will be presented to the court. *Held*, that the orphans' court acquires no jurisdiction until the petition for partition is presented; the notice required not being "process," and until the petition is presented there is no pending cause in the orphans' court, which will abate a suit for partition in chancery, filed after such notice is given.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5643-5651; vol. 8, p. 7766.]

## 2. EQUITY—MOTIONS—DEFECTS APPARENT ON THE RECORD.

Court of Chancery rule 213 is limited to motions against defects apparent on the record, and does not give a defendant the right to move against a bill on matters appearing only by affidavits accompanying the motion.

Bill for partition by William M. Brown and others against Sarah M. Gaskill and others. Heard on motion of defendants to dismiss the bill. Denied.

J. E. P. Abbott, for the motion. Thompson & Cole, opposed.

LEAMING, V. C. Defendants move to dismiss complainant's bill upon the ground that a suit for the partition of the same property was pending the Atlantic county orphans' court at the time the bill for partition was filed in this court.

Section 9 of the partition act (P. L. 1898, p. 648) authorizes the orphans' court to entertain jurisdiction for partition of lands, in the class of cases there named, "upon application by petition made by one or more of said coparceners, joint tenants or tenants in common." Section 10 requires that the person who proposes to apply to the orphans' court for partition of lands shall give four weeks' notice to all co-tenants of the time when the petition for that purpose will be presented to the court. The bill which is now moved against was filed after the notice under section 10 was given and before the petition was presented to the orphans' court.

I think it entirely clear that the orphans' court acquires no jurisdiction until the petition for partition is presented. The notice given pursuant to the provisions of section 10 is in no sense a process. Until the petition is presented there is no pending cause in the orphans' court.

In this reference to the merits of the motion I would not be understood to recognize the right of defendant to move against a bill upon matters appearing only by affidavits

accompanying the motion. I understand rule 213 of this court to be limited to motions against defects apparent upon the record.

The motion will be denied.

(74 N. J. E. 661)

WILLIAMS v. BROKAW.

(Court of Chancery of New Jersey. July 16, 1908.)

## 1. STATUTES — CONSTRUCTION — RETROACTIVE OPERATION.

A statute will not be given a retroactive effect, when the words in it can be construed as designed to make it prospective only; and before a statute will be given a retroactive effect there must be found in it such clear expression of legislative design as will preclude any other reasonable interpretation of the words used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 344.]

## 2. MARRIAGE — ANNULMENT—REMEDY—STATUTES.

P. L. 1907, p. 474, authorizing the annulment of a marriage at the suit of the husband "when he was under the age of 18 at the time of the marriage," etc., is not retroactive, and does not authorize the annulment of a marriage entered into prior to its enactment.

Suit by Percy E. Williams, by next friend, against Lola Maria Brokaw, to annul a marriage. Heard on demurrer to bill. Demurrer allowed.

Malcolm McLearn, for petitioner. Lum, Guild & Tambllyn, for defendant.

STEVENS, V. C. The petition alleges that petitioner was married to defendant on June 14, 1904; that the petitioner was then 16 years 9 months old and the defendant fifteen years old. He prays for the annulment of the marriage under the following provisions of the divorce act of May 17, 1907 (P. L. 1907, p. 474): "Decrees of nullity of marriage may be rendered in all cases . . . (6) at the suit of the husband when he was under the age of eighteen at the time of the marriage, unless such marriage be confirmed by him after arriving at such age." The defense is that this act is not retrospective; that it does not affect marriages entered into before the time of its enactment.

I think it is plain that it does not. At the time the marriage in question was contracted it was perfectly lawful. The union created by it was indissoluble, unless one of the spouses should commit certain specified offenses or crimes that would give to the other the right to terminate it. It is now sought to annul it, without fault on the part of the defendant and against her consent, at the mere will or caprice of the petitioner. The court is slow to give to a statute a retrospective effect unless its language plainly demands it. I can find nothing in the act under consideration that is not entirely consistent with the idea that the statute is prospective only. The words "when he was under the age," etc., plainly refer to past time anterior to the bringing of the suit—not to past time anterior to the passage of the act. The lan-

guage of the Court of Appeals in *Citizens' Gaslight Co. v. Alden*, 44 N. J. Law, 648, 653, is applicable to this statute: "Laws generally are enacted for the regulation of future affairs and conduct, and to establish the basis on which rights may thereafter under them be rested, and are not usually designed to alter or affect the quality or legal relation of past acts and concluded transactions, much less to disturb rights which have arisen under laws concurrently with their birth. Hence we do not look for or expect in any enactment that it shall be operative as of time prior to its own existence, and before we are permitted to ascribe to it such a purpose there must be found in the law such clear and indubitable expression of the legislative design as precludes any other reasonable interpretation of the words used. The rule in the courts is that retroactive effect will not be given to a statute when the words in it can be construed as designed to make it prospective only. All legislation is framed, or presumed so to be, in view of this conspicuous canon of construction governing the court where the duty of interpretation is reposed. And when the Legislature intend to give to law of their enactment operation upon the past, they will and must do it with such choice of words as places it beyond the realm of doubt."

If hereafter any person be so ill-advised as to enter into a marriage with an infant under the prescribed age, he or she will do it with the knowledge that the relationship can be terminated at the mere will of the infant. I am quite unable, in the light of the above canon of construction, to find anything in the act which would countenance the idea that it was the intention of the Legislature to allow persons to affirm or annul at their pleasure unions entered into before the act was passed and at a time when, by law, they were understood to be indestructible.

The demurrer should be allowed.

#### SWIFT v. CRAIGHEAD.

(Court of Chancery of New Jersey. June 20, 1908.)

##### 1. EQUITY—PLEADING—SUFFICIENCY OF PLEA—AVERMENTS OF BILL.

In determining the sufficiency of a plea in equity, the averments of the bill are to be accepted as true.

##### 2. TRUSTS—REVOCATION—EFFECT.

Complainant's father died intestate, and, the personal property having descended one-third to the widow and two-thirds to complainant, it was mutually agreed that all the property should be distributed to the widow, who was to hold it for life, paying one-third of the income to complainant and retaining two-thirds for her own use, and at her death the entire property was to vest in complainant. Pursuant to such agreement, the widow took the property under an assignment from complainant in trust for such use. Just prior to the widow's death an agreement was entered into between her and complainant, revoking the agreement previously so made by which the property was distributed

to the widow. *Held*, that such revocation should not be construed as revoking the trust only, but as revoking the entire arrangement, restoring their respective rights in the property as they existed at the death of the intestate, under whom they both held.

Bill by Mary L. Swift against Robert D. Craighead, Jr., individually and as executor of the will of Mary A. Sloan, deceased. Heard on bill and plea. Plea overruled.

Complainant's bill seeks an accounting, and defendant has pleaded certain facts as a bar to the rights asserted by complainant. The plea of defendant has been set down for hearing to determine its sufficiency. The bill avers that William J. Sloan, a resident of St. Paul, Minn., died intestate in that city March 17, 1880, leaving him surviving his widow, Mary A. Sloan, and his daughter, complainant herein, who is also the daughter of the widow; that by the intestate laws of Minnesota the daughter and her mother became entitled to certain personal property owned by decedent at his death, the daughter becoming entitled to two-thirds thereof and her mother (the widow) to the remaining one-third; that in order to carry out what they understood to be the wish of decedent the daughter and her mother mutually agreed to adopt a course whereby the widow should become the holder of the legal title of all of the personal property for her life, and assume its management and control during her lifetime, and pay one-third of the income to the daughter, and retain for her own use the remaining two-thirds of the income, and at her death the absolute title to the entire personal property should vest in the daughter; that in order to carry into effect the purpose above stated, and without consideration, the daughter executed, under date of April 23, 1880, an assignment to her mother of her rights in the personal estate, and in the assignment so executed expressly authorized the probate court to make a decree of distribution of all of the personal estate to her mother, and under date of May 27, 1880, a decree of distribution was accordingly so made, and on the same date a formal written agreement was executed by the daughter and mother, in which agreement the trust was specifically defined. A copy of the agreement defining the trust is annexed to the bill. After a recitation of all of the facts hereinabove set forth, the agreement declares that the mother holds the personal property covered by the decree of distribution "as trustee, and not otherwise, and for the following uses and trusts, and according to the following conditions." The uses, trusts, and conditions are then enumerated in the written agreement, and may be abbreviated as follows: (1) The trusteeship to continue during the life of the mother and to terminate at her death. (2) The property to be held by the mother as trustee for the joint benefit of the mother and the daughter and her heirs. (3) The trustee is empowered to invest and reinvest according to her best

judgment, subject, alone, to the control of a court of competent jurisdiction. (4) The trustee to report to the daughter when demand is made. (5) The trustee to annually deduct expenses of the trusteeship and pay one-third of the net income to the daughter and retain for herself two-thirds. All reinvestments to become subject to the trust. (6) Upon the death of the mother the trusteeship shall terminate, and all of the property shall vest absolutely in the daughter. The bill then avers that the mother of complainant died April 10, 1907, without having fully accounted for the income pursuant to the requirements of her trust, and that defendant has wrongfully taken possession of the corpus of the property which was subject to the trust, and prays for an accounting and an injunction to prevent defendant from disposing of the property.

Defendant has pleaded in bar: (1) The decree of the probate court already referred to. (2) A will of the mother of complainant, wherein the property in question is bequeathed to defendant in trust. (3) A certain instrument in writing, executed by complainant and her mother, under date of May 18, 1904, which agreement, after stating the parties, is as follows: "That the said parties to this agreement, in consideration of the sum of \$1 each to the other paid, the receipt whereof is hereby acknowledged, do hereby revoke and annul the agreement in writing by them entered into in the state of Minnesota on the 27th day of May, 1880." The agreement here referred to is the agreement which defines the trust, a copy of which is annexed to the bill.

Bleakly & Stockwell, for complainant. S. Cameron Hinkle, for defendant.

LEAMING, V. C. (after stating the facts as above). The issues presented are necessarily controlled by an accurate ascertainment of the intention of the parties to the agreement of May 18, 1904, which is pleaded in bar. It is contended by defendant that the words "do hereby revoke and annul the agreement in writing by them entered into in the state of Minnesota on the 27th day of May, 1880," are operative to discharge the trust only, and that these words do not and cannot operate to discharge the effect of the decree of distribution, which by its terms vested the absolute title to the property in the mother, and hence, with the trust discharged, the mother again became the absolute owner. I am unable to reach that conclusion. In determining the sufficiency of a plea in equity, the averments of the bill are to be accepted as true. The bill asserts that the assignment from the daughter to the mother of the daughter's two-thirds of the property was made without consideration and as one of the several steps necessary to carry out the general plan. The decree of distribution, which vested the legal title of the entire property

in the mother, was based on the assignment, and was procured as another step in consummation of the general plan. It seems manifest, therefore, that the assignment, the decree of distribution which was based upon it, and the declaration of trust immediately following the decree, must at this time be regarded as necessary parts of one transaction. By that transaction, treated as a whole, the daughter surrendered the present right to two-thirds of the corpus of the property, and received in lieu thereof a right to one-third of the income from the property during her mother's lifetime, with a right to the entire property at her mother's death. On the other hand, the mother received two-thirds of the income from the property for life, in lieu of the surrender of a present right to one-third of the corpus of the property. The averments of the bill and the recitations contained in the trust agreement fully disclose that the trusteeship assumed by the mother was but one part of one transaction containing the three component parts referred to. Under these conditions the parties subsequently agreed to "revoke and annul" the agreement which declared the trust, without using other language to disclose their purpose. Had the trust been a voluntary or gratuitous trust, which had been declared by the mother in favor of the daughter touching property theretofore owned by the mother, and in which the daughter had at no time enjoyed rights other than those conferred by the trust agreement, perhaps it might be reasonably assumed that the parties intended to annul the trusteeship and thus restore the legal and equitable estate to the trustor; but where, as here, the trust agreement was but a part of one entire transaction, which had operated to transfer a legal title from the daughter to the mother and to substitute an equitable title in the daughter in lieu thereof, I am convinced that it cannot, in the absence of other evidence, be properly assumed that the parties intended by the language used to revoke only a part of and not the entire transaction. The language used, literally understood, revokes and annuls only the written agreement which declares the trust, and with the trust alone annulled the title would be in the mother under the decree of distribution; but when the language so used is considered in connection with the averments of the bill I am unable to give it that conclusive force. I am impressed that upon the entire record it must be held to have been the intention of the mother and daughter to restore their respective rights in the property as they existed at the death of the intestate under whom they held.

But, even should the agreement be given the force contended for by defendant, complainant is, under the averments of the bill, entitled to an accounting for the period prior to the execution of the agreement in question. The plea must therefore, in either view, be overruled.



(76 N. J. L. 330)

**HANSEN v. DE VITO.**

(Supreme Court of New Jersey. Aug. 8, 1908.)

**1. APPEAL AND ERROR—RECORD—AMENDMENT—JURISDICTION.**

Where a case is removed to the Supreme Court from the circuit court by a writ of error, the Supreme Court has no jurisdiction to amend the record of the circuit court, save in matters of form, nor to compel the circuit court to change any record of its proceedings; each court being the custodian and guardian of its own records, with power to modify the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2816-2818.]

**2. SAME—DIMINUTION OF RECORD.**

Where the record returned to the Supreme Court in response to a writ of error was erroneous, but not incomplete, it could not be corrected by a rule of diminution.

**3. SAME—CORRECTION OF RECORD AFTER AFFIRMANCE.**

Where the record of the trial court was erroneous in misstating the real verdict, the record remained there for correction, notwithstanding a writ of error, and could be corrected by the trial court, without certiorari, after affirmance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2803-2806.]

Action by Elsie Hansen, by her next friend, against Joseph De Vito. A judgment for plaintiff was affirmed on a writ of error by the Supreme Court (68 Atl. 1062), whereupon defendant moved to have the record remitted to the circuit court to be reformed there, or to have the judgment opened and a writ of certiorari granted with a rule for diminution on the Middlesex circuit to return a true judgment, in accordance with the facts appearing on a new trial. Motion denied.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Alfred S. March and Robert Adrain, for the motion. Charles C. Honnam, opposed.

REED, J. This action was brought in Middlesex circuit, tried there, and a verdict returned against the defendant.

This judgment was brought to this court by writ of error, and the judgment was affirmed, and execution issued out of the Supreme Court. The reason for this affirmance is stated in the opinion then delivered, reported in 68 Atl. 1062. The record before us on error exhibited a declaration containing three counts, a verdict in tort and a corresponding judgment in tort. The first count was equivocal, setting out the debauching of the plaintiff by the defendant, and also a promise to marry her. The second count also set out that the defendant carnally knew the plaintiff, then a woman under the age of 16 years, whereby she became pregnant. The third count was for an assault and battery upon the plaintiff. It was insisted by the plaintiff in error that the trial court had at the trial directed that the first count should be regarded as declaring upon the promise to marry, and that the second and third counts should be disregarded. This court held that the plaintiff in error, by having

taken a rule to show cause, had waived her exceptions, and that nothing appeared in the record but the pleadings, verdict, and judgment; and that the third count supported the verdict and judgment in tort. It is entirely settled that this court has no power to amend the record of the circuit court save in matters of form only. Each court is the custodian and guardian of its own records. There exists no power in a superior court to modify the record of an inferior tribunal, nor to compel an inferior court to change any record of its proceedings. The prevalence of this rule is discussed and restated in the case of Davis v. Township of Delaware, 41 N. J. Law, 55, and Davis v. Township of Delaware, 42 N. J. Law, 513, affirmed 45 N. J. Law, 186. The present application, however, is in alternative; either that the record be sent back to the circuit court, so that it can amend its own record, or that our judgment of affirmance shall be opened and a rule of diminution granted, with directions for the circuit to send up a true record. Respecting the allegation of diminution of the record, it is sufficient to say that there is no incompleteness in the record. The record is complete, although it may be erroneous. Respecting the cases of Apgar v. Hiller, 24 N. J. Law, 808, and Brown v. Warden, 44 N. J. Law, 177, it will be observed that the allegations and certiorari in those cases went before the cause was decided, and were allowed in aid of the judgment below, and not to reverse it. If the record below is erroneous in misstating the real verdict, the proper tribunal to correct it is the circuit court. The record remains in the circuit court for this purpose. It is the practice after error brought for the court below to amend the record in matters of substance, and to certify the record so amended to the court above. Apgar's Admr. v. Hiller, supra. The amendment can be made by the circuit court without a certiorari from this court. Mellish v. Richardson, 1 Cl. & Fin. 224, cited in Davis v. Township of Delaware, 42 N. J. Law, 516.

The motion is denied.

(74 N. J. L. 572)

**BALLANTINE et al. v. YOUNG et al.**

(Court of Chancery of New Jersey. Aug. 7, 1908.)

**1. TRUSTS—EXECUTION BY TRUSTEE—INTEREST ON INVESTMENTS—CAPITAL AND INCOME—RIGHTS OF REMAINDERMEN.**

Where testator at the time of his death owned bonds having a market value in excess of their par value, which bonds became a part of a trust fund created by the will, the income of which was to be paid to a person for life, with remainder over, the entire interest derived from the bonds belonged to the life tenant, and the trustee could not retain such an amount as would, at the maturity of the bonds, equal the premium at which they were valued at testator's death, unless there was a clear indication in the will to the contrary.

**2. SAME.**

Where a testamentary trust fund to pay the income to a person for life with remainder

over was invested by the trustee in bonds, maturing at a date certain, purchased by him at a premium, a deduction should be made from the interest received on the bonds, such as would at their maturity amount to the premium, unless there was a clear direction in the will to the contrary.

**8. SAME — UNAUTHORIZED PAYMENTS — REIMBURSEMENT OF TRUSTEES.**

Testamentary trustees had had in their hands the entire trust funds to pay the income to persons for life, with remainder to their children. A part of the funds they erroneously, but in good faith, paid to the life tenants, calling it dividends. Another part they erroneously, but in good faith, withheld from the life tenants, under the name of indemnity fund, to make good wasting premiums on bonds in which the funds were invested. The children were infants. *Held*, that the trustees were entitled to recoup themselves out of the fund in their hands under the name of indemnity fund, and, if necessary, out of moneys that might become due the life tenants.

Bill by Jeannette Ballantine and others, trustees, against Alice J. Young and others for direction in the performance of duties under trusts created by the will of John H. Ballantine, deceased. Heard on bill. Trustees advised.

John O. H. Pitney, for trustees. Gilbert Collins, for infant defendants. Henry Young, for life tenants.

**STEVENS, V. C.** This is a bill by trustees for direction in the performance of their duties under the trusts created by the will of John H. Ballantine. He died on April 27, 1895, leaving a will which disposed of a large estate. The questions are such as have arisen between the life tenants and their children. They may be, for the purposes of this opinion, very briefly stated. To his three sons testator gave portions of his estate out and out. To his trustees he gave another portion, one-sixteenth, in trust for each son reaching a certain age; his direction being: "They are to receive respectively only the interest or income during their respective lives; and on the death of either of my said sons, the one sixteenth part of which he was entitled to receive the interest under this clause, shall go to his child or children him surviving in equal shares." Language substantially similar, as far as the present question is concerned, is used with respect to his daughter Alice. She is to have "the interest and income during her life." The principal, part by Alice's appointment and part by the will itself, goes to her children at her death. One of the testator's children, Robert, has died without issue. The other children are living and have children.

The testator at the time of his death was the owner of bonds of the Long Dock Company, which then had a market value of \$1,260 for each bond of \$1,000. The premium was due, in the language of the bill, "to their great security and the high rate of interest they bore." Under a power given to retain investments made by testator, "and in order to preserve the principal of the es-

tate against depreciation by a reduction in the value of said bonds as they approach maturity, the trustees have" (I quote from the bill) "set aside out of each installment of interest received from said bonds a sum sufficient, with other like installments similarly retained, to make up at the maturity of the said bonds a sum equal to the premium at which said bonds are valued and inventoried at the time of testator's death." It is claimed by the life tenants that the interest thus withheld belongs to them, and not to the ultimate beneficiaries, their children. The trustees, under their powers of investment, have, since testator's death, bought other bonds maturing at a date certain, and, where bought at a premium, they have also reserved a part of the interest. The life tenants make a similar claim to this, and the question is whether in the case of both classes, or of either class, of bonds, the retainer is justified. As far as concerns the bonds held by the testator in his lifetime, there seems to be very little conflict among the decided cases. It is held very generally that in the case of such bonds the entire interest belongs to the life tenant, unless there is a clear indication in the will itself to the contrary. In the case of bonds purchased at a premium by the trustees, after testator's death, the cases are in hopeless conflict. In Pennsylvania (*In re Penn-Gaskill's Estate*, 208 Pa. 846, 57 Atl. 715) and in some other states it is held that the entire interest in that case, too, belongs to the life tenant, while in New York, Massachusetts, and Wisconsin it is held that wasting premiums must be made good. It appears to me, on the whole, that the New York rule will, in the majority of cases, better effectuate the intent of the testator and better harmonize with the rule established in the somewhat analogous case of perishable or wasting property given to legatees in succession. *Van Blarcom v. Dagger*, 81 N. J. Eq. 783; *Helm v. Strater*, 52 N. J. Eq. 591, 30 Atl. 333. Its rationale is thus explained in *Re Stevens*, 187 N. Y. 471, 80 N. E. 358, 12 L. R. A. (N. S.) 814, by Cullen, C. J.: "The justification for the rule is very apparent. The income on a bond having a term of years to run and purchased at a premium is not the sum paid annually on its interest coupons. The interest on a \$1,000 10-year 5 per cent. bond, bought at 120 per cent., is not \$50, but a part thereof, and the remainder is a return of the principal. All large investors in bonds, such as banks, trust companies, and insurance companies, purchase bonds on the basis of the interest the bonds actually return, not the amount they nominally return; nor is the premium paid on the bond an outlay for the security of the principal. All government bonds have the same security, the faith of the government; yet they vary in price, a variation caused by the difference in the rate of interest and the time they have to run. It is

urged that there is often a speculative change in the market value of a bond, and a bond may be worth more at the termination of the trust than at the time of its purchase. This has no bearing on the case. The life tenant should neither be credited with an appreciation nor charged with a loss in the mere market value of the bond. But, apart from any speculative change in the market value, there is from lapse of time an inherent and intrinsic change in the value of the security itself as it approaches maturity. It is this, and this only, with which the life tenant is to be charged. We therefore adhere to the rule declared in the Baker Case, 165 N. Y. 484, 59 N. E. 257, 53 L. R. A. 544, that, in the absence of a clear direction in the will to the contrary, where investments are made by the trustees, the principal must be maintained intact from loss by payment of premium on securities having only a definite term to run, while, if the bonds are received from the estate of the testator, then the rule in the McLouth Case prevails, and the whole interest should be treated as income. \* \* \*

It is also to be said that, unless the rule in the Baker Case is to be observed, the relative rights of life tenant and remainderman would largely depend upon the favor or caprice of the trustees who might either buy a bond bearing a high rate of interest at a great premium and impair the principal, or buy a bond bearing a lower rate of interest substantially at par and preserve the principal intact." The rule thus lucidly explained is that which in both its branches prevails in Massachusetts. *Hemenway v. Hemenway*, 134 Mass. 446; *New England Trust Co. v. Eaton*, 140 Mass. 532, 4 N. E. 69, 54 Am. Rep. 493; *Shaw v. Cordis*, 143 Mass. 143, 9 N. E. 494. In the dissenting opinion of Justice Holmes in the Eaton Case will be found a strong statement of the opposite view, but it does not appear to me to be convincing. The question relating to the sinking fund reserved on the bonds of the Chicago, Milwaukee & St. Paul Railroad Company is disposed of by the conclusion thus reached. After testator's death, the Pullman Company made an extra stock dividend. It appears to be conceded by all the parties to this controversy that nearly all of it represented money earned after testator's death. The rule of apportionment is laid down in *Lang v. Lang*, 57 N. J. Eq. 325, 41 Atl. 705, and counsel are agreed that there is no difficulty in dividing it.

The last question to be decided arises in this wise: The four original trustees supposed that dividends declared after testator's death were income, and paid them over to the life tenants. The point came up subsequently in this court in *Lang v. Lang*, 56 N. J. Eq. 604, 40 Atl. 278, and *Emery, V. C.*, held that the whole of such dividends were in general income, and not principal. On appeal the Court of Errors held otherwise. Two of the trustees now before the court find them-

selves in the situation of having paid the life tenants money, part of which should have been treated as principal. They ask that, if responsible for its return, they may be permitted to apply so much of the moneys now or hereafter in their hands belonging to the life tenants as will make the capital fund good. They have accumulated a considerable fund to make good the wasting premiums in the case of investments made by testator. They acted in perfect good faith and in accordance with that view of the law which had been adopted by many courts. Did the trustees represent nobody but themselves, there might be the difficulty suggested by the case of *Horne* (1905) 1 Ch. 76. But they represent infant cestui que trust. These infants not being bound by the statute of limitations are in a position to claim a return of the money both from the original trustees and from the life tenants. The present trustees as the representatives of these infants must have a similar right. No final account has been made or could be made. The matter stands thus: The trustees have had in their hands the entire trust fund, principal and interest. A part of it they have erroneously, but in good faith, paid to the life tenants, calling it "dividends." Another part they have in good faith, but erroneously, withheld from the life tenants under the name of indemnity fund. Now, it is quite inconceivable that having money in hand which equitably belongs to the infants they should be compelled to give up a portion of it to those who have been overpaid, and then be compelled to make good the fund out of their own pocket.

The argument may be put a little differently. The infants are substantially complainants. They say to the original trustees: "You have erroneously taken money from the capital fund belonging to us and paid it to the life tenants. You have put into the capital fund money of the life tenants, to which, under the name of indemnity fund, we have no claim. We pray that you may be restrained from taking any money out of the capital fund, under whatever designation you may have put it in, unless it exceeds in amount that which we are entitled to. We have the right to insist that the fund be kept intact. That the dividends were paid out 10 or 12 years ago makes no difference, for the statute of limitations does not bar us. If, having the money in hand to make good our capital, you give a portion of it to the life tenants, you commit a breach of trust." It seems to me that the right of the infants is quite clear, and that the cases go to the length of allowing the trustees not only to recoup themselves out of the fund in hand, so far as held under the name of indemnity fund, but also, if necessary, out of the moneys that may become due the life tenants. *Livesey v. Livesey*, 3 Russ. 287; *Dibbs v. Goren*, 11 Beav. 483; *Harris v.*

Harris, 29 Beav. 110. I think that the argument based upon the idea that Lang v. Lang introduced a new rule of law on the subject of the apportionment of dividends, and that Lister v. Weeks, 60 N. J. Eq. 225, 46 Atl. 558, 61 N. J. Eq. 675, 47 Atl. 1132, so held, is altogether untenable. That was a case in which it was sought to remove a trustee from office because of misfeasance. The court merely held that the mistake of the trustee in paying the dividend there in question was no ground for removal. The other cases cited do not sustain counsel's position.

(74 N. J. E. 336)

SHREVE et al. v. HARVEY et al.

(Court of Chancery of New Jersey. July 23, 1908.)

1. MORTGAGES — PROPERTY COVERED — COVENANTS—ESTOPPEL.

Four sisters and four brothers being seised in fee of a tract of land, the sisters conveyed their undivided interests, amounting in all to one-half of the fee, to their four brothers, three of whom, being of age, executed four several bonds to their sisters, respectively, and gave them collectively a mortgage upon the same premises to secure a portion of the purchase money. The brother who was a minor at the time the mortgage was given and who did not join therein came of age within two years after the giving of the mortgage, and lived for more than 30 years thereafter, and died devising his one-fourth interest to his three brothers who made the mortgage; and the mortgage is now being foreclosed. *Held*, that the outstanding undivided one-fourth interest in the premises did not come under the lien of the mortgage when the entirety of the fee vested in the three brothers, the mortgagors, by reason of the devise to them of the one-fourth by their brother upon his death, and that the complainants' mortgage is still a lien only upon the three undivided one-fourths part and interest in the mortgaged premises; and this because there is no covenant of seisin or for title in the mortgage, and no intention is apparent that the outstanding one-fourth interest should ultimately fall within the mortgage. Hence no estoppel has been worked.

2. SAME—CONVEYANCE BY MORTGAGOR—ADVERSE POSSESSION.

On December 14, 1858, the three brothers, the mortgagors made a deed to R. P. for a portion of the mortgaged premises. The deed from the sisters to the brothers, dated December 9, 1858, was recorded May 3, 1860. The mortgage from the brothers to the sisters, dated January 1, 1859, was recorded May 3, 1860. The deed to R. P. was recorded October 9, 1860. There were other conveyances of portions of the mortgaged premises as follows: To S. A. May 1, 1860; to G. B. July 23, 1861; to M. K. March 31, 1874. The deed to S. A. was recorded September 10, 1860. The deeds to G. B. and M. K. were both made and recorded after the making and recording of the mortgage. These tracts by sundry mesne conveyances and devolutions of title have become vested in others than the original grantees, but the original grantees and their successors in title, including the present owners, have been for more than 20 years last past in the full, exclusive, and actual possession of their several distinct parcels of mortgaged premises without admitting the title of the mortgagees and with no claim for principal or interest having been made against them and without any entry by any holder of the mortgage. They have improved their tracts by the erection of houses and other buildings thereon, have paid the taxes upon their lots, and exercised in every particular

all the usual acts of ownership over the same. *Held*, therefore, that the mortgage is no longer any lien at all upon any of these several tracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 284.]

3. SAME—MERGER.

Two of the brothers, being then seised of the entire fee of the premises by virtue of their individual holdings and under the will of their deceased brother, and by a conveyance by their surviving brother, in the years 1891, 1895, and 1903 made three other several mortgages upon the premises to several mortgagees. Pending this suit one of the brothers died intestate and his interest in the mortgaged premises descended to his heirs at law, who are his surviving brother and his nephews and nieces, children of his deceased brothers and sisters. They, the surviving brother and those nephews and nieces, are the owners of the interest in the mortgage of one of the sisters in certain proportions, as well as being owners of the fee of the mortgaged premises. *Held*, as against the mortgagees of 1891 and 1895 (the question not being raised as to the mortgage of 1903), there is no merger of their interests in the original mortgage of 1859 into their title to the fee in the lands, because the subsequent mortgages are presumed to have been taken with reference to the state of the record, which in the case of the one of 1891 would have disclosed the existence of the complainants' mortgage and no interest therein at that time in the now owners of the fee, and, there being no unity of title as mortgagees and owners, there could have been no merger at that time; and, since acquiring title to such interest in the mortgage they have done nothing themselves to cause a merger; and as to the mortgage of 1895, there is no merger, because, when it was given while the two brothers who were owners of the fee were already beneficiaries of one of the original mortgages, yet they did nothing themselves whereby they can be held to have harbored any intention to surrender their interests in the original mortgage, which they derived as legatees, in favor of the mortgage of 1895.

4. SAME — FORECLOSURE — COSTS — COUNSEL FEES.

Rule 224 of this court promulgated in pursuance of section 91 of the chancery act (P. L. 1902, p. 540), provides for the only allowance by way of fee for counsel for the complainant that can be made in a foreclosure suit, litigated or ex parte. Whatever the complainants' counsel is entitled to beyond the amount provided for in rule 224 he will have to collect from his clients.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1674, 1675.]

(Syllabus by the Court.)

Suit by Joanna Shreve and others against Thomas E. Harvey, as administrator, etc., and others. Decree for complainants.

Eckard P. Budd, for complainants. Charles Ewan Merritt, for defendants Annie R. Antrim, administratrix, etc., and Charles Ewan Merritt, executor. Linton Satterthwait, for defendants Elizabeth Page, Lawrence L. Gratz, Anna G. Keller, Anna D. Keller, Maggie M. Keller, Amy E. Keller, Mary Keller, Marion Keller, Lillie V. Keller, and Lillie V. Keller, guardian. Samuel A. Atkinson, for James Tallman, Sarah A. Hancock, and Mary F. Tallman, an infant, by Elmer L. Tallman, guardian.

WALKER, V. C. This is a litigated and complicated foreclosure involving these ques-

tions: (1) Whether an outstanding interest in the mortgaged premises passed by way of estoppel when the mortgagors afterwards acquired title; (2) whether distinct parcels of the mortgaged premises conveyed to third persons who have been in the exclusive possession of their several tracts for over 20 years, and who improved the same, without recognizing the mortgage, and without any claim on behalf of the mortgagees being made upon them, are still subject to the lien of the mortgage; (3) whether certain interests in the mortgage acquired by owners of the fee by bequest from certain of the mortgagees have merged—that is, whether their interests in the mortgage have merged in the fee for the benefit of subsequent mortgages—and (4) the amount that may be allowed counsel for the complainants to be taxed in the costs in such a case as this.

On December 9, 1858, Sarah H. Shreve, Mary E. Harvey, Charlotte H. Biddle, and Elizabeth Harvey, the younger, Peter E. Harvey, Amos E. Harvey, Thomas B. Harvey, and William T. Harvey, were seised in fee, as tenants in common, of a certain farm in the township of Mansfield, Burlington county, of which Peter Harvey, their father, had lately died seised. Peter Harvey died intestate, and the persons named were his children and heirs at law, each one being seised of an undivided one-eighth part of the farm, subject to the estate in dower of their mother, Elizabeth Harvey, the elder. On the same day, December 9, 1858, Sarah H. Shreve and Charles M. Shreve, her husband, Mary E. Harvey, Charlotte H. Biddle, and Israel Biddle, her husband, and Elizabeth Harvey, the younger, conveyed all their undivided half part of the farm to Peter E. Harvey, Amos E. Harvey, Thomas B. Harvey, and William T. Harvey by deed dated the same day, December 9, 1858, and which was recorded March 21, 1859, in the office of the clerk of Burlington county. After the deed was executed and delivered, the ownership of the farm was vested in Peter E. Harvey, Amos E. Harvey, Thomas B. Harvey, and William T. Harvey as tenants in common, each one of them being then seised of an undivided one-quarter interest therein. At this time Peter E. Harvey, Amos E. Harvey, and Thomas B. Harvey were all of age, and William T. Harvey was a minor. On January 1, 1859, Peter E. Harvey, Amos E. Harvey, and Thomas B. Harvey, the three adult brothers, in order to secure the payment of a portion of the purchase price of the farm, executed to their sisters, Sarah H. Shreve, Mary E. Harvey, Charlotte H. Biddle, and Elizabeth Harvey, the younger, four several bonds, respectively, and also a mortgage on the lands conveyed to secure those bonds. The mortgage just referred to contains no covenants of seisin or for title, nor does it even recite the source of title of the mortgagors. It, however, described the farm in its entirety, and not an undivided interest therein. The fact that Wil-

liam T. Harvey was under the age at the time of the making of the mortgage by his adult brothers to their sisters did not absolutely incapacitate him from joining in the conveyance. He could have joined his brothers in the mortgage and ratified his act after he attained his majority. He must have been nearly of age at the time the mortgage was made, for on July 23, 1861, he joined his mother, the widow, and his brothers, Peter E. Harvey, Amos E. Harvey, and Thomas B. Harvey, in a conveyance of a portion of the mortgaged premises to George Black. He remained seised of the fee in an equal undivided one-fourth part of the premises until his death August 1, 1880, and by his last will and testament devised the same to his prothiers last named, whereupon, the mother having died on August 10, 1880, and her estate in dower in the premises thereby having terminated, the three brothers became seised of the entire fee in the premises in these proportions: Peter E. Harvey, four-ninths; Amos E. Harvey, four-ninths; and Thomas B. Harvey, one-ninth, being the one-third of the one-third devised to him by his brother William T. Harvey, he, Thomas B. Harvey, having on March 25, 1868, conveyed his one-fourth interest to his brothers Peter E., Amos E., and William T. Harvey.

It will be remembered that the complainants' mortgage conveyed only the three undivided fourth parts of the premises described therein, and the first question is: Did the outstanding undivided one-fourth interest in those premises come under the lien of the mortgage when the entirety of the fee vested in the mortgagors under the devise to them of that one-fourth by their brother, William T. Harvey, upon his death in 1880? That it did not, and that the complainants' mortgage is still a lien only upon the three undivided fourths part and interest in the mortgaged premises, is to me clear. The case, upon this head, comes within the reasoning of Chancellor Runyon in *Smith v. De Russy*, 29 N. J. Eq. 407. The learned Chancellor says, at page 408 of 29 N. J. Eq.: "There is no covenant of seisin or warranty in the mortgage to her; and, although the entire premises are described in the mortgage as being mortgaged thereby, yet the description of the property in that instrument is followed by the statement that the property mortgaged is the same which was conveyed by the complainant to the mortgagor by deed of even date with the mortgage, and that the mortgage was given to secure the payment of part of the purchase money of that conveyance." In the case under consideration the entire premises are described in the mortgage as being mortgaged thereby, and, while there is no recital that the premises conveyed are the same premises which were granted by the mortgagees to the three mortgagors, together with their brother who did not join, nevertheless the fact is that such was the case, and that the conveyance had been made only

three weeks before the mortgage was given, and therefore the mortgagees knew perfectly well that they were receiving a conveyance by way of mortgage security from three of their brothers, whereby title passed only to the three undivided fourths part of the mortgaged land. If by reason of a family arrangement, regarding the settlement of the estate of their father, it had been understood that William T. Harvey's interest in the lands was to be mortgaged to his sisters, then, as I have intimated, he doubtless would have joined in the mortgage, being within two years of his majority, and would not have repudiated his act afterwards, but would have ratified and confirmed it, or he would, upon attaining his majority, have executed to his sisters a mortgage upon his interest in the premises. That he did neither of these things, but, on the contrary, retained the fee in his one-fourth interest until his death, over 30 years after the mortgage was given, then devised it to these three brothers by will, is, to my mind, conclusive evidence that it was never intended that his, William T. Harvey's, outstanding interest in the estate should ever fall within the mortgage given by the three brothers to the four sisters on January 1, 1859, or become in any way subject to its lien. In *Hannon v. Christopher*, 34 N. J. Eq. 459, an after-acquired interest was held to pass by estoppel as the result of a conveyance by deed of bargain and sale without covenants, because it was found to be the intention of the parties to convey it, and it was held that, whenever it clearly appears that such was the intention of the parties, it is the duty of the court to adjudge an estoppel. This case is an authority for the view I take with reference to the mortgage under discussion, because in the case at bar it not only does not appear to have been the intention of the parties that the after-acquired interest in the lands should pass, but, on the contrary, to my mind it clearly appears that such was not the intention, and therefore no estoppel can be worked. There was excepted from the mortgage a small tract expressed to be conveyed to William C. Taylor, mentioned as a lot adjoining Thomas Page's lot. A conveyance of this lot to Taylor was made by the three brothers, the grantees of the mortgagees, on December 14, 1858, and on the same date the same grantors made a deed to Richard Page for another portion of the mortgaged premises. The deed from the sisters to the brothers was recorded May 13, 1860. The deed from the brothers to William C. Taylor, was recorded April 6, 1859; the deed from the same grantors to Page, October 9, 1860. The mortgage from the brothers to the sisters was recorded May 6, 1860. Besides the conveyances to Richard Page and William C. Taylor, there were conveyances made for other portions of the mortgaged premises as follows: By Elizabeth Harvey, widow, Peter E. Harvey, Amos E. Harvey, and Thomas B.

Harvey, to Samuel Asay, May 1, 1860. By the same parties, William T. Harvey, joining them, to George Black, July 23, 1861. By Peter E. Harvey, William T. Harvey, and Amos E. Harvey to Mary Kirkbride, March 31, 1874.

It will be noticed in passing that the conveyance to Taylor was of an undivided three-fourths part of the premises, the same to Page, the same to Asay; while that to Black was of four-fourths, or the whole, and that to Kirkbride was for three-thirds, or the whole. No question is raised in respect of the quantum of the estate vested in any of these grantees. The Asay tract was by sundry mesne conveyances and devolutions of title finally vested in the defendants Anna G. Keller, Anna D. Keller, Maggie M. Keller, Amy E. Keller, Mary Keller, Marion Keller, and Lillie V. Keller, which tract is mortgaged to the defendant Lawrence L. Gratz to secure the sum of \$700. The Page tract was, in like manner, finally vested in the defendant Elizabeth F. Page. The Black tract was, in like manner, finally vested in the defendants James Tallman, Sarah A. Hancock, and Mary F. Tallman. The Kirkbride tract was, in like manner, finally vested in the defendant Charlotte B. Biddle, subject to a mortgage for \$2,000 given to John Bishop, trustee, by Joseph W. Biddle, the then owner, in 1891, who, John Bishop, the trustee, has departed this life without any one having been appointed to succeed him in the trust. And Charlotte B. Biddle, the owner of the tract, claims an interest in the mortgage because she is entitled to the income of the same during her life, and the defendants Eliza Black Deacon, Anna W. Newbold, Marion E. Ellis, Bessie E. Biddle (Luce), and Sue Black Biddle claim to have an interest in it after the death of Charlotte B. Biddle, who is their mother. The only question in this suit regarding these lots is: Are they subject to the lien of the complainants' mortgage?

The deed to Page was made December 14, 1858, two weeks before the complainants' mortgage, which was made January 1, 1859, and recorded May 3, 1860, while the deed to Page was not recorded until October 9, 1860. The complainants claim that their mortgage is a lien against the property sold to Page because his deed was not recorded as required by law before the recording of the mortgage. The complainants also claim that their mortgage is a lien against the property sold to Asay because his deed was not recorded as required by law before the recording of the mortgage. Asay's deed bears date May 1, 1860, three days before the recording of the mortgage, but the deed was not recorded until September 10, 1860. The complainants also claim that their mortgage is a lien against the property sold to Black and Kirkbride because those two deeds were both given after the making and recording of the mortgage. If the mortgage be a lien upon these tracts, it would only be valid against the three un-

divided fourths interest in them, because at the time the conveyances just mentioned were made William T. Harvey's share had not vested in his three brothers who made the mortgage. However, the claims of the complainants concerning these tracts of land are not valid because it is admitted that none of the present owners in fee of the portions of the mortgaged premises described in these deeds nor their grantors had actual knowledge of the mortgage when the purchase of the lots was made and the improvements, which are many and valuable, were placed upon the grounds; that the mortgagees had every opportunity to witness the improvements while being made, as they lived in the neighborhood; that the present owners and their grantors have been in possession since the time of the conveyances above mentioned continuously and without any actual knowledge of the mortgage until either a short time before, or at the beginning of, these foreclosure proceedings; that none of them have ever paid any interest upon or in any way recognized the existence of the complainants' mortgage; that neither the mortgagees nor any one representing them ever made demand upon the owners in fee of these lots, or their grantors, for any payment on the mortgage by way of principal or interest; that the mortgagees never gave notice to any of the owners of the tracts, or their grantors, when the houses and buildings were being erected, or to any occupant of the premises, that they claimed any lien by mortgage incumbrance or otherwise upon any of these tracts; that the owners of the tracts in fee, and their grantors, have had the exclusive and notorious possession of the lands, and have collected for their own use and enjoyment all the rents, issue, and profits thereof, have paid the taxes upon the lots, and have exercised in every particular all the usual acts of ownership over the same; that no entry has been made upon any of these several tracts by any holder of the mortgage. Thus it will be seen that the present owners of these tracts, and their predecessors in title, have been for more than 20 years in the full, exclusive, and actual possession of these distinct parcels of the mortgaged premises without admitting the title of the mortgagees, with no claim for principal or interest having been made upon them, and without entry by any holder of the mortgage, and therefore the mortgage is no lien at all upon any of these several tracts, even if the mortgage debt has been kept alive by payment of interest by the owners of other portions of the mortgaged premises. *Ely v. Wilson*, 61 N. J. Eq. 94, 47 Atl. 806; *Wills v. Field*, 62 N. J. Eq. 271, 49 Atl. 1123. On February 2, 1891, Thomas B. Harvey conveyed his undivided one-ninth interest in the mortgaged premises to his brothers, Peter E. Harvey and Amos E. Harvey, and they thereupon became seised of the entire fee in these proportions, namely, Peter E. Harvey an undivided five-ninths part, and

Amos E. Harvey an undivided four-ninths part. On February 7, 1891, Peter E. Harvey and Amos E. Harvey executed a mortgage on the premises in question to the Mt. Holly Insurance Company to secure the sum of \$1,500. On April 29, 1895, the Mt. Holly Insurance Company assigned this bond and mortgage to Thomas Antrim, who died intestate, and whose administratrix, Annie R. Antrim, is now in possession of the bond and mortgage and entitled to realize upon it. This mortgage describes the same lands as are in the complainants' mortgage, the courses and distances being the same, excepting thereout, however, the lot sold to George Black, William C. Taylor, and Mary Kirkbride, three in number. On March 26, 1895, Peter E. Harvey and Amos E. Harvey executed a mortgage on the premises in question, together with other lands, to Shreve Antrim to secure the sum of \$4,000. Shreve Antrim died leaving a last will and testament, of which Charles Ewan Merritt, Esq., is the executor, and who is now in possession of the bond and mortgage, and entitled to realize upon it. This mortgage describes the same lands as are in the complainants' mortgage, with the addition of a tract which the Harveys purchased July 10, 1869, which joins the former tract, and is merged in the description. Out of this mortgage are expressly excepted the lots sold to George Black, R. H. Page, William C. Taylor, and Mary Kirkbride, four in number. On January 29, 1903, Peter E. Harvey and Amos E. Harvey executed a mortgage on the premises in question, together with other lands, to Thomas B. Harvey to secure the sum of \$1,000. Thomas B. Harvey departed this life leaving a last will and testament of which Mary S. Harvey and Thomas E. Harvey are the executors, and who are now in possession of the mortgage and entitled to realize upon it. The description in this mortgage is the same as in the one given to Shreve Antrim. There is expressly excepted therefrom the lots conveyed to George Black, R. H. Page, William C. Taylor, Samuel Asay, and Mary Kirkbride, five in number. Each of these three mortgages of February 7, 1891, March 26, 1895, and January 29, 1903, conveyed the entire fee in the farm, subject to the lien of the complainants' mortgage on the undivided three-fourths of the premises. All of the sisters, the holders of the bonds and the original mortgagees, are dead, and all of the brothers, the owners of the fee and three of whom were the original obligors and mortgagors, are dead, except Amos E. Harvey, who was one of the owners of the fee and one of the original obligors and mortgagors.

It becomes important now to ascertain who are the present holders and owners of the bonds, and who are, therefore, commensurately interested in the original mortgage, for the purpose of deciding who are entitled to the proceeds of the sale to be made of the mortgaged premises, and also for the purpose



of deciding another question, namely, that of merger, which has been raised as to certain interests in the mortgaged premises. The bond given to Sarah H. Shreve is now owned by the complainant Joanna Shreve, and there is due thereon the principal sum of \$500, with interest at 6 per cent. from March 9, 1897. The bond given to Charlotte H. Biddle is now owned by the complainant Elizabeth B. Conrow, and there is due thereon the principal sum of \$875 with interest at 6 per cent. from April 1, 1890. The bond given to Elizabeth Harvey is now owned by the complainant, John H. Hutchinson, her administrator c. t. a., and there is due thereon the principal sum of \$2,693, with interest at 6 per cent. from January 1, 1900. The bond given to Mary E. Harvey is now owned by the following persons and in the following proportions: Complainants Joanna Shreve, Mary H. Biddle, and Elizabeth B. Conrow, one-tenth part each; the defendants Amos E. Harvey and Thomas E. Harvey, administrator of Peter E. Harvey, deceased, one-fifth part each; and the defendants Caleb E. Shreve, Thomas E. Harvey, and John S. C. Harvey, one-tenth part each; and there is due thereon the principal sum of \$3,143, with interest at 6 per cent. from January 1, 1900.

It would be no purpose to trace the various steps by which the persons just named became entitled under the will of Mary E. Harvey, deceased, to her bond in the proportions just set out. Amos E. Harvey is the only original mortgagor still living. The premises in question, it will be remembered, were owned by him, and his brother, Peter E. Harvey, at the time of the latter's death pending this suit. He, Peter E. Harvey, died intestate and his interest in the mortgaged premises descended to his heirs at law, who are his brother Amos E. Harvey, and his nephews and nieces Joanna Shreve, Caleb E. Shreve, Mary H. Biddle, Elizabeth B. Conrow, Thomas E. Harvey, and John S. C. Harvey. The surviving brother and nephews and nieces of Mary E. Harvey just named are, as above stated, the owners of interests in the bond of Mary E. Harvey in the proportions mentioned, as well as being owners of the fee of the mortgaged premises.

In this situation of affairs the defendants Annie R. Antrim, administratrix of Thomas Antrim, deceased, who is the holder and owner of the bond and mortgage made by Peter E. and Amos E. Harvey to the Mt. Holly Insurance Company February 7, 1891, and Mr. Merritt, the executor of Shreve Antrim, who is the holder and owner of the bond and mortgage made by Peter E. Harvey and Amos E. Harvey to Shreve Antrim March 26, 1895, contend that such interest in the mortgage formerly owned by Mary E. Harvey as is owned by her beneficiaries above mentioned are merged into their legal title to the property by reason of their ownership of portions of the fee in the lands. No such contention is set up in behalf of the mortgage of 1903

given by Peter E. and Amos E. Harvey to Thomas B. Harvey. When the Mt. Holly Insurance Company took its mortgage from Peter E. Harvey and Amos E. Harvey (February 7, 1891), it is presumed to have taken it with reference to the record title which disclosed the existence of complainants' mortgage. *Bingham v. Kirkland*, 34 N. J. Eq. 229. If Mary E. Harvey, who was alive when this last-mentioned mortgage was given, had so disposed of her property that none of it would go to her brother Amos E. Harvey, and to the nephews and nieces of her brother Peter E. Harvey, then the mortgage of the Mt. Holly Insurance Company would remain what it was when made, namely, a second mortgage on the three-fourths interest in the farm, being, of course, a first mortgage on the other one-fourth. That this brother and these nephews and nieces are the recipients of Mary E. Harvey's bounty ought not, in my judgment, to operate for the benefit of the Mt. Holly Insurance Company. Her bequest to them of certain interests in this bond, and an accompanying interest in the mortgage, is a gift to them of so much of her property, and cannot inure to the benefit of the Mt. Holly Insurance Company unless these beneficiaries voluntarily forego their benefits. This they have not done. When the other mortgage, the one to Shreve Antrim, was made, Mary E. Harvey was dead, and her sister, Elizabeth Harvey, who was the beneficiary of her estate for life, was still living, and upon her death, by the will of Mary E. Harvey, her, Mary E. Harvey's, interest in her bond, went to her brothers and sisters and children of deceased brothers and sisters, share and share alike. Her brother Peter E. Harvey was living at her death and inherited a beneficial interest in her bond, which has since passed to his surviving brother and nephews and nieces. A search of the records at the time this last-mentioned mortgage was given would have disclosed the existence of the complainants' mortgage, and an appropriate search and investigation would also have disclosed the death of Mary E. Harvey and the interests of her brothers, nephews, and nieces in her share of the first bond and mortgage. While the doctrine of merger can be leveled against the beneficiaries of Mary E. Harvey with reference to the Shreve Antrim mortgage with much more effect than as against the mortgage of the Mt. Holly Insurance Company by reason of the facts just stated, still I am also against the view that there has been any merger with reference to the Shreve Antrim mortgage. If the Harveys had paid off their indebtedness to their sisters, they would not be permitted to keep these bonds and their corresponding interests in the mortgage alive as against the subsequent mortgagees, but, in such case, the subsequent mortgages would be moved up in the line of preference. This happens daily with reference to mortgages in consequence of payment of prior incumbrances. No equi-



ties are in such cases ordinarily involved, and none are involved in this transaction. Merger is essentially a matter of intention, and, where the intention to merge does not exist, the doctrine is not operative. *Andrus v. Vreeland*, 29 N. J. Eq. 394. Neither the Mt. Holly Insurance Company nor Shreve Antrim have been in any wise prejudiced by the bequests made by Mary E. Harvey, deceased. No equities are to be subserved by holding that those bequests, so far as they represent interests in the bond and mortgage, owned by her in her lifetime, are to be extinguished in favor of the Mt. Holly Insurance Company and Shreve Antrim, the subsequent mortgagees. One of the conditions under which merger will operate upon estates is that the two estates, the greater and the lesser (in such a case as this the fee and the interest by way of mortgage, are in same person at the same time. 10 Am. & Eng. Ency. L. (2d Ed.) p. 589. *Wills v. Cooper*, 25 N. J. Law, 137-164. There was not at the time the mortgage was given to the Mt. Holly Insurance Company any interest in the beneficiaries of Mary T. Harvey in the lands in succession to her as mortgagee, her estate at that time being in her sister, Elizabeth Harvey, the life tenant, and therefore there could have been no merger with reference to that mortgage at that time. Much less could there have been any merger worked by act and operation of law since that time. While the present owners of the bond of Mary E. Harvey and her commensurate interest in the mortgage were such at the time the second mortgage, namely, that to Shreve Antrim, was given, nevertheless their ownership was as beneficiaries of the estate, and they had done nothing themselves to in any wise prejudice the position of Shreve Antrim, the mortgagee, nor can they be held to have harbored any intention, which was not shown, to surrender the benefit they derived as legatees. Therefore equally there is no merger with reference to this second mortgage. There is now due to Annie R. Antrim, administratrix, upon the mortgage given to the Mt. Holly Insurance Company in 1891, the principal sum of \$1,500, with interest at 6 per cent. from March 22, 1900. There is now due to Charles Ewan Merritt, Esq., executor, upon the mortgage given to Shreve Antrim in 1895, the reduced principal sum of \$2,100, with interest at 6 per cent. from May 12, 1900, plus interest on the original principal sum of \$4,000 from March 28 to May 12, 1900, the principal having been reduced to \$2,100 on the last-mentioned date. There is now due to Mary S. Harvey and Thomas E. Harvey, executors, upon the mortgage given to Thomas B. Harvey in 1903, the principal sum of \$1,000, with interest at 6 per cent. from its date, January 29, 1903.

Directions will now be given as to the form of the decree, as follows: The whole of the mortgaged premises, or so much thereof as may be necessary, will be sold to raise and satisfy, in the first place, the bonds given to

the sisters out of the three-fourths part of the proceeds of sale to be distributed as follows: To Joanna Shreve (on the bond given to Sarah H. Shreve) the sum of \$500 with interest at 6 per cent. from March 9, 1907; to Elizabeth B. Conrow (on the bond given to Charlotte H. Biddle) the sum of \$875, with interest at 6 per cent. from April 1, 1900, to John H. Hutchinson, administrator c. t. a. (on the bond owned by Elizabeth Harvey) the sum of \$2,693, with interest at 6 per cent. from January 1, 1900; to Joanna Shreve, Mary H. Biddle, and Elizabeth B. Conrow, Caleb E. Shreve, Thomas E. Harvey, and John S. C. Harvey one-tenth each; and Amos E. Harvey and Thomas E. Harvey, administrators of Peter E. Harvey, deceased, one-fifth each (on the bond given to Elizabeth Harvey) of the sum of \$3,143, with interest at 6 per cent. from January 1, 1900. If sufficient money is not raised to pay these bonds in full, the distribution will be made pro rata; in the second place, the mortgage of the Mt. Holly Insurance Company out of the one-fourth portion of the proceeds of sale; in the third place, the mortgage of Shreve Antrim out of the one-fourth portion of the proceeds of sale; in the fourth place, the mortgage of Thomas B. Harvey out of the one-fourth part of the proceeds of sale. If any deficiency should exist in the payment of the second, third, or fourth mortgages, and any surplus should remain after the payment and satisfaction of the first mortgage, the surplus should be applied to the second, third, and fourth mortgages, respectively, pro tanto. The complainants' taxed costs and a counsel fee to be ascertained according to rule No. 224 of this court will be paid out of the three-fourths portion of the proceeds of sale, representing the first and original mortgage, before any payment is made upon the bonds secured by that mortgage. The taxed costs of answering defendants, mortgagees, will be added to the amounts provided for them in the decree and paid out of the proceeds of the sale of the one-fourth part of the premises, or out of the surplus of the proceeds of the three-fourths part, if any there be, and any deficiency remains in the payment of the defendants' mortgages. The complainants' counsel has asked for a special allowance by way of counsel fee. I regret that I cannot comply with his request. By the ninety-first section of the chancery act (P. L. 1902, p. 540) it is provided that the counsel fee in foreclosure suits to be included in the complainants' taxed costs shall be such percentage, not exceeding 5 per cent., of the amount decreed as the Chancellor may by general rule from time to time prescribe. Rule 224 was promulgated in pursuance of this statutory direction, and, as it makes no distinction between litigated and ex parte foreclosures, it comprehends both classes. This I regret; for in the present instance I would recommend an allowance for complainants' counsel. He has rendered important services not only to

the complainants, but to the defendants, in clearing up the title to the lands in question and procuring a decree for their sale and the satisfaction of the various liens above mentioned; and for this reason no costs will be allowed any of the defendants who have successfully answered the complainants; that is, those defendants who own the lots which have been exonerated from the lien of the mortgage. Counsel for the complainants must look to his clients for his extra allowance in this cause. That it is entitled to an allowance is clear (*Strong & Sons v. Mundy*, 52 N. J. Eq. 833, 31 Atl. 611), and, if I were at liberty to award it, I would hear the parties on the question of the amount of such counsel fee, and in advising the decree in this cause would report to the Chancellor what is a reasonable sum to be allowed (*McMullin v. Doughty*, 68 N. J. Eq. 776, 780, 55 Atl. 115, 284, 64 Atl. 1184).

The execution may be issued to a master, owing to the involved and complicated distribution to be made of the proceeds of sale.

# METROPOLITAN LIFE INS. CO. v. HAMILTON et al.

(Court of Chancery of New Jersey. June 19, 1908.)

## 1. INTERPLEADER — NATURE OF REMEDY — "STRICT INTERPLEADER."

A bill of strict interpleader is one in which complainant asserts his possession of some fund, or something in which he claims no personal interest, but in which other persons whom he makes defendants set up conflicting claims, and complainant cannot safely determine to which claim he should yield; and the fact that a complainant also seeks independent affirmative relief differentiates his case from cases of strict interpleader.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Interpleader, § 1.]

## 2. SAME.

An insurer issued two policies on the life of a person, each providing that, in case he understated his age, the policies should be adjusted to the amount of insurance that he would have been entitled to according to insurer's tables at his actual age. Assured died, and his widow claimed both policies, and sued insurer to reform one of them by striking out the name of a third person as beneficiary and substituting her own name. The third person, who was executrix of the will of assured, claimed both policies, and sued insurer at law on the other policy. *Held*, that a bill by insurer, alleging the understatement by assured of his age, and the rival claims for the policies, and praying that the insurance might be adjusted to the true age of assured, and that the rival claimants should interplead and should be enjoined from prosecuting their suits, was maintainable in the nature of a bill of interpleader.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Interpleader, § 14.]

## 3. SAME.

To support a bill of interpleader, complainant must show that the danger of double vexation is real; and a mere suspicion of a risk is insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Interpleader, §§ 6, 9.]

## 4. SAME.

A life policy was made payable to assured's wife, who predeceased him, and he married a second wife, who survived him. A second policy was made payable to a third person, described as the intended wife of assured. Assured gave by will all his estate to the third person. The second wife claimed both policies, and sued to reform the second policy by striking out the name of the third person as beneficiary, making insurer a party defendant. The third person claimed both policies, and sued at law on the first. *Held*, that the claim of the widow possessed sufficient validity to entitle insurer to file a bill in the nature of a bill of interpleader against her and the third person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Interpleader, § 14.]

## 5. EQUITY—PLEADING—BILL—MULTIFARIOUSNESS.

The rule against multifariousness in a bill is largely a rule of convenience, and, where the objection is urged, the court will endeavor to ascertain whether it is possible to make one decree which will do justice to all the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 340.]

## 6. SAME.

A bill by insurer, which had issued two policies on the life of one person, praying that the rival claimants to the policies should interplead, and that the amount of the insurance should be adjusted to the true age of assured, as provided by the policies, is not multifarious; for, if it should turn out that there are two causes of action, it is possible to separate them in the decree.

## 7. INJUNCTION—RELIEF—CONDITIONS.

Where an insurer filed a bill against rival claimants of the money due on two life policies, and prayed that the insurance might be adjusted to the true age of assured, as provided by the policies, and that the rival claimants should interplead, and should be enjoined from prosecuting their suits on the policies, the injunctive relief would not be granted except on condition that insurer paid into court the full amount of the insurance, and on insurer establishing, on the final hearing, that a deduction should be made because of misstatement of assured's age, such deduction might be adjusted on the distribution of the fund.

Bill of interpleader by the Metropolitan Life Insurance Company against Nannie B. Hamilton and Mary Dennis. Heard on rule for injunction to stay pending suits. Relief granted conditionally.

The complainant is a New York corporation engaged in the business of life insurance. On January 21, 1897, it issued a policy of life insurance on the life of Charles B. Dennis for the sum of \$500, making the same payable to his then wife, Ellen F. Dennis. In the application for insurance he stated his age to be 30 years. Ellen F. Dennis, the beneficiary under this policy, died on July 23, 1902, and some time thereafter he married a second time. This second wife, Mary Dennis by name, is still living. On August 16, 1906, the complainant issued another life insurance policy on the life of Charles B. Dennis for \$1,000, which was made payable to Nannie B. Hamilton, who is described in the policy as the intended wife of the assured. In the application for this policy he represented himself to be 39 years of age. He died leaving two policies in force on January

26, 1908. He left a will by which he gave all his estate to the said Nannie B. Hamilton, and appointed her sole executrix thereof. During his lifetime he made application to the complainant to change the beneficiary under the \$500 policy. He desired to have it made payable to Nannie B. Hamilton, but died before any change was made. Both policies provide (1) that, in case the assured shall have understated his age in his application for the policy, the policy on its maturity shall be adjusted to the amount of insurance that he would have been entitled to according to the company's tables at his actual age; (2) that, in case the assured should survive the beneficiary, the insurance money should be payable to the personal representatives of the assured. After the death of the assured, Nannie B. Hamilton submitted proofs of death under the \$500 policy in her capacity of executrix of the will of the deceased, and likewise submitted proofs of death under the \$1,000 policy as the beneficiary named therein. Mary Dennis, the widow of the deceased, made claim on the complainant for the insurance money on both policies. On May 14, 1908, Nannie B. Hamilton brought suit against the complainant on the \$500 policy, and on May 19, 1908, Mary Dennis brought suit in this court to reform the \$1,000 policy by striking out the name of Nannie B. Hamilton as beneficiary and inserting her own name. The complainant was made a party defendant to this suit. The complainant, being thus harassed by suits brought by rival claimants on these two policies, and considering itself in danger of being compelled to defend these claims and the actions thereon, filed the bill of complaint in the case now before the court, alleging the understatement by the deceased of his age in the applications for the policies and the rival claims for the money due thereon, and praying (1) that the insurance money might be adjusted to the true age of the deceased; and (2) that Nannie B. Hamilton and Mary Dennis should interplead before this court in respect to the moneys found due upon the policies after their readjustment, and offering to pay into court for this purpose the sums of money due under the respective policies on the basis of the true age of the insured. It prays also (3) that Nannie B. Hamilton and Mary Dennis be enjoined from prosecuting their suits with respect to the insurance moneys. The motion now before the court is for a preliminary injunction to stay the two pending suits.

Conover English, for complainant. Frank E. Bradner and George A. Douglas, for Nannie B. Hamilton. A. B. Cozey, for Mary Dennis.

HOWELL, V. C. (after stating the facts as above). The first question that arises under this bill is whether the complainant has any equity arising out of the facts above recited which justifies it in filing its bill. The bill

is not a bill of strict interpleader. A bill of strict interpleader is one in which the complainant asserts his possession of some fund, or something in which he claims no personal interest, but in which other persons whom he makes defendants set up conflicting claims, and the complainant cannot safely determine to which claim he should yield. The fact that the complainant in this case seeks independent affirmative relief on his own behalf differentiates this case from cases of strict interpleader. The complainant maintains that its bill belongs to that class of original bills in equity which are known to the profession by the name of bills in the nature of bills of interpleader, and refers to several cases in this court in which the distinction has been pointed out and settled. The cases are collected in the opinion of Chancellor Magle in *Carter v. Cryer*, 68 N. J. Eq. 24, 59 Atl. 233, a case which is similar in principle to the one at bar, and the authority of which I shall follow in this case. There the owner of real estate found a machine upon his premises, title to which or liens on which were claimed by various persons. The complainant also claimed that he had a lien upon the same machine for storage charges, and he filed his bill for the purpose of having (1) his claim for storage charges adjusted, and (2) a decree adjudging to which of the rival claimants the property belonged or on which they had liens. Objection was made to this bill by a motion to dismiss it under the rules, a proceeding equivalent to a demurrer, upon the ground that it was not a bill of interpleader, and that it therefore was without equity. The bill was sustained upon the ground that it was a bill in the nature of an interpleader bill. I have come to the same conclusion in this case. The parties defendant here claim under the same policies. These policies contain a provision for an adjustment of the insurance money to the correct age of the assured in case it shall be proved that there was any understatement of his age in the applications for the policies. The defendants, claiming under these policies, are bound by all the provisions and conditions thereof, including the provisions just referred to. Complainant claims the benefit of these stipulations, and, if the defendants have made claims which the complainant must recognize as apparently valid claims, it certainly has an equity to have the adjustment made in the same suit in which the rival claimants must litigate.

It is contended on behalf of Nannie B. Hamilton that the claim of Mary Dennis is apparently so baseless that no court would recognize any validity in it, and that it is therefore the duty of the complainant to absolutely reject it without investigation, and to take upon itself the burden of defending against it in any action at law or in equity which may be based upon it. The rule is that the danger of a double vexation must be real, and that a mere suspicion of a risk will

not be sufficient to support a bill. *Blair v. Porter*, 13 N. J. Eq. 287; *Fitch v. Brower*, 42 N. J. Eq. 300, 11 Atl. 330; *Atkinson v. Manks*, 1 Cow. (N. Y.) 691; *Crane v. McDonald*, 118 N. Y. 648, 23 N. E. 991, the last case holding that the complainant must show that he is unable to ascertain without hazard to himself to which of the claimants the money belongs. There are now pending two suits, one on each of the policies, one in a common-law court, the other in this court, and to each suit the complainant is a party defendant. In my opinion claims prosecuted in this way under the solemn sanction of legal proceedings in the courts are claims which the complainant has a right to regard as hazardous to its financial interests. I do not think that the complainant should be put to the risk and the expense of defending these actions separately, but, on the contrary, that they are sufficiently brought to its notice and bear on their face sufficient evidence of strength and validity to entitle it to call upon them to interplead.

Another objection to the bill is that there exists a separate cause of action on each policy, and that the complainant has theretofore filed a multifarious bill. The rule against multifariousness is very largely a rule of convenience, and, if the objection is urged, the court will endeavor to ascertain whether it is possible or even convenient to make one decree which shall do justice to all the parties. I see no reason why that course cannot be taken in this case. If it should turn out on final hearing that there are two causes of action, I think it will be quite possible to separate them in the decree.

It cannot be determined on this motion how much reduction in the amount of the insurance money the complainant is entitled to, or, in fact, whether it is entitled to any reduction. This is a question of fact, which will be considered on the final hearing. The complainant should be required, as a condition upon which the injunctive relief goes, to pay into court the full amount of insurance money, without deductions, and, if on final hearing the complainant shall establish the fact that a deduction should be made, it can be adjusted on the distribution of the fund.

(74 N. J. E. 621)

SPARKS et al. v. ROSS et al.

(Court of Chancery of New Jersey. July 16, 1908.)

MARRIAGE—EXISTENCE—QUESTIONS FOR JURY.

On the issue of the existence of a lawful marriage celebrated in 1873, evidence held to require the submission to the jury of the question whether the marriage of the man to another woman in 1862 was subsisting in 1873.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 90.]

Suit by Amelia Sparks and others against Charles S. Ross and others, in which issues were submitted to a jury. The verdict was

directed for complainants, and defendants moved for a new trial. Granted.

See 69 Atl. 185.

A feigned issue in this suit directed the law court to ascertain whether the marriage which was celebrated between Edmund B. Ross and Mary Cavanaugh October 24, 1873, was a lawful marriage. At the trial in the law court the jury was instructed to return a verdict to the effect that on the date named Edmund B. Ross was the husband of Maria Moose. This instructed verdict operated to declare the marriage of Edmund B. Ross and Mary Cavanaugh unlawful and the children of that marriage illegitimate. A motion for a new trial was made in this court in behalf of the children so declared illegitimate, and a new trial was ordered upon the ground that the evidence offered to overthrow the presumption of legality of the marriage of Ross and Cavanaugh was not of that character which commanded absolute acceptance or afforded a conclusive demonstration of the facts sought to be established, and in consequence the jury should have been permitted to pass upon the issue presented. *Sparks v. Ross* (N. J. Ch.) 65 Atl. 977. On appeal the Court of Errors and Appeals affirmed the order made by this court. *Sparks v. Ross*, 69 Atl. 185. The same issue has again been tried in the law court and again a similar verdict has been directed. A motion for a new trial is now made in this court.

Eckard P. Budd and French & Richards, for complainants. Timothy J. Middleton and John J. Crandall, for defendants.

LEAMING, V. C. (after stating the facts as above). The only material new evidence received at the second trial was testimony to the effect that Jacob Loudenslager, who is alleged to have celebrated the marriage between Edmund B. Ross and Maria Moose December 4, 1862, was at that time an ordained minister of the Methodist Episcopal Church. I am unable to conclude that the added testimony was sufficient to remove the case from the consideration of the jury. As heretofore stated, the presumption of legality of the marriage of Ross and Cavanaugh is a powerful presumption which cannot be disregarded. When Edmund B. Ross married Mary Cavanaugh and resided with her as his wife for the remaining 18 years of his lifetime and raised a family of children by her, in the same general section of this state in which the Moose woman resided, his conduct declared with great force and power that the impediment to his marriage, which is here claimed, did not exist. I am convinced that it was the province of the jury to weigh the force of these circumstances against the force of evidence which was offered in opposition. Even if it be assumed that Ross was married to Maria Moose in 1862, the Court of Errors and Appeals declared, when the former case

was there for review, that it "was not conclusive that that marriage was still subsisting in the year 1873, when, according to the evidence, Ross contracted a marriage with Mary Cavanaugh." Upon that aspect of the case the evidence at the second trial was the same as presented at the former trial. The Moose woman at the former trial and at the recent trial testified that she had never been divorced; but, as she remarried in 1870, her conduct either discredits her testimony or her morality. It was clearly a jury question whether the bonds of any former marriage still subsisted in 1873.

I will advise an order for a new trial.

(74 N. J. E. 797)

**In re MORTON'S ESTATE.**

**BARNUM v. MORTON et al.**

(Prerogative Court of New Jersey. July 18, 1908.)

**1. LIFE ESTATES—TAXES—INTEREST ON INCUMBRANCES.**

Where lands are conveyed to a trustee with directions to pay the income to one for life with remainder over, the one entitled to the income is the equitable tenant for life, subject to the duties of a life tenant, including the payment of annual taxes and interest on incumbrances, and, where the trust estate consists in part of improved property, productive of revenue, and in part of unimproved property producing no revenue, the life tenant must pay the taxes on the unimproved property from the income derived from the revenue producing property so far as such income extends.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Life Estates, § 39.]

**2. SAME.**

Testatrix devised unimproved and improved real estate to a trustee, to pay the income to a daughter for life with remainder over; declared that the provisions respecting the payment of rents derived from the unimproved property and respecting the vesting of such property if unsold or the proceeds thereof if sold should be subject to the payment of all incumbrances existing on such property; and authorized the trustee to pay such incumbrances either from the proceeds of such property or from the income thereof. *Held*, that the person entitled to the income for life must pay out of the income derived from the improved realty the taxes assessed against the unimproved realty and the interest on the incumbrances thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Life Estates, § 39.]

**3. TRUSTS—ACCOUNTING BY TRUSTEE—COSTS—PERSONS LIABLE.**

A trustee under a will whereby testatrix devised her improved and unimproved realty to the trustee to pay the income to his wife for life with remainder over and whereby she declared that the rents from the unimproved property and the proceeds thereof, if sold, should be subject to the payment of incumbrances, filed his account as trustee and charged himself with the payment of interest on the incumbrances on the unimproved property and taxes thereon accruing after the death of testatrix. The remaindermen excepted to such items on the ground that it was incumbent on the life tenant to pay such interest and taxes. *Held*, that the costs incurred by the remaindermen in the orphans' court were properly payable out of the estate, but the estate should not be burdened with the costs of the appeal by the trustee from the decree sustaining the exceptions to the account, for such appeal was in the interest of

the trustee individually or in the interest of his wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 491-493.]

**Appeal from Orphans' Court, Essex County.**

In the matter of the estate of Ann C. Morton, deceased. Proceedings for the settlement of the account of Stephen C. Barnum, trustee of the estate of the deceased. From a decree of the orphans' court sustaining exceptions to the account interposed by Thomas F. Morton and others, Stephen C. Barnum, trustee, appeals. *Affirmed*.

Elvin W. Crane and William T. Read, for appellant. John W. Queen, for respondents.

**PITNEY, Ordinary.** Ann C. Morton, late of Glen Ridge, Essex county, N. J., died on April 29, 1901, leaving a will and two codicils thereto which were admitted to probate by the surrogate of Essex county. She appears to have owned, first, her dwelling house at Glen Ridge, which after her death was sold for the payment of her debts; secondly, an apartment house in New York City known as the "Third avenue property," situate upon leased land; and, thirdly, a tract of unimproved property at Middle Village, Long Island, consisting of 26 or 27 acres laid out for sale in building plots. The Third avenue property produces a net income of from \$2,200 to \$2,500 per annum. By the second paragraph of the will testatrix devised all her real estate to trustees for purposes specified in the succeeding paragraphs, and in this paragraph defined the powers and duties of the trustees with respect to collecting and receiving the rents, managing, repairing, building, rebuilding, and improving the property, selling and conveying the real estate and leasing the same at their discretion, and investing and reinvesting the proceeds of sale. At the conclusion of the paragraph is the following clause: "It is my will that any provisions herein made respecting the payment of the rents derived from my property situated at Middle Village, in the town of Newtown, county of Queens and state of New York, and respecting the vesting of such property if unsold, or the proceeds thereof if sold, shall be subject to the payment of all encumbrances which may exist upon such property, and I hereby authorize my executors and trustees to pay off such encumbrances either from the proceeds of such property or from the income thereof as they shall deem best, one-half of such encumbrances to be borne by the principal of the trust hereinafter created for the benefit of the children of my son Thomas S. Morton, and the other one-half to be borne by the principal of the trust created out of the residue of my said estate." The third paragraph of the will establishes a trust with respect to "the net rents, income and profits" of the Middle Village property. Its provisions are long and involved, and it is not necessary now to quote them. The will in

this and other respects was modified by the codicil, with the result that by the provisions of the will and codicils taken together the trustee is directed to pay the net income arising from all the property of the testatrix to her daughter Amelia A. Barnum during her life. After her death, the Third avenue property and five-eighths of the Middle Village property goes to her children, and the remaining three-eighths of the Middle Village property upon the death of Mrs. Barnum goes to the children of Thomas S. Morton, who was a son of the testatrix. Stephen C. Barnum, son-in-law of the testatrix, was constituted an executor and trustee, and he now remains sole trustee under the will. On May 20, 1907, he filed in the Essex county orphans' court his account as trustee under paragraph 3 of the will, to which exceptions were filed by the present respondents. The account and exceptions were referred to Charles F. Kocher, Esq., Master, to hear the same for the court, and advise what order or decree should be made therein. After testimony upon the exceptions had been taken, and on June 29, 1907, the accountant, with permission of the court, filed a supplemental account, which met some of the objections raised by the exceptions to the first account. The master sustained certain other exceptions, and a decree was thereupon made as advised by him. From this decree Stephen C. Barnum, the trustee, appeals to this court.

Upon the argument here the appellant expressly waived all questions raised by his petition of appeal, except the two following: The charges admitted by the accountant in the account consisted entirely of the proceeds of sales of portions of the Middle Village property, the gross amount whereof was \$54,334.72. Against this he prayed allowance, not only for disbursements incident to the sale of the property, such as agent's commissions, counsel fees, and the like, but also for the sum of \$8,389.35 for interest paid by him upon a mortgage of \$27,500 that had been placed by the testatrix upon the property, the interest thus paid having accrued after her death; and he also prayed allowance for sums aggregating \$2,643.50 paid by him on account of taxes upon the same property that accrued subsequent to the death of the testatrix. To these items, among others, the respondents excepted on the ground that it was incumbent upon Amelia A. Barnum, as life tenant of the entire trust estate created by the will, to pay the interest which accrued upon the mortgage subsequent to the death of the testatrix and also the taxes accruing upon the property subsequent to the same event from the income derived by her as life tenant of the entire trust estate created by the will. The master sustained this contention, and the decree of the orphans' court ac-

cordingly struck out the credit items of \$6,396.35 and \$2,643.50 just mentioned. These two matters are the only ones pressed upon this appeal; all others being expressly waived. The learned master relied upon the well-settled rule that where lands are conveyed to a trustee, with directions to pay the income to one for life, with remainder over, the person entitled to the income becomes the equitable tenant for life, subject to all the duties of a life tenant, including the payment of annual taxes and interest upon incumbrances, and that where the trust estate to whose income the life tenant is entitled consists in part of improved property productive of revenue, and in part of unimproved property producing no revenue, the life tenant is bound to pay the taxes on the unimproved property from the income derived by him from the revenue producing property, so far as such income extends. He cited *Perry on Trusts*, § 552; *Combes v. Cadmus*, 38 N. J. Eq. 382; *Cadmus v. Combes*, 37 N. J. Eq. 264; *Schulting v. Schulting*, 41 N. J. Eq. 180, 3 Atl. 526; *Tuttle's Case*, 49 N. J. Eq. 259, 24 Atl. 1; *Murch v. Smith Mfg. Co.*, 47 N. J. Eq. 193, 20 Atl. 213; *Brearley v. Molten*, 62 N. J. Eq. 345, 50 Atl. 317.

Counsel for the appellant concede that the general rule is well established, but contend that this case does not come within it, because of the provision above quoted from the second paragraph of the will, which, it is insisted, set apart the proceeds of the sale of the Middle Village property as a specific fund out of which all incumbrances, including future interest upon existing mortgages and future taxes, must be paid in exoneration of the residue of the estate. I agree with the learned master that this clause has not the effect of exonerating the life tenant, Mrs. Barnum, from paying out of the income producing property on Third avenue the annual charges accruing after testatrix's death upon the unimproved property at Middle Village. The decree under review awarded a counsel fee to counsel of the exceptants, and ordered that this fee, together with the costs of the proceeding, be paid out of the estate. Respondents in their answer to the petition of appeal set up, under rule 2 of this court, that this portion of the decree is erroneous, and pray that it may be reversed, to the end that the costs below may be charged against the accountant. I think the court was well justified in ordering the costs and counsel fee to be paid out of the estate. But I do not think the estate should be burdened with the costs of the present appeal, which seems to have been taken in the interest of Mrs. Barnum, the wife of the trustee, or else in the trustee's individual interest.

The decree under review will be affirmed, with costs to be paid by the appellant out of his own estate.

(74 N. J. B. 603)

**FWLER v. WICK.**

(Court of Chancery of New Jersey. Aug. 1, 1908.)

**1. EASEMENTS—LIGHT AND AIR—DIVISION OF ESTATE.**

Where the owner of two adjoining lots, on one of which is a house with an apparent and continuous use of light and air over the other lot through windows in the building, conveys the lot on which the house is erected and retains the other lot, there arises, in the absence of any express provision to the contrary, an implied grant of the right to the light and air enjoyed over the other property, which may be enforced by and against the subsequent grantees of the respective parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 56, 57.]

**2. SAME.**

A quasi easement founded on an implied grant on the conveyance of one of two adjacent lots owned by the same proprietor will not arise, unless at the time of the severance of title the lot conveyed supported a building then receiving light and air through its then existing windows which was reasonably necessary to the enjoyment of the building.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 56, 57.]

**3. SAME—CHANGE OF BUILDING—ABANDONMENT OF EASEMENT.**

Where the owner of a building had a quasi easement to receive light and air from an adjoining lot, such easement was not abandoned or destroyed by alterations made in the windows of the main building which did not substantially change either the size or place, but the easement was terminated in so far as an annex to the building was concerned by the razing thereof and the erection of another without reference to any feature of the one destroyed, and without preservation of evidence of the situation of the old windows or doors, so that it could not now be determined whether any aperture corresponds with any previous one, either in location or office.

**4. SAME.**

The right of a property owner to maintain a door opening on the adjoining property previously owned by his prior grantor was lost by the destruction of the door.

Suit by Benjamin F. Fowler against John R. Wick. Decree for complainant for a part only of the relief prayed.

Complainant seeks to enjoin defendant from erecting a building in such manner as will close up the windows and doors in complainant's building. Defendant admits his purpose to do so, and claims the right.

The north side of complainant's building is adjacent to the line which separates complainant's and defendant's lots. Defendant's lot is vacant, and, should he erect the building contemplated, no light can enter any of the windows on that side of complainant's building, and the doors cannot be used. The right of complainant to the protection of his windows and doors is based upon the admitted fact that on April 12, 1887, George P. Stokes owned the two lots now owned by complainant, and defendant, respectively, and on that date, conveyed the lot now owned by complainant to complainant's predecessor in title, and at the time the conveyance was made a building was on the lot so conveyed,

which building was adjacent to the line between the lot conveyed and the lot reserved, and the building so conveyed contained windows and doors facing the vacant lot reserved. Defendant, who now holds under Stokes, asserts that whatever rights may have been created by the Stokes conveyance to receive light and air through the windows and to use the doors referred to have since been lost by reason of the radical changes which have since been made in the building so conveyed by Stokes.

From the evidence it appears that the building which was on the lot at the time of severance of title by the Stokes' conveyance consisted of what has been referred to at the hearing as a main building and an annex. The main building was two full stories in height, with an attic above formed by an old-fashioned peaked roof, and fronted on the street, with its end, at the hearing referred to as its gable end, adjacent to defendant's lot. The annex extended rearward and along the line of defendant's lot, and was two stories in height. In the end of the main building adjacent to defendant's lot there was one window in the first story, two windows in the second, and one in the third; the latter being an attic window near the peak of the roof. In the side of the annex adjacent to the defendant's lot there were in the first story several windows (probably three) and a door, and in the second story several windows (probably three) and a door.

In the year 1892, some five years after severance of title, radical changes were made in the building. That part of the building called the "main building" was remodeled, and that part called the "annex" was wholly torn down, and in its place was erected a structure corresponding, in the main, with the remodeled part of the main building. I am satisfied from the evidence that in remodeling the main building the two second-story windows were not materially changed. Large window glasses replaced the old small ones; but the apertures for light were not materially changed as to position or size. They may have been lengthened a few inches. The room which had been lighted by these two windows was not materially changed, and received all its light from these two windows both before and after the remodeling. The evidence is not entirely satisfactory touching the first-story window of the main building; but I am satisfied that in the remodeling the new window was made to occupy very nearly the same place as the old one. The new window may have been placed somewhat nearer to the front of the building, and may have been greater in height; but I am convinced that the aperture which made the old window was in part, if not wholly, in the same place as that which made the new. The purpose and necessity of the old and the remodeled window referred to were the same. The old window was necessary to

light the extreme rear of a long store which had no other light except from the front windows, and in the remodeled building the same storeroom was preserved and the new window afforded light for its extreme rear portion in the same manner as the old. In the remodeling of the third story of the main building no feature of the old building was preserved.

The annex, which was wholly destroyed, was rebuilt with no reference whatever to the part destroyed. The apertures in the old annex which faced defendant's lot were, at most, three windows and a door in its first story and three windows and a door in its second story. The rebuilt portion contains in its first story one single window, one double window, and one treble window, in all the equivalent of six windows, and also two doors; and in its second story contains two single windows and two double windows; and about one-half of the rebuilt portion is surmounted with a third story. The rebuilt portion is also about 11 or 12 feet longer than the portion destroyed. The evidence does not disclose with definiteness the interior arrangements of the old annex, and it does not appear definitely whether its rooms were supplied with light from sources other than the apertures facing defendant's lot. No evidence has been preserved of the location of the windows in the old annex, and almost every witness who has testified has differed from every other as to the number and location; and no witness has claimed to know whether any aperture in the rebuilt portion is in whole or in part in the same place in which an aperture existed in the portion which was destroyed.

A. H. Swackhamer, for complainant. Joseph J. Summerill, for defendant.

LEAMING, V. C. (after stating the facts as above). The law of this state is well settled to the effect that where one who is the owner of two adjacent lots of land, on one of which is a house with an apparent and continuous use of light and air over the other lot through windows in the building, conveys away the lot on which the building is erected and retains the other lot, there arises, in the absence of any express provision to the contrary, an implied grant of the right to the light and air which have been enjoyed through the windows over the other property. In such case the grantor cannot derogate from his own grant by building on the remaining lot so as to obstruct or materially interfere with the enjoyment of light and air through those windows. The rights and obligations arising from the implied grant may be enforced by and against the subsequent grantees of the respective parties. *Sutphen v. Therkelson*, 38 N. J. Eq. 318. It has been held, however, that the quasi easement founded on the implied grant will not arise unless at the time of the severance of title the re-

ception of light and air through the then existing windows was reasonably necessary to the enjoyment of the building. *Greer v. Van Meter*, 54 N. J. Eq. 270, 272, 33 Atl. 794. This latter view has met some criticism in this state, but appears to be the accepted law of this court. *Tooth v. Bryce*, 50 N. J. Eq. 589, 595, 25 Atl. 182. In the present case there can be no doubt but that the window in the first story of the main building and two windows in the second story of the main building were reasonably necessary to the enjoyment of the building at the time of the severance of the title. It is scarcely possible to assume that the continued presence of these windows was not in mind of the parties at the time of the sale. It is probable that the windows in the annex may also be said to have been reasonably necessary to its enjoyment; but the testimony touching the location of the windows of the annex and the relation of its windows to its interior arrangements is so vague and uncertain that it is difficult to positively assert the fact.

Assuming that all windows in both the main building and the annex were at the time of severance reasonably necessary for the enjoyment of the property, and that the Stokes' deed operated to create a right in the nature of an easement in favor of the property conveyed, as the dominant tenement, for the unobstructed use of light and air through these windows passing over the property reserved, as the servient tenement, the question arises: To what extent, if any, has the right so created been lost by reason of the changes which have been made in the building?

The opinion of Vice Chancellor Reed in *City National Bank v. Van Meter*, on the subject of extinguishment of rights of this nature, reported in 59 N. J. Eq. 32, 45 Atl. 280, was adopted by the Court of Errors and Appeals, 61 N. J. Eq. 674, 47 Atl. 1131. It was there determined that the destruction of a building and the erection of a new one, with a window in substantially the same place, would not operate to extinguish the easement, that abandonment is a question of intent, and that an intention to abandon will be inferred "if the building is torn down and the locality of the old windows, from delay in rebuilding or from failure to preserve evidence of their situation, cannot be proved."

The application of these principles to the facts already stated renders it manifest that in remodeling the main building in such manner that the single window in the first story and the two windows in the second story occupied substantially the same place and performed the same duties as the pre-existing window the right of complainant to the continued use of these windows was not lost; but in wholly destroying the rear annex and erecting in its place a new building without reference to any feature of the one destroyed, and without preservation of evidence of the



situation of the old windows or doors, so that at this time it cannot be ascertained whether any aperture corresponds with any previous one either in location or office, an abandonment of the rights claimed under the original grant must be assumed. It follows that an injunction may issue restraining defendant from obstructing the influx of air and light through the three windows referred to in what was formerly the main building; but that defendant cannot be enjoined from building adjacent to the line opposite to that part of the rear portion of the present building which was formerly known as the rear annex.

Complainant also claims a right to the use of a door in the first story of the annex and a right of passage from it over defendant's land. Whatever right to maintain a door he may have acquired has been lost by its destruction. At present two doors exist, and neither can be ascertained to occupy the place of the door which was destroyed. The claim of defendant to right of way over the land on which defendant proposes to build cannot be supported either as a way of necessity or as a right emanating from an implied grant.

(74 N. J. B. 733)

MOORE et al. v. MOORE et al.

(Court of Chancery of New Jersey. July 23, 1908.)

**1. INFANTS—ACTIONS—CAPACITY TO SUE—NEXT FRIEND—BILL IN EQUITY—AMENDMENT.**

Where a bill is filed by a complainant as an adult, and it is discovered that he was an infant at the time of filing the bill and so continues, complainant will be allowed to amend by inserting a next friend, notwithstanding a motion by defendant to dismiss.

**2. EQUITY—DEFECT OF PARTIES—MANNER OF RAISING OBJECTION—PLEA.**

Where defect of parties is not apparent on the face of the bill, the defect may be brought before the court by plea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 288.]

**3. SAME—PLEA FOR WANT OF PROPER PARTIES.**

A plea for want of proper parties is a plea in bar and goes to the whole bill, and want of capacity to sue may be taken advantage of by a plea to the person, for in such a case the party is not a proper one.

**4. INFANTS—ACTIONS—SUING WITHOUT NEXT FRIEND—BILL IN EQUITY—DISMISSAL.**

The usual practice in case of a bill filed on behalf of an infant without a next friend is for defendant to move to have it dismissed with costs to be paid by the solicitor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 249.]

**5. SAME—ATTAINMENT OF MAJORITY PENDING SUIT.**

A suit begun by an infant without a next friend may continue on his arriving at full age in his own name as complainant, and a plea averring that complainant was an infant and exhibited the bill without a next friend is inefficacious when it is filed after complainant reached full age.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 253.]

**6. SAME—PLEADING INFANCY OF COMPLAINANT.**

A plea which alleges that at the time complainant exhibited his bill he was an infant under the age of 21 years, to wit, 20 years, is insufficient, for such plea should aver that complainant before and at the time of filing the bill was and now is an infant under the age of 21 years; that is to say, of the age of — or thereabouts.

**7. EQUITY—PLEADING—PLEA—PROCEEDINGS BY COMPLAINANT.**

The practice on the filing of a plea is for complainant to set it down for hearing if he conceives it to be bad and to traverse it if he conceives it to be good in point of law, but denies the truth of its averments.

**8. SAME—STRIKING OUT PLEADINGS.**

The Court of Chancery has power to strike out a frivolous demurrer or a frivolous plea.

**9. SAME—FRIVOLOUS PLEA.**

Where a defendant knew the age of an infant complainant at the time the suit was instituted, and knew that complainant had been of full age for a period of eight days at the time he filed his plea alleging infancy, the plea was frivolous, and would be stricken on motion.

Suit by William Moore and others against Robert Moore and others. Heard on motion to dismiss plea as sham and frivolous. Granted.

W. J. St. Lawrence, for the motion. Ward & McGinnis, opposed.

**WALKER, V. C.** On May 8, 1908, the bill of complaint was filed in this cause. The complainants named in the bill are William Moore and Susan Moore, his wife, Mary Hagens and Mathew Hagens, her husband, Margaret Phillis and James Phillis, her husband, and Anna A. Jamieson. The suit is one for partition. On June 24, 1908, the defendants filed a plea to the bill, which sets up that at the time the complainants exhibited the bill against the defendants the complainant Margaret Phillis was an infant under the age of 21 years, to wit, 20 years, and exhibited the bill without having a guardian or next friend appointed to prosecute the suit for her, nor has any guardian or next friend been appointed for her since the commencement of the suit. The plea concludes with an averment that the matters pleaded are true, etc., in bar of the complainants' bill, and prays the judgment of this court whether the defendants should be compelled to make any other or further answer to the bill, and to be hence dismissed, with their costs. The complainants gave notice to the defendants that they would move for an order that the plea be dismissed as frivolous, because it was only filed as a mere flimsy pretense for the purpose of delay and to harass the complainants in obtaining their just and legal rights in the partition of the lands described in the bill. Annexed to the notice and served therewith is an affidavit of the complainant Anna A. Jamieson, who deposes that she is the mother of the complainant Margaret Phillis, who was born on June 16, 1887, and that at the time of the commencement of the suit the complainant Margaret Phillis was 20

years and 11 months old, and since that commencement of the suit has arrived at full age, to wit, on June 16, 1908, which was 8 days before the filing of the plea.

Where a bill is filed by a complainant as an adult, and it is afterwards discovered that he was an infant at the time of filing the bill and still continues so, in the face of a motion by the defendant to dismiss the bill, the complainant will be allowed to amend by inserting a next friend. *Flight v. Bolland*, 4 Russ. 298. Where defect of parties is not apparent upon the face of the bill, the defect may be brought before the court by plea, and a plea for want of proper parties is a plea in bar and goes to the whole bill. *Daniell's Ch. Pl. & Pr. (6th Am. Ed.)* \*290; *Mackey v. Mackey* (N. J. Ch.) 63 Atl. 984. It cannot be doubted that want of capacity to sue can be taken advantage of by a plea to the person. *Daniell's Ch. Pl. & Pr. (6th Am. Ed.)* \*630. In such a case the party doubtless is not a "proper" one for want of capacity. The usual practice in the case of a bill filed on behalf of an infant without a next friend is for the defendant to move to have it dismissed with costs to be paid by the solicitor. *Daniell's Ch. Pl. & Pr. (6th Am. Ed.)* \*68. Now, as seen, the want of capacity in the complainant Margaret Phillis to sue is not fatal, but, if continuing, it would be relievable by the appointment of a prochein ami. As this infant is now of age, she has capacity, and the suit may properly continue in her name as a complainant. The plea is inefficacious. There is nothing in writing to amend by, and there is no occasion for any amendment of the record. Moreover, the plea is bad in form. It merely alleges that at the time of exhibiting the bill the complainant Margaret Phillis was an infant under the age of 21 years, to wit, 20 years. A proper form of such plea is to be found in *Daniell's Ch. Pl. & Pr. (6th Am. Ed.)* \*2097, which avers that the plaintiff before and at the time of filing the bill was and now is an infant under the age of 21 years; that is to say, of the age of (blank) or thereabouts, etc. Doubtless the defendant interposing the plea knew the age of the infant complainant, being near relatives, and maybe the omission to state that she was an infant at the time of the filing of the plea was purposely made. The practice on the filing of a plea is for the plaintiff to set it down for hearing if he conceives it to be bad, and to traverse it if he conceives it to be good in point of law, but denies the truth of its averments. Neither one of these courses was pursued, but, on the contrary, this motion was made to dismiss.

This court has power to strike out a frivolous demurrer on motion. *Stanbery v. Baker*, 55 N. J. Eq. 270, 37 Atl. 351. This power, as I understand it, extends also to the striking out of a frivolous plea, for said Vice Chancellor Emery in that case, at page 271 of 55 N. J. Eq., at page 351 of 37 Atl.: "This right of the Court of Chancery to overrule

and suppress pleadings as sham and frivolous would seem to be necessary for the due administration of justice, and to be the same in its character as the right constantly exercised in our superior courts of common law." Upon the hearing of the motion under consideration there were no disputed facts. Counsel for the defendants appeared and contended for the sufficiency of the plea, but filed no counter affidavits. As I have already remarked, the defendants must have known of the age of the infant complainant at the time the suit was instituted, and therefore must have known when they filed their plea that the complainant had then been of full age for a period of eight days. Inquiry to ascertain the age of the complainant Margaret Phillis, if necessary, for the purpose of filing the plea, would have, and probably did, disclose the exact fact; but more probably no inquiry was made, as the defendants undoubtedly knew the age of this young woman, who was a near relative of all of them.

In my judgment the plea is sham and frivolous; and it will be struck out.

(74 N. J. E. 745)

ROBESON et ux. v. DUNCAN.

(Court of Chancery of New Jersey. Aug. 6, 1908.)

1. DEEDS—CONSTRUCTION—ESTATE CONVEYED—FREEHOLD.

A grantor conveyed land to a grantee "and to the heirs of her body," on conditions by which the grantor reserved, during the joint lives of himself and wife, the right to possess and enjoy the premises, and, if the grantee should die without leaving any heir of her body, the premises should revert to the grantor, etc. *Held*, that the estate conveyed to the grantee was an estate of freehold, but not in possession.

2. SAME—ESTATE TAIL—RECONVEYANCE BY GRANTEE—LIFE ESTATE.

A grantor conveyed land to a grantee "and to the heirs of her body" on conditions by which the grantor reserved, during the joint lives of himself and wife, the possession and enjoyment of the premises, and, if the grantee should die without leaving any heir of her body, the premises should revert to the grantor, etc. The grantee, for a valuable consideration, quitclaimed to the grantor. *Held* that, if the conveyance to the grantee created an estate tail, she took but a life interest, so that her conveyance to her grantor created in him an estate only during her life, for under 1 Gen. St. 1895, p. 1195, § 11, the freehold conveyed to her would not ripen into a fee simple until the limitation over took effect.

3. SAME—STATUTORY PROVISIONS.

Act March 24, 1899 (P. L. p. 531), as amended by Act April 9, 1902 (P. L. p. 688), providing that a conveyance to a given person, without more, shall, unless exception be made therein, convey a fee simple, if the grantor have a fee simple, does not apply to a conveyance by a grantor to a grantee and the heirs of her body on conditions by which the grantor reserves during the joint lives of himself and wife the possession and enjoyment of the premises, and, if the grantee shall die without leaving any heir of her body, the premises shall revert to the grantor, etc.

4. SAME—RULE IN SHELLEY'S CASE—CONTINGENT REMAINDER.

A conveyance to a grantee "and to the heirs of her body" on condition that, if she shall

die without leaving any heir of her body, the premises shall revert to the grantor, if the grantee's death shall take place during the lifetime of the grantor or his wife, but, if the grantee shall survive both the grantor and his wife and die without leaving any heir of her body, the premises shall revert to the estate of the grantor, creates an estate for life in the grantee with limitations over by way of contingent remainder, and the rule in *Shelley's Case* does not apply; and therefore a conveyance by the grantee to the grantor conveyed only an estate for the life of the grantee.

##### 5. WILLS — NATURE OF TESTAMENTARY DISPOSITION—DEED.

The doctrine that an attempt by a grantor to make disposition of his estate after his death, without complying with the requirements of the statute of wills, is void, has no application to a case where the grantor has, by his conveyance, divested himself of his property in his lifetime, but applies to the disposition in his lifetime of property which will be in the donor at the time of his death, the tradition to take place at or after death.

Bill for specific performance by John E. Robeson and wife against Stephen H. Duncan. Heard on demurrer to bill. Demurrer sustained.

Fergus A. Dennis and John T. Bird, for complainants. John A. Hartpence, for defendant.

**WALKER, V. C.** The bill is filed for the specific performance of a contract to convey lands in the borough of Princeton, and alleges that the complainants, John E. Robeson and Hattie M. Robeson, his wife, being seised or well entitled to the premises in question in fee simple on June 6, 1907, entered into an agreement in writing with the defendant, Stephen H. Duncan, for the sale of the premises to him for \$2,500, the sum of \$300 being paid on the execution of the agreement, and the balance to be paid and secured at a time stipulated; that Duncan, after paying the \$300, notified the complainants that he refused to perform or carry out the agreement on his part, assigning as a reason that the complainants could not make a good and marketable title to the premises, he having, upon examination, discovered that they had sold and conveyed the premises to "Jennie Hardison and to the heirs of her body" upon conditions contained in their deed of conveyance to her, as follows: "First. The said John E. Robeson, party of the first part, reserves during the joint lives of himself and wife the right to have, hold, possess, and enjoy, severally and jointly, to themselves and to them, all the rents, issues and profits accruing out of the premises herein above conveyed. Second. That, if said Jennie Hardison shall die without leaving any heir of her body, then the premises herein above conveyed shall revert back to the said John E. Robeson, if said Jennie Hardison's death shall take place during the lifetime of said John E. Robeson or his wife. But if said Jennie Hardison shall survive both the said John E. Robeson and his wife, and then die without leaving any heir of her body,

then the premises hereinabove conveyed shall revert back to the estate of the said John E. Robeson, the donor." Afterwards, and on April 26, 1907, Jennie Hardison by deed of quitclaim sold and conveyed the premises to the complainant, John E. Robeson. Both deeds were acknowledged, delivered, and recorded.

The complainants' contention is that by their deed to Jennie Hardison a perfect title in fee was conveyed, but that, in case the conditions in that deed have any binding force or effect, they are in favor of the complainants or one of them, and no one else, and that a conveyance by them, according to their agreement with the defendant, will effectually estop them or their heirs from claiming any title in the premises, and will secure to Duncan a good and sufficient title to the same. The prayer is that Duncan may be compelled to specifically perform the agreement on his part, and pay to the complainant John E. Robeson the remainder of the purchase money of \$1,000 in cash, and execute a mortgage for \$1,200 on the same premises to secure the balance, according to the agreement; the complainants offering to perform on their part.

The defendant demurs to the bill for want of equity, and the question that arises is: Has Mr. Robeson an estate of inheritance in fee simple absolute in the premises, or is there an estate tail, or some other estate, in Jennie Hardison, which was not divested by her quitclaim deed to Mr. Robeson for want of power in her to make a conveyance of any greater interest in the premises than an estate for her life, in which case the title is defective and the complainants cannot be relieved? The estate conveyed to Jennie Hardison by Mr. Robeson was an estate of freehold, but not in possession, for by the first condition in the deed he reserved to himself during the joint lives of himself and wife the possession and enjoyment of the premises and the usufruct thereof. This condition need not be further noticed, as it is in the second condition that the limitation of the estate is to be found. If the conveyance to Jennie Hardison created an estate tail, she took but a life interest, and her conveyance to Mr. Robeson created in him an estate only during the continuance of her life, and this is so even though her deed to him was one of quitclaim and release; for it was founded upon a valuable consideration, which gives it effect as a deed of bargain and sale notwithstanding the want of an estate in possession in the releasee (assuming that the rights reserved by Robeson do not amount to an estate in him, which is not decided). *Havens v. Seashore Land Co.*, 47 N. J. Eq. 365, 20 Atl. 497. If she had an estate tail, then the freehold would not ripen into a fee simple until the limitation over took effect. *Gen. St. 1895*, tit. "Descent," p. 1195, § 11. The act of March 24, 1809 (P. L. p. 531), as amended by the act of April 9, 1902 (P. L. p. 688),

cited by counsel, has no application to the case at bar. That act simply provides that a conveyance to a given person, without more, shall, unless exception be made therein, be construed to convey a fee simple, if the grantor have a fee simple, without words of inheritance being included in the conveyance; and it also provides what construction shall be given to certain covenants in deeds.

The complainants insist that the rule in *Shelley's Case* applies, because they say that the grant is to Miss Hardison for life with a limitation over of an estate which in terms is expressed to be given to her heirs, and therefore the estate given to her, the ancestor, although expressly given for life, is by force of the rule enlarged to a fee; the remainder over being executed immediately in the ancestor. Whether or not the rule in *Shelley's Case* applies depends upon the construction of the grant or devise under consideration. *Martling v. Martling*, 55 N. J. Eq. 771, 782, 39 Atl. 203. In my opinion the estate with which we are here dealing is one in which the limitation over is by way of contingent remainder, and therefore the rule in *Shelley's Case* does not apply.

It is true the grant is to "Jennie Hardison, the heirs of her body and assigns forever," which would, at common law, create an estate tail, and which would by our statute of descent create a fee simple in her issue upon the determination of her life estate, but the limitation over is expressly controlled by the second condition in the deed. The limitation expressed more perspicuously perhaps, than in the condition itself is this: If Jennie Hardison should die during the life of Mr. Robeson and his wife without leaving any heir of her body, then the premises shall revert to him; but, if she should survive Mr. Robeson and his wife and then die without leaving any heir of her body, the premises shall revert to the estate of Mr. Robeson (whatever "estate" may exactly mean in this connection). The person who is to take the remainder upon the death of Jennie Hardison cannot be ascertained until her death, and the taker may either be an heir or heirs of her body or Mr. Robeson or his "estate." Therefore, as I said, the remainder is contingent. If the conveyance had been to Jennie Hardison and her heirs general, it would have created in her a fee simple. If to her and the heirs of her body, without more, it would have created a fee tail; but the limitation is to her and the heirs of her body, in default of which the estate shall revert to Robeson or his "estate" as the case may be. As we have seen, the estate of Jennie Hardison in the premises in question was one for her life only, with limitation over by way of contingent remainder, and therefore her conveyance to Robeson was no more than the grant of an estate *pur autre vie*; that is, an estate whose duration is measured by her life.

The complainants in their bill charge that

the second condition in the deed under consideration is null and void because it is an attempt to make disposition of the estate of the grantor after his death without complying with the requirement of the statute of wills, but the point was not urged on the argument of the demurrer. This doctrine applies to the disposition in his lifetime of property which will be in the donor at the time of his death, the tradition to take place at or after death (*Stevenson v. Earl*, 65 N. J. Eq. 721, 55 Atl. 1091, 103 Am. St. Rep. 790), and to deeds intended by the grantor to be delivered after his death (*Schlicher v. Keeler*, 67 N. J. Eq. 635, 61 Atl. 434). It can have no application to a case where the grantor has by his conveyance divested himself of his property in his lifetime. Mr. Robeson divested himself of a fee simple by his conveyance to Jennie Hardison, and he has not reacquired that estate in the lands. The provision in the conveyance that the estate should revert to Robeson or his "estate" upon the happening of certain contingencies was only by way of limitation upon the grant. Whether that limitation is void for any reason it is not necessary to consider, for without it the estate in the grantee would be one in fee tail, which, under our statute, would give her an estate for life with the remainder in fee to the heirs of her body. My opinion is that in no aspect has the complainant Robeson a fee simple, and consequently he and his wife are unable to convey to the defendant an estate of the quality (fee simple), which they admit he bargained for, and, consequently, the title is defective.

The demurrer must be sustained.

(74 N. J. E. 570)

#### RADEMACHER v. RADEMACHER.

(Court of Chancery of New Jersey. July 25, 1908.)

#### DIVORCE—DEFENSES—CONNIVANCE.

Where a husband employs persons to procure evidence of his wife's adultery on which to obtain a divorce, and such persons set about to procure the defilement of the wife, and by the intervention of such persons the wife is purposely induced to commit adultery, the husband has no remedy, though it is proved that he had not given any distinct orders to such persons to so act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 164.]

Bill for divorce by Albert E. Rademacher against Isabella Rademacher. Dismissed.

H. H. Dawson, for complainant. Rudolph A. Braun, for defendant.

STEVENS, V. C. There are two charges in this case—one of incest committed by Mrs. Rademacher with her son in July, 1907, at Irvington, and the other of adultery committed in October, 1907, at Hoboken.

As to the first, it is admitted that on two successive nights the defendant slept with her son. They were found by the complainant and two constables in the same bed to-

gether, asleep. The defendant's explanation is that the complainant, her fourth husband, to whom she had recently been married, had made threats that he would strangle her and she took her son—17 years old—into bed with her for protection. She and the son both deny having had sexual intercourse. The crime alleged is so serious and so revolting that it is hard to believe the mother would have been guilty of it. I am disposed to give her the benefit of the doubt, and more especially as the bearing of the son on the witness stand was in his favor.

As to the second, the defendant's explanations do not seem very satisfactory; but it is perfectly plain that, if the adultery was committed, she was entrapped into committing it by the employes of the Gregory Detective Agency employed by complainant for the purpose of getting evidence. One of these employes, a woman by the name of Frances Morrell, went to the house of defendant and engaged board there, ostensibly as a boarder. After she had been there a few days, she invited defendant to go to New York, where they met two men, also provided by the agency, while other members of the agency followed and watched their movements. Frances, the defendant, and the two men went first to a *matinée*, then to a drinking place, then to a restaurant, and finally to a hotel in Hoboken, where the watchers broke into the bedroom in which defendant and her male companion were found in bed together.

While this outrageous performance does not appear to have been authorized by complainant himself, it was conducted in his interest by his agent, and I do not think he is in a position to take advantage of a situation brought about by that agent's acts. I think the proper rule is laid down by Lord Penzance in the following passage: "In my opinion, if a husband employs a man to get evidence of adultery upon which to obtain a divorce, and the man so employed sets about to procure the defilement of the wife, and by the intervention of that man the wife is purposely induced to commit adultery, the petitioner has no right to a remedy in this court for such adultery, and I further think that the husband would have no right to a remedy, even if it were proved that he had not given any distinct orders for the purpose. \* \* \* I decide the case on the broader ground that the petitioner cannot obtain the benefit of redress in this court for an act of adultery brought about by his own agent." *Gower v. Gower*, L. R. 2 Prob. & Div. 428.

The bill should be dismissed.

SCHNEIDER v. SCHMIDT et al.  
(Court of Chancery of New Jersey. July 23, 1908.)

1. CHATTEL MORTGAGES—AFFIDAVIT OF CONSIDERATION—PURPOSE OR USE OF LOAN.  
Under Chattel Mortgage Act April 3, 1902 (P. L. pp. 487, 488), requiring the affidavit of

the mortgagee to be annexed to a chattel mortgage "stating the consideration thereof," where the affidavit attached to a mortgage correctly stated that the consideration was the advance of \$1,500 of the mortgagee's money to the mortgagors, it was not defective because it did not correctly state the purposes of the advance or the use to which the money was to be put, such misstatement being important only as evidence on the issue of the bona fides of the transaction.

## 2. SAME—JOINT LIABILITY—COVENANTS.

Where a chattel mortgage was executed by the members of a firm, and contained a covenant by both partners that, on default in payment at the time mentioned in the condition, the entire debt should become instantly due and payable, the partners by such covenant became personally jointly responsible for the debt, so that an action at law might be brought on the covenant against both of them.

## 3. SAME—PROVISION FOR SALE OF PROPERTY.

Where a chattel mortgage executed by two partners containing a covenant that, on default in the payment of the debt at the time mentioned in the condition, the entire debt should become instantly due and payable, a further provision that, on the debt becoming thus due, the property might be sold, was an addition to the covenant, and not a restriction or qualification thereof.

## 4. SAME—AFFIDAVIT—ADVANCES TO THE PARTNERS JOINTLY.

Where a chattel mortgage executed by two partners to the wife of one of them to secure separate advances to each partner containing a joint covenant for payment, and there was no other evidence of indebtedness taken from either partner, such facts established the truth of the statement in the affidavit attached to the mortgage that the entire advance to both partners was made to them jointly.

## 5. SUBROGATION—ACTIONS TO ENFORCE—PARTIES.

Where complainant in a suit to set aside a chattel mortgage on certain personal property claimed that certain of her property had been wrongfully transferred by the mortgagees to L. in part payment for the property mortgaged, complainant could not enforce subrogation in such suit against the property mortgaged to the extent of the value of her property so transferred to L., he not being a party to the suit.

## 6. CHATTEL MORTGAGES — FORECLOSURE — RIGHTS OF SUBSEQUENT MORTGAGEE—TRUST.

Where defendants, H. and S., holding a second mortgage on certain personal property executed by complainant, purchased the property on foreclosure of the first mortgage after their debt was matured, they held the property subject to redemption, and not in trust for complainant, so that, while a private sale by them did not bind complainant as to the amount of the sale, it was effective to pass title to the buyer both at law and in equity, in the absence of notice of facts invalidating the foreclosure sale.

## 7. SAME—PAYMENT.

Defendants, S. and H., having a second mortgage on certain personal property belonging to complainant, after the maturity of their debt purchased under foreclosure of the first mortgage, and then sold the property to L., who credited the purchase price on a debt of S. and H. for the price of a carousal, which S. and H. had mortgaged to S.'s wife. *Held*, that such credit was a valid payment of the debt owing to L. so far as S.'s wife was concerned, and operated to discharge complainant's mortgage debt to S. and H. to the extent of the fair value of the goods so transferred to L.

## 8. SAME—NOTICE.

Defendants S. and H., holding a second mortgage on complainant's personal property, after maturity of their debt purchased the property on foreclosure of the first mortgage, where-

upon complainant instituted a suit to redeem other mortgaged chattels and for an account. S. and H. pending such suit transferred the chattels so purchased to L. in part payment for a carousal, which they mortgaged to S.'s wife for money actually loaned. Complainant's bill did not refer to the carousal so mortgaged, nor was any equity therein then claimed by her. *Held*, that service of such bill on S.'s wife as substituted service on her husband did not constitute notice to her of complainant's alleged interest in the carousal subsequently mortgaged to her.

Bill by Dinah Schneider against Charles Schmidt and another. Decree for defendants.

Walter J. Knight, for complainant. C. H. Beasley (McDermitt & McDermitt, of counsel), for defendants.

EMERY, V. C. Complainant is a creditor of the defendants Charles Schmidt (or Smith) and John Huber, and under a decree of this court for \$900, besides costs and interests, an execution was levied on November 2, 1905, on certain personal property, upon which at the time of the levy the defendant Emma Schmidt, wife of the defendant Charles Schmidt, held a chattel mortgage given by the debtors, dated and recorded November 4, 1903, and for \$1,500 and interest. The mortgaged property was a carousal or merry-go-round, with its appurtenances, owned by the debtors as partners. One object of the bill is to have the chattel mortgage declared void under the fourth section of the chattel mortgage act (Revision 1902; Act April 3, 1902; P. L. pp. 487, 488), because the affidavit of the mortgagee annexed to the mortgage was defective or false in not "stating the consideration of the mortgage," as required by the act. The mortgage executed by Schmidt and Huber, as parties of the first part, after reciting that it is given "for securing the payment of the money herein mentioned," and the consideration of one dollar, conveys the property in question to Mrs. Schmidt (by the name of Emma Smith) with a warranty, the conveyance being upon condition that "if the party of the first part shall pay to the party of the second part the sum of \$1,500 in one year from date, with interest at 6 per cent., payable semiannually, then this mortgage shall be void." The parties of the first part then covenant and agree "that in case default shall be made in the payment of the said sum above mentioned," or in case they permit or suffer process against property to be issued against them, or any judgment to be entered up against them, "then the said sum of money herein mentioned shall become instantly due and payable," and then the mortgagee might take and sell the mortgaged chattels, retaining the sum mentioned and charges, rendering the overplus to the mortgagors. The affidavit of Mrs. Schmidt stated "that the true consideration of the said mortgage is as follows, viz.: For money advanced to the said Charles Smith and John Huber to the amount of \$1,500 for the purchase of the goods and chattels mentioned in the in-

ventory attached to mortgage," and, further, that there is due on the mortgage the sum of \$1,500, besides interest from its date.

The proofs show that in November, 1899, Schmidt and Huber bought the carousal in question from a Mr. Luff in Brooklyn for \$2,300, upon which payments amounting to about \$1,300 were made by March 31, 1900, and that the property was then delivered to Schmidt and Huber, and a chattel mortgage for the balance of the purchase money was given to Luff. At least \$1,000 of the \$1,300 paid appears to have been advanced by Huber, who probably borrowed some money for this purpose. Before October 15, 1903, Schmidt and Huber turned over to Luff, as payment of \$500 of the balance due, another merry-go-round or carousal belonging to Mrs. Schneider, the complainant, upon which Schmidt and Huber held a mortgage. They bought in this mortgaged property at a foreclosure sale under a prior mortgage, and a bill was filed by Mrs. Schneider on October 15, 1903, against Schmidt and Huber to have the sale to them under the foreclosure declared fraudulent and void, and for an account and redemption. A copy of this bill was served upon Mr. Schmidt by delivery to Mrs. Schmidt at her residence, but she was not a party to the bill. The bill was filed in ignorance of the transfer of the complainant's property to Luff, and an injunction against any transfer was asked. The transfer to Luff was first disclosed by the answer in January, 1904. After the filing of this bill, and on or about November 4, 1903, Mrs. Schmidt advanced \$1,500, of which \$900 was actually given to her husband and \$600 to Huber. These advances are proved by the testimony of the three witnesses—Mr. and Mrs. Schmidt and Huber—and, as to the advance of \$900, their evidence is corroborated by the production of her deposit book in the savings bank from which she drew the \$900 handed to Smith. As to her possession of money sufficient to make the additional advance of \$600, I think her evidence reliable, and the actual advance of these sums by her on the credit of the mortgage is satisfactorily proved. As to the amount given to her husband, she states that she loaned it to him to pay off the balance due to Luff. She had married Mr. Schmidt on July 30, 1903, and he applied to her for the loan for this purpose shortly afterward, but no statement was made to her of the exact amount due, nor does she appear to have known either that Mrs. Schneider's property had been transferred in part payment, or that, after deducting this, the amount due was only about \$500. Her husband used \$493.60 of the \$900 in paying Luff, and the balance for other purposes, some of it for paying charges and repairs on their residence. The \$600 was given in cash to Huber, either directly by Mrs. Schmidt or through her husband, and this was advanced, as all the witnesses say, for the purchase of a bakery by Huber. He used \$300 for this

purpose and \$250 of the balance for paying a debt to one Donnaker. This debt appears to have been for money borrowed by Huber in connection with the business of the firm. No evidence of indebtedness, other than the mortgage itself, was taken at the time of the advances, and it is clear, I think, that no other was intended to be given.

Upon these facts it is claimed that the affidavit stating the consideration is substantially false in two particulars: First, because the money was not advanced for the purchase of the property as stated in the affidavit; and, second, that the money was not advanced to Schmidt and Huber or the firm, but that it was advanced to the parties individually, to Schmidt \$900 and Huber \$600, or that at least this latter sum was not advanced to the firm or to the two mortgagors jointly.

The first objection is not well founded. The "consideration" of the mortgage was the advance of \$1,500 of the mortgagee's money to the mortgagors, and the statement of the purpose of the advance, or the use to which it was to be put, is no part of the statement of the consideration required by the statute. The statement might be important as evidence on the question of bona fides of the whole transaction, but the sole legal consideration for the mortgage was the advance of the money by the mortgagee, and this was truly stated.

As to the second objection, there is no doubt, I think, that, as to the \$900, it was intended to be advanced by Mrs. Schmidt for the use of the firm (either wholly or in part), and on the credit of the firm and its property. The payment to Schmidt was an advance to Schmidt and Huber. There is more difficulty about the advance of the \$600 to Huber, which was intended for his own use, and whether as to this sum the statement of the affidavit that the \$1,500 was advanced to Schmidt and Huber was true. In my judgment the solution of this question depends on the determination on the whole evidence of whether or not it appears that this advance, as well as the \$900, was made on the joint credit of the borrowers, for which they were both directly responsible, or on the individual credit of each for the amount given to him. That the joint property was to be given as security for both advances is conclusively settled by the very form of the mortgage. In this mortgage there appears also a covenant by both Schmidt and Huber that, on default in the payment at the time mentioned in the condition, the entire debt shall become instantly due and payable. By this covenant they became, in my judgment, personally jointly responsible for the payment, and upon this covenant an action at law might be brought for the debt against both of them. The further provision of the covenant, that, upon the debt becoming thus due, the property might be sold, was an addition to the covenant, and not a restriction or qualification.

This joint covenant for payment, taken in connection with the fact that no other evidence of indebtedness was taken from either Schmidt or Huber, has decisive weight in reaching the conclusion that the advance of the \$900 and \$600 was made to Schmidt and Huber jointly, and that the affidavit in this respect was not false.

Second. Complainant's second ground for relief is based on a claim that as the defendants Schmidt and Huber fraudulently transferred her property to Luff in part payment of the amount due on his mortgage for the purchase money of the mortgaged chattels belonging to complainant, she is in equity entitled to a lien on these chattels for the value of this property so transferred to Luff, or, at least, the amount of the credit given by him therefor, and that this lien is prior to Mrs. Schmidt's mortgage, because at the time of her advance she knew of the suit brought by complainant against Schmidt and Huber. The equity is claimed to arise either on the principle of following funds held in trust, or of subrogation to the original mortgage held by Luff on the chattels. The principle of subrogation is not applicable to this bill, for no such case is stated, nor is Luff a party to this suit. He has received for the mortgage and in full. It does not appear that the mortgage is outstanding, or in the hands of any person who can be affected by decree in this suit. If the mortgaged chattels now in question were paid for by funds or property considered to be held in trust, they might to the extent for which the trust property was taken in payment be followed, and a lien for this amount be declared against the trustees, or those taking with notice. But the chattels mortgaged by Mrs. Schneider to Schmidt and Huber were not strictly held in trust by them after their debt was due and their purchase at the foreclosure sale under the prior mortgage. They held the goods subject to redemption, and, although a private sale or transfer by them after their purchase did not bind the mortgagor as to the amount of the sale, it did operate to pass the title to Luff, and, in the absence of any notice on his part of the circumstances making the purchase at the foreclosure sale invalid, his title to the goods was valid in equity as well as at law, and his credit on his own mortgage of the amount agreed upon at this sale was, so far as Mrs. Schmidt was concerned, a valid payment and discharge of his mortgage to the extent of the payment as against her mortgage. Mrs. Schneider, the mortgagor, was entitled to a credit on her mortgage of the fair value of the goods, and to a decree based on this value, against the mortgagors, for the excess in value beyond her mortgage debt. But to the extent of this debt (\$300) the sale was certainly valid as against her, and, as to the subsequent mortgage of the property now in question, to which the whole proceeds of sale (\$500) were applied for the reduction of Luff's prior mortgage on it, there would seem



to be no trust or lien impressed on the property in complainant's favor. Her only remedy in the suit brought against Schmidt and Huber, the mortgagors, without joining Luff, the purchaser, was a personal decree against the mortgagors to account for the fair value of the mortgaged property sold to Luff.

Mrs. Schmidt having actually advanced money at the time of taking the mortgage and on its credit, notice of the alleged trust must be clearly shown. The transfer of complainant's property to Luff by Schmidt and Huber had probably been made before her marriage to Schmidt, certainly before October 15, 1903, and it does not appear that any information about the transaction was given to her. The notice relied on is that given by the suit brought by complainant against Schmidt and Huber in October, 1903. On this bill there was an application to enjoin the transfer of the chattels mortgaged by complainant to Schmidt and Huber, which were alleged in the bill to be in the possession of Schmidt and Huber, and service upon Schmidt seems to have been made by delivering a copy of the bill to Mrs. Schmidt. She denies receiving the papers, but the probability is that she did receive them. The question is: What was the effect of such service, if made, as notice to her of complainant's equity now claimed? I think the suit was no notice to Mrs. Schmidt at all of this equity. The bill did not refer to these chattels now mortgaged, nor was the equity now claimed set up directly or indirectly. It was a bill to redeem other mortgaged chattels, and for an account. The suit was not a lis pendens in reference to the property mortgaged to Mrs. Schmidt, and it was not until the subsequent trial of the suit in 1904 that it was disclosed that the property had been transferred to Luff in part payment of his mortgage.

Defendant being therefore a bona fide mortgagee without notice, and the affidavit being sufficient under the statute, her chattel mortgage is prior to complainant's judgment, and the bill to have it declared void must be dismissed.

(74 N. J. E. 567)

#### CROCHERON v. FLEMING.

(Court of Chancery of New Jersey. July 23, 1908.)

#### WILLS—CONSTRUCTION—"WIDOW."

Testatrix bequeathed the residue of her estate in trust, one share to be invested and the income paid semiannually to complainant for life, and, if she should die either before or after testatrix and her daughter should survive her, the income to be similarly paid to the daughter for life. By a codicil she provided that on complainant becoming a "widow," or should she be a "widow" at testatrix's decease, the principal should be paid her absolutely for her own use, and, if she should die before her husband and their daughter should survive her, on the daughter's attaining 21 years of age one-half of the share should go to her and the other one-half to others. At the execution and probate of the will complainant was the wife of A. G., but was subsequently divorced from him and married

C., who died in January, 1907, after which A. G. died. *Held*, that the codicil did not require that complainant be the "widow" of A. G. in order to be entitled to such share of the estate so bequeathed, and that she was a "widow" within such codicil.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7457-7459.]

Suit by Sarah F. Crocheron against Dudley D. Fleming for the construction of a will. Decree for complainant.

Merritt Lane, for complainant. John L. Keller, for defendant.

STEVENS, V. C. Elizabeth A. Edge, by her last will, provided as follows:

"Seventeenth, I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, to my executors as joint tenants and not as tenants in common, in trust, to sell and convey the same and to divide the proceeds into seven equal shares and to pay over the said shares as follows:  
\* \* \*

"One share to be kept invested and the income thereof paid half yearly to my niece, Sarah P. Greene (the complainant) during her natural life and if she should die either before or after me and her daughter Annie Bell Greene should survive her, said income to be paid half-yearly to said Annie Bell Greene during her natural life."

She then provided that, on the decease of Sarah and Annie, the share should be divided among her other nephews and nieces. By a codicil, she modified the above dispositions as follows: "As to the one-seventh share of my residuary estate which in said will is directed to be invested and the income thereof paid to Sarah F. Greene for her life, I direct that on her becoming a widow, or should she be a widow at my decease, the principal of said share to be paid to her absolutely for her own use and that if she should die before her husband and their daughter Annie Bell should survive her and on Annie's attaining the age of twenty-one years, one half of said share shall go to her and the half to be divided among said Annie and the children then living of my other nephews and nieces above named (viz., James Dudley, Francis H., Alice E. F., Mary Louisa, and James F. Edge) equally per capita." At the time of the execution and probate of the will the complainant was the wife of Augustus Greene. She was subsequently divorced from him and she married William Crocheron. Her second husband died in January, 1907, and then Augustus Greene died.

The sole question is whether Mrs. Crocheron is a widow within the meaning of the codicil, and so entitled to the principal of the above-mentioned share. It will be noticed that the codicil contains two clauses, one of which relates wholly to the gift to Sarah Greene and the other wholly to the gift to her daughter, Annie. They are joined by the conjunctive "and," but the particle seems misplaced. If we read the first clause by it-



self, it is perfectly plain that the event has happened upon which the payment of the principal is to be made. She has become "a widow." She has not, however, become the widow of her first husband, even though he be now dead, but of her second husband. It seems to me to be an altogether unauthorized perversion of the meaning of words to assert that a divorced woman is a widow, unless there is something in the contract which indicates that the word was used in an improper sense. The question, then, is: Have the comprehensive words "a widow," contained in the first clause, been so cut down by anything found in the second clause that they must be held to mean "widow of Augustus Greene"? The argument that they have been rests upon the words "her husband" and "their daughter." The word "their" points very clearly to Greene as the husband referred to in the second clause, but why does it contract the generality of the expression "widow" in the first? It is, no doubt, true that the testatrix contemplated the possibility of Mrs. Greene becoming the widow of Mr. Greene, but what is there in the language used that forbids us to think that she contemplated her as becoming the widow of a second husband? Are divorces nowadays so infrequent that no woman is ever contemplated as likely to become the widow of a second husband, although the man from whom she is divorced be still alive? Suppose we interpolate the name Augustus Greene after the words "her husband" in the second clause, and then read the two clauses, what do we find? All we find is two separate provisions, one for the mother and the other for the daughter, the one making the gift to the mother dependent upon her becoming a widow; the other making the gift to the daughter—described as being the daughter of Sarah and Augustus—dependent upon her mother's death before her father and upon her own survivorship. In each clause the person, the share, and the contingency are different and apparently complete in themselves. Why add a limitation to the first that we do not find in it? If the gift to Sarah, the mother, had been made, in terms, dependent upon her surviving her husband, unquestionably the person intended would, without any help from the word "their" have been Mr. Greene, but it is the gift to Annie that is made dependent upon her mother's death before her father. The gift to Sarah is made dependent only upon her becoming "a widow."

I think complainant is entitled to relief.

#### ST. COLUMBA'S CHURCH v. NORTH JERSEY ST. RY. CO.

(Court of Chancery of New Jersey. July 23, 1908.)

#### 1. STREET RAILROADS—RIGHTS OF ABUTTING OWNER—REMOVAL OF SWITCH—BILL.

Where complainant filed a bill against a street railroad company to compel the removal

of a switch from the street in front of complainant's property, the bill should have alleged whether complainant owned the title to the middle of the street, so as to indicate whether the suit was based on complainant's property rights in the street or on its rights as an abutting owner.

#### 2. EQUITY—OBSTRUCTION IN STREET—ABUTTING OWNERS—REMEDY AT LAW.

An abutting owner owning the title to the center of the street could not maintain a suit in equity to compel the removal of a street railway switch from the street, on the theory that the switch was laid in the street without authority, since, if such were the fact, complainant had an adequate remedy at law by ejectment.

#### 3. MUNICIPAL CORPORATIONS—OBSTRUCTIONS IN STREET—ACTION BY ABUTTING OWNER.

Unless an abutting owner owns the fee to the middle of the street, he cannot maintain a suit to enjoin a nuisance in the street which injures him only in rights enjoyed by him as one of the public. The Attorney General in such case representing the public must file an information; and this, though the abutting owner would be much more inconvenienced by the nuisance than others.

#### 4. STREET RAILROADS—RIGHTS IN STREET—CONSENT OF ABUTTERS.

Act April 21, 1896 (P. L. p. 329), gives the governing body of municipalities the right to grant a franchise for the construction and operation of street railways on highways, and declares that the permission to construct and operate such a railway shall not be granted unless the consent of the owner or owners of at least one-half of the amount in lineal feet of property fronting on the streets through which permission to construct, etc., is asked shall be obtained and filed. *Held*, that the consent required was a limitation on the power of the governing body of the city, and belonged to every owner of property fronting on the streets selected, regardless of ownership to the center of such streets.

#### 5. MUNICIPAL CORPORATIONS—USE OF STREETS—GRANT TO STREET RAILROAD—REVIEW—CERTIORARI.

Act April 21, 1896 (P. L. p. 329), authorizes the governing body of a municipality to grant a street railway franchise provided that permission to construct a line on any street shall not be granted until the written consent of the owners of at least one-half in amount in lineal feet of the property fronting on the street shall be filed. *Held*, that where complainant's consent to the construction of a street railroad in front of its property, which was necessary to make up the majority in lineal feet of property owners to authorize construction on such street, was limited by a provision that no switch should be constructed in the street in front of complainant's property, but, notwithstanding this, the common council approved a plan provided for such a switch on the theory that the condition attached to complainant's consent was void, complainant's remedy was by certiorari to review the ordinance; the city council being authorized to determine such question in the first instance.

#### 6. EQUITY—SUBJECT OF RELIEF—PROPERTY RIGHTS.

Act April 21, 1896 (P. L. p. 329), gives the governing body of municipalities the right to grant street railroad franchises subject to certain consents of abutting property owners. *Held*, that the right of an abutting property owner to attach a condition to a consent necessary to authorize the construction of a road was a statutory privilege, and not a property right which a court of equity would protect.

Suit by St. Columba's Church against the North Jersey Street Railway Company. On demurrer to the bill. Sustained. Case con-

tinued to await the establishment of the legal right.

Ralph Lum, for complainant. L. D. Howard Gilmour, for defendant.

EMERY, V. C. (orally). This is a bill filed by the church as the owner of property on Thomas street, in Newark, to compel the defendant, a street railway company, to remove the switch that has been laid in Thomas street by the defendant in connection with its railroad track through this street. The bill is not filed as being in any aspect a bill by a property owner to bring in question the character of the use of the switch in the sense that, although legally laid, it is used in such an unreasonable manner as to create a nuisance; but the object of the bill is to test the right of the defendant to have the switch there at all for any purpose. It is a bill purely to compel the removal of the switch, and on the general ground that it has been laid in the street without lawful authority. The contention is that the law which gives the railway company the right to lay tracks in public streets has attached conditions to the grant of this right which were not complied with so far as the switch is concerned, and therefore the switch is improperly there. The bill does not allege clearly that the complainant's title extends to the middle of the street or to the lands in the street on which the switch is located. In respect to such ownership the language of the bill is ambiguous. The first paragraph sets out that the complainant is seised of an estate in fee simple in a tract of land in Newark "bounded on Brunswick street, Thomas street, and Pennsylvania avenue." Ordinarily, where a bill is filed in equity to protect a right of the complainant, a distinct and clear allegation is required as to the character of the right to be protected; and, if there is any ambiguity in the statement of the right, the case would ordinarily come under the general rule requiring pleadings to be construed most strictly against the pleader. If complainant owns the title to the middle of the street or title to the lands in the street on which the switch was laid, and complainant relies on such title for relief, then it should be distinctly alleged. It may be that the complainant has not such title, and the case must then be disposed of on the basis that, not having such title to the lands within the street, but being an abutting owner, it had certain rights given to it under the act as such abutter. The bill would then be based on complainant's right, under the act, to require its consent to laying the switch, independent of the ownership of the lands on which the switch is said to be illegally laid. I call counsel's attention to the ambiguous character of the statement of title, as it is a matter which can be reached by amendment if necessary. But I will treat the case in both aspects. That is best for

all parties, and I am obliged to do that, because the question of remedy at law and the extent of the equitable jurisdiction in the case arises at the outset of the case by reason of the defendant's demurrer. One distinct ground of demurrer is that the complainant, if there is any injury at all, has a remedy at law.

Treating the case, first, as one where the complainant has, as an abutting owner on Thomas street, title to the center of the street and title to the land on which the switch is laid, in that aspect the bill is filed to compel the removal of the switch. That relief, if the complainant has the right to it, is exactly the same which it would get by an action of ejectment. If the complainant owns the lands in fee on which the switch is laid, subject only to the public easement of a street, and the switch is a structure which is laid in the street without authority, the decisions in our courts of law are clear that an action of ejectment for the possession of the lands occupied by the switch is a remedy. That law was declared to be settled in *Wright v. Carter*, 27 N. J. Law, 76, 83. There a turnpike company, or company claiming under a charter issued for a turnpike, erected a tollhouse in front of a farmer's land. He brought an action of ejectment against the tenant of the company for occupying land in the highway to which he had title, subject only to the public easement. The court held that the owner had a right to his action of ejectment for the land occupied if the occupation was unlawful, but it was decided that the occupation was lawful, and judgment was directed for defendant. In the case of *D. L. & W. Railroad Co. v. Breckenridge*, 55 N. J. Eq. 141, 35 Atl. 756, I had the same question of remedy at law in relation to laying an oil pipe under ground across the right of way of the railroad company. The bill was filed to compel the removal of the pipe, because it was laid without lawful right. There were questions relating to the legal right dependent on the construction of deeds, and, the legal title being asserted on one side and denied on the other, it made what was called "unsettled title"; that is, the court in deciding on the legal title would have to construe deeds of a special character set up in the case, as to which there had been no previous construction in a court of law. If I had made such construction, it would have been the first decision in any court in reference to that kind of deed, and would have determined whether the deed made by a landowner to a railroad company for its right of way reserved to him rights of such a character as to enable him to sell to a subsequent purchaser the right to lay pipes across the right of way. I said in that case that the remedy of the railroad company, if they claimed absolute title by their deed, was to bring an action of ejectment for the land occupied by that pipe, because a writ of *habere facias pos-*

sessionem would deliver to them the land occupied by the pipe and remove the defendant; and therefore I held the case over to allow the railroad company to bring a suit at law. An appeal was taken from that decision, on which it was affirmed for reasons given below. 55 N. J. Eq. 593, 39 Atl. 1113. In the case cited by Mr. Gilmour—*Budd v. Camden Horse Railroad Company*, 61 N. J. Eq. 543, 48 Atl. 1028—there was also a claim that certain poles were erected by the defendant company on the complainant's land. The defendant claimed that they were erected within the street line, and where, under the charter and under the law relating to the erection of poles in the street for the purpose of street cars, they had the right to erect them. Vice Chancellor Grey said: "I will not try in equity the question whether the poles are on complainant's private property or are within the street line, because, if they are on his private property, an action of ejectment for the occupation of his land by the poles will not only settle the question of right at issue, but the remedy in that action will give exactly the same relief." This decision was also affirmed on appeal for the reasons given below. 63 N. J. Eq. 804, 52 Atl. 1130. So that, if in this case it is a fact that complainant owns title in fee to the lands on which this switch is laid, then the exact remedy it now asks is one that will be given by an action of ejectment, and, if this suit is based on that title, I must hold, under these decisions, that the right must be settled at law, and that before such settlement a court of equity cannot by injunction order the removal of the switch. Independent of title in the street, the abutting owner cannot complain of the impairment of any mere property right by reason of the alleged nuisance, for it has been settled that, unless an abutting owner of land owns the fee to the middle of the street, he cannot maintain a suit to enjoin a nuisance which injures him only in rights enjoyed by him as one of the public. The Attorney General, as representing the public in such case, must file an information, and it makes no difference as to the remedy that the individual would be much more inconvenienced by the nuisance than others. *H. B. Anthony Shoe Co. v. West Jersey R. R. Co.*, 57 N. J. Eq. 607, 617, 42 Atl. 279; *Grey v. Greenville & Hudson R. Co.*, 59 N. J. Eq. 372, 377, 46 Atl. 638.

The other aspect of the case is this: The trolley act of April 21, 1896 (P. L. p. 329), gives the governing body of a municipality the right to grant a franchise for the construction, maintenance, and operating of a street railway upon the highways, and contains this provision, which is a limitation on the power of the governing body: "The permission to construct, maintain, and operate a street railway shall in no case be granted until the consent in writing of the owner or owners of at least one-half the amount in lineal feet of property fronting on the streets

through which permission to construct, operate, and maintain the railway is asked shall be filed," etc. This right to be applied to for consent belongs to every owner of property "fronting on the streets," and ownership to the center of the streets is not necessary. If complainant's property fronts on the street, it is entitled to this privilege given by this statute to such property owner. Considered under this aspect of its statutory right to consent, the question is: What is the remedy, if the switch has been constructed without such consent? The complainant's statement in the bill, which for the purposes of the demurrer must be taken as true, is that, when it gave this consent to constructing the railway in Thomas street, it attached to the consent the limitation that it should not apply to the construction of a switch in the street in front of its premises, and this limitation, it is claimed by complainant, was effective to prevent its consent operating as a consent for the construction of the track in Thomas street, unless with that limitation. That being true, there was not a majority in lineal feet for the construction of the track with the switch as constructed, because it required, according to the statement of the bill, complainant's consent to make up the majority in lineal feet of property owners. The defendant, in reference to the character of the right in the property owner which is given by this statute, claims, on the other hand, that the statute did not give to the property owner any authority to affix limitations on its consent, and therefore, if any property owner attempts to affix for himself such conditions, the limitations must be ignored by the governing body and the consent be treated as absolute. At the time of this hearing, I do not think that this question as to the legal effect of affixing limitations or conditions to the consent had been decided in a court of law. The case of *Currie v. Atlantic City Railroad Company*, 66 N. J. Law. 140, 48 Atl. 615, referred to by Mr. Lum, had expressly reserved any decision on the point. See page 148 of 66 N. J. Law, page 615 of 48 Atl. Mr. Lum since the submission of the case has referred me to a case decided in the Supreme Court, in which Mr. Justice Pitney, now Chancellor Pitney, gave his view that such limitations were effective. *Specht v. Central Passenger Ry. Co.* (N. J. Sup.) 68 Atl. 785, 790. In this case the consents of the property owners to the construction of the railway in the street stipulated that the railway was to be of a single track. If the present case were one which I concluded to decide according to the legal rights, my present view is that I should have to follow the conclusions of a court of law in reference to the nature of the legal right, as a court of equity never undertakes for itself to settle what are legal rights, if the court of law has already done so. I must say that my view had been rather in the direction that, by reason of the provisions of section 1 of the

act of 1896, the consent of the property owner had been limited to the construction, maintenance, and operation of the street railway in the street, and that the question of the location of the rails in the street, which, as I was inclined to think, would include also the location of the switches or turnouts in connection with the track, was, by the concluding paragraphs in this section 1, given to common council to be exercised by resolution, either at the time of the ordinance or afterwards. However, that is only a statement of my first impression on reading the act, and I express no opinion on the question, because it relates to a question of legal right as to which the decision of the court of law is controlling.

The situation, then, is this: Taking the limitation affixed by the complainant to its consent to the construction of this railway in Thomas street as a consent which did not include the erection of the switch in question, what is now the complainant's remedy, the common council having actually granted the permission to construct the railway, including the erection of the switch, and the switch being constructed and since used, not only without any subsequent consent of complainant, but, as the bill alleges, against its protest? It appears by the bill that, on the application for the grant by ordinance, there was annexed, as required by section 1 of the statute, a map showing the proposed location of the tracks, and this included the track and the switch located as it was subsequently erected. There was also on the consent of complainant, as appears by the bill, a stipulation on its part that it did not consent to the erection of the switch as shown on the map. In that situation of the papers presented to the common council, the common council concluded that, notwithstanding this limitation, they had the authority to authorize the construction of the railway, including the switch, according to the map, and did by ordinance grant permission to construct the railway in Thomas street in accordance with the plan and diagram or map submitted, showing the switch in front of complainant's property. The company thereupon constructed the railway with the switch so located, and have since operated it. This decision of the governing body of the city, in reference to the character of the consent, was one which in the first instance was a matter for its decision, subject, of course, to review by the proper tribunal. In the cases above referred to—*Currie v. Atlantic City Railroad Co.* and *Specht v. Central Passenger Railway Co.*—such decision of the municipal authority as to the validity of the consents was reviewed by a removal of the ordinance itself by certiorari proceedings direct to the municipal body and to which the railway company was made party. In both cases the consents were held invalid and the ordinances set aside. These cases point out the proper and regular method of reviewing the

decision of the municipal body. The complainant in the aspect of the case, which I am now considering its statutory right to consent has no property right directly affected by the erection of the switch. It has only a statutory right to control the action of the common council on granting a franchise to construct the track with the switch until it gives its consent. A court of equity ordinarily protects only property rights, and this right of an abutting owner to require his consent as a preliminary to a municipal grant under the statute is to a certain extent a governmental right, a right to share in a limited way, and by a special method, in the grant of a franchise. The Court of Errors and Appeals in a late case have decided that this right to consent is not an ordinary property right which the abutting owner can dispose of or sell as he chooses, and with regard only to his own interests. In the case of *Montclair Military Academy v. New Jersey Railway Company*, 70 N. J. Law, 229, 57 Atl 1050, a property owner undertook to bargain for his consent with the railroad company, and said, "If you will give me so much, I will give you my consent"; and the company gave a note for the amount agreed on. The railroad company, having gotten the privilege, afterward defended suit on the note. The Supreme Court held them liable (65 N. J. Law, 328, 47 Atl. 890), but the Court of Errors and Appeals, Mr. Justice Dixon delivering the opinion, reversed the judgment, holding that the right to consent was not a right which the owner could bargain for and deal with as if it was an ordinary property right belonging to him, but that it was a privilege given by statute to a class of persons having similar and common interests, and there was implied in this grant of the privilege a condition that the owner would exercise it, not for his private or exclusive gain, but on views that concerned all of the class who had the right to consent. In *Paterson & S. L. Co. v. Wostbrock* (N. J. Ch.) 56 Atl. 698, I had occasion to consider the character of this right of consent, and held that it was not a property right, but only a special statutory limitation on the authority of the municipality. Suppose that in this case there had been no consent at all of the abutting owners, as required by the statute, and a grant had been made; there is no question that the property owner could have enforced the right given to him by the statute. But would not the enforcement be by a certiorari, removing to the Supreme Court the municipal ordinance which made the grant, on the ground that the council had no right to give it? You must notice this feature of the law. This traction law does not provide that the railroad company may not lay the tracks unless they get the consent of the property owners, but it provides that it shall not construct the railway unless a municipal act is performed allowing the construction in the public street, and then, as a restriction on the power of

the municipality, and as such restriction only, the act provides the grant shall not be made by the municipality, unless the consent of the abutting owner is filed. The property owner has no dealings whatever directly with the railroad company in relation to the grant itself. He has a right to a review of any municipal action granting the franchise which has been taken without the statutory consent that is required to be given to him. From the opinion in *Specht v. Central Passenger Ry. Co.* (N. J. Sup.) 68 Atl. 789, it would seem that the ordinance cannot be attacked collaterally because of illegality in passing without the requisite consents, and on this view of the conclusive effect of the ordinance, except on direct attack by certiorari, the complainant standing merely on its right of consent (and not on the violation of any property right in the land on which the switch was erected), would have no status to attack the ordinance in this court. I think, therefore, that treating the rights of complainant as based on the statutory privilege requiring consent to be given, and if the consent has been given without the proper permission, a certiorari to remove the ordinance is the remedy at law of the complainant. I may further say that if a certiorari is taken, and by a judgment in certiorari the ordinance is set aside, perhaps a writ of restitution might require the removal of the switch. A final judgment in certiorari often requires the restoration to the original condition (*Riker v. Mayor, etc., of City of Jersey City*, 38 N. J. Law, 225, 227, 20 Am. Rep. 386), and in that case exactly the same remedy would be applied as is now asked for by injunction. My view, therefore, is that the objection that the remedy in this case is complete at law must be sustained. The direction can be made that this case stand over to await the establishment of the legal right.

Mr. Lum: I will ask that that disposition be made of it.

#### SIMPSON v. ANDERSON et al.

(Court of Chancery of New Jersey. July 9, 1908.)

#### 1. CHATTEL MORTGAGES—RECORDING—AFFIDAVIT—SUFFICIENCY—STATEMENT OF CONSIDERATION.

An affidavit annexed to a chattel mortgage, made by the mortgagee, who was not the original creditor of the mortgagor, but took an assignment of a bond for \$1,500 and a mortgage other than the chattel mortgage, which avers that the original mortgagee, for the consideration of \$1,500, assigned the bond and mortgage to deponent by deed of assignment, and that the mortgagor was indebted to deponent for the full amount of the \$1,500 together with interest, does not state the consideration of the mortgage, as required by Gen. St. 1895, p. 2113, § 52, declaring that a chattel mortgage shall be void as against the creditors of the mortgagor unless it is recorded and has annexed thereto an affidavit by the holder stating the consideration of the mortgage.

#### 2. SAME—FORM OF AVERTMENT IN AFFIDAVIT—"WHEREAS."

An affidavit annexed to a chattel mortgage, which states "that the consideration of said mortgage is, whereas" the mortgagor became indebted to a third person in the sum of \$1,500, and executed and delivered to the third person a bond and a mortgage to secure the same, and "whereas" the third person for the consideration of \$1,500 assigned the bond and mortgage to the mortgagee in the chattel mortgage, and "whereas" the mortgagor is indebted to the deponent for the full amount of \$1,500, together with interest, is insufficient to state the consideration, as required by Gen. St. 1895, p. 2113, § 52, since the language to show that there was an indebtedness originally from the mortgagor to the third person, and that the indebtedness was assigned to the chattel mortgagee, is not direct and positive, but by mere recital; the word "whereas" meaning "the thing being so that," "considering that things are so."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7442.]

#### 3. SAME.

An affidavit annexed to a chattel mortgage, which states "whereas" the mortgagee loaned a specified sum to the mortgagor at his special request, and that the whole amount thereof with interest is due, and "whereas" deponent at the special instance of the mortgagor became an accommodation indorser on promissory notes, etc., is insufficient to state the consideration, as required by Gen. St. 1895, p. 2113, § 52, since the items of the indebtedness are stated by way of recital, instead of as positive facts.

#### 4. SAME.

An affidavit annexed to a chattel mortgage, which states that the mortgagee at the request of the mortgagor became an accommodation indorser on promissory notes, described by giving their dates and the amount thereof, is bad for failing to sufficiently describe the notes, and thereby failing to show how the debt was created to secure which the mortgage was made, as required by Gen. St. 1895, p. 2113, § 52.

#### 5. SAME.

Under Gen. St. 1895, p. 2113, § 52, providing that a chattel mortgage shall be void as against the creditors of the mortgagor unless it is recorded and has annexed thereto an affidavit by the holder stating the consideration of the mortgage, and as nearly as possible the amount due and to grow due thereon, to omit to state either the consideration or the amount due and to grow due renders the affidavit defective, and makes the mortgage void as against creditors.

#### 6. SAME.

An affidavit annexed to a chattel mortgage stated by way of recital that the consideration of the mortgage was a bond for \$1,500 assigned to the mortgagee, \$344 cash loaned to the mortgagor by the mortgagee, etc., and averred, "And now the consideration for the chattel mortgage is the said \$1500 due \* \* \* upon the said bond, \* \* \* and the further sum of \$344 loaned \* \* \* by this deponent to [mortgagor], and the further sum of money as this deponent may be called on to pay by reason of having become an accommodation indorser upon the three certain promissory notes hereinbefore mentioned," and "the amount of money now due and to grow due thereon is the sum of \$1,844 payable," etc. Held, that defects in the affidavit arising from stating the consideration of the mortgage by way of recitals merely were not cured by the quoted statements, because they merely stated that such an amount of money was due from the mortgagor to the mortgagee, without disclosing the consideration on which the mortgage was founded, especially where the mortgagee admitted that the loan of \$344 and the notes had been paid.

Suit by the ordinary, etc., for and on behalf of Mabel L. Simpson, against Abijah A. Anderson and others. Heard on motion for preliminary injunction. Preliminary injunction advised.

Henry D. Lanning and John S. Van Dike, for the motion. John Sykes, opposed.

WALKER, V. C. On May 8, 1907, the ordinary, for and on behalf of Mabel L. Simpson, recovered a judgment in the Mercer circuit against the defendant Josiah B. Flock for \$1,168.75, including costs, and issued an execution and levied upon the goods and chattels of the defendant named, but was confronted with a chattel mortgage made by the defendant Flock to the defendant Abijah A. Anderson August 28, 1897, covering the goods and chattels upon which the levy was made. The bill charges that the chattel mortgage is void and invalid as against the creditors of the defendant Flock and as against the complainant under his execution and levy, in that the affidavit attached thereto does not comply with the statute in such case made and provided. There are other objections levelled against the validity of the chattel mortgage, and they raise questions of fact. Their determination is in my judgment unnecessary, because the affidavit is insufficient, and the mortgage is, therefore, in law, void as against the creditors of mortgagor.

The affidavit annexed to the chattel mortgage reads as follows: "State of New Jersey, County of Mercer—ss.: Abijah A. Anderson, of the borough of Allentown, county of Monmouth, being duly sworn on his oath, saith that he is the holder of the foregoing mortgage, that the consideration of said mortgage is, whereas the said Josiah B. Flock became indebted to one Richard H. Hendrickson in the sum of fifteen hundred dollars, and the said Josiah B. Flock made, executed, and delivered to the said Richard H. Hendrickson a certain bond bearing date the twenty-third day of March, eighteen hundred and ninety-two, and to secure the payment of the said bond the said Josiah B. Flock and wife made, executed, and delivered to the said Richard H. Hendrickson a mortgage bearing date the twenty-third day of March, eighteen hundred and ninety-two, which said mortgage is recorded in the office of the clerk in and for the county of Mercer in Book 89 of Mortgages, pages 290, etc., and whereas the said Richard H. Hendrickson, for the consideration of fifteen hundred dollars, assigned, transferred, and set over the said bond and mortgage to Abijah A. Anderson by virtue of a deed of assignment of mortgage bearing date the first day of April eighteen hundred and ninety-three, and recorded in the clerk's office in and for the county of Mercer in Book 8 of Assignment of Mortgages, pages 296, etc., and whereas the said Josiah B. Flock is indebted to this deponent

for the full amount of the said fifteen hundred dollars, together with interest thereon from the first day of April, eighteen hundred and ninety-seven, and whereas, on the thirtieth day of March, eighteen hundred and ninety-four, this deponent loaned and advanced in cash, the sum of three hundred and forty-four dollars to the said Josiah B. Flock, at his special instance and request, and that the whole amount of the said three hundred and forty-four dollars, with interest thereon from the first day of April, eighteen hundred and ninety-seven, is still due and owing from the said Josiah B. Flock to the said Abijah A. Anderson, and whereas this deponent has, at the special instance and request of the said Josiah B. Flock, become an accommodation endorser and surety upon three certain promissory notes, one of which bears date the twenty-second day of June, eighteen hundred and ninety-seven, for the consideration of thirty-five dollars, one of which bears date June twenty-eighth, eighteen hundred and ninety-seven, for the sum of twenty-eight dollars; and one which bears date the third day of August, eighteen hundred and ninety-seven, for the consideration of seventy-eight dollars: And, now, the consideration for this chattel mortgage in the said fifteen hundred dollars due from the said Josiah B. Flock to this deponent upon the said bond and mortgage, and the further sum of three hundred and forty-four dollars, loaned and advanced by this deponent to the said Josiah B. Flock on the thirtieth day of March, eighteen hundred and ninety-four, and the further sum of money as this deponent may be called upon to pay by reason of having become an accommodation endorser upon the three certain promissory notes hereinbefore mentioned, and the amount of money now due and to grow due thereon is the sum of eighteen hundred and forty-four dollars, payable on the twenty-eighth day of August, eighteen hundred and ninety-seven, besides such sums of money as this deponent may be called upon to pay by reason of having become such accommodation endorser, together with interest on the said sum of eighteen hundred and forty-four dollars, from the first day of April, eighteen hundred and ninety-seven."

So much of the statute in force at the time the chattel mortgage was made as is applicable provided that every such conveyance should be absolutely void as against the creditors of the mortgagor, unless it be recorded and had annexed thereto an affidavit by the holder, his agent, or attorney, stating the consideration of the mortgage, and, as nearly as possible, the amount due and to grow due thereon. Gen. St. 1895, p. 2113, § 52. The present statute is the same. P. L. 1902, p. 437, § 4. It will be remembered that the present mortgagee and affiant was not the original creditor of the mortgagor, but took from his mortgagee an assignment of a bond and mortgage other than the chattel mort-

gage under consideration, and the mortgagee in this chattel mortgage, in his affidavit annexed thereto, says that Richard H. Hendrickson, the original mortgagee, for the consideration of \$1,500, assigned the bond and mortgage to him, deponent, by deed of assignment, etc., and that the mortgagor, Flock, is indebted to him, deponent, for the full amount of the \$1,500, together with interest, etc. Here is no statement of the consideration of the mortgage. This amounts to no more than an assertion that Flock was indebted to Hendrickson in the sum of \$1,500, and that Hendrickson assigned the mortgage given to secure that indebtedness to Anderson for something which was of the value of \$1,500, and that therefore Flock owes Anderson the \$1,500. The language used by Vice Chancellor Van Fleet in declaring void the chattel mortgage in *Graham Button Co. v. Spielmann*, 50 N. J. Eq. 120, at page 122, 24 Atl. 571, at page 572, is so pertinent that it is here quoted: "Nothing, as it seems to me, can be more certain than that simply saying, under oath, that the consideration of a mortgage is the indebtedness of the mortgagor to the mortgagee, consisting of a present indebtedness of \$1,500—and that is all that is said here—without disclosing how the debt on which the mortgage is founded arose, whether it arose out of a sale, a loan, or how otherwise, is not a compliance with the statute. On the contrary, a statement of consideration, expressed in language so general and indefinite, so plainly contravenes the fundamental purpose of the legislation that, if it were adjudged to be a compliance with the law, such judgment would unquestionably defeat the most salutary provision of the statute. The command of the statute is imperative. Unless the mortgage, when recorded, is accompanied by an affidavit which states fully and plainly the consideration on which it is founded, the statute says that the courts shall treat the mortgage as absolutely void as against the creditors of the mortgagor."

There is another defect in the affidavit concerning the consideration for which the chattel mortgage was given, and it is entirely aside from the statute to which reference has been made. It is this: The language used to show that there was an indebtedness originally from Flock to Hendrickson, and that that indebtedness was assigned to the chattel mortgagee, is not direct and positive, but a mere recital, and is insufficient. The affidavit states "that the consideration of the mortgage is, whereas, the said Josiah B. Flock became indebted to one Richard H. Hendrickson," etc., "and, whereas, the said Richard H. Hendrickson for the consideration of \$1,500 assigned, \* \* \* the said mortgage to Abijah A. Anderson," etc., "and, whereas, the said Josiah B. Flock is indebted to this deponent [Anderson] for the full amount of said \$1,500," etc. In *Bennett v. Benson*, 25 N. J. Law, 166, 170, an affidavit to

hold to bail, which commenced with the words, "for that," was held to be good, but it was observed that an affidavit commencing with the words, "for that whereas," was by way of recital, and would not be sufficient. Now, I can see no difference between commencing an affidavit with the words "for that whereas" and commencing an affidavit with the words "and whereas." Both are commonly used by way of recital in legal instruments, but are not, so far as I am aware, used by way of direct and positive averments of facts in affidavits. The word "whereas" is defined to mean "the thing being so that," "considering that things are so." 30 Am. & Eng. Ency. of Law (2d Ed.) p. 514. Suppose a witness were upon the stand giving oral testimony, and he were asked: "Is the mortgagor indebted to you?" and he answered, "it being so that he is indebted to me," or, "considering that he is indebted to me"—neither would be a direct and positive statement that the mortgagor was indebted, but, at best, only a statement from which it might be inferred that he was indebted. There are two other items of consideration for which the chattel mortgage was given, as shown by the affidavit. One is that the mortgagee loaned and advanced in cash to the mortgagor April 1, 1897, the sum of \$344. The other is that the mortgagee, at the request of the mortgagor, became an accommodation indorser and surety upon three promissory notes, one of which bears date June 22, 1897, for the consideration of \$35, another June 28, 1897, for the consideration of \$28, another August 2, 1897, for the consideration of \$78. These two items of indebtedness (if, in fact, any indebtedness ever accrued upon the promissory notes) are also bad because they are stated by way of recital, instead of as positive facts; the language being, "and whereas \* \* \* deponent loaned and advanced in cash," etc., "and whereas this deponent has, at the special instance and request of the said Josiah B. Flock, become an indorser and surety upon three certain promissory notes," etc. That is not all, for, as to the contingent liability of indorser and surety upon the promissory notes, there is no sufficient description of the notes. This defect came under the reprobation of Vice Chancellor Grey in *Dunham v. Cramer*, 63 N. J. Eq. 151, 51 Atl. 1011. He said, at page 157 of 63 N. J. Eq., at page 1014 of 51 Atl.: "Nothing in this affidavit shows whose promissory note is secured by the chattel mortgage in question, nor who is the holder of that promissory note, nor for what consideration, whether a loan of money, or a sale of goods, or how otherwise the debt was created to secure which the chattel mortgage was made. An affidavit so markedly deficient in the statement of the transaction out of which the mortgage arose, no opportunity to inquiring creditors of the mortgagor to as-



certain whether the chattel mortgage is given for a valuable consideration, which would be binding upon them, or for a merely voluntary one, which would not be obligatory upon them." Nor are the defects in the affidavit as to the several matters of consideration cured by the statement (laid under "and whereas"), "The said Josiah B. Flock is indebted to this deponent for the full amount of the said \$1,500.00," etc., or "and now, the consideration for the chattel mortgage is the said \$1,500.00 due from the said Josiah B. Flock to this deponent upon the said bond and mortgage, and the further sum of \$344.00 loaned and advanced by this deponent to the said Josiah B. Flock on the 30th day of March 1894, and the further sum of money as this deponent may be called upon to pay by reason of having become an accommodation endorser upon the three certain promissory notes hereinabove mentioned," or, "and the amount of money now due and to grow due thereon is the sum of \$1,844.00, payable," etc., because these are mere statements that such an amount of money is due from the mortgagor to the mortgagee, and do not disclose the consideration upon which the mortgage is founded. It is one of the two essential requisites which are conjunctively required by the statute to be stated in the affidavit. Not only must the mortgage have an affidavit annexed thereto stating the consideration of the mortgage, but also as nearly as possible the amount due and to grow due thereon. To omit to state either the consideration or the amount due and to grow due renders the affidavit defective, and makes the chattel mortgage void as against creditors.

The only possibly supportable consideration set forth in the chattel mortgage is the loan of \$344 made by Anderson to Flock, but, as Anderson in his affidavit submitted on the return of the order to show cause says that that sum has been paid (and also the promissory notes which the mortgage was given, in part, to secure), the mortgage stands only as security for the \$1,500, the consideration of the original mortgage which was made by Flock to Hendrickson and by the latter assigned to Anderson. The affidavit as to the consideration underlying that transaction, namely, the assignment, being so radically defective, the mortgage cannot stand as against the complainant who is a judgment creditor of the mortgagor, Flock, with an execution actually levied upon the goods and chattels covered by the mortgage, which mortgage, of course, as between Flock and Anderson is perfectly valid.

Mr. Anderson, having seised and advertised for sale the goods and chattels levied upon under the complainant's execution, will be restrained from making a sale under his chattel mortgage. I will advise the issuance of a preliminary injunction as prayed for in bill of complaint.

(21 Conn. 218)

## FOOTE v. BROWN et al.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

## 1. EJECTMENT—TITLE TO SUPPORT ACTION.

One to whom testator gives land so long as she remains his widow has sufficient title to maintain an action for possession thereof.

## 2. DESCENT AND DISTRIBUTION — TITLE OF HEIRS—REAL PROPERTY.

Title of one to whom testator devises land for so long as she remains his widow vests in her, with the immediate right of possession, immediately on his death; the vesting and right of possession not being suspended during settlement of the estate, and by the fact that the property may be wanted for payment of debts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, §§ 243-248.]

## 3. EXECUTORS AND ADMINISTRATORS — REAL PROPERTY—POSSESSION.

The action of J. in signing, as administrator of deceased, leases of land which deceased had devised to his widow, and in collecting the rent and managing the property generally, does not show conclusively that he, and not she, was the party in possession, as it may be shown that she was his principal in all that he did.

## 4. EJECTMENT—PRIOR POSSESSION OF PLAINTIFF—NECESSITY.

Possession by plaintiff or his predecessor in title, other than that carried by title, is not necessary that plaintiff may maintain action for possession of land, if others were not in actual exclusive occupation when plaintiff acquired title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 63.]

## 5. APPEAL AND ERROR — HARMLESS ERROR — INSTRUCTIONS.

Even if the trial court, in reading an extract from an opinion in the course of the charge, read the word "without" as "with," as indicated by the record, and this was not a mere mistake of the stenographer, it was harmless; the general tenor of the charge being such that the jury could not have been misled thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219-4228.]

## 6. TRIAL—INSTRUCTIONS—CURING ERRORS.

Error of the court in mistating in its charge the contents of a deed is cured by its subsequent correction of the error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

## 7. EVIDENCE—ADMISSIONS.

Evidence of admissions of one of defendants, in an action for possession of land, and his conduct without the premises, tending to show a participation by him with the other defendant in the acts of disseisin, is properly admitted and submitted to the jury on the question of such participation by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 786-796.]

## 8. APPEAL AND ERROR — HARMLESS ERROR — INSTRUCTIONS.

The instruction that the effect of a vote of a town to grant land, and of an instrument purporting to be signed by the proprietors, reciting that they give their right therein, was to convey their interest, if not strictly accurate, was not prejudicial, as though the instrument, not having been executed as required of conveyances of land, may not have been sufficient to convey the legal title, it, having been given for an expressed consideration, conveyed an equitable title, which it will be presumed later drew to it the legal title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219-4228.]



### 9. SAME—CLAIM NOT MADE BELOW.

The claim that the identity of the signers, as the proprietors, of an instrument, made for the purpose of granting land of a town, was not established, not having been made below, is not fairly before the appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1079-1120.]

### 10. EVIDENCE—ANCIENT INSTRUMENTS.

Proof of the identity of the signers of an ancient instrument as the proprietors is not required; it being presumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1614.]

### 11. SAME—DECLARATIONS OF DECEDENT.

Under Gen. St. 1902, § 705, providing that in an action by the representative of a deceased person declarations of deceased, relative to the matter in issue, may be received in evidence, declarations of deceased as to his title to land are admissible in an action by his devisee to recover the land of persons claiming that he had no title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1059.]

Appeal from Superior Court, New Haven County; George W. Wheeler, Judge.

Action by Eliza S. Foote against Chester A. Brown and another to recover possession of a tract of land and damages. Judgment for plaintiff on a verdict that she recover possession of the land and one dollar damages, and defendants appeal. Affirmed.

The land in controversy is a strip of non-arable land adjoining the seashore, known as "Pipe Beach," and containing about one acre. Its chief value arises from the large quantities of shells, seaweed, and mud which are cast thereon by the sea, and have, as is claimed, a market value and a substantial value for farm purposes. April 13, 1849, George A. Foote, the plaintiff's husband, received a deed of a near-by farm, and with it Pipe Beach. The plaintiff claimed to show that Foote at or about the date of this conveyance entered into the possession of both the farm and said beach and continued therein, using the beach in connection with the farm and as a part of it until his death in 1878, and that his possession and use of said beach was during all this time open, notorious, exclusive, under a claim of right, and adverse. Foote left a will, duly probated, which contained the following provision in favor of the plaintiff, who has remained unmarried: "Whereas, I have leased my farm on which I now live to my son William Todd Foote, for five years, from the 1st of January, A. D. 1863, to the 1st of January, 1873, for five hundred dollars a year and other privileges and perquisites mentioned in said lease, now therefore my will is that in case of my death my wife, Eliza Spencer Foote, shall receive all the pay and enjoy all the privileges which are secured to me in said lease. At the termination of said lease my said wife is hereby fully authorized and empowered to renew the same to my son, Wm. T. Foote, or in case of his death or refusal to renew the same, then she may lease the said farm to any other son or person as shall seem best for her and her children, as long as she

remains my widow, and no longer." Mrs. Foote was the executrix of the will until she resigned in 1897, and her son-in-law, E. H. Jenkins, was appointed as administrator c. t. a. Upon his appointment an order of notice for the presentation of claims was made. Only one claim was presented, and that was one which Mrs. Foote had personally paid some years before upon demand upon her. This claim was later paid to her out of the proceeds of the sale of the greater portion of the farm. No inventory of the estate has ever been filed; neither has any account been filed by either Mrs. Foote as executrix or Jenkins as administrator c. t. a. From the appointment of Jenkins as administrator in 1897 down to the sale of a portion of the farm in 1907, there was no money in the estate, and the income from the farm was insufficient at times to pay the taxes and repairs, and at the present time there is only between \$100 and \$200 in the estate.

When Foote died, the farm was still under lease to his son William, and leases thereof to him were renewed until April 1, 1897. Since that time it has been leased to other parties; the earlier leases being made by the plaintiff, and those since 1899 by Jenkins as administrator. The plaintiff claimed to show that all of the lessees used and occupied said beach as a part of the farm, taking shells, seaweed, and mud therefrom for use on the farm, and selling a part thereof from time to time. Since the plaintiff's removal to New Haven, Jenkins has collected the rents and disbursed the moneys thus received in the payment of taxes and repairs. Mrs. Foote, after her husband's death, continued to live upon the farm until 1894, when she went to reside with her son-in-law in New Haven, and there she has continued. The plaintiff claimed to show that since her removal to New Haven she had continued to manage and lease the farm through her son-in-law, Jenkins, that he had done nothing but carry out her directions in the matter, that his signature of certain leases as administrator was the result of a misunderstanding and mistake on his part, and that he never in his capacity as administrator claimed to have, or had in fact, possession or control of said farm, including said Pipe Beach, and never received anything therefrom except as agent for Mrs. Foote and at her request. The last lessee of the premises held a lease under the signature of Jenkins as administrator. Prior to the bringing of this action, he released his interest thereby acquired to Jenkins, administrator. This the plaintiff claimed to show was done for the purpose of bringing the suit. The plaintiff also claimed to show that both the defendants had unlawfully entered on the land in question and placed a building thereon, and that they were wrongfully continuing in possession thereof.

The only evidence introduced by the plaintiff as to the occupation and possession of said beach by the defendant Chester A.

Brown was conversation between him and Jenkins, in which Brown told Jenkins that it was his building thereon, and that he had the right to keep it there, having obtained the permission of the selectmen, and that he refused to remove the same; and, further, that he spoke to the selectmen to secure permission to place this building upon the beach. Said Chester testified, but did not deny said conversation, and said Chester and James G. Brown testified that the former asked permission of the selectmen as aforesaid.

The defendants offered evidence to prove, and claimed to have proved: That said Pipe Beach had been used for over 60 years and up to the present time by the public generally for purposes of getting seaweed, shells, and mud, and in any other way they desired; that such use was open and visible; that, while said George A. Foote was in the occupation of his said farm, he had seen people using this beach and had not objected to such use; that the use of said Foote of said beach was the same as that of the general public; that he did no acts thereon different from those of any other of the public who desired to use it; that in 1849 neither the predecessor in paper title of said Foote nor said Foote was in possession of said beach, but the possession was in the public, and has since so remained; that the defendant Chester A. Brown, in company with the defendant James G. Brown, asked permission of one of the selectmen of Guilford to put a small building on said beach; that, after securing the same, said James, in 1903, placed a small building thereon, and has used the same ever since; and that the defendant Chester A. Brown neither owns nor has occupied said building since it was placed on said beach.

The plaintiff having offered evidence upon which to base a title by adverse possession, the defendants advanced the claim that title cannot be so acquired as against the public whose right they asserted. They claimed that the beach had been public or common lands and so used by the public from time immemorial. To meet one aspect of the situation thus presented, the plaintiff offered in evidence, from the town records, a vote passed April 7, 1818, as follows: "Voted that the town are willing the proprietors should grant their lands at the Pipe Beach to Elijah Leete," and also the following from the town records: "We, the subscribers, being proprietors in the Pipe Beach, lying at the lower part of the Long Cove, our right being small, and the prospect being over for getting shells, and finding it our duty to relinquish our claim to the beach, for and in consideration of having the cove drained, and whereas, Elijah Leete hath undertaken to drain said cove, we do give our right to said Leete for his encouragement to drain said cove. David Bishop. Jonathan Bishop. Jared Bishop. Bela Cruttenden. Timothy Cruttenden. Ab-

ner Stone. Abraham Stone. Saml. Robinson. William Hubbard. Daniel Hubbard. Recd. for record March 23, 1818, and is truly entered. Attest: Saml. Fowler, Regr."

The court instructed the jury that there was nothing in the evidence to justify a finding that the land in question was public land or so used by the public from time immemorial, and also that, if the premises referred to in the records above recited should be found to be identical with the land in dispute, the legal effect of the instrument of March 23, 1818, was to vest in Leete the interest of these proprietors.

William T. Foote, a son of George A. Foote, having been called as a witness for the plaintiff, was inquired of as to the use made by his father of the beach, and was then permitted, against objection, to testify to certain declarations made by his father to the effect that the beach was a valuable part of his farm, worth half of the regular cost, and that there was always a time when one could go there and get manure.

The defendants made no claim to title to the beach in themselves, but justified their acts solely under the public right therein and permission obtained from the selectmen of the town.

Robert C. Stoddard, for appellants. Henry C. White, for appellee.

PRENTICE, J. (after stating the facts as above). The reasons of appeal present in various forms certain questions as to the right of the plaintiff to maintain her action even upon the assumption that the facts are as claimed by her. It is asserted, and was unsuccessfully asserted below, that her action must fail for want of a sufficient title accompanied with the present right of possession being shown in her: (1) Because the will of her husband conferred upon her no such title as would enable her to maintain her action; (2) because, whatever title the will may have set out to her, it never vested in her by reason of the incompleteness of the probate proceedings and the condition of the testator's estate as shown, or at least that the right of possession was for these reasons never hers; and (3) because the acts of Jenkins in leasing and managing the property, either alone or in connection with the status of Foote's estate, show that the possession of the premises was that of Jenkins as administrator c. t. a. and never that of the plaintiff in her own right. The first of these reasons is insufficient. "The action of disseisin will lie in all cases in favor of a man who has an interest in lands and is entitled to the possession of them, whether it be an estate in fee, for life or for years, or for an interest in the herbage or growing crops; but the right must be of some duration and exclusive." 1 Swift's Dig. p. 507. Upon the former appeal, with this will before us, we said that the plaintiff was an owner of land in possession, that her grievance against the de-

fendant was an unlawful entry and occupation of land, and that her redress was possession and damages. *Foote v. Brown*, 78 Conn. 369, 378, 62 Atl. 667. The title which came to Mrs. Foote under her husband's will vested in her immediately upon his decease. *Brewster v. McCall's Devisees*, 15 Conn. 274, 289. The devise being a specific one and of the character it was, there went with it the right to the immediate possession of the property. Gen. St. 1902, § 362; *Merwin v. Morris*, 71 Conn. 555, 573, 42 Atl. 855. The vesting of the plaintiff's title, together with the right of possession, was not in suspension during the settlement of the estate of the testator, or delayed by the fact that the property might be wanted for the payment of debts, as it was not in fact. *Griswold v. Bigelow*, 6 Conn. 258, 263. The action of Jenkins in signing leases as administrator and in collecting the rents, disbursing the rent receipts and managing the property generally, cannot be said to show conclusively that he, and not she, was the party in possession. Those features of the situation were simply facts to go, with their explanation and any other pertinent facts, to the jury for the determination of the question of fact involved. They were properly submitted to the jury, and the issue found in favor of the plaintiff's contention that she was Jenkins' principal in all that he did, and that his acts indicative of possession were her acts.

The plaintiff, in support of her title to the beach, offered in evidence deeds running back in a continuous chain to 1823, and direct evidence that the parties in this chain of title had been in occupation and open, actual, and exclusive occupation, as their own, since 1852 during the ownership of Foote. No direct evidence of occupation at an earlier date by any person in this line of title was presented. Upon this evidence, the plaintiff's claim was that a record title to the beach was established in George A. Foote, and, if not, that one by prescription was shown. The court, after calling the jury's attention to this dual claim, proceeded to instruct them as follows: "It is the law of this state that ownership of real property carries a right of possession as much as the ownership of personal property, and ownership in one case draws after it possession as much as in the other. The possession involved in the fact of ownership is sufficient, if the land was not in the actual exclusive occupation of another. A mere paper chain of title in the plaintiff does not establish his ownership of the land, unless his possession or that of his grantors is shown; but evidence of actual possession is unnecessary, if the jury is satisfied, by documentary or other evidence, of ownership by the plaintiff's predecessors in title, since title thus established draws with it possession in the absence of any evidence to the contrary." To the last portion of these instructions the de-

fendants object. They say that, in view of their claim that the public was in possession in 1849, when Foote took his deed and his grantor out of possession, the jury must have been misled into the belief that he acquired title by his deed by the mere fact of its being executed and delivered. The instructions were in harmony with the repeated declarations of this court and correct. *Dawson v. Orange*, 78 Conn. 96, 107, 61 Atl. 101; *Merwin v. Morris*, 71 Conn. 555, 573, 42 Atl. 855; *Waterbury Clock Co. v. Irion*, 71 Conn. 254, 259, 41 Atl. 827; *Noyes v. Stillman*, 24 Conn. 15, 21; *Bush v. Bradley*, 4 Day, 298, 306. But the court did not stop with them. It immediately took up the defendants' claim from the situation shown, and gave such instructions thereupon, in addition to those recited, that the jury could not have been misled in the way suggested.

In the course of its charge, the court read a somewhat extended extract from the opinion in *Carney v. Hennessy*, 74 Conn. 111, 49 Atl. 910, 53 L. R. A. 699, 92 Am. St. Rep. 199, upon the subject of title by prescription. In the record this extract is made to contain the word "with," where "without" was the word in the original and the word plainly intended. The charge is in a material matter, and the instructions as thus framed are assigned as error. The form which the instructions are thus made to assume is so palpably the result of a mistake on the part of the stenographer, and not of the court, that error ought not to be predicated upon it. Furthermore, the meaning of the court was too plain to be mistaken, and the general tenor of the charge such that the jury could not have been misled by an inadvertent interchange of words, if one there was.

During the charge the court made an error in respect to the contents of a deed of a certain date, confusing that deed with an earlier one. This error was later corrected, and a correct statement made. The matter involved in the error was one of trifling consequence. Had it been of more serious importance, the correction of the error would have removed all cause for complaint. If our jury system is to continue to be a practical working one, and productive of reasonably satisfactory results, it must be given a chance to operate within human limitations as respects both judge and jury and have reasonable presumptions applied to its operation. Substantial errors will be committed for which a remedy must be given, but an appellate court ought not to be expected to create substance out of shadows, to conjure up errors out of trifles, or to seek for judicial irregularity by microscopic processes, speculative imaginings, or refined reasoning.

The defendants complain of the charge in so far as it relates to a recovery against the defendant Chester A. Brown, saying that the jury were told, in substance, that a verdict could be rendered against him, if it was found

that he, in conversation, told Jenkins that he was occupying the land. What the court did do, and properly do, was to receive evidence of said Brown's admissions and his conduct without the premises as tending to establish a participation by him with James in the acts of disseisin and to leave the question of such participation by him to the jury, with proper instructions for their determination. The language of the court upon this point was as clear and distinct as it well could be.

The instructions of the court that the effect of the vote of the town and of the instrument of March 23, 1818, purporting to be signed by the proprietors, was to convey to Leete their interest in Pipe Beach, was not prejudicial to the defendants, if not strictly accurate. Upon the trial no claim was made, as far as appears, that the instrument, not being executed as required of conveyances of land, was not sufficient to give Leete title. It is now embodied in one of the reasons of appeal. Although the instrument may not have been sufficient to convey the legal title, it was given for an expressed consideration, and conveyed an equitable title which it will be presumed later drew to it the legal title.

It is, however, now urged that the identity of the signers of this writing as the proprietors is not established. This claim was not presented below, and therefore is not fairly before us. If it were, its answer would be found in the application of the maxim: "*Ex diuturnitate temporis omnia presumuntur esse solemniter acta.*" *Dawson v. Orange*, 78 Conn. 96, 118, 61 Atl. 101; *Fowler v. Savage*, 3 Conn. 90, 98. "God forbid that ancient grants and acts should be drawn in question, although that cannot be shown which was at first necessary to the perfection of the thing." *Fowler v. Savage*, supra. "Antiquity of time fortifieth all titles and supposeth the best beginning the law can give them." *Ellis v. Mayor*, 15 C. B. N. S. 52.

The declarations of George A. Foote, testified to by his son, were admissible under section 705 of the General Statutes of 1902. The plaintiff received her title as the devisee of the declarant, her husband. *Lockwood v. Lockwood*, 56 Conn. 106, 110, 14 Atl. 293; *Pixley v. Eddy*, 56 Conn. 336, 340, 15 Atl. 758; *Baxter v. Camp*, 71 Conn. 245, 252, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 169.

The remaining matters involved in the reasons of appeal are without merit and do not require discussion.

There is no error. All concur.

(81 Conn. 127)

Appeal of DUNN et al.

DUNN et al. v. GRANT et al.

(Supreme Court of Errors of Connecticut. Aug. 3, 1908.)

1. INSANE PERSONS—PROPERTY—SALE UNDER ORDER OF COURT—LIABILITIES OF CONSERVATOR—REMEDIES AGAINST CONSERVATOR.

Where a conservator, under an order of the probate court procured by her, sold land of her

ward at a much less price than it was worth, for the purpose of thereafter buying it herself, and the transaction was completed and the deed filed for record before the ward's death, the ward was the only person injured by the sale, even though no return of the sale was made before her death, as such return was not necessary to pass title.

2. SAME—ACTION FOR FRAUD—ACTION ON BOND—CUMULATIVE REMEDIES.

Where a conservator fraudulently sold land of her ward's, worth \$2,300 for \$1,500, for the purpose of thereafter buying it herself, the ward had a right of action against the conservator for the fraud, since one selling land under order of court so as to defraud the owner is liable at common law for the resulting damage, though a bond with surety may have been given for the proper execution of the order of sale; the remedy on the bond being cumulative.

3. ABATEMENT AND REVIVAL—DEATH OF PARTY—SURVIVAL OF CAUSE OF ACTION—FRAUD OF CONSERVATOR—SALE OF WARD'S LAND.

Under Pub. Acts 1903, c. 149, c. 193, providing that no right of action shall be lost or destroyed by the death of any person, but shall survive in favor of or against decedent's executor, where a conservator fraudulently sold land of her ward for much less than its real value, on the death of the ward thereafter her right of action survived in favor of her executor, and a recovery by him would inure to the benefit of her residuary legatees.

4. PARTIES—PARTICULAR CAPACITY—DESCRIPTION—EXECUTOR—WAIVER OF OBJECTION—"REAL PARTY IN INTEREST."

In an action against a conservator for fraudulently selling land of her ward, afterward deceased, brought by the ward's residuary legatees, one of whom was also her executor, plaintiffs were named in the suit as individuals, but the complaint averred the probate of the ward's will and the qualification of said plaintiff as her executor. There was no demurrer on the ground that the executor had no right of action individually; the only objection being taken orally on final argument. *Held* that, in view of Gen. St. 1902, § 621, authorizing the court to determine the controversy as between the parties before it where it can do so without prejudice to the rights of others, and where other parties are necessary to a complete determination to order them to be brought in, section 622, providing that no action shall be defeated by non-joinder of parties, and that new parties may be added at any time, and section 623, providing that, where an action has been commenced in the name of the wrong plaintiff, the court may allow another to be substituted or added as plaintiff, the trial court was warranted in disposing of the case upon its merits, and regarding the executor as a party of the record, both as an executor and individually, as he, being one of the residuary legatees, was a real party in interest within Rules of Court, Practice Book 1908, p. 238, § 126, and, if defendant had desired that he be made a party in his representative capacity, she could have moved to that effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 170.

For other definitions, see Words and Phrases, vol. 7, pp. 5938-5939; vol. 8, p. 7779.]

5. APPEAL AND ERROR—RIGHT OF REVIEW—PERSONS AGGRIEVED—RESIDUARY LEGATEES—EXECUTOR.

Where a conservator, under an order of the probate court, fraudulently sold her ward's land, the ward was the only person aggrieved thereby, and on her death her right of appeal from the decrees of the probate court passed to her executor, and if he did not avail himself of it the residuary legatees under her will could not.

6. JUDGMENT—AMENDMENT—NATURE OF DEFECT—FAILURE OF RECORD TO SHOW PROCEEDINGS.

Where a proper bond with surety was ordered and given by a conservator prior to the sale

of the ward's land under order of the probate court, and a proper finding of the necessity for a sale was made before the order of sale was passed, that these facts did not appear upon the original record of the proceedings, but were subsequently added by amendment, pending an appeal, did not render the decree void, and the defect was cured by the amendment, since every court of record has inherent power to make its record speak the truth.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 599.]

**7. INSANE PERSONS—PROPERTY—PROCEEDINGS FOR SALE—INCONSISTENT FINDINGS.**

In proceedings by a conservator for the sale of her ward's land, a paragraph in a draft finding, filed by the conservator, stating that whether there were claims against the ward's estate at her decease did not appear, which was marked "proven" by the trial court, was not inconsistent with the statement in the findings as finally made up that she owed no debts at her decease and had been incompetent to contract debts for a period before that time, as the paragraph marked "proven" referred only to the evidence then before the court, while the latter statement gave the court's conclusion from all the evidence.

Appeal from Superior Court, New Haven County; Howard J. Curtis, Judge.

Appeal by Francis Dunn and others from decrees of the court of probate, and action by Michael Dunn and others against Margaret Grant and others, for an injunction, damages, and other relief. The two causes were tried together in the superior court. From a judgment affirming the probate decrees, said appellants Francis Dunn and others appeal, and from a judgment for plaintiffs in the second action for damages, defendants therein appeal. Both judgments affirmed.

Terrence F. Carmody, for appellants. John O'Neill and William Kennedy, for appellees.

BALDWIN, C. J. In August, 1901, a conservator of Hanora Dalton, a widow about 74 years old, living in Naugatuck, was appointed by the court of probate for the district of Naugatuck, and from that time to her death, which occurred June 10, 1907, she was very weak mentally and physically. In 1898 she had made a will, making a specific bequest to Michael Dunn, a son-in-law, naming him as sole executor, and giving her residuary estate to him and his three minor children, Francis, Hanora, and Lorett, who were her grandchildren and only living descendants. Michael and his daughters lived in Pennsylvania. Francis lived with Margaret Grant of Naugatuck, who was a niece of Mrs. Dalton, and who knew the contents of the will. In 1905 she succeeded to the conservatorship, and took Mrs. Dalton to her own house, where she kept her till her death. In January, 1907, she filed an account as conservator, which was accepted, showing a balance due her, mostly for necessities furnished, of about \$500. Mrs. Dalton had owned a homestead in Naugatuck for many years, which at this time, as Margaret Grant well knew, was worth \$2,300, and was subject to mortgages of \$500, executed by pre-

ceding conservators. On May 27, 1907, her conservator applied to the court of probate for an order of sale of this real estate. It could not be beneficially divided for purposes of sale, and it was reasonably necessary to sell the whole of it. She was asked by the judge of probate if there were any interested parties out of the state, and told him that there was a son-in-law, Michael Dunn, whose residence she did not know. This was true, but she knew that she could learn it by asking Francis Dunn. May 31, 1907, was then set by the court for the hearing, and notice ordered and given by publication in a local newspaper. No one appeared on the day named, except the conservator, and an order of sale was passed. Shortly before, the judge of probate had told Francis Dunn that such a hearing was to take place, and asked him to notify his father. Francis replied that he would, but he did not. The conservator requested Francis, who was then nearly of age, to appear, but he refused. Michael Dunn and his daughters knew nothing of the application until after June 10th. In May and June, Hanora Dalton was very weak and obviously near death. The conservator was aware of this, and desired to hurry through a sale while Mrs. Dalton was alive, and also before Michael Dunn and his daughters came to Naugatuck on a visit which, as she knew, they planned to make in July. She had conceived a scheme of selling the land, free of incumbrances, for \$1,500, to some person with whom she might have an understanding that he was to reconvey to her personally for the same sum, and induced one Moulthrop, who was ignorant of its value, to purchase it on June 8th, on those terms and with that understanding. It did not appear that he knew that this would be injurious to Mrs. Dalton or profitable to Margaret. She made no reasonable effort to obtain a purchaser at a reasonable price, and acted negligently and fraudulently, in thus selling to Moulthrop. With reasonable efforts she could have sold it for \$2,300. He took immediate possession, but paid her only \$500, with which she discharged the mortgages. The deed to him was filed by her for record on June 10th, and about two hours afterward Mrs. Dalton died. On June 8th the conservator filed in the court of probate an account, which was accepted on that day, showing the receipt of \$1,500 for the land sold, and crediting herself with the \$500 paid on the mortgages, and other proper items. The balance stated as due from her was \$166.12. The judge of probate knew nothing of the value of the land, except what the conservator told him. On June 14th she filed a return of the sale to Moulthrop. A few days later the will was admitted to probate, and Michael Dunn qualified as executor. His three children, who are the sole heirs at law of Hanora Dalton, appealed from the several decrees of the court of probate relative to the ap-

pointment and proceedings of Margaret Grant as conservator, and on the same day joined with him in a suit against her and Moulthrop, charging them with fraudulent conspiracy to cheat Hanora Dalton and the plaintiffs by obtaining the title to the real estate of Mrs. Dalton for an inadequate consideration. The plaintiffs were named in the writ simply as individuals, but in the complaint it was averred: That Hanora Dalton died testate; that her will, a copy of which was annexed, had been duly probated; that Michael Dunn had duly qualified as executor; that the plaintiffs were the persons described in the will, and the only heirs of Mrs. Dalton; and that she had no creditors at the time of her decease. All the allegations of the complaint were found true in the judgment file, except that as to a fraudulent conspiracy. As to this, it was found that there was no such conspiracy; Moulthrop not being chargeable with any fraudulent intent, although Margaret Grant was.

The only person whom the law can recognize as injured by the sale was Hanora Dalton. The transaction was complete, and the deed filed for record, before her death. No return of sale was necessary to pass the title. *Bryan v. Hinman*, 5 Day, 211. She had a right of action against Margaret Grant for the damage resulting from the fraud of the latter in selling what was worth \$2,300 for \$1,500. One who sells land under order of court, on such terms as to defraud its owner, is liable to him at common law for the resulting damage, notwithstanding a bond with surety may have been given for a proper execution of the order. The remedy on the bond is cumulative, not exclusive. Mrs. Dalton's right of action survived in favor of Michael Dunn as the executor of her will. *Pub. Acts 1903, p. 149, c. 193*. A recovery by him, since she died owing no debts, would inure to the benefit of him and his three children, as her residuary legatees. They joined with him in an action for the damages suffered by Mrs. Dalton, and also for equitable relief. While the writ does not describe him as executor, the complaint does. There was no demurrer on the ground that he sued individually and had no right of action as such. The only objection on that score was taken orally on the final argument, and the court was, under the circumstances, well warranted in disposing of the cause, as it had been tried, upon the merits, and regarding Michael Dunn as a party on the record, both as an executor and an individual. The practice act and the rules framed under it swept away, in furtherance of the attainment of substantial justice, all the mere technicalities of the common law in regard to making and describing parties to actions. *Bowen v. National Life Ass'n*, 63 Conn. 460, 475, 27 Atl.

1059. Michael Dunn, individually, as one of the four residuary legatees, was a real party in interest within the meaning of the rules of court. *Practice Book 1908, p. 238, § 126*. If Margaret Grant, who is the only party appealing from the judgment for damages, had wished to make him assume more explicitly the additional position of an executor, on the face of the papers, she could have moved to that effect. *Gen. St. 1902, §§ 621, 622, 623*.

If any one was aggrieved by any of the decrees of the court of probate, it was Hanora Dalton, for all were passed before her death. Her right of appeal passed to her executor, but he has not seen fit to avail himself of it. His children could not. In their motion for an appeal, they alleged that the return of sale was accepted and approved by the court of probate on June 14th, which was after the death of Mrs. Dalton. This, if true, gave them as her heirs at law and residuary devisees a right of appeal from the decree. Their reasons of appeal reiterated this statement, but it was traversed and has been found untrue. All the other decrees, as against the appellants, were good, because they were not legally aggrieved by them. The result to which the superior court came therefore was right, and it is unnecessary to inquire whether they were fully justified, since there was no appeal from any of them by the only party who could challenge their validity, the executor.

The finding shows that while a proper bond with surety was ordered and given by the conservator, and a proper finding of the necessity for a sale made, before the order of sale was passed, these facts did not appear upon the original record of the proceedings, but were added by amendment, pending the appeal. Their omission did not render the decree void, and the defect was effectually cured by the amendment. Every court of record has inherent power to make the history which it keeps of its proceedings speak the truth. *Tyler v. Aspinwall*, 73 Conn. 493, 496, 47 Atl. 755, 54 L. R. A. 758; *Taylor v. Gillette*, 52 Conn. 216, 218.

A paragraph in a draft finding filed by Margaret Grant was marked "proven" by the trial court, which states that whether there were claims against Mrs. Dalton's estate at the time of her decease did not appear. This is not inconsistent with the statement in the finding, as finally made up, that she owed no debts at that time, and had been incompetent to contract debts since August 16, 1901. The paragraph marked "proven" refers to the evidence before the court. The statement in the finding gives the conclusion of the court from the evidence, and all the evidence.

There is no error on either appeal. In this opinion the other Judges concurred.

(221 Pa. 201)

## In re KEENE'S ESTATE.

(Supreme Court of Pennsylvania. May 11, 1908.)

## 1. JUDGMENT—FORMER DECISION—RES JUDICATA.

Where the construction of the residuary clause in a will as it affected the ultimate interest of legatees was not before the court for consideration on prior appeals, nothing decided therein concluded the rights of the persons entitled to a distribution of such residuary estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1263-1268.]

## 2. WILLS—CONSTRUCTION—PARTIAL INTENTACT.

A will will not be construed so as to create an intestacy with reference to a part of testatrix's property if such result can be avoided by reasonable interpretation, especially where, after having made specific bequests and devises covering a large part of the estate, there is a clause disposing of the residue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 964.]

## 3. SAME—"CONDITIONS."

Testatrix bequeathed the income of \$30,000 to her niece for life, and, after her death, to her children, if any, absolutely, but, if she died without issue, the principal to go to two brothers named, the interest only for their use and to their children, lawful issue, absolutely. The will also contained a clause bequeathing the residue to the niece, subject to the same conditions as the legacy, the interest to be used for her benefit for life, the principal to go to her children, lawful issue, absolutely, but, if she died unmarried, she should have power to devise it to whichever of her brothers she considered most worthy to inherit, the interest only to go to them, the principal to their children. The niece died without issue and without having exercised the power of appointment. *Held*, that the principal of the residue passed to the children, lawful issue, of the two brothers who took the \$30,000 legacy absolutely; the word "conditions," as used in the residuary clause, being construed to mean the same as "provisions" under which the niece took the pecuniary legacy.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1394-1400.]

## 4. POWERS—EXERCISE—RIGHTS OF BENEFICIARIES.

Possible beneficiaries in the event of a discretionary power being exercised in their favor can claim no rights as cestuis que trustent before the exercise of the power.

Appeal from Orphans' Court, Philadelphia County.

Judicial accounting by Eli Kirk Price, as executor of the will of Ellen Mitchell, deceased, in which the executor claimed the right to distribute the balance of the estate of Sarah Lukens Keene of which decedent Mitchell had enjoyed the income for life to Mrs. Mitchell's residuary legatee, the Keene Home, and, in case this claim should not be sustained, that one-quarter interest passed on the death of testatrix, Mitchell, to the next of kin of Sarah Lukens Keene, as intestate property. Both claims were rejected by the auditing judge, who awarded the net balance for distribution to the issue of James Bryden Keene's children or their legal representatives, and exceptions to the adjudication being dismissed, and the adjudication confirmed by the court in banc, the executor appeals

and assigns error in the dismissal of exceptions to the adjudication. Affirmed.

Exception to adjudication. From the adjudication it appeared that the testatrix died May 11, 1863, leaving a will dated November 18, 1843, duly probated, whereby, after making certain specific bequests to her niece, Ellen Keene (afterwards the wife of Dr. S. B. Wylie Mitchell), she provided as follows: "I also bequeath to this dear niece (the only surviving daughter of my brother, Jesse Lukens Keene, deceased), whom I have educated, the sum of thirty thousand dollars, to be invested in ground rents, or bonds and mortgages on real estate, the interest to be paid to her only, or her power of attorney, whether married or single, during her life, and after her death to her children, if any, absolutely; but if she dies without issue, the principal to go to her brothers, Henry and James, namely, the aforesaid investment of thirty thousand dollars in ground rents and bonds and mortgage, the interest only for their uses; but to their children, lawful issue, absolutely. But if she marries without my consent, or after my death, to any person whom I did not approve during my life, then this devise shall be null and void, and she shall only receive ten thousand dollars, subject to the same investment of ground rents or bond and mortgage, the interest only to be paid to her alone, or her power of attorney, and after her death to her children absolutely. I have made this clause, not from any fear of its probable necessity, but from prudence and precaution. If she dies without lawful issue, this sum to go to her brothers in the same manner as specified above in the larger sum." The residuary clause of the will is as follows: "The residue of my estate, real and personal, I give and bequeath to my dear and affectionate niece, Ellen Keene, subject to the same conditions as my legacy of thirty thousand dollars specified in a former part of this instrument, the principal to be invested in ground rents or in the bank stock considered safe, but preferable in bond and mortgage on real estate, the interest to be enjoyed by her during her life, the principal to devolve to her children, lawful issue, absolutely; if she dies unmarried, she has power to devise it, to whichever of her brothers she will consider most worthy to inherit her bequest and mine, the interest only to them, to their children, lawful issue, absolutely."

The testatrix was survived by her niece, the said Ellen Keene, who had married Dr. Mitchell in her aunt's lifetime and with her approval, two nephews, Henry Edgar Keene and Lenox R. Keene, brothers of Mrs. Mitchell, and six children of another nephew, James Bryden Keene, a deceased brother of Mrs. Mitchell. The two surviving brothers died in the lifetime of Mrs. Mitchell, Henry without issue, Lenox leaving two children, both of whom also died in Mrs. Mitchell's lifetime, one leaving issue who survived her.

All the children of her brother James also died in her lifetime, but some left issue still living. Mrs. Mitchell survived her husband and died without issue February 12, 1905, and without being able to exercise her power of appointment of the residue of her aunt's estate, which limited her selection to her brothers and their children, all of whom had died in her lifetime, but leaving a will, upon which letters testamentary were granted to Eli Kirk Price, the executor therein named, and whereby, after making sundry specific bequests, all of which have been paid, she left the residue of her estate to the Keene Home, a charity created by another provision of her aunt Sarah Lukens Keene's will. Upon Mrs. Mitchell's death her executor filed an account of her administration of the residue of Sarah Lukens Keene's estate, of which she had "enjoyed" the "interest" "during her life," as provided in her aunt's will, and at the audit claimed on behalf of the Keene Home, Mrs. Mitchell's residuary legatee, the entire balance for distribution, or, if it should be held that an intestacy of the principal of the residue under Sarah Lukens Keene's will had occurred, a one-quarter interest in the balance as the legal representative of one of the four shares which would have passed to her next of kin at the death of the testatrix. The auditing judge rejected both claims and awarded the entire net balance for distribution to the issue of James Bryden Keene's children or their legal representatives. Exceptions to the adjudication were dismissed, and the adjudication was confirmed absolutely by the court in banc.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William A. Glasgow, Jr., for appellants.  
George L. Crawford, for appellees.

ELKIN, J. In 1843, Sarah Lukens Keene, an intelligent and discriminating person, being possessed of an ample fortune, made a will, wrote it herself, disposing of her estate, consisting of real and personal property. She died in 1866, and her will was in due time admitted to probate. It has been the cause of much litigation as will appear by reference to our own cases, which show that in one form and another questions involving the real or supposed rights of persons directly or contingently interested in its provisions have arisen in three different proceedings. It was suggested at the argument that the question now raised had already been decided by this court in the former cases, and is therefore *res adjudicata*. We have concluded, however, after a careful examination of our former cases, that the construction of the residuary clause as it affects the ultimate interests of legatees was not before the court for consideration, and nothing decided in those cases is conclusive of the rights of the parties here. It is true that some of the views ex-

pressed by the learned justices who wrote the opinions in the former cases relate to the construction of the residuary clause, but nothing therein decided was intended to be a final determination of the rights of ultimate residuary legatees. That the question now raised is a close one, not free from difficulty, and that the clauses of the will under consideration are susceptible of several different interpretations, radically differing in results, is made apparent by a review of the decisions of this court, the opinions of the courts below, and the argument of learned counsel in dealing with this subject. In Keene's Appeal, 60 Pa. 504, the only question decided was that the petitioner, who claimed to have a possible or contingent interest under the will, had no such present interest, immediate or remote, as to give him standing to require an accounting and settlement of the estate. This case was decided in 1869, at which time Mr. Justice Agnew, forecasting the difficult questions that might subsequently arise, but nothing in that case demanding their decision then, in delivering the opinion of the court, said: "It is not necessary that we should determine the rather difficult question what ultimate interest in the estate of Sarah L. Keene the appellant might take under the will."

In Austin Keene's Appeal, 64 Pa. 268, the petitioner taking advantage of the act of 1869, passed after the opinion in the former case had been handed down, and evidently intended to give relief from the consequences of that decision, filed his petition as an alleged owner of a contingent interest in the personal property of the testatrix, asking for a citation requiring the executrix to file an account. The court below dismissed the petition and refused the citation. On appeal this court reversed the decree of the court below, and in doing so pointed out that under the act of 1869, which in terms gave the owner of any contingent interest in the personal property of a decedent the right to require an accounting, the petitioner had a standing to ask for a citation for this purpose. The only question before the court in that case was whether, under any of the provisions of the will, the petitioner had such a possible contingent interest as to give him standing under the act to require an accounting. It was decided that he had, and in arriving at that conclusion the court reviewed the situation as it then appeared, freely discussing several possible contingencies that might arise, but did not undertake to finally determine the ultimate interests of the residuary legatees. Mr. Justice Sharswood, who delivered the opinion of the court in that case, and whose views on any question of law are always entitled to most respectful consideration, did discuss many contingencies that might arise in the final distribution of the estate, and suggested that if Ellen Keene Mitchell should die without issue or without exercising the power of appointment, which she did, there would be



an intestacy as to the residuum which would go to the next of kin. It is clear, however, that this was intended only as an expression of opinion on the possible and probable interpretations of the residuary clause when that question should arise, and was not intended to be a final conclusive determination of the rights of the parties either presently or remotely interested.

In Brock's Appeal, 1 Penny. 36, a different question arose, although incidentally the interpretation of the will was involved. Certain real estate of which Sarah Lukens Keene, the testatrix, died seised, was situate in Blair county, and the surviving executrix as testamentary trustee under a decree of the orphans' court of that county sold the same under the act of 1853. Upon a distribution of the proceeds arising from that sale several claimants appeared, among others Brock, who claimed a right to participate in the distribution. His claim arose in the following manner: Henry Edgar Keene, a nephew of the testatrix, and brother of Ellen Keene Mitchell, died in 1875, never having had any children, and, no doubt, acting on the theory that, inasmuch as these lands had not been specifically devised in the will of his aunt, there was as to that particular real estate an intestacy, he therefore by will devised his interest therein as an absolute estate to his wife, who subsequently conveyed the same in fee to Brock. Counsel for Brock contended that the testatrix died intestate as to these lands, and that his predecessor in title, Henry Edgar Keene, in the distribution inherited as next of kin a one-fourth interest in them. The learned court below, President Judge Dean presiding, held that there was no intestacy, disallowed the claim of Brock, and awarded the fund to the children and issue of Lenox R. Keene and James Bryden Keene. Why the fund was awarded to the children and issue of the two brothers named does not appear in the report of the case, and we have no means of knowing why these particular children were awarded the fund. The case turned on the right of Brock to participate, and not on questions arising between the Keene heirs. On appeal this court, affirming the court below, said: "The language of the will limiting the interest of Henry E. Keene to a life estate is sufficiently clear. The fund in contention is disposed of in the residuary clause. Henry's interest being thus restricted, he had none in the residuary estate to devise to his wife and she none to assign to appellant." As the situation then stood, it was determined that there was no intestacy as to the real property of the testatrix, certainly none arising from failure to specifically devise the real estate in question, and that the entire estate, not specifically bequeathed or devised, passed into the residuum to be disposed of under the residuary clause. While this case is authority for the proposition that the estate of the testatrix was disposed of by her will

either in specific bequests and devises, or by passing into the residuum, and is strongly persuasive that an intestacy could not occur under the provisions of the residuary clause, yet that exact question was not before the court, and was not, therefore, finally decided. We are now confronted with the precise "difficult question" suggested in Keene's Appeal, in 1869, discussed, but not decided, in Austin Keene's Appeal in 1870, and considered, but not finally determined, in Brock's Appeal in 1881. What did the testatrix mean when she said in the residuary clause of her will, "The residue of my estate, real and personal, I give and bequeath to my dear and affectionate niece, Ellen Keene, subject to the same conditions as my legacy of thirty thousand dollars, specified in a former part of this instrument, the principal to be invested in ground rent or in the bank stock considered safe, but preferable in bond and mortgage on real estate, the interest to be enjoyed by her during her life, the principal to devolve to her children, lawful issue, absolutely; if she dies unmarried she has power to devise it to whichever of her brothers she will consider most worthy to inherit her bequest and mine, the interest only to them, to their children, lawful issue, absolutely"? While the question involved here grows out of a distribution of the personal property in the residue of the estate, and depends largely upon the construction of the residuary clause, yet there are other clauses which must be taken into consideration in arriving at a proper construction of the residuary clause.

Four different constructions are suggested as possible under these clauses of the will: First, that an absolute estate vested in the favorite niece, Ellen Keene Mitchell; second, that Ellen Keene Mitchell took a life estate with remainder to her children, if any, and on her death without issue, and without exercising her power of appointment, to the children of all three of her brothers, Henry, James, and Lenox, appointees of the power; third, on the death of Ellen Keene Mitchell, without issue and without having been able to exercise the power of appointment, there was an intestacy as to the remainder; and, fourth, as giving Ellen Keene Mitchell a life estate in the residue with remainder to her children, if any, absolutely, and on her death without issue, and without having exercised the power of appointment, or being unable to do so on account of marriage, to the children of Henry Keene and James Keene, two brothers of Ellen Keene Mitchell and the legatees named in the prior clause of the will, to which reference was made by testatrix in the residuary clause. The first suggestion is not tenable. In terms the legacy of \$30,000 and the bequest of the residuary estate is given to Ellen Keene Mitchell for life, and it is expressly provided that only the interest shall be paid to her, no matter whether married or single, during her life, and at her death it was to go to her children absolutely. The

reasons suggested by Mr. Justice Sharswood in Austin Keene's Appeal amount to a demonstration that under our authorities Ellen Keene Mitchell only took a life estate, and to this can be very pertinently added what was said by Judge Penrose of the orphans' court, who delivered the opinion of the court in banc in the present case, wherein it is stated: "With regard to the suggestion that the niece, under the gift to her of a life estate and at her death to her lawful children ('children, lawful issue') took the entire estate, but little need be said; for, apart from the fact that the Supreme Court has already decided to the contrary, as her life estate was equitable and that to her children legal, the two would not coalesce even if the remainder had been to heirs or issue (Boyd's Estate, 199 Pa. 487, 49 Atl. 297); and, if both had been legal or both equitable, the words 'children, lawful issue,' are words of purchase, which are not to be changed into words of limitation by the use of the word 'devolve' which precedes them, a word very different from the word 'descend,' which implies an estate of inheritance in the parent."

We find no authority to support the second proposition. This position assumes that the power of appointment in favor of the brothers and their children amounted to a trust in favor of the possible appointees, but certainly this cannot be the law, for the power was only to be exercised in the event of Ellen Keene Mitchell dying unmarried, and was not an absolute imperative direction to make an appointment, and, even if she remained unmarried, under the power she could designate "whichever of her brothers she will consider most worthy to inherit her bequest and mine." It would seem necessarily to follow that possible beneficiaries in the event of a discretionary power being exercised in their favor can claim no rights as cestuis que trustent before the exercise of the power. In the present case the power was never exercised and no rights vested in possible contingent beneficiaries under an unexercised discretionary power of appointment.

As to the third proposition, it has been well said that every intestacy is to be made against holding a person to die intestate who sits down to dispose of the residue of her property. In arriving at the intention of a testator, courts do not look with favor upon a construction of a will which leads to an intestacy, and especially is this true where, after having made specific bequests and devises covering a large part of the estate, there is a residuary clause evidencing an intention to dispose of every part of it. An intestacy is never favored, and a construction should not be adopted which leads to such a result if it can be avoided by a reasonable interpretation of the will. In the present case we think the testatrix did not intend to die intestate as to any part of her estate. She seems to have thought of and arranged for every possible contingency that might

arise. Her intent is clearly manifested in the bequest of \$30,000 to her niece, and a similar disposition of the residuum is made apparent without doing violence to any of the words used. As to the \$30,000 legacy, she provides that the interest shall be paid to her niece during life and after her death it was to go to her children, if any, absolutely. Her first concern was for the comfort of her favorite niece, which she undertook to provide for by giving her the income of \$30,000. At the time of the execution of the will the niece was unmarried, and the aunt, anticipating her marriage, and desiring to provide for her children, if any, gave them the absolute estate upon the death of the niece. She did not stop here, but, foreseeing that her niece might die without issue, the testatrix provided for that contingency by giving the income to her brothers, Henry and James, during their lives and the principal was to go absolutely to their children. Again, in order to take care of another contingency, the testatrix provided that the niece, if she married without the consent of the aunt, should only have the income of \$10,000 and in that event the disposition of the \$10,000 was to be the same as of the larger sum. Here, then, is presented a case in which an intelligent testatrix by her will has provided for almost every possible contingency that might subsequently happen, every part of which shows an intent to dispose of the \$30,000 absolutely. When this testatrix comes to dispose of her residuary estate, keeping in mind her favorite niece for whom she manifests great affection, and still desiring to more bountifully care for her, she provides that the residue of her estate, real and personal, shall be enjoyed by the niece "subject to the same conditions as my legacy of \$30,000 specified in a former part of this instrument." It seems perfectly clear that the testatrix in providing for her niece had in mind, not only the legacy of \$30,000, but the residuary estate as well, and that it was intended the residuary estate should be held and enjoyed by the niece subject to what she terms the same "conditions" as those under which she took the former legacy. We concur with the learned court below in the view that the word "conditions" in the residuary clause was not a technical term, but was used in its popular sense as signifying provisions, or in the same manner. Such a construction gives effect to every part of the will, avoids an intestacy, does no violence to the language used, and in our opinion carries out the manifest intention of the testatrix. It must not be overlooked, as suggested by the learned court below, that the word "conditions" is used in the plural, not in the singular, and this is significant as an answer to the contention of the learned counsel for appellant wherein it is said the only condition upon which the niece took the \$30,000 legacy was that she should not marry without the consent of the testatrix. When the testatrix

used the word "conditions," she meant more than one condition, and in our opinion clearly indicated thereby an intention to couple the residuary bequest with all the "conditions"; that is to say, all the provisions contained in the former clause of the will to which it referred.

As to the fourth proposition, we concur in the conclusion reached by the auditing judge which was affirmed by the court in banc, and that is that Ellen Keene Mitchell took a life interest in the residuary estate, subject to the same "conditions," which we construe to mean the same provisions, as she took the legacy of \$30,000, and, the niece having died without issue and without having exercised the power of appointment, the principal went to the children, lawful issue of her brothers, Henry and James, or to the issue of the survivor of them or their legal representatives, absolutely.

Decree affirmed.

(221 Pa. 171)

BURT v. BURT et al.

(Supreme Court of Pennsylvania. May 4, 1903.)

1. INSURANCE—LIFE POLICY—BENEFICIARIES—EVIDENCE.

A life insurance agent, who procured insured's policy, filled the blanks in the application at insured's dictation, making insured's nephews and nieces beneficiaries. This application was forwarded to the insurance company, which by mistake wrote the policy payable to insured's estate. The policy was received by the agent, who, without reading it, handed it to insured, and he, without reading it or knowing the mistake, placed it in his safe, and subsequently, on several occasions, told the agent he was pleased that he had made it payable to his nephews and nieces. He also repeatedly told other disinterested witnesses that his nephews and nieces were the beneficiaries, such statements covering a period to within a few months of his death; and the widow had in the presence of other witnesses reproached insured for making the policy payable to his nephews and nieces. *Held*, that the nephews and nieces were entitled to the proceeds of the policy.

2. EVIDENCE—PAROL EVIDENCE—WEIGHT.

Parol evidence to vary a written instrument must be so clear, precise, and indubitable as to carry conviction to the jury that the witnesses are credible and the facts distinctly remembered and accurately stated, and to the court that if the facts alleged are true the matters in issue are distinctly and definitely established.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2448.]

Appeal from Court of Common Pleas, Monroe County.

Interpleader to determine the ownership of the proceeds of a life insurance policy by Ida Burt, as executrix of the will and testament of William H. Burt, deceased, against Margaret Burt and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The facts are stated in the prior opinion of the Supreme Court. See 218 Pa. 198, 67 Atl. 210.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Henry J. Kotz, for appellant. Wilton A. Erdman and A. Raiguel Brittain, for appellees.

FELL, J. The issue in this case was framed to determine the right to money paid into court by a life insurance company. In the application for the policy the nephews and nieces of the insured were named as the beneficiaries in the event of the death of the insured before the expiration of the endowment period. The policy was issued payable to the insured, his executors, administrators, or assigns. On a former appeal it was held that in the absence of satisfactory evidence of mistake in writing the policy the rights of the parties were to be determined from the writings in evidence, and that the designation of beneficiaries in the policy prevailed over that in the application. See *Burt v. Burt*, 218 Pa. 198, 67 Atl. 210. The order directing judgment to be entered for the plaintiff on the reserved question was subsequently rescinded on application of the defendants, and a new venire was awarded to give them an opportunity to prove that there had been a mistake in writing the policy of which the insured was at no time aware.

At the second trial the defendants assumed the burden of proving that the insured intended that his nieces and nephews should be named as the beneficiaries and that he was under the belief that their names appeared in the policy. The only question raised by this appeal relates to the sufficiency of the proof offered. It was shown by the agent who procured the policy that he filled up the blanks in the application by the direction and at the dictation of the insured; that he forwarded the application to the company and received the policy; that without reading it he handed it to the insured, who without reading it placed it in his safe; and that subsequently on several occasions the insured had told him that he was pleased that he had made the policy payable to his nieces and nephews. Four other witnesses, wholly disinterested, testified that the insured had repeatedly told them that his nieces and nephews were the beneficiaries in the policy. These statements by him covered nearly the whole time he had the policy and extended to within a few months of his death. Other witnesses testified that his widow, the plaintiff in this case, had in their presence on different occasions reproached the insured for making the policy payable to his nieces and nephews.

There was evidence of statements made by the insured in regard to the policy that were in conflict with those testified to by the defendant's witnesses. But it was not necessary to the defendant's case that the testimony to show a mistake in writing the policy should be uncontradicted or that it should establish the fact with absolute certainty. The standard of such proof is that it should be clear, precise, and indubitable, in the sense that it carries conviction to the mind. Ott

v. Oyer's Executrix, 106 Pa. 6; Boyertown Nat. Bank v. Hartman, 147 Pa. 558, 23 Atl. 842, 30 Am. St. Rep. 759. The rule is clearly stated in the opinion in Cullmans v. Lindsay, 114 Pa. 166, 6 Atl. 332: "Parol evidence to vary a written instrument must be so clear, precise, and indubitable as to carry conviction to the jury that the witnesses are credible and the facts distinctly remembered and accurately stated, and to the court that if the facts alleged are true the matters in issue are definitely and distinctly established." The case was very carefully submitted, with proper instructions, and we find no error in the record.

The judgment is affirmed.

(221 Pa. 186)

In re MCCAHAH'S ESTATE (No. 1).

(Supreme Court of Pennsylvania. May 4, 1908.)

1. MASTER AND SERVANT — WRONGFUL DISCHARGE—RIGHT TO SUE—TENDER OF PERFORMANCE.

The right of a servant discharged before the expiration of her contract term to recover for breach of contract either at once or at the termination of the contract term depends on her ability to establish that she had been wrongfully discharged, and that she had tendered performance thereafter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 42.]

2. APPEAL AND ERROR—FINDINGS BY COURT—REVIEW.

A finding of fact by the orphans' court, based on sufficient evidence that a claimant against a decedent's estate under a contract of employment had treated the contract as rescinded, will not be reversed on appeal in the absence of manifest error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

Appeal from Orphans' Court, Philadelphia County.

Claim of Annie Gertrude Taggart against the estate of Mary C. McCahan, deceased. From a decree of the orphans' court of Philadelphia county dismissing exceptions to an adjudication against claimant she appeals, and assigns the dismissing of her exceptions as error. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Francis Shunk Brown, E. L. Hallman, and Robert S. Bright, for appellant. John G. Johnson, Frederick S. Drake, and John Weaver, for appellee.

ELKIN, J. The assignments of error in this case, either directly or inferentially, relate to findings of fact by the learned auditing judge, and this appeal is intended to challenge the correctness of those findings. It is earnestly contended that there was error in finding as a fact that the appellant had treated the contract relied on as rescinded, and in not finding that she was wrongfully prevented from performing her part of the

contract of service. It is contended for appellant that she had a contract of employment for a fixed period, and was wrongfully discharged before the expiration of the period, and that, by reason of the wrongful discharge, she could either sue for a breach of the contract at once or wait to the end of the contract period, even if she had not performed the service; her readiness to serve being considered the equivalent of performance within the meaning of the law. No doubt this is a sound rule of law, but it is predicated upon two essential conditions: First, that the servant had been wrongfully discharged; and, second, that she had tendered performance after the wrongful discharge. It will be observed that both conditions are dependent upon the facts, which, in the present case, have been found against appellant in these respects. The case, therefore, comes within the well-established rule that findings of fact by a court below will not be disturbed by an appellate court except for manifest error, nor is it sufficient to say that, if the testimony had been before us in the first instance, we might have found differently. Lazarus's Estate, 142 Pa. 104, 21 Atl. 792; Plankinton's Estate, 212 Pa. 235, 61 Atl. 888.

We do not find such manifest error in the essential findings of fact as would justify our disturbing the conclusion reached by the learned court below.

Assignments of error overruled and decree affirmed, costs to be paid out of the estate.

(221 Pa. 188)

In re MCCAHAH'S ESTATE (No. 2).

(Supreme Court of Pennsylvania. May 4, 1908.)

1. APPEAL AND ERROR—REVIEW—FINDINGS OF FACT.

A finding of fact by an auditing judge of the orphans' court, based on sufficient evidence and confirmed by the court in banc, that a claimant for services against a decedent's estate had a contract of employment with the decedent, will not be reversed in the absence of manifest error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

2. WITNESSES — COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED.

On an issue as to the existence of a contract by which it was claimed decedent agreed to compensate claimant for services rendered and to be rendered, an attorney at law was competent to testify to declarations made by decedent with reference to a contract of employment which decedent had made with claimant, and as to instructions received from decedent to insert in her will, which he had subsequently drawn, certain terms of the employment contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 670.]

3. WILLS—CONDITIONS — FILING CAVEAT—"CONTEST."

The mere filing of a caveat did not constitute a "contest" of a will within a provision directing that any of the legatees contesting or attempting to contest the will should lose their legacies.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, p. 1494.]

Appeal from Orphans' Court, Philadelphia County.

Claim by Anna Gertrude Taggart against the estate of Mary McCahan, deceased. From an order dismissing exceptions to an adjudication allowing the claim, Maria L. Taggart appeals, and assigns errors in dismissing exceptions to the adjudication. Affirmed.

The material portions of the adjudication of Dallett, J., in the trial court, were as follows:

"The testatrix died November 12, 1905, leaving a will whereby, after making certain pecuniary bequests as set out in the petition for distribution and giving Robert McCahan her 10 shares of Francisco Sugar Company stock and her sister, Maria L. Taggart, her jewelry, household furniture, etc., and 100 shares of her stock in the W. J. McCahan Sugar Refining Company, she gave to her trustee 70 shares of the McCahan Sugar Company stock in trust, to pay the income to her brother, David Taggart, for life, and upon his death to pay the principal to his children, etc., and gave 30 shares of said stock to her trustee in trust, to pay the income to her niece, Anna G. Taggart, for life, and upon her death to pay the principal to the issue of the said Anna G. Taggart, etc. The residue of her estate she gave to her sister, Maria L. Taggart, and her brother, David Taggart, in equal shares. She appointed her sister, Maria L. Taggart, executrix and trustee, and provided that in the event of any of her legatees contesting, or attempting to contest, her will, such legatees should take no part of her estate, but their legacies should fall into the residue. Messrs. Hallman, Bright, and Brown presented a claim on behalf of Anna Gertrude Taggart for the value of 100 shares of the W. J. McCahan Sugar Refining Company stock, with interest from 1901, and testimony in reference to the claim was taken. It appears therefrom that in the fall of 1900, on returning from a trip to Europe, the claimant went to live with her aunt, the testatrix, and continued to live with her until the end of July, 1902. Having studied physical culture and dramatic art, she had matriculated in the Women's Medical College, but she gave up these pursuits on her aunt's promise that, if she would live with her until her death, she would give her 100 shares of McCahan sugar stock. On May 2, 1902, the testatrix executed a will by which she gave to her niece, the claimant, 'in consideration of my love and affection for her, and of her faithful services to me,' 100 shares of the W. J. McCahan Sugar Refining Company stock, and, in addition, after certain pecuniary bequests and the gift of the income from 100 shares of said stock to her sister, Maria L. Taggart, for life, gave her said niece the residue of her estate, including therein the remainder interest in 50 shares of the stock, the income of which she had bequeathed to her sister for life.

The testatrix, who had been afflicted with heart trouble, on July 9, 1902, suffered a stroke of apoplexy, and cried for her sister, the present accountant, who was sent for. The sister came in answer to the request, and assumed charge of the house and of the patient, and displaced the niece, who, being refused access to her aunt's room, and shorn of her power over the household, left the house. On November 12, 1902, the testatrix executed another will, that admitted to probate, the provisions of which are hereinbefore set out. The contest over Mrs. McCahan's money evidently began long before her death. From 1900 until 1902 the niece was in favor, but in 1902 the sister superseded the niece in the testatrix's affections, and continued to occupy the close relationship until her death. Disappointed at not receiving by the will probated the 100 shares of sugar refining company stock, the niece now claims the value of that stock under a contract with the testatrix.

"The first question, therefore, is: Was there a contract? Mrs. Mogee, Sarah L. Gardiner, Elizabeth Hart, and Frederick H. Stillwagen, the attorney who prepared the first will, and a competent and most important witness (Dowle's Estate, 135 Pa. 210, 19 Atl. 936; Padelford's Estate, 190 Pa. 85, 42 Atl. 351), have testified to the testatrix's declarations that she had promised the 100 shares of stock. Mr. Stillwagen testified: 'She said that Miss Anna Taggart had come to her only for a little while, and had since wanted to go back and continue her studies and ultimately read medicine, but she said: "I have persuaded her not to do that. I told her, if she would stay with me and live with me as long as I lived, I would see her well taken care of." She said: "I have promised her 100 shares of the sugar stock," and she said: "Some day I want to draw a will, and I want that put in the will."' Mr. Stillwagen subsequently prepared the will, dated May 2, 1902. Mrs. Mogee testified that, when the testatrix came to her to ask for a loan, she (the testatrix) declared: 'You give me the \$500 and you will be well secured, as I have promised to give my niece 100 shares of the William McCahan sugar stock as soon as the executors of my deceased husband's estate turn it over to me.' And again: 'She told me that Anna had given up her medical pursuits and every source of income, and had gone to live with her, to remain with her as long as Mrs. McCahan lived.' And, again, that, when Mrs. McCahan paid her the money she owed, she said, 'I have settled up with everybody;' and Miss Taggart, Miss Anna, said: 'Everybody, aunt, but me. You have not given me my 100 shares.' She said: 'That is all right; I will fix that, Anna.' Mrs. Gardiner, the seamstress employed by Mrs. McCahan, testified: 'She told me she had taken Anna away from her studies and she intended to do what was right by her;

that she intended to provide for her so she would not have to teach any more. She said she was not strong enough to teach, and not strong enough to study medicine and practice. She did not wish her to do it, and she was going to provide for her so she would not have to do anything after her death.' And, again, that when she told her niece to draw two checks, one for herself and one for her sister Maria, the claimant, said to her: "'Aunt, never mind my check; draw Maria's.'" She says, "I have provided for you," and Anna said, "In what way; do you mean the 100 shares?" And she said, "Yes." And Miss Hart testified: 'She [Mrs. McCahan] went on to tell me that she had persuaded Anna to give up her studies and to come there to live, that she would always provide for her, and spoke about Maria and Sarah being jealous, and how provoked they would be, and Anna told her, she said, "Aunt, won't they be mad when they find out you gave me the 100 shares?"' and Mrs. McCahan said, "Yes, they would." This testimony, in the opinion of the auditing judge, coupled with proof of the fact that the claimant did live with and perform certain services for the testatrix until the end of July, 1902, clearly establishes a contract. *Thompson v. Stevens*, 71 Pa. 161; *Harper's Estate*, 196 Pa. 137, 46 Atl. 302.

"The character of the services, in view of the contractual relation, is not of the greatest importance, but while Miss Hamilton (a friend of the testatrix who visited her not less frequently than once a month) testified with regard to the claimant: 'The only thing I saw was her having a good time in every way. The only thing she did was to help Mrs. McCahan spend her money. That is the only thing I saw her do.'—Mrs. Moge, who had been introduced to the testatrix by the claimant, and whose visits averaged one in ten days for a considerable period, testified that the complainant 'did everything from kitchen maid to trained nurse.' Mr. Stillwagen, who saw her on several visits, said that 'I should call her a nurse to her aunt,' and Miss Gardiner, that the claimant performed 'all the service that a nurse would do for her. She bathed her limbs (they were very much swollen and had to be bathed every morning), combed her hair, dressed her, and did everything for her, besides having charge of the house.'

"The question to follow naturally is: Has the claimant fulfilled her part of the contract? And the answer necessarily is 'No.' But it is clear that she was not permitted to complete it. Dr. Kelley, called by the accountant, testified in answer to the question: 'Will you give us a reason why you objected to Miss Anna Taggart coming into the room and did not object to Maria coming into the room?' 'Because during my visits when Miss Anna Taggart came into the room she had a deleterious influence.' And Miss Rambo

testified: 'Miss Taggart inquired if she might enter the room. She first asked the doctor to let her in, and he told her she could not go in. She asked Miss Maria Taggart to let her go in, and she told her she couldn't let her go in, as her sister was too ill,' and in answer to Mr. Johnson's question, 'Do you know any reason why there was a difference (why the testatrix was not too ill to see her sister and was too ill to see her niece)?' answered: 'Yes; because Mrs. McCahan asked me if I would not keep her niece out of the room.' And Miss Gardiner testified that Miss Maria Taggart had made it so unpleasant for the claimant by taking all power out of her hands, and 'instructing the servants not to obey any orders of hers,' that she could not stay. Having performed a portion of her contract, therefore, and further opportunity to complete performance being refused by her aunt, two courses were open to her: The one to insist upon an opportunity to do her part, and the other to accept the rescission of the contract and withdraw. That she chose the latter course appears without doubt from the letter of her then attorney, Mr. Pepper, who wrote on July 29, 1902: 'Miss Taggart reports the situation of affairs at 1516 South Sixth street as being intolerable to her. She accordingly expects to withdraw from the house in two or three days. She will leave, whether or not she is permitted to see her aunt, Mrs. McCahan, again. She prefers, however (since she took up her residence at the house at Mrs. McCahan's invitation), to terminate her residence at Mrs. McCahan's personal request.' *Moorhead v. Fry*, 24 Pa. 37.

"To what compensation, under these circumstances, is she entitled? She apparently never saw her aunt after July, 1902, although she lived until November 12, 1905. Her compensation was not due under the contract until her aunt's death. She perhaps expected, but it does not appear that she was notified, that she would receive it, but when the will is probated she finds that instead of 100 shares of the sugar company stock absolutely, worth in 1901, according to the testimony, \$200 per share, she only receives 30 shares for life, with some remainder interest in 70 shares bequeathed to her father for life. Is this a sufficient compliance on the part of the testatrix? Figuring roughly, her life estate is worth but one-third of \$6,000, or \$2,000, while figured on her contract, as subsequently determined by the years testatrix survived, she earned for about 21 months out of 60 months, for which she was to be paid \$20,000, or \$7,000, a sum perhaps more than might be recovered upon quantum meruit, based upon the usual salary earned by a companion, combined with what would be reasonable damages for giving up the claimant's medical pursuits, but a sum figured at the rate determined upon by the parties themselves. Deducting, therefore, the value of the life estate as being part payment on the

contract (*Reynolds v. Robinson*, 64 N. Y. 589), the auditing judge allows the claim to the extent of \$5,000, without interest. The filing of the caveat may not, in the opinion of the auditing judge, be construed as a contest of the testatrix's will."

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Frederick S. Drake, John Weaver, and John G. Johnson, for appellant. E. L. Hallman, Robert S. Bright, and Simpson & Brown, for appellee.

ELKIN, J. The principal question raised by this appeal is whether the evidence produced before the auditing judge was sufficient to establish a contract of employment and service alleged to have been entered into between the decedent, whose estate constitutes the fund for distribution in this proceeding, and the appellee who presented her claim under such contract, and asked for an allowance of the same. The auditing judge and the court in banc have so found, and we concur in the views expressed and findings made by the learned judges who heard and determined the case in the court below. The contention as to the admissibility of declarations made by decedent to counsel and as to the proviso in the residuary clause relating to an attempt to contest the will, under the facts of this case, cannot be sustained.

Decree affirmed, costs to be paid out of the estate.

(221 Pa. 180)

**ESCHER v. SOUTHWARK MILLS CO.**  
(Supreme Court of Pennsylvania. May 4, 1908.)

**1. EVIDENCE — DOCUMENTARY EVIDENCE — WRITTEN STATEMENT—ACCURACY—QUESTION FOR JURY.**

Where, in an action for injuries to a servant, defendant offered a statement signed by plaintiff shortly after the accident, and claimed that plaintiff's evidence was inconsistent with the statement, which was in German and had been translated into English by another person and written out in defendant's office, and was shown to be inaccurate in some minor matters, whether the statement accurately embodied the statement made by plaintiff was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1039.]

**2. MASTER AND SERVANT—INJURIES TO SERVANT — METHODS OF WORK — NEGLIGENCE — QUESTION FOR JURY.**

In an action for injuries to a servant by being struck by caustic soda as he was assisting in rolling an iron barrel of such material up an incline at defendant's works, whether defendant was negligent in adopting an unsafe method of raising the soda by means of which it could easily be spilled from the barrel held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1032-1043.]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Henry Escher against the Southwark Mills Company to recover dam-

ages for personal injuries. The court refused binding instructions for defendant, and plaintiff had a verdict and judgment for \$2,500, from which defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

George L. Crawford, for appellant. Eugene Raymond, for appellee.

MESTREZAT, J. This case was submitted to the jury in a clear and adequate charge to which no exception was taken and no error is assigned. The learned judge was entirely accurate in his statement of the law applicable to the case, and pointed out in detail the evidence submitted on either side bearing on the questions of fact. The only complaint here requiring consideration is that the court erred in not directing a verdict for the defendant company.

The defendant contends that the plaintiff knew, and therefore assumed, the risk of the employment, and that his injuries resulted from the negligence of a co-employé in handling the loose rope which was used in removing the iron barrel of caustic soda from the floor to the top of the tank in which the soda was to be emptied from the barrel. It is further claimed by the defendant company that the method used by it in handling the caustic soda was not the proximate cause of the accident by which the plaintiff was injured, and hence it is not responsible in this action. The evidence clearly discloses that the plaintiff was an ignorant German, not familiar with the English language, and had been employed by the defendant for some time prior to the accident to work on or operate a machine. He was called from this service into a dark frame shed to assist three other men in removing this iron barrel containing caustic soda from the floor to the top of the tank into which the soda was to be emptied. It appears, and is undisputed, that this iron barrel was about three feet long and one and a half feet in diameter, and that a hole had been cut in one of the heads, the diameter of which was about six inches less than the diameter of the head itself. When the plaintiff appeared on the scene to assist the other three workmen in hoisting the barrel, there was a piece of burlap in the hole in the head of the barrel, placed there, of course, to prevent the soda from leaving the barrel. While the barrel was being rolled up the incline, and when it was within about one foot of the top, the burlap came out of the hole, and the soda ran out and part of it got in the plaintiff's eye, and injured it very severely.

The evidence in the case does not support the defendant's position that the plaintiff knew of the risk incident to the work of removing the barrel of caustic soda from the floor to the top of the tank. The plaintiff

testified positively that he did not know of the danger. He admits they put oil on his hands, and told him not to touch the barrel with the blank hand, but he testified that he did not know that caustic soda was in the barrel until after it got on his face. To meet this testimony, the defendant company offered in evidence the paper, dated June 27, 1904, which the plaintiff signed and which purported to state how the accident happened. It was strenuously urged by the counsel for the defendant company, and the court was asked to so instruct the jury, that, if they believed the paper correctly stated the manner of the accident, the verdict should be for the defendant. It was claimed that the statements in this paper as to the manner and cause of the accident contradicted the testimony of the plaintiff on that subject, and clearly showed that the accident to the plaintiff was not attributable to the negligence of the defendant company. The court, however, did not agree with the defendant's counsel as to the effect or construction of the paper. The learned trial judge in his charge to the jury discussed the paper at length and submitted it as evidence for the consideration of the jury. He said in his charge: "The story of that paper is not inconsistent radically with the story of the plaintiff on the stand. Any skirmishing over that paper was wholly unnecessary." He did not hold with the defendant's counsel that the language of the paper conclusively established that the plaintiff's injuries were caused by the negligence of a fellow workman. He went still further, and told the jury that it was a question for them whether the language of the paper was the language that the plaintiff used to the scrivener who wrote it. At the time the paper was prepared the plaintiff, not familiar with the English language, gave his statement in German, and it was translated and written in English by another party at the defendant's office. It can be easily seen how a mistake could be made, and that the paper in English would not disclose the plaintiff's real version of the manner and cause of the accident. In fact, two of the immaterial statements in the paper are now conceded by both sides to be incorrect. Hence it may well be that there are other inaccurate statements in the paper, and that they arise from a misinterpretation or an erroneous translation of the language used by the plaintiff. At all events, these matters were for the jury, and were correctly submitted for their consideration. We agree with the learned trial judge that there is no radical difference between the plaintiff's testimony and the statements contained in the paper which he signed. Whether the plaintiff knew the danger of the risk he encountered when, under the directions of the defendant company, he assisted its other employes in removing the barrel to the top of the tank, was clearly for the jury, and there was ample testimony to support their finding.

If the plaintiff's injuries resulted from the

negligence of a co-employe in adjusting the rope used in taking the barrel of soda to the top of the tank, the defendant company is not responsible for the injuries, and there could be no recovery in this action. And this was the view of the learned judge, and he distinctly so ruled on the trial of the cause. In his charge to the jury he said: "That paper [referred to above] says it was the use of the rope that did this thing, and, of course, it was the use of the rope by the defendant's people, 'employes' as we call them. It was not used by anybody else. We cannot avoid that conclusion. The defendant's servants were there acting. If you find it was so used by those men, and that as a consequence of that use this accident happened, it will be your duty to find a verdict for defendant." In concluding his instructions on this branch of the case, the learned judge further told the jury that, if the use of the rope caused the injury there could be no recovery, and clearly defined the issue which he submitted to the jury. He said: "If you find from the discretion I have recognized as yours in the examination of these proofs that there was a negligent furnishing of appliances in the matter of the barrel, in the matter of the burlap, and so forth, which amounted to a violation of the defendant's duty to the plaintiff, and that as a consequence of that he was hurt, then you may find a verdict for the plaintiff, but, in order to reach that conclusion, you must find that the use of the rope was not the immediate cause of the injury, but that it was some defect in the appliances which caused the injury. If you find as thus indicated to you, you will find a verdict for plaintiff, otherwise you will find a verdict for defendant." It will therefore be observed that the learned trial judge submitted to the jury the one question whether the plaintiff was injured by the defective or unsafe appliances furnished him to perform the services for which he was employed. Under the clear and explicit instructions of the court the jury were given for consideration the single issue, and they have found that the defendant company was negligent in not furnishing the proper appliances with which to do his work. Under the court's instructions the verdict must have been for the defendant if the jury had found that the plaintiff's injuries were caused by a defective rope or by a careless handling of the rope by a fellow employe or by negligence on the part of the plaintiff. The jury has found against the defendant on each of these several matters which, if either or all of them had existed, would have been a complete defense and a barrier to the plaintiff's right to recover in this action.

As correctly said by a recognized authority: "great caution is necessary in tasting and handling caustic soda, as it rapidly destroys organic tissue." That it is a dangerous chemical and must be used with the greatest caution is well known, and it must be assum-



ed was known to the defendant company. It was used by the company in its business, and its ingredients and highly dangerous character were, of course, known to the defendant. It was conveyed by the defendant to its tank in an iron barrel, which was certainly a proper precaution for the protection of those who had to handle it. Any less careful manner or method of conveying a drug so dangerous would well warrant a jury in finding negligence if injuries resulted therefrom. Was it, therefore, negligence in the defendant company to use for this purpose an iron barrel with a hole in one head of the dimensions shown by the testimony which was closed by placing in it a loose piece of burlap? The testimony disclosed the fact that the edge of the hole was turned outward, and hence the material in the barrel could easily push the burlap from its place. The hole, it will be remembered, was only six inches less in diameter than the head of the barrel. The burlap was not fastened nor secured in the hole, but only "pushed in." It is apparent that it would not, and did not, require much force to remove it from the hole. The barrel was rolled to the top of the tank, a distance of possibly 12 or 15 feet and to a height of between 4 and 5 feet, and then was emptied by using a rope. Three men were not sufficient to do the work, and hence a fourth man, the plaintiff, was on this occasion directed by the company to assist. It is manifest that the material in the barrel was heavy, and that the burlap would afford very little resistance to the flow of the soda from the barrel. This was so apparent, and the consequent danger to the servants engaged in the work was so obvious, that any reasonably prudent man would not have pursued such means or appliances to carry the soda to the tank. It was therefore a question for the jury whether the method thus adopted by the defendant company in conveying the soda to the tank was negligent and improper, and was the cause of the plaintiff's injuries. As said by the learned trial judge in his charge: "Were they negligent in using it [caustic soda] as they did use it there; that is to say, in causing a barrel containing it to be removed as this barrel was with a view to having it emptied?" This was the controlling question in the case, a proper one for the jury, and it has been found in favor of the plaintiff.

The assignments of error are overruled, and the judgment is affirmed.

(221 Pa. 196)

VAN LEER v. VAN LEER et al.  
(Supreme Court of Pennsylvania. May 4, 1908.)

1. TRUSTS—SPENDTHRIFT TRUST—TERMINATION—FULFILLMENT OF OBJECT.

Testator by a codicil revoked an absolute devise previously given to his son, and created a trust of his son's portion, with a provision

that the income should be devoted to the son's exclusive personal use, protected from any claim of his creditors, and against any judicial process for his debts. The codicil also declared that the son's interest should not be liable for the "support, contracts, debts, or engagements" of the son's wife, naming her, and directing that she should derive no benefit from the income or principal of the trust estate. *Held*, that the trust so created was an active spendthrift trust, and not a special trust for the sole purpose of preventing the son's wife from sharing in his share of testator's estate, and hence the court, after testator's death, and after the son had secured a divorce from his wife, had no power to declare the trust ended and direct a transfer of the trust estate to the son freed from the trust, on the ground that the purpose thereof had been accomplished.

2. WILLS—CONSTRUCTION.

Where the meaning of a will is clear from the language used, the instrument interprets itself; the object of the court being to ascertain testator's intention as expressed in accordance with the ordinary meaning of the words used properly interpreted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 974.]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity for partition by Edward Shippen Van Leer against George R. Van Leer and others. From a decree directing distribution of the proceeds of a sale of the property, John P. Van Leer appeals. Affirmed.

From the record it appeared that the bill was filed by one of the seven children of the testator, praying for the partition of the real estate of the testator. The averment of the bill, so far as material to the present controversy, was that each of six of the testator's children, including the complainant, was entitled to an undivided one-seventh share of two-thirds of the testator's real estate in fee; and that a like share of a remaining child of the testator, John P. Van Leer, the appellant, was vested in George R. Van Leer, surviving executor and trustee under the will of the testator and codicil thereto, in trust for the said John P. Van Leer, during his life. No answer was filed to the bill, and a decree pro confesso was entered, directing partition to be made, and referring the proceedings, "by agreement of the parties," to a master. Subsequently, under order of the court, the master exposed the real estate to public sale, and realized therefrom the net sum of \$38,980, one-third of which he awarded in trust for testator's widow during her life, and the remaining two-thirds he divided into seven parts, six of which he distributed among six of the testator's children, reserving for further consideration and report, upon request of all the parties in interest, the contention of testator's seventh child, John P. Van Leer, that the trust created as to him by the testator's codicil to his will was a special trust intended solely to bar his then wife, Maud D. Van Leer, from any participation in his share, and that he, being now divorced from Maud D. Van Leer, was

entitled to receive his distributive one-seventh share, or \$3,712.38, free and discharged of the trust. All the co-distributees filed with the master a written declaration that they were satisfied that the testator's purpose in creating the trust as to John P. Van Leer had been accomplished by the divorce of the latter and his former wife, Maud D. Van Leer, and setting forth their reasons in the nature of a case stated. George R. Van Leer signed this instrument individually, but "not as executor or trustee." The master awarded the distributive share of John P. Van Leer to George R. Van Leer, surviving executor and trustee under the will and codicil of the testator, and dismissed exceptions filed to his report by John P. Van Leer. On appeal the lower court, without opinion filed, dismissed the exceptions and confirmed the master's report.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Howard Benton Lewis, for appellant.

MESTREZAT, J. This is an appeal by John P. Van Leer from the decree of the court of common pleas No. 4 of Philadelphia county in refusing to award him in fee the undivided one-seventh of two-thirds of the real estate of his deceased father. It would certainly give us pleasure to grant the desire of the appellant's mother and brothers and sisters and decree the property in question to the appellant free and discharged of the trust. Our decree, however, cannot be based upon our pleasure, but upon the interpretation of the will of the testator. We are clear that the learned master interpreted correctly the codicil to the testator's will, and we agree with his conclusion "that the trust is not a special trust, but an active spendthrift trust, and that the legal fee is not in John." There can be no doubt that the testator by his will intended to give his son John the undivided one-seventh of the two-thirds of his real estate in fee. His will, executed March 28, 1894, so declared. But it is equally clear that, for reasons satisfactory to himself, he had changed his mind and his intention when he executed the codicil to his will on May 22, 1896. That codicil does not affect the interests of any of the other six children who had been given, by the will, an equal interest in the testator's estate. The codicil dealt exclusively with John P. Van Leer's interest or share, and it plainly and explicitly disposed of that share. It is contended by John that in executing the codicil the sole purpose of the testator was to prevent the woman whom John had married, and from whom he had separated, deriving any benefit or advantage from the income or principal of the estate, that the object was to create a special trust for that purpose, and that the divorce of the appellant from his wife executed the trust and accomplished

the object of the testator. The learned master, however, as we have seen, did not agree with that construction of the codicil, but held that the testator intended to and did create an active spendthrift trust of the estate which had been given to John in fee by the will.

The sole basis of the appellant's contention is the supposed intention of the testator obtained dehors the will. The mother and brothers and sisters of John, remaindermen under the codicil, declare in the paper of June 29, 1907, that the only purpose the testator had in executing the codicil was to exclude John's wife from participating in any part of the testator's estate, and that the trust created by the codicil for John was fully executed and terminated by the divorce of John from his wife. This contention is in direct opposition to the language of the codicil. It revokes the devise to John in the will, and devises to the testator's executors the same interest given John in the will, but in trust to receive the income and pay it to John for his own use and without anticipation, "and so that the same shall never at any time or in any manner be liable for his debts, contracts or engagements, or subject to any distress, execution, or levy therefor, or to any process, whatever, on the part of any creditor or creditors of my said son, and expressly so that it shall not be liable for the support, contracts, debts or engagements of his present wife, Maud D. Van Leer." The codicil, after making this provision, and authorizing John by will to appoint the principal of his share at his pleasure, makes an alternative disposition of the estate on failure of John to appoint. At the conclusion the codicil also declares that John's wife should in no event or in any circumstances derive any benefit from the income or principal of the trust created for John. It is clear, and no authorities need be cited to sustain the proposition, that, had the parts of the codicil referring specifically to John's wife been omitted, there would have been created an active spendthrift trust. This court has declared time and again that such is the effect of substantially the same language as that used in this codicil. The instrument itself declares the intention of the testator to annul and revoke the devise in fee made to John in the will. The intention to revoke is manifest and is expressed in apt terms. In language equally certain and unequivocal, a trust is created and the purpose is definitely and unequivocally declared in language not to be misunderstood. The income from the principal was to be paid into John's own hands. He had no right of anticipation. Neither could it be subjected to his debts, contracts, or engagements; nor was it liable to distress, execution, or levy by any creditor. Standing alone, this language is so clear and comprehensive that there can be no basis whatever for any doubt

as to the testator's intention. That intention is made clearer by the devises over of the principal of the estate. They show that the principal was not to vest absolutely in John. It is true that he is given the power of appointment. He may dispose of it by will, but that discloses no intention to vest in him the fee and permit him to dispose of it for his own use during his life. The power, therefore, does not change the otherwise clearly expressed intention of the testator to create an active spendthrift trust.

It is contended, however, that the intention to create a special trust to protect the estate against John's wife is disclosed by the express prohibition in the codicil against liability "for the support, contracts, debts or engagements of his present wife, Maud D. Van Leer," and the provision that the wife shall derive no benefit from the income or principal of the trust estate. But these provisions of the codicil do not modify, limit, or in any way change the spendthrift trust previously declared in the codicil. Eliminating the special reference to John's wife in the codicil, the intention of the testator, expressed in apt language, is that the trustees shall hold the principal of the estate for the persons named in the codicil, and that the income shall be devoted exclusively for John's personal use, protected from any claim of his creditors and against any writ or process on any judgment or debt against him. Unquestionably the testator's intention was to defeat any claim that John's wife might have or obtain against the trust estate, but his intention is equally clear and expressed in language of no doubtful signification that he intended to extend a protection to the estate against any and all other claims and debts which John might incur or become liable for. This intention is as apparent and clearly expressed as the intention to defeat the wife's claims against the trust estate. If the testator intended simply to protect the trust estate against John's wife, he has failed to do so in language that can be so construed by any known rules of interpretation. He has declared a spendthrift trust pure and simple, and the special reference to John's wife has neither added to nor detracted from it. In *Hawkins on Wills* (2d Am. Ed.) p. 1, it is said: "In construing a will, the object of the courts is to ascertain, not the intention simply, but the expressed intentions of the testator, i. e., the intention which the will itself, either expressly or by implication, declares, or (which is the same thing) the meaning of the words—the meaning, that is, which the words of the will, properly interpreted, convey." In *Woelpper's Appeal*, 126 Pa. 562, 572, 17 Atl. 870, 872, we said: "It is often said \* \* \* that 'the question in expounding a will is not what the testator meant, but what is the meaning of his words.' But by this it was never intended to say that the testator's meaning when apparent can be disregarded, but that it cannot be got at aliunde,

by what he might have meant, or even what under the circumstances perhaps he would have meant, but only by what he said. The search is confined to his language, but its object is still his meaning." And in *Huber's Appeal*, 80 Pa. 348, this court said (page 358): "When the meaning is clear from language that is unmistakable, the instrument interprets itself." In construing the codicil and will of Joseph W. Van Leer, we cannot go outside of its terms or apply any artificial canons of construction. The language is clear and unmistakable, and discloses the testator's intention. It is not open to doubt. It creates no necessity for going outside of the instrument itself to ascertain the testator's intention. It may be that his chief and possibly his only purpose in revoking the devise to his son John and in creating the trust was to prevent John's wife from participating in his estate, but, if so, it does not appear from the codicil itself, which manifests a clear and unmistakable intention to create an active spendthrift trust and thereby protect John and his interests from assault from any and all quarters.

We concur in the conclusion reached by the learned master and approved by the court below; and therefore the decree is affirmed.

(221 Pa. 174)

#### SINGLEY et al. v. EASTON TRANSIT CO.

(Supreme Court of Pennsylvania. May 4, 1908.)

#### STREET RAILROADS—INJURIES TO TRAVELERS—BICYCLE RIDER.

In an action for injuries to a boy riding a bicycle while crossing a street behind a standing street car which was unexpectedly moved backward, the negligence of the motorman and the contributory negligence of the boy *held* for the jury.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 44, *Street Railroads*, §§ 251-257.]

Appeal from Court of Common Pleas, Northampton County.

Trespass for personal injuries by William Singley and Herbert Singley against the Easton Transit Company. The court refused binding instructions for the defendant, and verdict was rendered for William Singley for \$1,800 and for Herbert Singley for \$2,700. Judgment was entered on the verdict for Herbert Singley for \$2,700 and for William Singley for \$1,200, all above that amount having been remitted, and defendant appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

H. J. Steele, for appellant. James W. Fox and Edward J. Fox, for appellees.

PER CURIAM. The questions of negligence on the part of the motorman of the defendant company and the contributory negligence of the plaintiff, who was injured, were necessarily for the jury, and they were submitted with full and accurate instruc-

tions. Two cars, one an open summer car, which was at the time used as a motor, and the other a flat car loaded with rails and attached to the summer car, were standing on a switch on a city street at a place where an east-bound passenger car stopped every 15 minutes during the day to allow a car to pass on the main track. The motorman stood on the east platform of the open car facing west in the direction in which he intended to move the cars. The plaintiff, a boy 13 years old, was riding east on a bicycle, and when near the open car turned from his course to cross the street diagonally and pass behind it. This place was not a regular crossing, but was frequently used to reach a subway under a railroad. At the moment he reached the track the cars were started west, and he was struck and injured. There was nothing except the position of the trolley pole to indicate that the car would move west, and any one not observing this might well suppose the car was a regular passenger car going east or a car out of service. The case was not that of a boy coming unexpectedly in front of a moving car, but of one going behind a standing car which unexpectedly moved backwards, and the question of negligence could not be determined by the court.

The judgment is affirmed.

(221 Pa. 176)

#### GILBERT v. ELK TANNING CO.

(Supreme Court of Pennsylvania. May 4, 1908.)

#### 1. MASTER AND SERVANT—DUTY OF MASTER—SAFE PLACE TO WORK.

A master's duty to provide a reasonably safe place and to maintain it in a reasonably safe condition by inspection and repair is an absolute personal obligation, from which nothing but performance can relieve him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 179.]

#### 2. SAME — INJURIES TO SERVANTS — FELLOW SERVANTS—VICE PRINCIPAL.

The act of a tannery superintendent, having general supervision of the plant and entire control of the business, in removing the cover of a vat containing hot liquid, and permitting the vat to remain exposed so that decedent, a bleacherman, slipped and fell into it, and was killed as he was pushing a car along greasy tracks, adjoining the vat, was the act of a vice principal, and not of a fellow servant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 456-465.]

#### 3. SAME—NEGLIGENCE—QUESTION FOR JURY.

In an action for death of a servant in a tannery by slipping on greasy tracks and falling into an open vat from which the tannery superintendent had removed the cover, whether the removal of the cover was negligence held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1060.]

Appeal from Court of Common Pleas, Bradford County.

Trespass by Clara Augusta Gilbert against the Elk Tanning Company to recover dam-

ages for the death of her husband. Verdict and judgment for plaintiff for \$6,000, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Clarence E. Sprout, John C. Ingham, and John E. Cupp, for appellant. M. E. Lilley, for appellee.

POTTER, J. This was an action of trespass brought by Clara A. Gilbert to recover from the Elk Tanning Company damages for the death of her husband, Elijah B. Gilbert. The plaintiff died before the case was tried, and her administrator was substituted. It appears from the evidence that Elijah B. Gilbert was employed as a bleacherman in defendant's tannery at Powell, in Bradford county, and had been so employed for years prior to the accident by which he lost his life. On December 10, 1905, while working in the tannery, he fell into an open vat containing hot liquid, and was scalded so seriously that his death soon followed. In the yard of the tannery there were over 400 vats which were covered with planks. Between the vats, and very close to them, ran several car tracks over which hides were carried in cars to and from the yard. These tracks were about 14 inches in width, and from the nature of the business naturally tended to become greasy and slippery. On the day of the accident Gilbert, with two other workmen, was employed in transporting hides by means of a car running upon one of these tracks from the yard to the bleacher some distance away. It was 5 o'clock in the afternoon, and the light was falling. One of the workmen was in front of the car, and Gilbert and the other workmen were pushing it from behind. The car passed very close to the edge of vat No. 59, which was seven by nine feet in area, and about five feet deep, and was used for the purpose of heating liquids for distribution to other vats. The testimony shows that a plank had been taken from the cover of this vat, at the side next to the car track, and not replaced. The tracks were narrow and slippery, and as Gilbert passed the opening into the vat his feet slipped, and he was precipitated into the hot liquid. P. S. Martin, who was superintendent of the tannery and had general supervision of the plant, and who, under the evidence, had full and entire control of the business of that tannery, had been at the vat shortly before the accident, and he testified that he moved one plank, he thought, that was lying on the vat next to the track, in order to pull out a plug that was beneath it; but he could not say positively whether he replaced the plank or not before he left. Another witness, Frank Ward, who had been working at the vat before the superintendent was there, testified that at half past 3 or 4 o'clock he left the planks next to the track

down in place, and the first four feet from the track tightly covered. It is undisputed that at the time of accident the vat was uncovered adjoining the track, and that while engaged in pushing the car along the track Gilbert slipped into it. The negligence charged was in leaving the vat uncovered in such dangerous proximity to the track along which the men were obliged to walk. The defendant company offered no evidence, but asked for binding instructions in its favor. The trial judge refused this request, but reserved the question of law whether there was any evidence which entitled the plaintiff to recover, and submitted the question of negligence and contributory negligence to the jury, who found a verdict for the plaintiff. A rule for judgment in favor of the defendant non obstante veredicto was subsequently discharged, and judgment entered on the verdict.

It is contended by counsel for the defendant that the negligence, which was that of the superintendent, was not that of a vice principal in this case, because he was engaged at the time in doing the work of an ordinary laborer. This contention is hardly borne out by the evidence, for it is a fair inference that in the attention which he was at the time bestowing upon the vat he was acting in a supervising capacity. The defendant corporation could act only through its agent, and the superintendent was the officer having charge of the business of the defendant, and therefore, for all practical purposes, must be regarded as the corporation itself. *Ardesco Oil Co. v. Gilson*, 63 Pa. 146. The duty of maintaining a reasonably safe track between and past the vats, along which the men could walk in pushing the cars, was one which was a direct and absolute obligation upon the part of the defendant company from which nothing but performance could relieve it. This court, speaking by Justice Fell, in *Lillie v. American Car & Foundry Co.*, 209 Pa. 161, 166, 58 Atl. 272, 273, said: "The duty to provide a safe place to work and to maintain it in a reasonably safe condition by inspection and repair is a direct, personal, and absolute obligation from which nothing but performance can relieve an employer, and the person to whom it is delegated becomes a vice principal whose neglect is the neglect of the employer." This statement of the principle was quoted and approved in the later case of

*Schiglizzo v. Dunn*, 211 Pa. 253, 60 Atl. 724, 107 Am. St. Rep. 567.

Under the thoroughly well-settled rules of law, it is clear that Martin, the superintendent in this case, must be considered a vice principal, and that the defendant was liable for his negligence. The uncontradicted evidence showed that Martin was superintendent of this tannery and had been so for more than two years, and had "general supervision of the plant"; and the testimony further showed that he had full and entire control and management of the business at this place, and that he directed the arranging of the appliances and apparatus there. The defendant offered no testimony whatever to rebut this evidence, which was certainly sufficient to take the case to the jury on the question of whether or not Martin was a vice principal. Under the evidence he was guilty in this case, not merely of an act of omission, such as failure to inspect or repair would have been, had the premises gotten out of order through wear and tear, but he was himself in this instance the one who by his own negligent action in leaving the vat uncovered placed a dangerous trap at the very feet of the men whose duties obliged them to walk past it in the dim light of the hour; so that, instead of protecting them, he brought into existence the dangerous situation. In this respect he certainly failed to use ordinary care for the safety of the employees, and thereby failed to discharge the duty with which he was charged by the defendant company, and for which it could not evade responsibility. If another workman had left the vat uncovered, and the superintendent had seen it in time to have remedied the matter, or given warning to the decedent, had he failed to do either, his conduct would very properly have been considered negligence for which the master would be compelled to answer. Much more so when the carelessness was in his own action. There is no affirmative evidence that the decedent was in any way guilty of contributory negligence, and there was certainly nothing which would have justified the trial judge in pronouncing upon it as a question of law. That was a matter for the jury. We see no error either in the fact of submission, or in the manner in which this case was submitted to the jury by the learned trial judge.

The assignments of error are overruled, and the judgment is affirmed.

(221 Pa. 248)

**MANAYUNK TRUST CO. v. PLATT et al.**  
(Supreme Court of Pennsylvania. May 11, 1908.)

**1. INFANTS—JUDGMENT—VACATION—GROUNDS—NOTICE TO MINOR.**

A judgment on foreclosure of a mortgage against the guardian ad litem of a minor owner will not be opened merely because neither the minor nor his next of kin had notice of the application for the appointment of a guardian ad litem.

**2. JUDGMENT—OPENING—GROUNDS IN GENERAL.**

A motion to open a judgment, being an appeal to the equitable powers of the court, cannot be sustained because of a mere technical irregularity not affecting the merits or justice of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 691.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Manayunk Trust Company, to the use of John W. Platt and others, against Ammon Platt and others to foreclose a mortgage. From an order discharging a rule to open a judgment for plaintiff, Andrew C. Kerr, guardian of John W. Fitzpatrick, a minor, appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Henry A. Hoefler and Charles A. Chase, for appellant. Melick, Potter & Dechert, for appellees.

**PER CURIAM.** The motion to open a judgment, being an appeal to the equitable powers of the court, should be based on some equitable ground shown. In this case there was none. The judgment was regular on its face, and not assailable at law. The only objection to it now set up is of technical irregularity not in any way affecting its merits or justice. The court was not called upon to intervene.

Judgment affirmed.

(221 Pa. 247)

**GARDNER v. CITY OF PHILADELPHIA.**  
(Supreme Court of Pennsylvania. May 11, 1908.)

**MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—ICE AND SNOW.**

A city was not negligent in failing to repair a defect in a sidewalk consisting of a rut, in which plaintiff's heel caught, made by a push cart in soft snow or slush which had frozen on the walk, and then had become covered by one or two inches of fresh snow that had fallen the same morning, on which plaintiff was injured.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Richard Gilpin Gardner against the city of Philadelphia to recover damages for personal injuries caused by a fall on an icy sidewalk. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

70 A.—48

The facts are stated in the opinion of the Supreme Court. The court entered a compulsory nonsuit, which it subsequently refused to take off.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

John R. K. Scott, for appellant. Harry T. Kingston, James Alcorn, Asst. City Sol., and J. Howard Gennell, City Sol., for appellee.

**PER CURIAM.** Plaintiff, walking down Pine street, in the city of Philadelphia, fell on the icy pavement. Examination showed a circular or curved rut in which his heel caught and his foot was turned. It was apparently made by a push cart in the soft snow or slush, later frozen hard and then covered with an inch or two of fresh snow that had fallen that morning. It was one of the most dangerous conditions that occur for pedestrians, but a condition incident to city pavements in our variable winter weather, and there was no evidence that the city had actual notice of it, or that it had been there long enough for notice to be implied. Judgment affirmed.

(221 Pa. 233)

**BEISEL v. GERLACH.**

(Supreme Court of Pennsylvania. May 11, 1908.)

**1. HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—ACTS OF WIFE'S FATHER—MALICE.**

A father being authorized by law to advise his daughter about her domestic affairs in accordance with the reciprocal obligations and affections existing between parent and child, which last through life, the daughter's husband cannot recover against the wife's father for alleged alienation of affections, though the father's advice influenced the daughter to separate from the husband, unless such advice was given in bad faith, and with malice or unworthy motives.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1121.]

**2. SAME—EVIDENCE.**

Letters written by a wife to her husband were insufficient to sustain a charge that the wife's father had alienated her affections, in the absence of proof that the father had anything to do with the letters or was responsible for having them written; there appearing from the letters themselves nothing showing alienation of affections or any misconduct by the father.

**3. SAME—EVIDENCE.**

In an action for alienation of the affections of plaintiff's wife by her father, evidence held insufficient to sustain a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1124.]

Appeal from Court of Common Pleas, Northampton County.

Trespass for alienation of wife's affections by George W. Beisel, by his next friend, John Beisel, against E. J. Gerlach. Verdict for plaintiff, and defendant appeals. Reversed.

The opinion of the Supreme Court states the case.

Defendant presented these points:

"(1) There being no evidence in the cause that defendant made any false and malicious

statements of and concerning the plaintiff to his wife, under the pleadings there can be no recovery by the plaintiff. Answer: Refused.

"(2) There being no evidence in the case that defendant encouraged and compelled plaintiff's wife to receive the attentions of other men, and no evidence that he promised to secure a divorce for her from plaintiff, so that she could marry another man, under the pleading there can be no recovery. Answer: Refused.

"(3) The proof and testimony in the case do not support the allegations of plaintiff's pleadings, and there can be no recovery by him. Answer: Refused."

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

W. E. Doster, for appellant. James T. Woodring, for appellee.

ELKIN, J. This is an important case in the sense that it has to do with the rights, duties, and liabilities of a parent in dealing with a married child. The action is brought by a son-in-law against his father-in-law to recover damages for the alienation of the affection of the wife of the former and daughter of the latter. At the old common law it is doubtful whether the alleged alienation of the affection of a child by a parent under such circumstances was actionable; and, while the courts in more recent years have opened the door to this class of cases by recognizing the right to maintain such an action under certain circumstances, it should be borne in mind that the reciprocal obligations and affections of parent and child last through life, before and after marriage, and in the trial of such causes the greatest care should be exercised, so that the assertion of a supposed right of action may not be based upon a proper parental regard for the welfare and happiness of the child. Almost a hundred years ago it was said by Chancellor Kent that: "A father's house is always open to his children; and, whether they be married or unmarried, it is still to them a refuge from evil and a consolation in distress. Natural affection establishes and consecrates this asylum. The father is under even a legal obligation to maintain his children and grandchildren, if he be competent and they unable to maintain themselves; and according to Lord Coke, it is nature's profession to assist, maintain, and console the child. I should require more proof to sustain the action against the father than against a stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from her husband from improper motives." In actions of this character the question is whether the father was moved by malice and without justification, or by a proper parental regard for the welfare and happiness of his child. There can be no law to restrain a father from honestly and

properly endeavoring to protect his daughter, by means of counsel and advice concerning her marital relations, so long as he in good faith advises what he believes to be right and proper under the circumstances. There is a wide and essential difference between the rights and privileges of a parent in such cases and those of an intermeddling stranger. In all such cases the motives of the parent are presumed good until the contrary is made to appear. It is true a father has no right to restrain his daughter from returning to her husband if she desires to do so. On the other hand, he may lawfully give counsel and advice for her own good, and shelter her in his own house, if she chooses to remain with him, without making himself liable in an action of damages. The law recognizes the right of a father to advise his daughter about her domestic affairs, without incurring liability for alienation, if the advice be given in good faith and prompted by worthy motives, even if such advice influenced the daughter in making up her mind to separate from her husband. In other words, there can be no recovery against the father, unless it clearly appears that he acted maliciously, without justification, and from unworthy motives. This is substantially the rule recognized in all jurisdictions. *Burnett v. Burkhead*, 21 Ark. 77, 76 Am. Dec. 358; *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492; *Zimmerman v. Whiteley*, 134 Mich. 39, 95 N. W. 989; *Payne v. Williams*, 63 Tenn. 583; *Tucker v. Tucker*, 74 Miss. 93, 19 South. 955, 32 L. R. A. 623; *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 312; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Young v. Young*, 8 Wash. 81, 35 Pac. 592; *Huling v. Huling*, 32 Ill. App. 519; *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574.

In the present case the amended statement of claim alleges that the defendant did willfully, unlawfully, and maliciously cause his daughter to separate from her husband, and that he encouraged her to receive the attentions of other men, under a promise that he would procure a divorce for her so that she could remarry, by reason of which acts and promises the affection of the wife for her husband was alienated. These allegations were evidently made in the amended statement, because the averments of the original declaration were not deemed sufficient to sustain the action against the father under the rule hereinbefore referred to. In this connection it is proper to remark that it is not only necessary to allege all the essential elements required to sustain the action, but the measure of proof must be correspondingly high. It will not do to allege an extreme case and support it by indifferent proof, or by proof which, fairly considered, only shows that the parent did what any parent would have done under similar circumstances for the peace and comfort and happiness of his household. We have examined with pains-

taking care the record in this case, and have carefully read all the testimony in order that it might be properly determined whether the evidence was sufficient to justify the submission of the question to the jury. In this class of cases the first duty rests with the court to say whether the evidence is sufficient to meet the measure of proof required and whether, if believed, it would warrant a finding by a jury in favor of the plaintiff. As to the allegation that the father encouraged the daughter to receive the attentions of other men, no testimony was offered in support of it, and it must fall. The case, therefore, must rest on the allegation that the father, by false and malicious statements, alienated the affection of his daughter from her husband, and did unlawfully, in a spirit of malice, without justification, cause a separation. No single fact proven, nor all of the facts combined, are sufficient to establish these allegations, and it is the duty of the court to say so. A jury, in the absence of sufficient evidence, should not be permitted to guess at or conjecture about the rights and liabilities of parents and children in this class of cases. The plaintiff's case rests almost entirely on his own testimony, the important part of which relates to what occurred at the time the defendant ordered him to leave his house on April 24, 1905. There is some further testimony about what occurred at two subsequent interviews, one when he returned the key of the house, and the other at a meeting on the street. He is contradicted in all the material facts of his testimony by the other parties present, but if it was only a question of credibility, it would have to go to the jury. In our opinion, however, his testimony is not sufficient, if believed, to warrant a finding that the father, without just cause and with malicious purpose, did unlawfully alienate the affections of his daughter from her husband. The wife, and daughter, in this case was a young girl fifteen years of age, wayward and self-willed. She was seduced by a schoolmate, and became pregnant with child to him. Several months after the child was conceived, and before the parents were aware of the condition of their daughter, Betsel, the appellee, a boy about the same age, came upon the scene, took the place of the seducer, and subsequently married the girl. The child was born a very few months after the marriage, and that it has been the cause of much dissension subsequent events clearly demonstrate. A boy husband and a girl wife, with a child born a couple of months after marriage, the real father another boy in the community, a fact known to both young husband and wife, furnished a situation full of discord and dissension, all of which quickly followed. The boy husband was poor, without a home to shelter his young wife, and accepted the hospitality of the father, whom he now tries to mulct in damages, but who then furnished him and his family food and shelter. The

young couple acted like the children they were. At times they seemed fond of each other, and at other times they quarreled and bickered and pouted, then made up again and seemed to forget their troubles. Sometimes the young wife would refuse to speak to her husband, and ordered him away, and thus the trouble grew. It finally culminated in a quarrel which resulted in wearing out the patience of the father, who ordered the young husband to leave the house and not return to it. Just what occurred at this interview is in some doubt. The young husband says the father commanded him to leave, and that he would not allow his wife to go with him, and that he said his daughter should never live with him again. This is all denied by the father, mother, and brother, who were present, but at most it was only an expression of the displeasure of the father, whose patience had been worn out, and the peace of whose household had been disturbed by these young people. There was no malice in this; it was righteous indignation, manifested in temper, and fully justified under the circumstances.

As to the letters offered in evidence, we are inclined to think there is some force in the suggestion of the learned counsel for appellant that they were improperly admitted for the purpose offered. They showed, not any alienation of affection, but continued affection by the wife for her husband. However, we do not deem it necessary to pass upon the question of their admissibility, because, if properly admitted, there was nothing to show that the father had anything to do with them, or had been responsible for having them written. Certainly under these circumstances nothing said in the letters would be sufficient to support a charge that the father had alienated the affections of the daughter.

Our conclusion is that the testimony was wholly insufficient to support the action, that the case should not have been submitted to the jury, and that a verdict should have been directed for the defendant.

Judgment reversed, and is here entered for defendant.

(211 Pa. 245)

TILBURG v. NORTHERN CENT. RY. CO.  
(Supreme Court of Pennsylvania. May 11, 1908.)

1. CARRIERS—PASSENGERS—EJECTION—DEATH  
— CONTRIBUTORY NEGLIGENCE — QUESTION  
FOR JURY.

In an action for death of a passenger after ejection from a train by being struck by another train while walking to his destination, whether deceased was negligent in pursuing an unsafe way was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1402.]

2. JUDGMENT — NON OBSTANTE VEREDICTO—  
STATUTES.

Act April 22, 1905 (Laws 1905, p. 286) authorizing a motion for judgment non obstante verdicto, only allows the judge to review the whole case and determine whether it would



have been proper to have given a binding direction at the trial, and does not authorize the judge to decide questions of conflicting evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 387.]

Appeal from Court of Common Pleas, Lycoming County.

Action by Mary Tilburg against the Northern Central Railway Company to recover damages for the death of her husband. From a judgment for plaintiff for \$4,225, defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Seth T. McCormick, for appellant. Otto G. Kaupp and M. C. Rhone, for appellee.

**PER CURIAM.** That the negligence of the appellant in putting the deceased off the train at Haleeka Station, and the contributory negligence of the deceased in attempting to get back to Cogan Valley Station by walking on the tracks, were questions for the jury was decided when the case was here before (217 Pa. 618, 68 Atl. 846, 12 L. R. A. [N. S.] 359). As the former trial ended in a nonsuit, there was no evidence on the part of the defendant as to the actual safety of the place, or the deceased's opportunity of learning it. These elements were supplied at the last trial, but the evidence did not take them away from the jury. Defendant claims to have shown that, though Haleeka is a flag station, and there is no station house there, yet there was a large clubhouse in full view, and only 225 feet distant from the point where Tilburg alighted; that there was also a public road leading in a direct line from Haleeka Station to Cogan Valley Station, on a level with, in plain view from, and within sixty feet of, the platform upon which Tilburg stood after he got off of the train; that the distance to Cogan Valley by the public road is less than by the railroad, and that less than 600 feet distant from the point where the plaintiff stood on the platform of the station there was a house standing by the side of the public road, in plain view from the station. And furthermore that there were present at Haleeka Station, after Tilburg got off the train, and before he started to walk down the track, several persons from whom he could have inquired his way, and that there was a cinder path on both sides of the track all the way from Haleeka Station to below the point where the body of Tilburg was afterwards found between the tracks, on which he could have walked in safety without ever setting foot upon the railroad track. But these facts were not admitted, and on the other side were the facts that Tilburg, if he had ever been there before, was certainly not familiar with the station, and was put off the train there about dusk on a snowy January evening. The important question in regard to his contribu-

tory negligence was not so much the actual situation as what it appeared to him to be, what means of information were reasonably open to him, and how far he availed himself of them. On all these points the case was clearly for the jury.

The court would not have been justified in entering judgment for the defendant non obstante veredicto, under the act of 1905 (Laws 1905, p. 286). That act "was not intended to change the relative functions of court and jury, so as to permit the judge to decide questions of conflicting evidence, but only to allow him to do subsequently, on review of the whole case, what it then appeared it would have been proper to do by binding direction at the trial." *Bond v. Penna. R. R. Co.*, 218 Pa. 34, 36, 68 Atl. 983.

Judgment affirmed.

(221 Pa. 228)

**LACKAWANNA LUMBER CO. v. KELLEY.**  
(Supreme Court of Pennsylvania. May 11, 1908.)

**1. ADVERSE POSSESSION—COLOR OF TITLE.**

A deed of gift executed by an attorney in fact, who had only power to make an executory contract for the sale of the land, was at most only color of title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 476.]

**2. SAME—OCCUPANCY—CUTTING TIMBER.**

Adverse possession cannot be made out by occasional acts of trespass for the purpose of cutting timber without any evidence of cultivation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 112, 113.]

Appeal from Court of Common Pleas, Clinton County.

Ejectment by the Lackawanna Lumber Company against Uriah Kelley. From a judgment for plaintiff, defendant appeals. Affirmed.

The following is the opinion of Hall, P. J., in the court below:

"After full argument and careful examination of the testimony in this case, the court is unable to say that there was any error in the former trial, nor has anything been presented from which we can conclude the possibility of a different result if a new trial were granted. Alexander Kelley, the father of the present defendant, took a conveyance of 116 acres and 22 perches of land from Horace M. Bliss, June 25, 1889. His deed was recorded the next day, and he went into possession some time thereafter. All of the land described in this conveyance lies upon the north side of Kettle creek, except a small portion in the southeastern corner, which presents the general shape of a right angle triangle, the base or southern boundary of which extends east from the creek about 60 rods, the perpendicular running thence north about the same distance to a point where it strikes the creek again, opposite the mouth of Hammersley's Fork, and the

creek itself forms the hypotenuse or north-western side of this triangle. The defendant claims that after his grandfather had gone into possession of the land described by the Bliss conveyance, he discovered that about 40 acres on his northern boundary was an interference with the land of one Daugherty, and consequently to this part of his conveyance his ancestor took no title, and that, in order to make the deficiency good, Mark Slonaker, who had a power of attorney from the plaintiff's predecessors in title, undertook to give him an equal amount of land on the south side of Kettle creek adjoining his former conveyance, and that one Solomon Bastress, a surveyor, ran out the lines of this tract and marked them upon the ground. In support of this contention he offered in evidence a power of attorney from William Williamson, trustee, dated November 10, 1843, more than four years after the date of the conveyance to Kelley, authorizing Slonaker to make and deliver written executory contracts or agreements of bargain and sale for the sale and disposal of certain lands, including the lands in controversy. It does not confer upon him any right to affect the title of his principal by any other act than the execution of written contracts or executory agreements of sale. That he did attempt to rectify the alleged mistake in the Kelley conveyance rests entirely upon the testimony of Jane Corbin, a sister-in-law of Alexander Kelley, the original grantee, a woman now 75 years of age. She testified that she thinks she was 12 or 13 years old when she heard a conversation between Mark Slonaker, Solomon Bastress, and Alexander Kelley relating to the fact that Daugherty was finding fault with Alexander about his land, and that Slonaker said, 'We will run on the other side, and let Daugherty keep his land.' After which she says the three crossed the creek in a canoe, carrying their surveying instruments and maps, and went up the hill blazing the trees. And she says when they came back they stayed at her father's, and she heard them tell her father that they had run Kelley's timber lot out. This statement of Jane Corbin's is followed by the introduction of a map drawn by Solomon Bastress and indorsed in his handwriting as follows: 'The above draft represents a certain piece of land lying at the first fork of Kettle creek in Clinton county, it being part of the Henry Drinker lands and part of Warrant No. 1065 and conveyed to Alexander Kelley by Horace M. Bliss and Sarah his wife, by deed dated 25 day of June, A. D. one thousand eight hundred and thirty-nine; recorded in the office for recording deeds, etc., in and for Lycoming county in Deed Book AA, page 68, the 26 day of June, 1839. Solm. Bastress.' The map itself, however, does not follow in any respect the courses and distances recited in the conveyance to Kelley referred to, but seems to be an attempt to relocate the lands so as to

take in about 40 additional acres on the south, and to leave out about 40 acres on the north which was included in the original conveyance. It appears that there are marks upon the ground south of Kettle creek, made in 1843, showing lines which correspond generally with that portion of the Bastress map which shows territory south of the original conveyance to Kelley. In 1843 Jane Corbin was only 11 years old. To the additional 40 acres included in the Bastress survey there was never any conveyance from the owners to Kelley. On the contrary, the owners conveyed this land to other parties in 1853, and from the year 1853 down to the present time the title to that portion of it which lies west of Turtle Point Run, which is the land in controversy in this suit, has been in parties other than those who held title to that portion of it lying east of Turtle Point Run.

"Let it be clearly understood that there is no dispute as to lines and boundaries in this case. The location of the original conveyance to Kelley is admitted; some of the original corners are still upon the ground. Neither is there any question as to the location of the additional 40 acres contained in the Bastress survey, but the defendant must sustain title to this, if at all, upon the ground that it was a parol gift of land, followed by his entry thereon, under color of title and his subsequent maintenance of possession thereof, either by residence or cultivation, within its lines continuously and openly for a sufficient period to establish a title in him by prescription. There was no such evidence in the case, and no offer made by the defendant that would have covered this point if admitted. We are satisfied that, if Kelley had entered upon any portion of this 40-acre tract under color of title, and had maintained possession thereof, either by residence or cultivation, for a period of 21 years, it would have been sufficient to draw to him all of the land contained within this additional tract, as shown by the marks upon the ground land including the timber, lying west of Turtle Point Run, now in controversy, even though such residence or cultivation had been on that portion of the tract lying east of Turtle Point Run which has been owned by other parties since 1853, and which is not involved in the present suit. But as we have said there is no such testimony and no such offer. The defendant, it is true, offered to prove that Kelley's widow received pay for certain timber which was cut on the Bastress survey east of Turtle Point Run, and to show that this widow leased part of the lands east of Turtle Point Run for banking purposes, and defendant also offered to prove that timber on this tract east of Turtle Point Run was cut by the said widow and other heirs of Alexander Kelley after her death; and all of the offers relating to the taking of timber specifically cover, not only all of the land east of Turtle Point Run within the addition-

al 40 acres, but also the triangular piece lying on the north of it and between it and Kettle creek, which was contained in Kelley's original conveyance from Bliss, but none of the offers relating to the taking of timber or the banking of logs would be sufficient, if proved, to create a title by prescription, and when it comes to the making of an offer to prove cultivation on the land south of Kettle creek, the offer is very ingeniously drawn, to the effect 'that a portion of the land east of Turtle Point Run suitable for cultivation was cultivated many years.' This part of the offer is fatally defective in failing to specify that the cultivation existed for a sufficient period of years to establish title by prescription. Its ingenuity consists in the fact that it does not specify that the portion of land which was cultivated was within the lines of the additional 40 acres. As a matter of fact, the cultivation referred to on the lands east of Turtle Point Run occurred within the lines of the original conveyance from Bliss to Kelley. This is shown by the testimony of both Mr. Mitchell and Mr. David, one the surveyor for the plaintiff, and the other the surveyor for the defendant. But, further than that, there is no doubt that, at the time of the original conveyance to Kelley, the southern bank of Kettle creek for its whole distance through these lands was the side of a mountain so precipitous as to make its cultivation impossible. This precipice was broken at one point only where Turtle Point Run flows into Kettle creek from the south. It appears from the testimony, and from the connected draft introduced by the defendant as Exhibit L, that between this point and Hammersley's Fork, which flows into Kettle creek from the north at the eastern boundary of Kelley's conveyance, there was an island extending almost the entire distance between the two streams, which was in the southwest corner of the Bliss conveyance. The southern channel was the boundary of warrant 3640, as shown by the original survey of the warrant. This channel is now closed at the upper end. This was probably done because, as the evidence shows, a mill and dam were built on the northern channel, through which the creek now flows exclusively, but the general course and location of the original or southern channel is shown upon defendant's Exhibit K, where it is marked 'Water Course,' and also, as I have said, upon the connected draft, known as Exhibit L. All the cultivation ever attempted was on what is now the south side of Kettle creek within the lines of the triangular southeast corner before referred to, which was a part of the original conveyance from Bliss, and was probably done upon this island, but certainly within the lines of the original Bliss conveyance.

No cultivation was ever attempted within the lines of the additional 40 acres, nor as a matter of fact was any cultivation possible within those lines; the lines included therein being situated upon an almost perpendicular mountain side. The defendant's offer in this respect is confusing, for the reason that it would have enabled him to show cultivation east of Turtle Point Run and south of Kettle creek and yet within the lines of Kelley's original conveyance and entirely outside of the additional 40 acres, and therefore of no avail in proving possession of the latter tract. The map introduced by defendant, Exhibit K, was evidently designed for the same purpose that it does not show the south line of the Bliss conveyance, neither does the map agree with the courses and distances in the conveyance from Bliss to Kelley, nor with the Bastress map, nor with the marks upon the ground.

"The doctrine of consentable lines, so strongly urged by one of the counsel for defendant, has no application whatever to this case. There is no claim here that an attempt was made to agree upon a disputed boundary between the adjoining landowners. This is an attempt to maintain a parol gift by possession. It matters not that the land so given adjoins the lands previously owned by the grantee. The doctrine would be the same if the parol grant had been to 40 acres situated a mile away, and to make it valid it would have to be followed, either by written conveyance thereof, or by residence or cultivation within its boundaries. There was no offer on the trial to prove residence or cultivation within the lines of the additional 40 acres taken in by the Bastress map. There has been no attempt to show such residence or cultivation within those lines since the trial, on the hearing of this motion, and it is clear to the mind of the court that in fact there never was, and from the nature of the ground never could have been, any such residence or cultivation, and that the only acts of dominion ever exercised by Kelley, or any of his successors in title, to that 40 acres consisted of an occasional trespass for the purpose of cutting timber.

"The motion for a new trial is therefore refused."

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

C. S. McCormick and T. C. Hipple, for appellant. W. C. Kress and D. L. Krebs, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the court below refusing a new trial.

(221 Pa. 249)

## In re DOBBINS' ESTATE.

Appeal of McMURTRIE et al.

(Supreme Court of Pennsylvania. May 11, 1908.)

## 1. WILLS—CODICILS—CONSTRUCTION—RESIDUARY ESTATE—INTESTACY.

Testator devised the residue of his estate to his executors to pay the whole net income to his sister for life, and on her death to pay the principal to such charities as she should appoint, and, on her failure to do so, to eight charities named. He also directed that, if the bequest to charities should fail, then he gave all money intended for charity to his sister and brother, or to the survivor of them, to be divided between them. A codicil revoked the charitable provision of the will, and gave legacies to certain specified charities, and directed that the residue of his estate was to be held in trust for his sister, and at her death to be paid to such charities as he should thereafter appoint, and in case of failure to do so, to pay over the same to such charities as his sister should appoint. A subsequent codicil revoked the provision for the payment of the whole income to testator's sister, and directed his executors to pay her for life an annuity much less than the total income. Testator failed to name any charities as beneficiaries of the residue, and the residuary income was much larger than that directed to be paid to testator's sister. *Held*, that the provision in the will, in favor of the brother and sister in case of a failure of the charitable bequest was not revoked by the codicils, and that there was no intestacy as to the corpus of the residuary estate.

## 2. SAME—ACCUMULATION.

There was also no intestacy as to the surplus income, it being testator's intention that the entire residuary estate should go to charity, for which purpose an accumulation is not forbidden; and, it being provided that on the failure of the charitable bequests all money intended to be given to charities should go to testator's brother and sister, the entire surplus income passed to them.

Appeal from Orphans' Court, Philadelphia County.

Judicial settlement of the estate of Edward T. Dobbins, deceased. From an order dismissing exceptions to the adjudication of the auditing judge, Mary S. McMurtrie and others appeal. Affirmed.

The material portions of the will and codicils of the decedent were as follows:

## WILL.

"Item 24. All the rest, residue and remainder of my property and estate of every nature and kind and wheresoever the same may be or be situated, or to which I shall be entitled at the time of my decease and not already hereinbefore disposed of, I give and devise and bequeath unto my executors and trustees hereinafter named and appointed and to the survivors or survivor of them in trust nevertheless for the following uses and purposes and not otherwise. That is to say to invest such of my estate as shall come into their hands uninvested and keep the same and all the other property coming into their hands under this my will invested and change the investment as often as the proper and beneficial management of my estate shall in their judgment require, and pay the income

and interest thereof together with the rents of my real estate which I desire shall remain unsold so far as relates to that situate in the city of Philadelphia, over to my said sister Mary A. Dobbins, in quarterly payments or oftener if she request it during the whole term of her natural life. And I request and direct my said executors and trustees to allow and permit my said sister Mary A. Dobbins to possess, occupy, use and enjoy as a place of residence for herself my dwelling house and premises No. 1808 Locust street, Philadelphia, and also to have full use and possession and enjoyment of my stable and premises No. 1919 Ann street, Philadelphia, both free of rent and of every other charge during her life, or so long as she shall desire to have and use them or either of them."

"Item 27. At and immediately after the death of my said sister Mary A. Dobbins or at any time during her life if she should so request, I do hereby authorize and empower my said executors and trustees to sell and dispose of all or any part of my real estate and to give good and sufficient deed or deeds or other assurances in the law to the purchaser or purchasers thereof, without any liability on the part of the purchaser or purchasers to see to the proper application of the purchase money and I direct them to pay over all the rest, residue and remainder of my said estate to and among such charitable institutions as my said sister Mary A. Dobbins by her last will and testament shall direct and appoint, and in default of such direction and appointment, then to pay over the said rest, residue and remainder to the following charitable institutions:—To;

"The Burlington County Hospital, Mount Holly, New Jersey.

"The Bethesda Home, Located at Chestnut Hill, Philadelphia.

"The Lying in Charity Hospital and Nurses Home, located Cor. 11th & Cherry streets, Philadelphia.

"The Blind Men's Home, 3518 Lancaster Avenue, West Philadelphia.

"The Episcopal Hospital, Philadelphia.

"The Howard Hospital, located on Broad Street, Philadelphia.

"The Southern Home for Destitute Children, Broad & Morris Streets, Philadelphia.

"The House of Rest, Germantown, Philadelphia.

dividing the said rest, residue and remainder equally among the said above named institutions or she shall add to the list any other charities that she may deem worthy and desires to be benefited by my estate.

"Item 28. Should my said foregoing bequests to charitable institutions for any reason not take effect or be held to be void, then I give and bequeath all moneys intended by this my said will to be given to charitable purposes to my sister Mary A. Dobbins and my brother Murrell Dobbins or to the sur-

vivor of them to be divided equally between them and to be disposed of by them or the survivor of them in any manner that they may deem proper and useful."

#### Codicil 1.

"1st. I hereby revoke and annul Item 27 of my said will and all the provisions thereof as contained on page eight of the said will."

"18. After the death of my sister, Mary A. Dobbins, I order and direct that all the rest residue and remainder of my estate, which under the terms of Item 24 of my will shall have been held by them in trust for the benefit of the said Mary A. Dobbins during her lifetime shall be held by my said executors and trustees and the survivor or survivors of them upon the further trust to pay over and distribute the said rest, residue and remainder of my estate to such charitable institution or institutions or to such charitable purpose or purposes as I shall hereafter designate by instructions in writing addressed to my said executors or by provision in a future codicil to my will, but if I shall fail to make such designation, then to pay over and distribute the same to such charitable institution or institutions as my sister, Mary A. Dobbins, shall by her last will and testament direct and appoint."

#### Codicil 2.

"8. I hereby revoke and annul Item 24 of my said will and in place thereof I give, devise and bequeath all the rest, residue and remainder of my property and estate, of every nature and kind whatsoever and where-soever situate, or to which I shall be entitled at the time of my decease, and not already hereinbefore or by my said will or other codicils thereto disposed of, unto my executors and trustees, and to the survivors or survivor of them, in trust, nevertheless, for the following uses and purposes, that is to say:

"To invest the same and keep the same invested, changing the investments as often as the proper and beneficial management of my estate shall in their judgment require; to collect the income therefrom, and after the payment of all lawful charges and expenses thereof, to pay out of the net income to my sister, Mary A. Dobbins, the sum of \$2,000 per month during the whole term of her natural life, and I direct my executors and trustees to allow and permit my said sister, Mary A. Dobbins, to possess, occupy, use and enjoy as a place of residence for herself my dwelling house and premises, No. 1808 Locust street Philadelphia, and also my stable and premises, No. 1919 Manning street, Philadelphia, both free of rent and of every other charge during her life or so long as she shall desire to have and use them or either of them."

The auditing judge held that there was an intestacy as to the surplus income in excess of the annuity, and directed it to be dis-

tributed by the trustees amongst the distributees under the intestate law. He held that there was no present intestacy as to the principal of the estate, which he held to be subject to the testamentary appointment of Mary A. Dobbins under the sixteenth clause of the first codicil. The heirs at law filed exceptions to the action of the auditing judge in holding that there was no intestacy as to the principal. Mary A. Dobbins and Murrell Dobbins, brother and sister of the decedent, filed exceptions to the action of the auditing judge in holding that there was an intestacy as to the surplus income.

The following is the opinion of Penrose J., in the court below:

"The record does not show who the parties are who would take under the intestate laws if there should be an intestacy, and, as we are without information on the subject, we do not know the extent of the interest of those who have excepted to the refusal of the auditing judge to award distribution of any part of the principal of the residuary estate. We think, however, that his action in this respect was clearly right. By his will, executed November, 1894, the testator after numerous pecuniary and specific legacies contained in 22 items, separately numbered, to relatives and to designated charities, gave the residue of his estate 'of every nature and kind and wherever same may be' to his executors in trust to pay the income, interest, and rents to his sister Mary, 'during the whole term of her natural life,' further directing, by Item 27 (the direction to pay the income to the sister being contained in Item 24) that at her death the trustees, after sale of real estate, shall 'pay over all the rest, residue and remainder' of such residuary estate 'to and among such charitable institutions' as she shall, by will, direct and appoint, and in default of such appointment to 10 charitable institutions there named, viz.: the Burlington County Hospital, the Bethesda Home, the Lying in Charity Hospital, the Blind Men's Home, the Episcopal Hospital, the Howard Hospital, the Southern Home for Destitute Children, and the House of Rest; 'dividing the said \* \* \* residue \* \* \* equally among said \* \* \* institutions, or she shall add to the list any other charities that she may deem worthy.' Immediately after this disposition of the residuary estate, the will, by Item 28, provided as follows: 'Should my said foregoing bequests to charitable institutions, for any reason, not take effect or be held to be void, then I give and bequeath all moneys intended by this my said will to be given to charitable purposes to my sister Mary A. Dobbins and my brother Murrell Dobbins or to the survivor of them to be divided between them and to be disposed of by them or the survivor of them in any manner that they may deem proper and useful.' Six years lat-

er, by a codicil dated July 20, 1900, he revoked and annulled 'Item 27' of his will, 'and all the provisions thereof,' and after giving pecuniary legacies to 12 charitable institutions, including some of those mentioned in Item 27 as residuary legatees, and providing that if his nephew, T. Monroe Dobbins, or his niece, Laura E. Dobbins, should die without issue, the \$30,000 and \$25,000 given to them, respectively, by Items 15 and 17 of his will, should be paid to their 'father and mother \* \* \* or the survivor,' he directed that at the death of his sister Mary 'all the rest, residue, and remainder,' held 'under the terms of Item 24' in trust for her benefit, for life, shall be held in trust 'to pay over and distribute \* \* \* to such charitable institution or institutions or to such charitable purpose or purposes as I shall hereafter designate by instrument in writing addressed to my said executors or by provision in a future codicil to my will; but if I should fail to make such designation then to pay over and distribute the same to such charitable institution or institutions as my said sister \* \* \* shall by her last will \* \* \* direct and appoint.' Other codicils (April 5, 1902, July 27, 1904, July, 1905, and July 7, 1905), revoked by referring to names of legatees and number of items, Items 17, 3, 9, 11, 14, 24, 13, 5, and 18, and gave additional legacies, charitable and otherwise, as there set forth; the codicil of July 27, 1904, Item 8, being as follows: 'I hereby revoke and annul Item 24 of my said will and in place thereof I give \* \* \* all the rest, residue, and remainder of my property \* \* \* of every kind \* \* \* and not already \* \* \* by my said will or codicils disposed of unto my executors and trustees \* \* \* in trust \* \* \* to invest the same \* \* \* to collect the income therefrom, and to pay out of the net income to my sister Mary A. Dobbins \* \* \* \$2,000 per month during the whole term of her natural life,—she to have the right to occupy, free of rent and of every other charge, his residence and stable, and the executors and trustees to have power to sell all his other real estate, 'at such time and upon such terms as to them shall seem best.'

Under the will, as originally drawn, an intestacy was impossible. The charitable institutions designated as residuary legatees 'in default of appointment' by the sister, took vested interests, subject to be divested by the exercise of the power (*Doe v. Martin*, 4 Term Rep. 39; 4 Kent 204, 324; *Brooke's Estate*, 214 Pa. 46, 47, 63 Atl. 411); and, if the testator should die within a calendar month after its execution, the sister and brother would take under Item 28, with no restriction on their right of disposal, but with the evident belief on the part of the testator that they would carry out his wishes. A codicil, as it is well settled, is to be interpreted in the light of the will, which it changes only to the extent that the original

provisions are thus altered; everything else remains just as it was, and this is the case even if the codicil professes to 'revoke and annul' that which it actually only modifies. *Watt's Estate*, 8 Pa. Dist. R. 343; *Sloan's Appeal*, 168 Pa. 422, 32 Atl. 42, 27 Am. St. Rep. 899; *Whelen's Estate*, 175 Pa. 23, 34 Atl. 329; *Cooper v. Day*, 3 Merivale, 154; *Leacroft v. Maynard*, 3 Bro. C. C. 233, etc. The codicil becomes part of the will, with like effect as if it had been incorporated in it. A principle of no less importance is that a codicil republishes the will and all previous codicils—regarded as forming part of it; and all that at the time of such republication has been retained is, necessarily, to be treated as taking effect as of the date of such republication. From this it results that Item 28, giving the residuary estate to the brother and sister in the event of failure of the charitable gifts, which was never revoked, is to be read in the light of the codicil which reduced the gift of income to the cestui que trust for life, and of the codicils which followed. The retention of this item, especially in view of the revocation of so many other items, is very significant, and there is no right to disregard it, or to say that its operation is to be confined to the terms of the will as it originally stood. See *Sherer v. Bishop*, 4 Bro. C. C. 55. Obviously the provision became of more importance by reason of the first codicil than it had been previously, for not only was there danger of failure of the pecuniary legacies to charities, newly created by the codicil, by the death of the testator within a calendar month after its execution, but, the vested residuary gifts to charities being revoked, there was danger that the intention with regard to charitable disposition of the residue might fail by reason of the omission of the testator to designate the special object 'by instructions in writing \* \* \* or by provision in a future codicil,' and the further danger that the sister might die without having exercised her power of selection. Hence Item 28 was retained, the provisions of the codicil substituted in place of the items revoked or modified being incorporated in the will in place of Item 27, etc., which preceded it, and thus falling within its terms. This was the case, also, after the modification, by the later codicil, of the estate of the cestui que trust for life by the reduction of her share of income to \$24,000 per annum, but with no suggestion that Item 28 of the will had been revoked or in any way abrogated. There was no revocation of the power of selection given to the sister. It was unaffected by the abridgment of her interest in the income of the residuary estate, and would have continued as a power in gross if her right to income had been taken away altogether. Whether she will exercise her power or not cannot be known until her death, and, in the meantime, as the auditing judge has held, the principal of the estate cannot

be distributed. The exceptions to this ruling are dismissed.

"The codicil having reduced the amount to be paid to the sister to \$24,000 per annum, there is, and while she lives, will be, a large surplus of income. If the charities ultimately intended to take the principal of the residuary estate were designated by the will, this surplus would accumulate for their benefit, the act of Assembly restraining accumulations to the case of an existing minority, and for the benefit of the minor expressly declaring that its provisions shall not extend to charities. But this exception from the operation of the statute manifestly cannot apply where there is no charitable object having a vested, or, at least a contingent interest at the time the accumulations occur; and especially where, as in the present case, such object may never come into existence at all. Under these circumstances there would be an intestacy as to the surplus income, as the auditing judge has held there is, unless it is prevented by the provisions of Item 28 of the will, republished by this codicil and those which come after it. The intention of the testator as manifested, both by the will and the codicils, was that his residuary estate should go, either by his own designation or by the selection of his sister, to charitable institutions; and he knew, for such is the law which all are presumed to know, that accumulation, either by express provision or by indirection, was not forbidden in case of charitable gifts. He did not know that the court would hold that the statute would apply as against an unknown and unascertainable charity. This, however, did not affect his intention, and thus is presented the very case contemplated by Item 28 of the republished will: 'Should my said foregoing bequests to charitable institutions for any reason not take effect or be held to be void, then I give and bequeath all moneys intended by this my said will to be given to charitable purposes to my sister, Mary A. Dobbins, and my brother, Murrell Dobbins, or to the survivor of them, to be divided equally between them, and to be disposed of by them, or the survivor of them, in any manner that they may deem proper and right.' 'Moneys intended' for charities are, if the charitable intention should be held ineffective, covered by this item, and the 'intention' may be manifested by implication no less than by express provision. It is true that 'the heir will not be disinherited except by express words or necessary implication,' but where the will shows unequivocally, as it does in this case, that he has been excluded, the principle has little application where the claim by the heir is based upon a codicil. *Norris' Estate*, 217 Pa. 560, 66 Atl. 1000, 15 Pa. Dist. R. 449. The right to dispose of his property by will is conferred upon the owner by a statute no less explicit in its terms than is that which provides for its disposition where there is no will, and the very purpose of a will is to pre-

vent the operation of the intestate laws. An intestacy will never be permitted where, by any fair interpretation of the will, or any reasonable understanding of its language, it can be avoided. An intestacy can seldom, if ever, take place where there is a gift of the residue, for such gift will, in general, take in whatever is not well disposed of. Here there is a double disposition of the residue, first, to charities to be defined in the future; and, second, if they should fail, to the brother and sister."

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

N. Dubois Miller, Harman Yerkes, John Faber Miller, Carroll R. Williams, and Nicholas H. Larzelere, for appellants. John G. Johnson, for appellee.

PER CURIAM. This appeal is dismissed for reasons appearing in the opinion of Penrose, J., in the court below.

(221 Pa. 259)

#### In re DOBBINS' ESTATE.

(Supreme Court of Pennsylvania. May 11, 1908.)

Appeal from Orphans' Court, Philadelphia County.

Judicial settlement of the estate of Edward T. Dobbins, deceased. From an order dismissing exceptions to the adjudication of the auditing judge, Mary A. Dobbins and others appeal. Reversed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

John G. Johnson, for appellants. N. Dubois Miller, Harman Yerkes, John Faber Miller, Carroll R. Williams, and Nicholas H. Larzelere, for appellee.

PER CURIAM. The decree is reversed, and the exceptions of the appellants directed to be sustained in accordance with the opinion of Judge Penrose.

(74 N. J. L. 80)

#### TRUSTEES OF STEVENS INSTITUTE OF TECHNOLOGY v. BOWES, Collector, et al.

(Supreme Court of New Jersey. Nov. 12, 1906.)

TAXATION—PROPERTY EXEMPT—LAND OF COLLEGES.

Land belonging to a college, not conducted for profit, upon which there is a laboratory of chemistry, containing chemical laboratories, lecture rooms, and recreation rooms, used by students in connection with their courses in chemistry, the portion not actually occupied by the building being necessary for its fair use and intended to be used for other college buildings, is exempt from taxation under Act April 8, 1903 (P. L. p. 395) § 3, subd. 4, exempting from taxation all buildings actually and exclusively used for colleges not conducted for profit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 395, 396, 401.]

Certiorari by the Trustees of the Stevens Institute of Technology against Richard Bowes, collector of taxes of the city of Ho-

boken, and others to review the validity of an assessment of taxes. Assessment set aside.

Argued June term, 1906, before FORT, GARRETSON, and REED, JJ.

Lewis, Besson & Stevens, for prosecutor. James F. Minturn, for defendants.

GARRETSON, J. This certiorari brings up an assessment of taxes made against the prosecutor for the year 1905 by the assessors of taxes of the city of Hoboken.

It appears from the return to the writ that taxes were assessed upon the property of the prosecutor by the description: "Plot 1, Gore 4, 562 Acres." The prosecutor claims to be exempt from taxation under "An act for the assessment and collection of taxes," approved April 8, 1903 (P. L. p. 394). It is provided by section 3: "The following property shall be exempt from taxation under this act, namely, (4) all buildings actually and exclusively used for colleges, schools, academies, and seminaries not conducted for profit. Also all buildings actually and exclusively used for public libraries, religious worship or for asylums or schools for feeble minded or idiotic children and owned by corporations of this state authorized to carry on such charities and the land whereon the same are situated necessary to the fair use and enjoyment thereof, not exceeding five acres in extent for each."

It appears from the testimony in the case that the prosecutor is a college not conducted for profit; that the building on the land assessed is a laboratory of chemistry, containing chemical laboratories, lecture rooms, and recreation rooms, and the laboratories are used by the students in connection with their courses in chemistry. It is also testified to by the president of Stevens Institute that the tract of land surrounds the laboratory and is necessary for its fair use, and is to be used also for other buildings that are to go up there. There is nothing to contradict this testimony; and, in the absence of evidence to the contrary, the prosecutor has established its rights to have the property in question exempted from taxation.

The assessment will be set aside.

(74 N. J. L. 71)

### SCHNEIDER v. WINKLER.

(Supreme Court of New Jersey. Nov. 12, 1906.)

#### 1. EXCEPTIONS, BILL OF — SEALING — NECESSITY.

The Supreme Court is not required to consider a writ of error where no exceptions have been sealed.

#### 2. MUNICIPAL CORPORATIONS — DEFECTS IN STREETS — INJURY TO PEDESTRIANS.

In an action for injuries to a child by falling into an insufficiently guarded opening in a sidewalk leading to an area, evidence as to whether the opening was in front of defendant's store was admissible.

#### 3. TRIAL — EXCEPTIONS — FORM.

A general exception to the entire charge is unavailable, the court being entitled to know

to what particular part of the charge exception is taken, to the end that an opportunity to correct it may be given.

#### 4. MUNICIPAL CORPORATIONS — SIDEWALKS — CONSTRUCTION — CARE REQUIRED.

Where an abutting property owner maintained an opening in the sidewalk leading to an area, he was bound to keep the area so covered and protected as to render the walk safe to the public.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1684.]

#### 5. SAME — NATURE OF PRECAUTIONS — SUFFICIENCY — QUESTION FOR JURY.

Defendant maintained an opening in a sidewalk over an area adjoining his building. The area was covered with a steel or iron door, which, when closed, was flat with the sidewalk. The door opened outwardly from the building towards the middle of the street, and, when the area was in use, the door was held up by a three-quarter inch iron rod, fastened to the end of the door, three feet three inches above the sidewalk and sloping to the building, where it was one foot four inches above the walk. When the door was raised, there was an opening in the sidewalk the size of the door, and  $6\frac{1}{2}$  to 7 feet deep. Held, that whether the door and the rod constituted safeguards against injury to persons using the sidewalk was for the jury.

#### 6. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — CHILD.

A child under seven years of age injured in falling into an opening in a sidewalk leading to an area adjoining defendant's building, alleged to have been insufficiently protected, cannot be charged with contributory negligence.

Error to Circuit Court, Monmouth County.

Action by Madeline Schneider against Thomas J. Winkler. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued July term, 1906, before FORT, GARRETSON, and REED, JJ.

James D. Carton, for plaintiff in error. Charles E. Cook, for defendant in error.

GARRETSON, J. The plaintiff is a girl about six years of age. The defendant is a confectioner and baker, carrying on his business in a store fronting on Madison avenue, in Asbury Park. The store is about 38 feet wide, and the front consists, beginning at the east, of the wholesale department of the defendant's business, then a hallway with stairs leading to the apartments above, and then the retail department of the defendant's business; that is, the candy and bakery department. In the front of the retail department are two windows and an entrance between. In one window was a display of articles from the bakery and in the other a candy display. In front of the most easterly window of the retail department and on the sidewalk is a cellarway or area about three feet three inches wide and about six feet long, with stairs leading down from the westerly end of the areaway. The opening was adjoining the building, and the long dimension was along the building. Covering the areaway was a steel or iron door, which, when closed, was flat with the sidewalk, and which opened outwardly from the building toward the middle of the street.



When the areaway was in use and the iron door was open, the door was held up by an iron rod about three-quarters of an inch in thickness, fastened to the easterly end of the door about three feet three inches above the sidewalk and sloping to the building, where it was about one foot four inches above the sidewalk. The sheet-iron door, when closed, formed part of the sidewalk, and, when it was raised up, there was an opening in the sidewalk of the size of the door and of the depth of  $8\frac{1}{2}$  to 7 feet. The plaintiff was lawfully using the sidewalk, being with her aunt and mother. The aunt stopped at the door of the wholesale department, and attempted to go in, but found the door locked. The child at this time was going on from the east towards the window in which was the candy, and either fell over or under the rod which held up the iron door, and was precipitated into the area or cellar. She was injured, and brings this suit to recover damages for her injuries.

There are no exceptions whatever which have been sealed, and the court is therefore not required to consider the case at all; but we have concluded to dispose of the exceptions as if they had been actually sealed. Four exceptions were taken. The first is as to a question asked of a witness whether the opening was in front of the store of the defendant. No assignment of error covers this exception. It has not been argued. We are not able to see any objection to it in the connection in which it appears. At the end of the entire charge the defendant, by his counsel, prayed a bill of exceptions. It does not say so, but we presume it is a general exception to the charge. Such an exception cannot be considered, for the reason that the court, when the charge is concluded, has a right to know to what particular part of the charge exception is taken, to the end that the court may have opportunity to correct it to the jury if satisfied that the exception is well taken.

There remains to be considered only the exceptions to the refusals to nonsuit and direct a verdict for the defendant. It is well settled that one who obstructs a sidewalk by placing excavations in it is bound to render it safe to the public. *Durant v. Palmer*, 29 N. J. Law, 544; *Houston v. Traphagen*, 47 N. J. Law, 23; *Quimby v. Filter*, 62 N. J. Law, 766, 42 Atl. 1051; *Temperance Hall Association v. Giles*, 33 N. J. Law, 260. And it is a question for the jury to determine whether the safeguards provided against the danger are sufficient. This was submitted to the jury with proper instructions.

The plaintiff, being a child under the age of seven years, could not be charged with contributory negligence. The rule laid down by the judge in his charge upon that branch of the case was in accordance with the law of this state. *Newman v. Railroad Co.*, 52 N. J. Law, 446, 19 Atl. 1102, 8 L. R. A. 842.

The judgment below is affirmed.

(74 N. J. L. 492)

# STURTEVANT MILL CO. v. KINGSLAND BRICK CO.

(Court of Errors and Appeals of New Jersey. March 28, 1907.)

## 1. SALES—BREACH OF WARRANTY—ELEMENTS OF DAMAGE.

A contract for the sale of certain rolls provided for their erection at once after arrival at the buyer's plant, for 30 days' trial, and, if not satisfactory, that they might be returned. There was no provision in the contract that the seller should furnish or erect the foundation for the rolls, and the buyer agreed not to hold the seller liable for any expenses or losses connected with installing or operating the machine, except what the order called for. *Held*, that the seller, on the rolls being unsatisfactory, was not liable for the cost of the foundation.

## 2. SAME—ACTION FOR PRICE—DEFENSES—NON-COMPLIANCE WITH CONDITION.

A contract to purchase certain rolls on 30 days' trial provided that, if at the expiration of such trial the rolls did not prove satisfactory, the buyer would load them on cars at his plant immediately after the expiration of such time, to be returned to the seller. The installation of the rolls was completed on June 16, 1904, and they were operated to their full capacity, beginning June 18th. On July 8th defendant's president stated to the seller's agent that the rolls would have to go back, and on July 14th telegraphed the seller, "Am arranging for the reshipment of rolls," but defendant did not, within 30 days thereafter, or at any time, load the rolls on cars for return to the buyer, though between July 11 and 22, 1904, the seller telegraphed for a decision as to whether the rolls were to be returned or paid for. *Held*, that defendant, not having loaded the rolls on cars for return as required, was liable for the price.

## 3. APPEAL AND ERROR—PREJUDICE.

Where a contract for the sale of certain machinery after trial provided that, if rejected, the buyer should immediately load the same on cars for return to the seller, and the buyer after rejecting the machinery did not, within any time proven, load the machinery on cars for return, it was not prejudiced by the court's failure to properly interpret the word "immediately" as used in such contract.

Magie, Ch., and Pitney, Swayze, Reed, Trenchard, and Vroom, JJ., dissenting.

Error to Supreme Court.

Action by the Sturtevant Mill Company against the Kingsland Brick Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Collins & Corbin, for plaintiff in error. Addison Ely, for defendant in error.

GARRETSON, J. The plaintiff brought its action upon the following order of the defendant, which the plaintiff has accepted: "New York, April 12, 1904. Sturtevant Mill Co., Stephen Girard Building, Phila., Pa.: All communications should be addressed to our New York office. \* \* \* Please deliver to our Kingsland plant the following: One set of standard centrifugal rolls, 36-in. diameter by 6-in. face, as specified in your catalogue, No. 3, page 44, you to guarantee the capacity of seven tons per hour or seventy tons per day of ten hours, to be ground fine enough to go through No. 20 mesh Dunlap screen, the price to be \$1,600, F. O. B., Bos-

ton, Mass., together with automatic feeder, for which we will pay \$100 additional. If, however, the feeder will not be found necessary after trial, you to give us credit for it after return of same, we to have a trial of thirty days of above specified rolls, the rolls to be erected at once after arrival at our plant at Kingsland, N. J., trial to be given at once after completion of erection. If after thirty days' trial the rolls do not prove satisfactory, we will load them on cars at our plant immediately after the expiration of above specified time. If rolls prove satisfactory, terms to be \$850 at expiration of trial and \$850 thirty days thereafter. You to furnish a competent man to superintend the erection of said rolls. Machinery to be shipped within ten days from the date of this order. The rolls remaining your property until paid for in full. [Signed] Kingsland Brick Company. Per M. M. Tannenbaum, Pres. Deliver no goods without this order." Also a telegram as follows: "April 18, 1904. Sturtevant Mill Company, Stephen Girard Building, Phila., Pa.: We will not hold you liable for any expenses or losses contingent with installing or operating the machines except what our order calls for. Kingsland Brick Company."

The plaintiff furnished the rolls, and they reached Kingsland April 29, 1904. Mason, the plaintiff's machinist, arrived at Kingsland May 9, 1904, to superintend the erection of the rolls. The rolls began to run June 4th. The installation of the rolls was completed June 16th. The test of the rolls to their full capacity began June 18th. The defendant tested the rolls, and July 8th Tannenbaum, the defendant's president, stated to Hallett, the agent of the plaintiff who had obtained the order, that the rolls would have to go back. July 14, 1904, defendant telegraphed the plaintiff: "Am arranging for reshipment of rolls." So far as appears, after 30 days' trial, the rolls were not loaded on cars at the defendant's plant immediately, or at any other time after the expiration of the time specified for their trial. They remained in possession of the defendant, at its works, up to the time of the trial, and have not been paid for. The trial resulted in a judgment for the plaintiff for the price agreed upon in the contract. The defendant having upon the trial moved for a nonsuit and for direction of a verdict, and both motions being denied and exceptions taken, the case for these alleged errors and others is before this court.

The defendant, by notice annexed to its plea of the general issue, claimed to recoup against the plaintiff, as damages for breach of the guaranty, moneys expended in the erection of a foundation for the rolls in question and in procuring belting for the rolls, and to recover these moneys because the rolls, after 30 days' trial, did not prove satisfactory, in that they did not have the capacity guaranteed by the contract, and the plaintiff had been notified of that fact. The an-

swer to the plaintiff's demand for payment is that the rolls were sold with a guaranty of capacity; that there has been a breach of that guaranty, and recovery results therefrom; also that the defendant is entitled to recover from the plaintiff the expenses of demonstrating the breach of the guaranty. The contract provided that the defendant should have a trial of the rolls for 30 days, the rolls to be erected at once after arrival at defendant's plant, and the trial to be given at once after completion of erection. There is no provision in the contract that the plaintiff is to furnish and erect the foundation for the rolls, only to furnish a competent man to superintend the erection of them; and, when we consider the telegram of the defendant to the plaintiff of April 19th, which is part of the contract, that the defendant would not hold the plaintiff liable for any expenses or losses contingent with installing or operating the machine except what the order calls for, we cannot escape the conclusion that the plaintiff was not to be in any way liable for the cost of the foundation, and, if this is so, we cannot suppose that the parties to the contract contemplated that the plaintiff should pay for the foundation by the way of recoupment for the failure of the rolls to do the work guaranteed in the contract.

Had the clause, "If after thirty days' trial the rolls do not prove satisfactory we will load them on cars at our plant immediately after expiration of above specified time," been omitted, the defendant, upon failure of the rolls to stand the test as to capacity, would have been entitled, upon notice to the plaintiff of such failure, unless relieved by some act of the plaintiff, to declare the contract rescinded. *Starr v. Torrey*, 22 N. J. Law, 180; *Smalley v. Hendrickson*, 29 N. J. Law, 371; *Smith v. York Company*, 58 N. J. Law, 242, 33 Atl. 244; *Woodward v. Emmons*, 61 N. J. Law, 281, 89 Atl. 703; *Underfeed Company v. Hudson Company*, 70 N. J. Law, 649, 58 Atl. 296; *Columbia Company v. Beckett Company*, 55 N. J. Law, 391, 26 Atl. 888. But even in such case we are not able to see how the defendant would, under this contract and telegram, have any ground to recover for the cost of the foundation. The only effect of a breach of such a guaranty in such a contract of sale must be to rescind the contract and prevent a recovery of the price, if it has not been paid, or authorize the recovery back of the moneys paid by the buyer to the seller, if the price, or any part, has been paid. It cannot be that, when one uses the property of another under an agreement to buy it if upon trial it meets certain requirements, the cost and expenses of the trial are to be paid by the owner, unless it is so expressly agreed. In the contract in question the parties have made special provision as to what shall happen in case the rolls upon trial did not prove satisfactory, viz., the defendant was to load them on cars at

its plant immediately after the expiration of the 30 days' trial. The defendant cannot substitute a right to rescind the contract for breach of the guaranty contained in it, upon notice to the plaintiff, for what he has agreed in his contract he will do upon the happening of such breach, nor can he add to the contract such additional right. The plaintiff was entitled to recover the price of the rolls agreed upon in the contract, and the motions of the defendant for nonquit and for direction of a verdict were properly refused.

Another error assigned is the failure of the trial judge to properly interpret the meaning of the word "immediately" as used in the contract, referring to the time of loading the rolls upon the cars upon proving unsatisfactory. Even if the charge was erroneous in this respect, it was not harmful to the defendant, for it appeared that the defendant had never loaded the rolls upon the cars, neither immediately after the 30 days, nor within 30 calendar days after, nor within 30 days excluding Sundays and holidays, nor within any extended time proved by the evidence. It was therefore unnecessary for the judge to charge the jury as to the meaning and effect of the 30-day clause, or of the word "immediately" used in that clause.

It is also claimed that there was evidence to show that the plaintiff had, by its conduct, consented to an extension of the time of payment, because there were negotiations between the plaintiff and the defendant for the payment of a less price for the machine than that contemplated by the contract. Hallett, who got from the defendant the order in this case, was a salesman for the Borton & Tierney Company, who were sales agents for the plaintiff, and testified that there were some negotiations between him and the president of the defendant company about throwing off \$250 on the price; that he (Hallett) said he would submit it to the home office; that he did so, and they refused to make concession. There is also some further evidence as to talks between Tannenbaum and Hallett about reduction in price and about putting the machine on the cars, but there is no evidence anywhere to show that Hallett had any authority to negotiate with the defendant, or to make any change in the contract which had been entered into between the plaintiff and the defendant. The plaintiff constantly insisted upon the performance of the contract by the defendant. On the 11th of July, 1904, the plaintiff telegraphed to the defendant as follows: "Please pay for Kingsland rolls or return immediately. No desire to force machine on you, but must ask decision now. Please wire it"—and continued to demand return of the rolls or payment for the same by numerous telegrams until the 22d of July, 1904.

We have examined the other alleged errors, but do not find in them any substance.

The judgment below is affirmed.

For affirmance: GUMMERE, C. J., and GARRISON, FORT, GARRETSON, HENDRICKSON, BOGERT, VREDENBURGH, GREEN, and GRAY, JJ.

For reversal: MAGIE, Ch., and PITNEY, SWAYZE, REED, TRENCHARD, and VROOM, JJ.

(74 N. J. L. 68)

MAYOR, Etc., OF CITY OF NEWARK v. EAST SIDE COAL CO.

(Supreme Court of New Jersey. Nov. 12, 1906.)

1. WEIGHTS AND MEASURES—SHORT WEIGHT DELIVERY—LIABILITY FOR PENALTY—KNOWLEDGE.

Under the act entitled "An act for the protection of purchasers of coal" (Act March 5, 1900 (P. L. p. 27)), declaring that "any person, firm or corporation that shall sell or deliver, or attempt to sell or deliver, less than 2,000 pounds \* \* \* to a net ton \* \* \* shall be liable to a penalty," it is no defense that the coal dealer did not know of the shortage.

2. SAME — AGENTS OR INDEPENDENT CONTRACTORS.

That a dealer in coal hires a man with his wagon to get coal from a railroad company, on slips delivered to such company, and then to deliver it to the purchaser, such man being designated in the slips, by the dealer, as a driver, does not make such man an independent contractor, rather than the servant or agent of the dealer, so as to relieve the dealer from the penalty for attempting to deliver less than 2,000 pounds for a ton.

Appeal from First District Court of City of Newark.

Action by the mayor and common council of the city of Newark against the East Side Coal Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This case was heard in the First district court of Newark, before his honor Thomas L. Raymond, judge of said court, who decided the same in an opinion, in substance, as follows:

"This action was brought to recover the penalty of \$50 provided for in an act entitled 'An act for the protection of purchasers of coal.' Act March 5, 1900 (P. L. p. 27). 'It is not denied by the defendant that it attempted to deliver 1,680 pounds of coal to one Leah Waseman for an order for a net ton of 2,000 pounds, the only defense being that the attempted delivery of short weight was caused through mistake, and that the defendant did not knowingly commit the offense for this reason. It is further urged that the proofs show that the driver who delivered the coal was an independent contractor, and that the doctrine of respondeat superior does not apply to independent contractors.

"I will first dispose of the case on the question of whether the defendant's knowledge of the short delivery is a necessary prerequisite to finding him guilty of the offense charged. In the case of Halsted v. State, 41 N. J. Law, 592, 32 Am. Rep. 247, Chief Justice Beasley says: 'As there is an undoubted competency in the lawmaker to

declare an act criminal irrespective of the knowledge or motion of the doer of such act, there can be, of necessity, no judicial authority having power to require, in the enforcement of the law, such knowledge of motion to be shown. In such instance the entire function of the court is to find out the intention of the Legislature, and to enforce the law in absolute conformity to such intention.' And further on, in the same case, he says: 'The course of the inquiry, therefore, has led to this point: Is there anything in the language of the statute now to be construed, or in the legislative design displayed in it, or in the consequences, if its terms are construed strictly, by force of which this court can limit its operation to those only who act with consciousness of violating the law?' A question very similar to the one under consideration arose in the case of *Waterbury v. Newton*, 50 N. J. Law, 586, 14 Atl. 604, wherein Mr. Justice Dixon said: 'In *Halsted v. State*, 41 N. J. Law, 552, 32 Am. Rep. 247, the Court of Errors laid down the principle that, in regard to statutory offenses, the defendant's knowledge of all the physical facts which go to constitute the offense is not essential to guilt, unless made so by a proper construction of the statute itself.' If, therefore, in construing the act a legislative intent to make only those guilty who knowingly violate the act is not found, it is plain that the defense which has been offered in this case cannot be received. As a guide in finding the intention of the Legislature, I think the words of the act should be considered. Its title is 'An act for the protection of purchasers of coal.' The primary object and purpose of the law was the protection of purchasers of coal. Does it afford a protection to those purchasers if the vendor may plead mistake, or that he did not knowingly attempt to deliver short weight? I think not. I can find nothing in the act itself which would have the effect of limiting its operation to those only who violate it knowingly. There is not the slightest indication of such a legislative intent. The words defining the offense and its penalty would seem to preclude such a construction beyond all doubt. They are: 'Any person, firm or corporation that shall sell or deliver, or attempt to sell or deliver, less than two thousand pounds by weight to a net ton \* \* \* shall be liable to a penalty of fifty dollars for each offense.' This clearly refers alike to those who do so with guilty minds and those who do so innocently or through mistake. The defense, therefore, that this coal was delivered through mistake cannot be received.

"The defendant also insists that the evidence showed that the driver of the wagon was an independent contractor. While it is true that the testimony of the president of the defendant corporation showed that the defendant hired a man named Mitchell, with his wagon, to go to the coal pockets of

the Delaware, Lackawanna & Western Railroad Company and procure this coal by delivering certain slips to the railroad company, and then to deliver the coal to the purchaser, I do not see that the mere fact that the man and the wagon were both hired clothes the man with any other character than that of agent or servant. An examination of the slips will show that the East Side Coal Company designates Mitchell as a driver. While it is a very ingenious theory to advance under circumstances such as these, the real facts show that the driver was a servant or agent, and not an independent contractor.

"As a result of these conclusions, I find the defendant guilty of the offense charged, and judgment will be entered against it for the sum of \$50."

Argued July term, 1906, before FORT, GARRETSON, and REED, JJ.

Louis Hood, for appellant. Frederick A. Lehlbach, for appellee.

PER CURIAM. The judgment of the district court of Newark, in this case, is affirmed, with costs, for the reasons given by the judge of the district court, the substance of whose opinion we have placed at the head of this memorandum.

(74 N. J. L. 53)

KNICKERBOCKER TRUST CO. v.  
O'ROURKE ENGINEERING  
CONST. CO.

(Supreme Court of New Jersey. Nov. 12, 1906.)

ATTACHMENT—ATTACHABLE INTEREST.

The contract of a construction company to construct a tunnel for a railroad company provided for advancement by the railroad company of part of the cost of the construction plant; and that, as soon as the contractor had put any of the plant or material for the work on the ground of the railroad company, it should become absolutely the property of the railroad company, and so remain till after completion of the work, when on a certificate of the railroad engineer such of the property as was covered thereby should be delivered and given to the contractor; and that the contractor should not be entitled to final payment so long as there was any outside lien on the property. *Held*, that the contractor had an attachable interest in machinery and material to be used in the construction, and which had already been delivered by it on the premises, subject, however, to the contract right of the railroad company to have the plant used for the execution of the contract, and its further right to have the material put in the tunnel, and thereby made a fixture, released from any lien of the attachment.

Certiorari to Circuit Court, Hudson County.

Attachment by the Knickerbocker Trust Company against the O'Rourke Engineering Construction Company. Defendants bring certiorari to review an order. Affirmed.

On certiorari to the Hudson county circuit court, bringing up an order refusing to release from the lien of an attachment certain property attached under the writ. The order was made by his honor Charles W. Parker, a judge of said court, who decided

the same in an opinion, in substance, as follows:

"On examination of the papers in this case and of the authorities cited by counsel and some others, I am fairly well satisfied that for the most part the property covered by the inventory under the writ of attachment as first executed should not be entirely discharged from the writ. The property consists of machinery and of materials to be used in the construction of a tunnel under the Hudson river for the Pennsylvania, New Jersey & New York Railroad, under a contract with that company by the defendants. Certain provisions in that contract, which is in writing and very voluminous, provide for the advancement by the railroad company of part of the cost of the plant; prescribe that, as soon as the contractor has put any of the property, plant, or material upon the ground owned or occupied by the railroad company, such property shall become the property absolutely of said railroad company, and so remain until some time after the completion of the work, when, upon the certificate of the railroad engineer, such property as is covered by such certificate shall be delivered and 'given' to the contractor. There is also a provision that the contractor shall not be entitled to a final payment so long as there is any outside lien upon the property. There are other provisions, to which counsel for the construction company has called attention, which it is deemed unnecessary to recite here. I think, notwithstanding all these provisions, that the construction company has an attachable interest in the working plant, and also in the material purchased by it, subject to the contract rights of the railroad to have the plant used for the execution of the contract, and the further right of the railroad to have the material put in the tunnel where it belongs, and thereby made a fixture and released from any lien of the writ. This attachable interest exists whether the present right of possession of the railroad be regarded as that of a chattel mortgage to secure payment of advances made to the contractor, as was the case in *Long Dock Co. v. Mallery*, 12 N. J. Eq. 93, 431, or in *Fox v. Cronan*, 47 N. J. Law, 493, 2 Atl. 444, 4 Atl. 314, 54 Am. Rep. 190, or whether the provisions

of the contract are intended to prevent interference during the work by outside creditors, or are to be considered as an attempt to defeat creditors altogether, in either of which last two cases I think the right to attach the right, title, and interest of the construction company is clear.

"But under ruling in *Fox v. Cronan* I think the railroad company is protected from interference by attachment with its right to control possession of the property until the contract is performed. So far as relates to movable property forming part of the plant, or buildings temporarily erected for storage or protection of machinery, etc., they will remain in the possession of the railroad for the purpose of building the tunnel, and when the work under the contract is complete it would seem that the attaching creditor will have a right to be heard on the question whether the final certificate of the engineer as to the disposition of this property is made in good faith. *Chism v. Schipper*, 51 N. J. Law, 1, 16 Atl. 316, 2 L. R. A. 544, 14 Am. St. Rep. 668. Whether such a creditor will have to seek the aid of a court of equity at that time need not be discussed now. As to the material, such as castings intended for the building of the tubes, which will be permanently installed as part of the tunnel itself, it seems to me that the contract protects all such property now on the ground, assuming it to be covered by the terms of the thirty-second clause, to the extent of justifying the contractors in putting it into the tunnel and turning it into real estate of the railroad free from attachment.

"The rule to show cause will be discharged."

Argued June term, 1906, before FORT, GARRETSON, and REED, JJ.

Collins & Corbin, for plaintiff in attachment. Vredenburgh, Wall & Van Winkle, for defendant in attachment.

PER CURIAM. The order of the circuit court in this case is affirmed, for the reasons given by the learned circuit court judge, the substance of whose opinion we have placed at the head of this memorandum.

The plaintiff in attachment is entitled to costs.

(221 Pa. 261)

## In re MCCLELLAN'S ESTATE.

Appeal of BLOODGOOD et al.

(Supreme Court of Pennsylvania. May 11, 1908.)

## 1. POWERS—EXERCISE—VALIDITY.

Testatrix bequeathed her estate to her husband for life, with power to dispose of the same during his life, and to appoint any remainder undisposed of at his death to any person other than a member of his family. The husband died, leaving a will, by which he appointed the estate coming to him from his wife to a designated person for life, remainder to the latter's daughter for life, with power to appoint the principal by will. *Held*, that the husband's will constituted a valid exercise of his power of appointment, and that he did not die intestate as to any part of the estate derived from his wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Powers, § 144.]

## 2. SAME.

Where a husband was given a power of appointment over property bequeathed to him by his wife, and the husband in his will gave the appointee a life estate in the property, with power to appoint to another for life, and with authority in the last appointee to will the principal to whom she might choose, the exercise of the power would not be held invalid because the last donee was thereby given authority to create a life estate in one not in being at the death of the testatrix, as it would not be assumed that she would so exercise the power that it would be invalid, under the rule that the law will remedy, if it can, the defective execution of a power.

## 3. TRUSTS—CY PRES DOCTRINE.

The law will not invalidate a trust which is good in part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 72.]

## 4. ESTATES—"VESTS"—DEFINITION.

To vest an estate is to give a legal or equitable seisin. An estate "vests" in a person who is given a present and immediate interest, as distinguished from an interest the existence of which depends on a contingency. The word applies to estates in personalty, as well as estates in land.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7302.]

## 5. POWERS—EXERCISE—LIMITATIONS.

Where a wife gave her husband a power of appointment, over property bequeathed to him, to any person he might see fit, providing that nothing be given to any member of his family, such proviso, though not carried forward in the husband's will, by which he exercised the power by creating another power in his donee, was nevertheless a limitation on the exercise of the donee's power by operation of law.

Appeal from Orphans' Court, Philadelphia County.

Judicial settlement of the estate of Clara D. H. McClellan, deceased. From an order dismissing exceptions to the adjudication, Helen Bloodgood and Robert N. Hawley appeal. Affirmed.

The testatrix died June 22, 1904, leaving a will, by which she gave her entire estate to her husband, John M. McClellan, for life, with power to dispose of it during his life, and with power to appoint and vest any or all remaining to such persons as he might see fit, provided that nothing should be disposed of or given, during his life or by his will, to any member of his family. John M. McClel-

lan died July 1, 1906, leaving a will, whereby he appointed the estate coming to him from his wife to J. Rundell Smith, in trust, to use the income during his life, excepting the payment of a sum annually for the care of his lot in Laurel Hill cemetery, and the payment of \$1,500 to Dr. R. N. Hawley, and after the death of J. Rundell Smith, appointed the said estate to his daughter, Ellen Hollingshead Smith, in trust, with power to appoint the principal, only provided that she should see to the proper care of Mrs. McClellan's grave. Mr. Turner, on behalf of Robert N. Hawley, to whom the testatrix gave her estate for life in the event that her husband should not dispose of it as she had provided, or in the event of his dying intestate, asked that the balance now before the court should be awarded to him for life. Mr. Baxter, on behalf of Mrs. Frances Bloodgood, Jr., a sister of the testatrix, asked the award of one-half of the estate to her, on the ground that the testatrix had died intestate, because the execution of the power of appointment by her husband was invalid, and as he had not technically died intestate, the provisions of her will, in case he should die intestate could not take effect. The auditing judge awarded the sum of \$1,500 to R. N. Hawley, and the balance to the trustee under the will of John M. McClellan.

The following is the opinion of Ashman, P. J., in the court below:

"The main inquiry concerns the validity of the testamentary trust created by the husband and that created by his appointee. By the will of the testatrix she devised and bequeathed her estate to her husband in these terms: 'To my husband John Morton McClellan for the term of his life, with power to dispose of the same during his life, and with power of his last will and testament at his death to appoint and vest any or all that remains undisposed of of my estate, to and in such persons as he sees fit \* \* \* provided that nothing shall be given during his life or bequeathed by his last will to any member or members of his family.' In case of a breach of this proviso she directed that her estate should go to her brother, Dr. R. N. Hawley, for life, with a similar power of disposition during life or by will. The only limitation which is here suggested or can be implied is found, if found at all, in the use of the word 'vest.' An estate vests in a person who is given a present and immediate interest, as distinguished from an interest whose existence depends upon a contingency. As defined by Chancellor Kent, to vest is to give a legal or equitable seisin. 4 Kent's Com. (13th Ed.) 202. An estate in remainder is vested in the remainderman, although its enjoyment is deferred until the falling in of the life estate. So an estate is vested in a trustee to serve the interests of the cestui que trust. Whatever may have been the original meaning of the word as denoting the in-

vestiture of the fee, the word is now applied to estates in personalty as well as estates in land. In this instance the husband of the testatrix could have willed the estate in parcels by appointing it to A. for life, with remainder to B. in fee, and no one could doubt that he would thereby have vested an estate in each of those parties; and with the same effect he could have vested an estate in a trustee to serve their interests.

"Assuming, as we think it did, that the power of appointment in John M. McClellan covered equitable as well as legal estates, was his appointment to J. Rundell Smith in trust within the limits of the authority conferred by the will of the testatrix, the original donor? It omitted the proviso in that will, prohibiting any gift to a member of the husband's family. But that proviso was, by operation of law, written into any will or power of appointment which the husband or his appointee might execute, and would carry with it the penalty imposed by the will of the testatrix. Without doubt the trust created by the husband tended to a perpetuity. His will gave the donee of the power a life estate, with power to appoint to another for life, and with authority in the last donee to will the principal as she should choose, and therefore with power to create a life estate in one who was not in being at the death of the testatrix. The law, however, will remedy, if it can, the defective execution of a power, and will not strike down a trust which is in part good and in part invalid, so long as the part which is valid can be upheld. *Horwitz v. Norris*, 49 Pa. 213. Here the trust for the daughter of J. Rundell Smith for life is valid, and we cannot assume that her exercise of the power will be other than valid.

"The testatrix owned a small undivided interest in a large tract of land. After her death John M. McClellan joined with the remaining owners in an agreement to sell, under which the land was sold, but he died before the payment of the purchase money. He evidently executed the contract in his own name, and not as executor or trustee, because after his death, some doubt having arisen as to his power, the court authorized the executor of his will to execute the deed. If the husband by his joinder intended more than simply to facilitate the sale, in which others, and not he, were largely interested, and if his purpose was rather to assert his individual ownership, can he be said by this act to have disposed of 'the share' within the meaning of testatrix's will? Especially can this be said when the purchase money never came into his hands, and when the testatrix had used the words 'disposed of,' in connection with the words 'given or spent,' meaning thereby some act by which the husband should unmistakably distinguish between his wife's estate and his own. So with the personal effects, consisting of books, paintings, etc. The husband continued after

his wife's death to reside in the house which she had occupied, and he apparently allowed these articles to remain undisturbed where she had left them. They passed, as part of his wife's estate under the clause in his will by which he gave 'all my personal property and effects coming to me from my deceased wife,' to a trustee.

"The discussion by counsel covered a wide range, into which it would be more interesting than useful to enter. The exceptions are dismissed and the adjudication is confirmed."

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Alex Simpson, Jr., Wm. Y. C. Anderson, and Wm. Jay Turner, for appellant R. N. Hawley. L. W. Baxter, for appellant Helen Bloodgood. John G. Johnson and John Marshall Gest, for appellee.

PER CURIAM. The decree is affirmed, on the opinion of the court below.

(221 Pa. 165)

**S. MORGAN SMITH CO. v. MONROE COUNTY WATER POWER & SUPPLY CO.**

(Supreme Court of Pennsylvania. May 4, 1908.)

**EVIDENCE—VARYING CONTRACT BY PAROL—CONTRACT OF SALE — PAROL REPRESENTATIONS.**

In an action on a note given in part payment for machinery sold under a written contract, an affidavit of defense pleading a parol representation or warranty by plaintiff's agent, variant from the express warranty contained in the contract, without any allegation that the representation or warranty was omitted from the contract by fraud, accident, or mistake, is insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1778-1793, 1799-1806.]

Appeal from Court of Common Pleas, Monroe County.

Assumpsit on a note by the S. Morgan Smith Company against the Monroe County Water Power & Supply Company. On rule for judgment for want of a sufficient affidavit of defense. From an order directing that the rule be made absolute, defendant appeals. Affirmed.

The following is the opinion of Staples, P. J., in the court below:

"Opinion and judgment of the court making absolute rule to show cause why judgment should not be entered in the above case for want of a sufficient affidavit of defense. The plaintiff's action was based on a written agreement, or contract, between the parties, wherein the said plaintiff agreed to sell to the said defendant certain machinery, inter alia, two 'C' compensating Woodward wheel governors, and for which the defendant agreed to pay the said plaintiff a certain sum of money. In accordance with the said agreement or contract, the said defendant executed and delivered to the said plain-

tiff a certain promissory note in the sum of \$3,425, upon which it made certain payments, reducing the same to the sum of \$1,605.72, which it refused to pay, and for which the above action was brought. The defendant filed an affidavit of defense, which was substantially to the effect that prior to the execution of the said agreement plaintiff's agent, knowing the purpose for which the defendant desired to use the said governors, represented that the said governors would control the machinery plant of the defendant to a regulation of two per cent., and that he, the said agent, then and there guaranteed the same, whereupon, upon that representation, the defendant signed the contract. It further alleged that the said governors had not controlled the plant as represented by the said agent, and as guaranteed by him, and, although an engineer of the manufacturers of the said governors had adjusted the same, the said governors had never controlled the said machinery plant, and the said plaintiff had been informed by competent engineers that the said governors are not intended for the class of work for which the defendant desired to use them, and that it had notified the said plaintiff that the said governors were not as represented, had not been, and would not, be accepted, and were held only subject to the order of the plaintiff as to their disposal. The said affidavit further alleged that the said defendant was informed and believed that governors, which would properly control their machinery plant, would cost at least \$1,700.50, or more than the balance due on said note.

"The contract or agreement between the parties, inter alia, contained the following: 'The party of the first part agrees to sell to the party of the second part the following machinery, to wit: All that machinery described in proposal on preceding pages, all to be in accordance with the specifications and guarantees set forth in the proposal of the party of the first part hereunto annexed.' Also: 'The foregoing is the agreement between the said parties as it exists at this date, and it is agreed and distinctly understood that all previous communications between the said parties, either verbal or written, contrary to the provisions hereof are hereby withdrawn and annulled; and that no modification of this agreement shall be binding upon the parties hereto, or either of them, unless such modification shall be in writing, duly accepted by the purchaser and approved by an executive officer of the S. Morgan Smith Company.' Also: 'All material and workmanship to be first class in every particular, and we agree to replace, free on board cars, York, Pa., any parts which fail or become broken, due to poor material or workmanship within one year from the completion of the erection of the plant.'

"There is no allegation in the affidavit of defense that any of the material and work-

manship was not first class in every particular, nor that any parts failed or become broken due to poor material or workmanship, and were not replaced as stipulated for in said agreement. But it was simply alleged in the said affidavit of defense that the two 'C' compensating Woodward water wheel governors were not intended, or could not, do the kind of work demanded by the plant of the defendant company, and, under the guaranty of the agent of the said plaintiff, it was not obliged to pay for them. To sustain this contention of the defendant would require a modification of the contract by making the alleged guaranty a part thereof. The plaintiff in the said contract agreed to furnish to the said defendant the said particular 'C' compensating Woodward water wheel governors, and the defendant seeks to have inserted into the said contract a prior parol agreement and guaranty as to the kind of work they would do, although the contract specifically provides that 'all previous communications between the said parties, either verbal or written, contrary to the provisions hereof, are hereby withdrawn and annulled.' The alleged representations and guaranty made by the agent of the plaintiff were made prior to the execution of the contract, and the alleged guaranty was contrary to its provisions. All the machinery, including the governors, was sold 'in accordance with the specifications and guarantees set forth in the proposal of the party of the first part, thereto annexed.' There was no such guaranty in the specifications as that alleged to have been made by the agent, nor does the defendant in its affidavit of defense claim that the machinery was not in accordance with the said specifications, but it seeks to insert in the said contract an agreement which would modify the same, and practically make the terms of payment depending upon a trial of the said governors, as to whether or not they would work satisfactorily, and, as the agent, it is alleged, represented they would work.

"It is a rule too firmly rooted in justice and honesty to be easily eradicated from any system of wise laws that all negotiations, all conversations, all oral promises, all verbal agreements are forever merged in, superseded, and extinguished by the sealed instrument, which is the final outcome and result of the bargaining of the parties. *Wodock v. Robinson*, 148 Pa. 503, 24 Atl. 73. Unless fraud, accident, or mistake be averred, the writing constitutes the agreement between the parties, and its terms can neither be added to or subtracted from by parol evidence. *Wodock v. Robinson*, 148 Pa. 503, 24 Atl. 73. When parties without fraud or mistake have put their agreements in writing, that is not only the best, but the sole, evidence of their agreement. *Union Storage Co. v. Speck*, 194 Pa. 126, 45 Atl. 48. Without citing any further authorities, it is sufficient to say that the principle, thus enunciated, has been commented upon and considered and affirmed so



often that it should leave no doubt as to its application; and the only question for our consideration is whether or not the said alleged misrepresentation and guaranty were omitted from the contract by fraud, accident, or mistake, and all the more is this the case when attention is called to the stipulations in the contract as to the annulment and canceling of all prior communications, etc. Mere representation is not necessarily fraud, nor the mere omission to insert in a written contract an alleged guaranty. In order for the contention of the defendant in this case to prevail, there must be contained in the affidavit of defense a statement of fact, or of circumstances, from which a conclusion can be drawn that the agent of the plaintiff was guilty of some fraud, whereby the said guaranty was not included or inserted in the said contract. In the absence of such a state of facts, it does not appear clear to us how the said contract could be either varied, contradicted, or modified. There is no allegation in the affidavit of defense that the said guaranty was omitted from the contract by reason of any fraud, accident or mistake. At the best, if said alleged guaranty were made, it was a mere contemporaneous agreement by the agent as to what the 'C' governors would do. There is not even an allegation that the agent knew differently. There is nothing contained in the affidavit of defense to the effect that the said agent said anything whereby the defendant was induced to permit the omission of the said alleged guaranty from the contract, and in the light of the stipulations in the agreement itself as to prior communications, there being no allegation of fraud accounting for the omission of the said alleged guaranty, the affidavit of defense does not set forth such fraud, accident, or mistake with regard to the contract as would authorize the court in permitting a modification of the same as contended by the defendant, or that would be sufficient to prevent a recovery by the plaintiff.

"To contradict or vary the terms of a written contract by a parol contemporaneous agreement between the parties, there must be allegation, as well as proof, not only of it, but of its omission through fraud, accident, or mistake, from the writing. *Krueger v. Nicola*, 205 Pa. 38, 54 Atl. 494. Where, in an action to recover damages for the breach of a written contract for the exchange of land, the plaintiff, in order to meet the averments of the affidavit of defense, sets up an oral agreement made prior to the execution of the written agreement, but neither in his statement of claim, nor in his replication, avers that the oral agreement was omitted from the written agreement by fraud, accident or mistake, the plaintiff will not be permitted at the trial to offer evidence of the alleged oral agreement. *Krueger v. Nicola*, 205 Pa. 38, 54 Atl. 494.

But, besides this, the court below placed its ruling on the ground that the offer, even if

sustained, was not proof of such fraud, accident, or mistake in the execution and delivery of the writing as rendered it admissible. In this the court was correct. *Fuller v. Law*, 207 Pa. 101, 56 Atl. 333. An offer of parol evidence which does not propose to show a contemporaneous parol agreement which induced the party offering the evidence to sign such an order, but simply the declarations of an agent made when the order was signed, is not admissible. *Express Publishing Co. v. Aldine Press*, 126 Pa. 347, 17 Atl. 608. Besides, the defendant had distinct notice before signing the order that it was subject to acceptance on its face as written, and that no one was authorized to change, modify or in any way affect the writing by verbal agreement or otherwise. *Express Publishing Co. v. Aldine Press*, 126 Pa. 347, 17 Atl. 608. There is nothing in the affidavit of defense from which the court could draw any conclusion that there was anything done upon the part, either of the plaintiff or its agent, which induced the defendant to execute the agreement, without including in it the alleged representation and guaranty as to what the 'C' governors would do. We cannot hold that the mere representation and guaranty made by the agent of the plaintiff would be sufficient to modify the written contract between the plaintiff and defendant in the absence of any fraud, inducing the defendant to assent to the omission of the same.

"And now, June 11, 1907, for the reasons above stated, the rule to show cause why judgment should not be entered for the plaintiff in the above case for want of a sufficient affidavit of defense is made absolute."

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

C. C. Shull, for appellant. A. Mitchell Palmer, for appellee.

PER CURIAM. The judgment is affirmed for the reasons stated in the opinion of the learned judge of the common pleas.

(321 Pa. 213)

KRAUCZUNAS et al. v. HOBAN.

(Supreme Court of Pennsylvania. May 11, 1908.)

# 1. RELIGIOUS SOCIETIES — REAL PROPERTY — CONVEYANCES—STATUTES.

Under Act 1731 (1 Smith's Laws, p. 192), giving to religious societies legal capacity to hold real estate, a conveyance of real estate to a trustee for the use of a particular Catholic congregation constituted an executed legal estate in the congregation itself to be used by it for such purposes as were authorized by law.

## 2. SAME—TRANSFER—COERCION OF TRUSTEE.

Where real estate was conveyed to a trustee for the benefit of a Catholic congregation under Act 1731 (1 Smith's Laws, p. 192), authorizing such congregations to hold title to realty, the congregation at a subsequent duly convened meeting was authorized to direct the trustee to execute a conveyance to other persons named as trustees, and it was no answer to such direction that he was, in fact, the bishop of the Roman Catholic Church, of which the congrega-

tion was a part and under the rules, discipline, and usages of the church he held the title to the property in question as a bishop, and not as trustee.

### 3. TRUSTS—HOLDING REAL ESTATE—OBLIGATIONS OF TRUSTEE.

Where a Catholic bishop held title to real estate in trust for the congregation, he occupied a position of trust and confidence, and could not set up an adverse holding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 181.]

### 4. RELIGIOUS SOCIETIES — OWNERSHIP OF PROPERTY—ECCLESIASTICAL RULES.

Under Act April 26, 1855 (P. L. 328), confirming to every religious society, whether incorporated or not, the absolute ownership in its property subject only to the condition that it shall not divert it from the uses, purposes, and trusts to which it may have been lawfully dedicated, a Roman Catholic congregation owning real estate, the title to which was in the bishop, as trustee for the congregation, could not be divested thereof by the ecclesiastical rules and regulations of the church.

Appeal from Court of Common Pleas, Lackawanna County.

Bill by Andrew Krauczunas and another against Michael Hoban to compel a conveyance of real estate. From a decree dismissing the bill, complainants appeal. Reversed and remanded, with directions to enter a decree in accordance with the opinion.

The following is the opinion of Edwards, P. J., in the court below:

"(1) The plaintiffs, 10 in number, bring suit for themselves and their associates, who constitute an unincorporated religious association, named the St. Joseph's Lithuanian Catholic Congregation. The defendant is the Roman Catholic bishop of the Scranton diocese.

"(2) The said congregation is composed mainly of Lithuanians, and was organized as a church in the year 1892. It was organized as a Roman Catholic church, and is under the ecclesiastical jurisdiction of the defendant as bishop of the Scranton diocese. It has been since its organization a Roman Catholic church.

"(3) In 1893 the said congregation purchased, under contract, a lot of land in the city of Scranton for the purpose of erecting thereon a church building. The title to this land was taken in the names of Vincent Blazys, W. Yususe, Mike Bernotas, George Mitchell, and Joseph Tamalinnas. These persons were acting for the congregation; two of them being officers thereof. Afterwards, in 1896, the deed for the property was made to the same persons, naming them as 'trustees,' but not giving the name of the congregation for which they were trustees.

"(4) Soon after the foregoing deed was obtained, an attempt was made to place the title to the property in the name of the then bishop of the Scranton diocese, Bishop O'Hara, the predecessor of the defendant in said office. On March 13, 1896, a deed was made to the 'Providence Lithuanian Catholic Congregation.' This deed was signed by the five men named in the foregoing finding. Al-

though named as 'trustees' in the deed, they signed as individuals. In September, 1896, the 'Providence Lithuanian Catholic Congregation' deeded the property to Bishop O'Hara, in trust for the congregation. This deed is signed by two persons, named as 'president' and 'secretary,' without designation of the name of the congregation. It is apparent that the purpose of these conveyances was to take the title to the church property out of the individuals named in the third finding, and to place it in the bishop of the diocese in trust for the congregation. This attempted transfer was a somewhat crude effort, judged by the technical rules governing conveyancing. The first deed, January 17, 1896, was to the five persons named as 'trustees' merely. The second deed, March 13, 1896, although purporting to be made by 'trustees,' is signed by the grantors as individuals and the name of the congregation is incorrectly given. The third deed, September 12, 1896, is improperly executed, and this latter deed does not show a resolution of the congregation authorizing the transfer to the bishop.

"(5) Between the years 1889 and 1901 the church building was erected. The congregation went into debt, and in 1901 it became necessary to secure a loan of \$10,000. Application for the loan was made to an attorney, and, while investigating the title, he discovered the defects in the deed above referred to. The consequence was that a meeting of the congregation was called for February 13, 1901. It is as to this meeting that we find the first substantial dispute in the testimony, the plaintiffs claiming that there was present only a small minority of the congregation, and that the action taken at the meeting was therefore void. As to the number present at this meeting, and as to what transpired therein, a large number of witnesses have testified on each side. Except as to the number present at the meeting, the testimony of plaintiffs' witnesses is vague and very unsatisfactory. The only clear and definite testimony comes from defendant's witnesses. On one side it is claimed that the number present at the meeting was from 100 to 200; on the other side the number is given at from 400 to 700. We are of the opinion that the defendant's witnesses are more nearly correct than the other witnesses, and we find as a fact that the congregation was represented at said meeting by a majority of the members. The matter discussed was the transfer of the title to the church property to Bishop Hoban, the successor of Bishop O'Hara. It was explained that this was the only way by which the loan could be secured. A resolution was adopted, with substantial unanimity, authorizing and directing the transfer of the title to the church property to Bishop Hoban, the defendant in this case, in trust for the St. Joseph's Lithuanian Catholic Congregation.

"(6) The action taken at said meeting contemplated the formal transfer of the title to

Bishop Hoban from the old trustees, the five men named in our third finding of facts, thus ignoring the attempted transfer from them to the congregation and from the congregation to Bishop O'Hara, as shown by the deeds already referred to. The attorney considered these deeds so imperfect as to cast a serious doubt on the validity of the transfers. He therefore advised the action as taken by the meeting of the congregation. Subsequently the old trustees refused to make the transfer, and then another meeting was called and held, the result of which was the authorization of legal proceedings to compel the five old trustees to convey the church property to Bishop Hoban in accordance with the resolution adopted at the previous meeting.

"(7) The next step was the filing of a bill in equity, in which George Smith and others for themselves and associates, constituting the St. Joseph's Lithuanian Catholic Congregation, were plaintiffs, and Vincent Blazys et al., the five old trustees, were defendants. The purpose of the bill was to have a trust declared in the defendants as to the church property for the benefit of the said congregation, and to secure a conveyance of the property to Bishop Hoban. The bill was taken pro confesso and a final decree was entered (1) declaring a trust in the defendants as to the property aforesaid; (2) ordering the defendants to execute a declaration of trust within 10 days; and (3) directing the defendants to convey the church property to Bishop Hoban in trust for the said congregation. Whatever criticism might be made as to the regularity of these equity proceedings, they finally resulted in a deed from the defendants—the old trustees, as trustees, to the Right Rev. Michael John Hoban, trustee for the St. Joseph Lithuanian Catholic Congregation. Therefore, in August, 1901, the title to the church property was securely vested in Bishop Hoban in trust for the congregation.

"(8) In the year 1906 it appears from the evidence that considerable dissatisfaction existed among the members of St. Joseph's congregation. They were not satisfied with their priest, and many of them claim that the congregation had no knowledge that the title to their property was in Bishop Hoban, as trustee. At first it seems the objections were more on account of the priest than because of the bishop's connection with the property; but, whatever may have been the cause of the irritation, the outcome was that on July 20, 1906, a meeting of the congregation was held to take action relative to the transfer of the church property from Bishop Hoban to other trustees selected by the congregation. This meeting was called by means of notices in newspapers and by printed slips or bills handed to the members of the congregation. There is no evidence as to the manner in which meetings of the congregation to transact its business was usually called. The meeting of February 13, 1901, was called by the priest from the altar; but we were not

referred to any rule, by-law, or custom governing the calling of meetings. We therefore cannot say that the meeting of July 20, 1906, was irregularly called. There is some question as to the number present at this meeting; but we have no difficulty in finding as a fact, and we do so find, that the resolution adopted at said meeting was passed 'by a vote of more than a majority of the adult members of the congregation.' The resolution provided that Andrew Krauczunas and others, 10 in number, 'the present trustees,' be chosen as trustees 'to hold the title to all the property belonging to this society.' These trustees are directed 'to take such action, in law, equity, or otherwise, as may be necessary to secure the conveyance to them as trustees for said society of the legal title to any and all property now held by any other person or persons as trustee or trustees for this society.' The resolution also provides for the incorporation of the society and the subsequent conveyance of the property to the incorporated society. Another meeting was held in October, 1906, in which the said trustees, the plaintiffs named in the present case, were instructed to bring legal proceedings to secure the conveyance of the church property from the defendant; he having refused to make the transfer when requested to do so.

"(9) The canons of the Roman Catholic Church provide and require that the title to the property of a Roman Catholic congregation, which is under the jurisdiction of the Roman Catholic bishop of the diocese in which the congregation has its place of worship, must be in the 'ordinary,' or, in the present case, in the bishop of the diocese.

"The above specific findings cover all the material facts established by the evidence in this case. Briefly recapitulated the facts are: (a) The St. Joseph's Congregation is a Roman Catholic church, and is under the jurisdiction of the defendant as bishop of Scranton. (b) By action of the congregation and by legal proceedings and deed, the title to the church property was transferred in 1901 to Bishop Hoban in trust for the congregation. (c) A large majority of the congregation in 1906 passed a resolution to secure the transfer of the title from Bishop Hoban to 10 trustees, plaintiffs named in the present case. (d) The bishop refused to make the transfer, claiming the right, under the laws of the Roman Catholic Church, to hold the title to said property in trust for the congregation."

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

A. A. Vosburg and W. J. Hand, for appellants. T. P. Hoban and Robert J. Murray, for appellee.

STEWART, J. The findings of fact by the court below are entirely adequate to an intelligent understanding of the case, and we see no reason to question the correctness of

any of them. The plaintiffs and those associated with them, and whom they here represent, constitute the St. Joseph's Lithuanian Catholic Congregation of the city of Scranton, an unincorporated religious association organized in 1892, and which is under the ecclesiastical jurisdiction of the defendant as bishop of the Scranton diocese (finding No. 1). In 1893 the congregation contracted for the purchase of a lot of ground in the city of Scranton for the purpose of erecting thereon a church building. In 1896, the purchase having been completed, the title to the lot was taken in the names of certain members of the association simply as trustees, without any designation or description of the beneficiaries. In regard to the character of their holding there is no dispute. Several ineffectual attempts—ineffectual because of defective conveyances, and apparent want of authority in the grantors—were shortly thereafter made to place the title to the property in the then presiding bishop of the diocese as trustee. The result of these efforts, through diverse outstanding questionable conveyances, was a clouded and disputed title, which embarrassed the congregation, when in 1901, a large debt having been incurred in the building of the church, it became necessary to negotiate a loan on the security of the improved lot to the amount of \$10,000. The attorney representing the congregation reported that the condition of the title prevented the securing of the loan, and advised that a deed be obtained from the original trustees ignoring the subsequent attempted conveyance to the bishop of the diocese to some one in trust for the congregation. Thereupon at a called meeting of the congregation February 13, 1901, at which there were present a majority of the members of the congregation, a resolution was adopted with substantial unanimity authorizing and directing the transfer of the title to the property to the defendant in this case for the St. Joseph's Lithuanian Catholic Congregation. The court finds that at this meeting the matter discussed was the transfer of the title to the defendant, and that it was there explained that this was the only way in which the contemplated loan could be secured. The original trustees declining to transfer the title as directed by the resolution, proceedings were begun by bill against them to have a trust declared as to the church property and compel a conveyance from them to the defendant. A decree followed pro confesso, and this was followed by a regular conveyance from the original grantees to "the Right Reverend Michael Hoban, trustee of the St. Joseph Lithuanian Catholic Congregation of the city of Scranton," etc., in accordance with the decree. So matters stood, with much discontent in the congregation, however, arising from several causes, until July 20, 1906, a meeting of the congregation was held, at which a majority of the adult members were present to take action relative to the transfer of the title from the

defendant to other trustees to be selected by the congregation. The court declined to find that this meeting was irregularly called. It had been called by a priest from the altar, by means of notices in newspapers, and by printed slips or bills handed to the members. There being no evidence as to any other or different requirements for the calling of the congregational meeting to transact business, it may very safely be assumed that all essentials were complied with, and that the meeting was regularly called for the purpose indicated. Its regularity is not questioned. At this meeting the plaintiffs in this case below, 10 in number, were chosen trustees "to hold the title to all the property belonging to this society," and they were directed by resolution "to take such action, in law, equity, or otherwise as may be necessary to secure the conveyance to them as trustees for said society of the legal title to any and all property now held by any other person or persons as trustee or trustees for the society." The defendant having declined to convey to the trustees named, at a subsequent meeting held in October following, the plaintiffs were directed to begin legal proceedings to compel a conveyance. In accordance with this resolution the present bill was filed. The answer, filed controverts many of the statements contained in the bill, but we take the facts to be as found by the court. Their correctness is not challenged by any exceptions on the part of the defendant. While the answer distinctly avers that the defendant became invested with the legal title to the property through the conveyance from the former trustees, made pursuant to the decree of the court based on the action of the congregation at the meeting held February 13, 1901, it is made apparent by what is set out in other parts of the answer, as well as by the conclusions of the court in response to points submitted on behalf of the defendant, that resistance to the plaintiffs' demands is based on matters wholly distinct from anything expressed in the conveyance, or which could result from such conveyance between ordinary parties where ecclesiastical considerations were not involved. Before referring to these, it may be as well to determine just what was the legal effect of this conveyance to the defendant, as trustee, judged by the proceedings which led up to it, and by what is expressed in terms. That the congregation was acting within the scope of its powers, in directing the conveyance, cannot be questioned; certainly it will not be by the defendant who holds the title derived thereunder, and makes no disclaimer. The property conveyed was the property of the congregation. While the legal title was in the former trustees, the entire beneficial interest, equivalent in equity to a corresponding legal estate, was in the congregation. The latter's dominion over it extended even to the right of alienation under proper conditions, not qualified by any right in the trustees. Speaking of a convey-

ance similar in all respects to that which vested the title here in the original trustees, this court said in *Brendle et al. v. German Reformed Congregation et al.*, 33 Pa. 415: "Now, it is very plain that hereby a complete fee-simple title in regular form passed from Wistar to the trustees, and that an equal title, in the form usually adopted" (a simple declaration by the trustees of their trust), "for conveying land to congregations under the act of 1731 (1 Smith's Laws, p. 192), passed from the trustees to the congregation. That act gave to religious societies legal capacity to hold, and therefore the conveyance to their trustees constituted an executed legal estate in the congregation itself. The use of the medium of trustees was mere matter of form.

\* \* \* Such trustees seldom, if ever, convey to successors; but title in their name is treated as the title of the congregation, to be used by the congregation at their discretion for such purposes as the law allows." A trust so limited is as dry and passive as any that can be conceived. It gives to the trustee neither interest in the estate nor power to control it or direct its management in any way. It creates no duty for the trustee to perform, and leaves nothing to his discretion. He is simply the passive, silent depository of the legal title, and nothing more. This was the situation when the title to this property vested in defendant's predecessors, the former trustees. In what respect was it changed by the transfer of the title to the defendant? Did the congregational meeting of July 20, 1906, which ordered such transfer, direct that the new trustees should be invested with other or greater interest in the property, or power over it, than the former trustees had? Nothing of the kind is suggested; but, on the contrary, it conclusively appears from the resolutions themselves and from the findings of the court that the sole purpose in ordering the transfer was to clear the legal title of doubts, and matters which had interfered with the negotiation of the loan for congregational purposes, and that nothing beyond was contemplated. The resolution adopted at the meeting was to the effect that the former trustees be requested to make and execute a declaration of trust that they had no title or interest of their own in the property, "and that they execute and deliver a deed for the premises to Bishop M. J. Hoban, as trustee for our said church, which said deed shall be made in proper form so as to convey the interest which they hold in said church as trustees for the said St. Joseph's Lithuanian Catholic Congregation." There can be but one conclusion with respect to the matter we are now considering—the defendant is simply a depository of the legal title to the property. He holds just as his predecessors in title did, without interest and without power. The entire beneficial interest is in the congregation to be used by it at its discretion for such purposes as the law allows. If the congregation in 1901 had the power to change the trustees

of its title, as unquestionably it had, why had it not the same power in 1906? No reason can be suggested why it should be held to have exhausted its power with the first change. It is only reasonable that the right to exercise such power when it sees fit should abide with the congregation as the owner of the property. Any other result would be inconsistent with the full ownership with which it is invested. No one without interest can be heard to complain of such exercise, and here the only interested party is the congregation. Without more in the case than has so far appeared, the right unquestionably rests with the plaintiffs, and they would be entitled to a decree in their favor.

We turn now to the actual defense set up. Without disclaiming the title to the property conveyed to him by the former trustees in accordance with the action taken by the congregation, the defendant in the sixth paragraph of his answer declares "that he holds title thereto as trustee of said corporation in accordance with the laws, rules, discipline, and usages of the Catholic diocese of Scranton"; and in the ninth paragraph he asserts: "That he holds the title to the property in question and other property of said congregation as trustee for St. Joseph's Lithuanian Catholic Congregation in accordance with the rules, discipline and usages of the Catholic Church in the diocese of Scranton." What is meant by this becomes apparent in the light of the findings and conclusions of the court in response to requests submitted on behalf of the defendant. The ninth finding of the court is as follows: "The canons of the Roman Catholic Church provide and require that the title to the property of the Roman Catholic congregation which is under the jurisdiction of the Roman Catholic bishop of the diocese in which the congregation has its place of worship must be in the ordinary, or, in the present case, in the bishop of the diocese." The first of the court's conclusions of law is as follows: "If a congregation is formed for the purposes of religious worship according to the faith and rites of the Catholic Church, has accepted the pastor assigned to it by the bishop of the diocese, has placed itself under the authority of the bishop, and submitted itself to his authority in all ecclesiastical matters, the title to its property must be taken and held as provided by the canons of the Catholic Church. The property acquired by the congregation under such circumstances is the property of the church and is subject to its control and must be held in the manner directed by its laws. A congregation cannot divorce itself from the church or form an independent organization and retain the ownership of the property." The second conclusion is as follows: "That the title to the real estate described in plaintiffs' bill is properly and legally vested in the defendant, Right Rev. Michael J. Hoban, Bishop of Scranton, as trustee for St. Joseph's Lithuanian Cath-

olic Congregation, in accordance with the laws and usages of the Catholic Church."

It will be seen from this that what was a controversy over an unimportant result—the right to substitute one dry, passive trustee of a legal title for another—was made to involve a question of ownership of property. It is to be observed, first, in regard to the defense here set up that it is in effect the assertion by a trustee of a right and title adverse to his cestui que trust. The conclusion of the court, in affirmation of the position taken by the defendant, is that the property acquired by the congregation is the property of the church with which the congregation is affiliated, subject to its control, and must be held in the manner directed by its laws. This is a distinct and unequivocal denial of ownership in the congregation. We have seen that under the law the effect of the original conveyance was to vest the ownership of the property in the congregation. By no act on the part of the congregation recognized by the law as sufficient for the transfer of its ownership did it ever divest itself of such ownership. More than that, there is not a particle of evidence that any such divestiture was ever contemplated. The deed to the defendant is in trust for the congregation; and it is to him, not as the ecclesiastical head of the diocese for the use of the church, but to him in his individual character, "Right Reverend Michael Hoban, trustee of St. Joseph's Lithuanian Catholic Congregation of the city of Scranton." It is declared in the habendum that he is to hold it "in trust nevertheless and at all times for St. Joseph's Lithuanian Catholic Congregation aforesaid." So long, therefore, as defendant claims to hold in any degree under this conveyance, he cannot be heard to challenge the ownership of the congregation whose trustee he is therein declared to be. It is fundamental that a trustee, while occupying a place of trust and confidence, cannot be heard to set up an adverse holding. Perry on Trusts, § 863, and the authorities there cited. While it is not for us to inquire into the reasons for the action of the congregation in directing a conveyance to other trustees, we have no hesitation in saying that, if none other existed than the fact the trustee in office denied the ownership of the party at whose pleasure and for whose use he was made trustee, this of itself would be sufficient to justify the action taken. Again, it is nowhere made to appear how, or by what proceeding, the church, as distinguished from the congregation, became invested with the ownership of this property. Conveyance to the church is not pretended; nor is forfeiture on the part of the congregation. Nothing is asserted in this connection but ecclesiastical rules and regulations, which, except as they are aided by legal conveyance, are ineffectual to divest any owner of his property. But more than this, the position taken by defendant and sustained by the court is in direct opposition

to the law, whose supremacy, over all ecclesiastical rules and regulations, when rights of property are concerned, is not to be questioned. Act April 28, 1855 (P. L. 330), § 7, provides that "whosoever any property, real or personal, shall hereafter be bequeathed, devised or conveyed to any ecclesiastical corporation, bishop, ecclesiastic or other person, for the use of any church, congregation, or religious society, for religious worship or sepulture, or the maintenance of either, the same shall not be otherwise taken and held, or inure, than subject to the control and disposition of the lay members of such church, congregation, or religious society, or such constituted officers or representatives thereof," etc. The same act provides "that it shall be lawful for the majority of the male members, of lawful age, of any unincorporated church, congregation, or religious society to choose for their trustee or trustees any other person or persons than a layman; and whenever not previously declared, to declare the manner in which the title to their trust control shall be held and conveyed, subject, however, to all terms and conditions upon which the same may have been bequeathed, devised or conveyed to such unincorporated church, congregation or religious society, and upon due proof of such consent, any court having jurisdiction over trusts may direct the legal title to be conveyed accordingly." This legislation in most unequivocal terms confirms to every religious society, incorporated or unincorporated, the absolute ownership of its property, subject only to the condition that it shall not divert it from the uses and purposes and trusts to which it may have been lawfully dedicated. It expresses the settled policy of the state with respect to the tenure of property held by religious societies that has been steadily observed without question for now more than half a century. Its restraining provisions positively forbid the setting up under such title as is held by this defendant any use other than that which resides in the congregation. It is to be remarked that we are dealing only with property rights. Such rights can be acquired only by, and in conformity with, the law of the land. When so acquired, the law which allows them must be equal to their protection and security.

To conclude, the entire beneficial ownership in the property here sought to be involved is, and has been from the beginning, in St. Joseph's Lithuanian Catholic Congregation of the city of Scranton. The defendant is trustee of the legal title to the property for the exclusive use of said congregation, without any interest therein or any right or power to control its use or disposition. The congregation has the right to substitute other trustees in his stead, and, having done so by a majority vote at a regularly called meeting for that purpose, it is entitled to the process of the court to compel a conveyance from the defendant to the trustee.

tee of its own selection. The plaintiffs requested a finding to the effect that, under all the evidence, the plaintiffs were entitled to a decree directing the defendant to convey the property in question to the 10 trustees named in the bill and chosen by the congregation. This was refused, and its refusal is the basis of the thirteenth assignment of error. The assignment is sustained. The decree is reversed at the costs of the defendant; and it is now ordered, adjudged, and decreed that plaintiffs' bill be reinstated, and it is ordered that a decree be entered in the court below, in accordance with this opinion, directing a conveyance from the defendant of the premises held by him in trust for St. Joseph's Lithuanian Catholic Congregation of the city of Scranton to the plaintiffs, in trust for St. Joseph's Lithuanian Catholic Congregation of the city of Scranton, within such time as to the court below may seem reasonable and proper.

(221 Pa. 266)

# **HOLBERT v. CITY OF PHILADELPHIA.**

(Supreme Court of Pennsylvania. May 11, 1903.)

## **1. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—SIDEWALKS—SLIPPERINESS.**

A city is not liable for injuries from mere general slipperiness of its streets and sidewalks occasioned by recent fall of rain or snow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1626-1628.]

## **2. SAME—DEFECT IN STREET—TRAINS—NEGLIGENCE OF CITY.**

A city is liable for injuries to a person slipping on ice, in a street or sidewalk, which has accumulated by reason of a defect in the street or walk, or by reason of the city's neglect to construct and maintain suitable drains to carry off the water.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1628.]

## **3. SAME—DUTY OF CITY.**

A city is bound to keep its streets and sidewalks in a reasonably safe condition, so that pedestrians exercising care may use the walks with safety; the city being responsible only for defects attributable to its negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1612.]

## **4. SAME.**

A city's liability for injuries sustained by accumulations of ice and snow on the sidewalk is not confined to cases where the accumulation has resulted in hills or ridges.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1626-1628.]

## **5. SAME—CARE REQUIRED OF PEDESTRIANS.**

A pedestrian is not required to refrain from using the city's streets because the city has permitted them to fall into disrepair; it being sufficient that the pedestrian exercises ordinary care under the circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1673, 1677, 1678.]

## **6. SAME—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

In an action for injuries to a pedestrian while traversing a city sidewalk, which was defective in that it was covered with ice and snow,

the city's negligence and plaintiff's contributory negligence held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1747, 1748, 1754-1756.]

Appeal from Court of Common Pleas, Philadelphia County.

Action for personal injuries by Agnes Y. Holbert against the city of Philadelphia. Judgment for plaintiff for \$2,406, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Joseph W. Catharine and Charles W. Boger, Asst. City Solicitors, and J. Howard Gendell, City Solicitor, for appellant. Lewis Lawrence Smith, for appellee.

MESTREZAT, J. About 2 o'clock on Sunday afternoon, January 25, 1903, Agnes Y. Holbert, the plaintiff, and her sister, Mrs. Stevens, left the former's home on East Walnut lane, Germantown, within the limits of the city of Philadelphia, to go to Indiana avenue. Their direct route was south along Magnolia avenue to Chelton avenue, where they were to board a street car to reach their destination. Magnolia avenue is 50 feet wide, and its general course is north and south. Both the cartway and the sidewalks are paved with brick. The Germantown branch of the Philadelphia & Reading Railroad crosses it at a right angle. Only the eastern footway or sidewalk is continued under the bridge, and forms with the bridge and its abutments a tunnel about 30 feet long, 10 feet wide and 7 feet high on the north end, and 10 feet high on the south end. From a point some distance north of the tunnel or bridge Magnolia avenue descends rapidly to the south side of the bridge; the grade in the tunnel being 3 feet in a distance of 30 feet. The sidewalk under the bridge is paved with brick, but without curb. While there were intakes in the avenue on the north side of the bridge through which water from the street could pass, yet the water which fell on the east sidewalk, and water dropping from the bridge, naturally ran through the tunnel to the south side of the bridge. The bridge prevented the sun from falling upon the sidewalk beneath it. When the plaintiff arrived at the north side of the bridge, she discovered some ice at the mouth of and also in the tunnel. She proceeded along the sidewalk, and when she was about halfway through the tunnel, she slipped on the ice, fell and broke her left arm in two places. Her description of the attempt to pass under the bridge and of the accident is as follows: "I went on, and I came by picking my way carefully, and I stopped and looked where I was going, and I saw a bare spot at my right. I thought, here is a place of safety, I will get on that place, so I could see my way on through the place in safety at

that place. Just as I was stepping from the ice that I was standing on, onto this place of safety, my feet went out from under me, and I fell, and I broke my left arm in two places—at the wrist and at the elbow.” The plaintiff claimed, and her testimony tended to show, that the walk under the bridge, except a few small places, was covered with ice from one to two inches thick, and that part of the ice was very rough. The bridge was built in 1895, and there was ample evidence in the case to warrant the jury in finding that, during the winter seasons since its construction, ice invariably accumulated on the sidewalk beneath it. It was in evidence that the winter of 1902-03 was “a very hard winter—a hard, miserable winter. \* \* \* It [sidewalk] was icy all that month [January, 1903].” This action was brought by the plaintiff to recover damages for the injuries she sustained in falling on the sidewalk under the bridge. It is averred in the statement of claim “that by reason of the overhead bridge of the railroad across the said Magnolia avenue ice and snow accumulate under said bridge unless the pavement is kept clean; that it was the duty of said defendant to keep said sidewalk clean and free from ice. \* \* \* But, notwithstanding its duty in the premises, the said defendant did not keep the said sidewalk in good order and repair and free from such obstructions, but allowed the said ice and snow to accumulate there and remain there for a long space of time, and by reason of its said neglect the plaintiff was injured.” The defendant offered no evidence, and the case was submitted to the jury upon the plaintiff’s testimony. The verdict was for the plaintiff, and from the judgment entered thereon this appeal was taken by the city.

A municipality is not liable for injuries resulting from the general slipperiness of its streets or its sidewalks occasioned by a recent precipitation and freezing of rain or snow. During the night rain or snow may fall and freeze so that streets and sidewalks are slippery and in a dangerous condition, but it manifestly would be unreasonable to hold the city liable for injury to a pedestrian the following morning, caused by his falling on the sidewalk. Therefore persons who undertake to pass over the sidewalks of a city, made unsafe or dangerous by the freezing of recent falls of rain or snow, know their condition and assume the risk; and, if they fall by reason of the smoothness of the ice, the law imposes no liability upon the city. While, however, the city is not responsible for the general slippery condition of its sidewalks caused by the recent falling or freezing of rain or snow, yet the rule does not extend so far as to protect the city from liability for injuries caused to a person by slipping on ice, in a street or sidewalk, where it has accumulated by reason of a defect in the street or walk, or by reason of the neglect to construct and maintain suitable drains

to carry off the water. *Decker v. Scranton City*, 151 Pa. 241, 25 Atl. 36, 31 Am. St. Rep. 757; *Manross v. Oil City*, 178 Pa. 276, 35 Atl. 959. It is the duty of a municipality to keep its streets, including its sidewalks, in a reasonably safe condition, so that pedestrians using the sidewalks and exercising care may do so with safety. A sidewalk may be made defective or dangerous by the accumulation of ice or snow, as well as in other ways and by the other means. The municipality, however, is not responsible unless the defective condition of the walk is attributable to its negligence. That is the general rule, and one which applies as well where the sidewalk is defective by reason of the slippery condition of the ice thereon as well as by reason of excavations or other obstructions in the walk. The liability for injuries resulting from the accumulation of ice on a pavement is not confined to cases where the accumulation has resulted in hills or ridges. That is not the only test of liability in such cases, as this court distinctly ruled in *Manross v. Oil City*, 178 Pa. 276, 35 Atl. 959. There the court sustained the ruling of the trial judge in denying the point submitted by the defendant city that it was “not liable for an injury caused by reason of the slippery condition of the ice and snow upon its walks unless such injury is caused by the accumulation of ice and snow into hills and ridges so as to render passage dangerous.” The trial judge refused the point, and in doing so said: “A city may be liable for an accident caused by the slippery condition of its streets caused by the negligence of its officials, even where the ice and snow do not form into hills and ridges.” The accumulation of ridges and hills in ice may cause a pavement to be dangerous and convict the city of negligence, but the city is equally responsible if the sidewalk is made dangerous to public travel by reason of any accumulation of ice and snow caused by the negligence of the city. In other words, if an injury results to a pedestrian by reason of a defective sidewalk, the municipality is liable if the defect, whatever it may be, was occasioned by the municipality’s negligence. These principles are settled by numerous authorities in many jurisdictions.

Recurring now to the case in hand, we think the evidence was sufficient to warrant the jury in finding that the plaintiff’s injuries were caused by the negligence of the city. They were not caused by the general slipperiness or smoothness of the sidewalk resulting from the precipitation and freezing of recent falls of snow or rain. If they were, of course she could have no claim against the city. They were caused by the condition of the sidewalk beneath the bridge, made unsafe and dangerous to travel by the accumulation of ice, which could, and should, have been prevented by the city. The conditions of the place were peculiar. The sidewalk was not the ordinary and usual open and exposed pavement. On the contrary, it was correctly



described as a tunnel. Owing to the grade of the street, water falling on the east sidewalk flowed into the tunnel. The water that accumulated on the bridge also fell in and passed through it. The direct rays of the sun never penetrated it. These conditions necessarily caused ice to accumulate beneath the bridge in the winter, and naturally it was liable to remain during the winter months. The water from the walk and that dripping from the bridge formed into ice on the sidewalk in the tunnel. That ice was not reached by the sun and was unaffected by it. The sun melted the ice on the walk above the bridge, but the water would flow to the bridge, only to be frozen as it passed upon and over the ice under the bridge. The inlets at either side of the 50-foot avenue gave no sufficient relief to this condition of affairs. The city made no adequate provision for preventing the water falling on the walk, and that dripping from the bridge, from flowing into and through the tunnel, or for the removal of the ice which, in winter, was produced by this water. The consequence was, as disclosed by the evidence, that since the construction of the bridge the sidewalk beneath it has been, by reason of ice, unsafe each winter for persons who had occasion to use the street. This danger resulted, therefore, from causes under the control of the city, and not from natural causes, such as the recent precipitation and freezing of rain or snow upon ordinary sidewalks. The duty of the city to make this sidewalk reasonably safe for public travel is as imperative as to keep the streets and other sidewalks of the city in a safe condition. As long as this tunnel is kept open and maintained as a public highway by the city, the duty to keep it reasonably safe is imperative, and cannot be evaded or neglected with impunity. From what has been said it will be observed that it was not a question whether the plaintiff's injuries resulted from a ridge or hill of ice on the pavement beneath the bridge, but whether the icy condition of the pavement made it dangerous and unsafe for pedestrians using the sidewalk, and that such condition was attributable to the negligence of the city. One of the witnesses testified: "It [condition of the pavement] was from the water falling down the hill, not having a proper drainage off of it, the drippings of the railroad over on the pavement dripping down, and the water falling down and freezing on the pavement, by not having the proper drainage from the top to get it away from there." In fact all the evidence in the case bearing on the subject tended to show that this was the cause of the conditions prevailing under the bridge at the time of the accident. And, as we have said, the evidence was ample to show that this unsafe condition of the tunnel had existed in the winter months since the construction of the bridge. It was therefore clearly a case for the jury to determine whether the conditions existing there at the time the plaintiff

received her injuries were caused by the negligence of the city. This is a street that is frequented by a great many people in winter as well as in summer. It is one of the public thoroughfares of the city, which should be kept in a safe condition for travel at all times.

Whether the plaintiff exercised proper care in passing along the sidewalk, and whether she fell from any want of care on her part, were for the jury. It has been argued that as she approached the bridge she saw ice on the pavement, both in and outside the tunnel, and that therefore it was negligence for her to attempt to pass through the tunnel. That position, however, is wholly untenable. There was nothing there to admonish her that by the exercise of care she could not pass with safety through the tunnel. She had done so on a previous occasion when the same or similar conditions existed. The danger was not immediate or imminent. The sidewalk was in constant use by the people of that vicinity. Of course, other persons had fallen on the ice there, but many others had passed over it with safety. In fact, just as the plaintiff was entering the tunnel, another person came out of it, and passed her. There were spots or places in the pavement where there was no ice, which the plaintiff attempted to use to avoid the ice. Under the circumstances, therefore, it was not negligence, to be declared by the court, for the plaintiff to use the sidewalk. As said in the recent case of *Steck v. City of Allegheny*, 213 Pa. 573, 576, 62 Atl. 1115, 1116: "When the testimony shows a defect of such character that the street can be used with safety by the exercise of reasonable care, notwithstanding its defective condition, it is not for the court, but for the jury, to determine whether the injured party performed the duty required of him under the circumstances." Nor was the plaintiff to be driven from the street or prevented the use of the sidewalk by the fact that she, like many others in that community, knew of the icy condition of the walk. As we said in *City of Altoona v. Lotz*, 114 Pa. 238, 246, 7 Atl. 240, 242, 60 Am. Rep. 346: "It is not the law that a resident in a city must remain continuously on his property when the city grossly neglects the repair of its streets, under pain that, if he ventures on the streets or walks and suffers injury resulting from the city's default, he can recover nothing. Nor is the resident bound under like pain to abstain from going to church in the evening, or other places, when he may be moved to go by a sense of duty or love of pleasure. On his part it is enough if he takes the ordinary care which ought to be exercised by a prudent man under the circumstances." This street and sidewalk, as we have seen, was in constant use by the public, and, while some persons were injured by falling upon the accumulation of ice, the number was small as compared with those who used the walk in safety. The sidewalk under the

bridge was kept open and maintained as a place for travel by pedestrians, and hence there was an invitation by the city for the public to use it. It was not error for the court to decline to say to the jury that the plaintiff was negligent in using the sidewalk under the circumstances. There could be no question under the evidence that the defendant knew of the unsafe condition of the walk. Since the construction of the bridge, eight years previous, it has been dangerous in the winter months, caused by the accumulation of ice resulting from the peculiar conditions existing at the place. These conditions as well as the danger resulting therefrom were obviously and necessarily known to the defendant. The danger had existed for years in the winter season, and hence it is manifest that the city must have had knowledge of it. Two of the witnesses testified specifically as to the existence of ice on the sidewalk at that place during the month of January of the year 1903. What everybody else sees the city must see.

The only error assigned is the refusal of the court below to give binding instructions to the jury to find for the defendant, and for the reasons stated the assignment is overruled, and the judgment is affirmed.

(221 Pa. 277)

#### IN RE STITZEL'S ESTATE.

Appeal of SHOMO et al.

(Supreme Court of Pennsylvania. May 11, 1908.)

#### 1. EXECUTORS AND ADMINISTRATORS — ACCOUNTING—SURCHARGE—NOTICE.

A surcharge by the orphans' court of an executor's account is an adjudication against him which cannot be made without notice and an opportunity to be heard.

#### 2. SAME—EXCEPTIONS TO ACCOUNT—OVERPAYMENT OF COUNSEL FEES.

A surcharge of an executor for an overpayment of counsel fees cannot be made by the court without an exception to his account taken by a party in interest before the court.

#### 3. AMICUS CURIAE—RIGHT TO APPEAR—APPOINTMENT.

Where the orphans' court surcharged executors with money paid for counsel fees, and two charitable corporations, the only persons interested, did not except to the account or employ counsel, but prayed that the account be confirmed, the court erred in appointing an amicus curiae to file exceptions, and on the hearing thereof in confirming the first surcharge and in making an additional one.

#### 4. SAME—JURISDICTION.

It is not proper for an amicus curiae to become a prosecutor, to put into shape objections dictated by the court, which the court itself has no authority to make, in the absence of objections by some party in interest.

Appeal from Orphans' Court, Berks County.

Judicial accounting by H. O. Shomo and another, as executors of the will of George D. Stitzel, deceased. From a decree dismissing exceptions to the adjudication, the executors appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, ELKIN, and STEWART, JJ.

George S. Graham, Isaac Hiester, and Stevens & Stevens, for appellants. George J. Gross, Anthony A. Hirst, and James Fitzpatrick, for appellee.

MITCHELL, C. J. The executors of Stitzel filed their account, showing a balance due to the residuary legatees, St. Joseph's Hospital and the Homeopathic Hospital of the city of Reading. No exceptions were filed to the account by either of the residuary legatees, and no other parties appear to be interested. The learned judge below, on his own motion, without notice or hearing, surcharged the executors with \$2,500 out of \$4,000 paid by them as counsel fees. To this adjudication the executors filed exceptions, and when these were called for argument, the executors were offered by the court an opportunity to present evidence on the subject of the exceptions. Accountants declined to present any such evidence, but desired to argue the regularity of the court's action, whereupon Mr. Gross appeared on behalf of St. Joseph's Hospital, and, desiring to file exceptions to the account, was ruled to file his warrant of attorney. On the return of this rule Mr. Gross answered, admitting that he represented no one authorized to execute a warrant of attorney, but the court immediately appointed him amicus curiae, allowed him to file exceptions, and compelled the executors to undergo an examination at his hands, not only on matters pertinent to the surcharge, but on the administration of the estate generally. At a continuance of this hearing on a subsequent day, the accountants presented formal resolutions by the boards of trustees of the two residuary legatees, requesting the court to dismiss the exceptions and confirm the account as originally filed. Disregarding these resolutions, the court subsequently filed a second adjudication, not only confirming the first surcharge, but making an additional surcharge of the other \$1,500 previously allowed for counsel fees, and striking off the accountants' entire compensation, on the ground that there had been an overvaluation of securities, which the legatees had accepted in kind, and thereby the commissions had been inflated. This is a sufficiently detailed recital to show the nature of the proceedings, and anything more illegal would be hard to find. Every step was irregular.

By Act April 14, 1835, § 1 (P. L. 1834-35, p. 275), the orphans' court is directed to examine the accounts of executors, "and if not excepted to they shall after due consideration be confirmed, but if any person interested in the estate shall except to the account," etc., the court shall decide whether the matters contested call for reference, etc. The usual course of practice where no exceptions are filed is to confirm the account without

further proceedings, and the accountants, in the absence of notice, are entitled to assume that this course will be followed. The duty, however, to examine with due consideration carries with it the right of the court on its own motion to make inquiries, suggest objections, and call for explanations. But such matters must be treated judicially, upon notice and hearing. A surcharge is an adjudication against the accountant which cannot be made without notice to him and an opportunity to be heard before he is condemned. And a surcharge of the kind made in this case, for an overpayment of counsel fees, is not one that can be made at all by the court without an exception by some interested party before it. There is no question of law or public policy involved, simply a question of the proper or improper amount paid for a proper charge. If the residuary legatees out of whose pockets the fees would come had been individuals who had expressly agreed to the fees, the court would have had no authority to say they should not be allowed. The right of contract or consent in such cases is in the parties, not the court. And it makes no difference that the immediate parties are corporate trustees. All that the court could properly do was to notify the parties, state the objections, and make sure that the trustees understood the court's views. After that the decision rested with the trustees. In the present case the trustees not only failed to except, but formally and explicitly declined to do so, and requested confirmation of the account.

There was not only no authorized exception by either of the only parties interested, but there was no one before the court entitled to speak for them even as nominal exceptants. Mr. Gross attempted to appear, but had to confess that he could not produce a warrant of attorney after being ruled to do so. That ended any right to speak for them, if he had had any before. Act April 14, 1834, § 71 (P. L. 1833-34, p. 354). The first adjudication and surcharge, being without notice or hearing, were illegal and void. And the attempt to cure the defects subsequently were equally futile. The accountants were entitled to a fair hearing before judgment, not merely to an opportunity to convince a judge who had already prejudged the case. Further, all the proceedings were irregular for the reason, as already suggested, that there was no one before the court entitled to raise exceptions. The judge appointed Mr. Gross as *amicus curiæ*, and allowed him, as such, to file exceptions. But it is not the office of an *amicus curiæ* to become prosecutor to put into shape objections dictated by the court, and which the court itself, as already shown, had no authority to make in the absence of objection by some party in interest. What is said in Franklin's Appeal, 163 Pa. 1, 29 Atl. 912, may be appropriately repeated here. "It is not intended in this opinion to say that a

judge may not, of his own motion, initiate an investigation for the correction of evils in the administration of justice. He is the responsible head of his court, and if he has reason to suspect wrongs or irregularities, it is not only his right, but his imperative duty, to see to their correction. But he should proceed in an orderly and judicial manner. \* \* \* The legal remedies are ample and effective, but none of them permits a judgment before a hearing. A judge never serves either law or justice by proceeding lawlessly, or forgetting that a court is a tribunal where justice is judicially administered. Actual justice may be done, and sometimes effectively, by the summary action of a vigilance committee or a mob of lynchers, but it is not done judicially, and the dangers are such as no civilized community can afford to tolerate. Deliberate and orderly proceedings, including, as a foremost requisite, a full and impartial hearing before judgment, are the inviolable safeguards of public justice as well as of individual liberty. With the best intentions, no doubt, and under the belief that the situation required extraordinary action, the learned judge, nevertheless, adopted a method which cannot be sanctioned. The whole proceeding was non-judicial, void in form and in substance, and it is ordered to be struck off the record."

The decree is reversed, all objections to the account are overruled, and the account directed to be confirmed.

(221 Pa. 276)

#### WHEELER v. EQUITABLE TRUST CO.

(Supreme Court of Pennsylvania. March 11, 1908.)

#### 1. INSURANCE — TITLE INSURANCE — INDEMNITY.

A policy of title insurance insured the mortgagee against defects or unmarketability of the title to the estate, mortgage, or interest in the real estate included in the mortgage. The policy contained in a note to a schedule a guaranty to complete certain buildings according to certain plans and specifications. The insured held the mortgage as collateral for a loan, and thereafter bought it in at his own sale, as authorized by the terms of the loan, at a price equal thereto, and thereafter had the mortgage foreclosed and bought the real estate. *Held*, that the policy should be construed as a whole as a contract of indemnity, and insured, having bought the mortgage at a price equal to the loan, suffered no loss, and therefore was not entitled to show, in an action on the policy, that there was a defect in the title, or that the houses had not been completed.

#### 2. SAME—EVIDENCE.

It was immaterial under such circumstances that the insured, and not a stranger, bid the mortgage up, and bid it in at an amount equal to the loan, and that the only other bidder was the insolvent borrower.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit on a policy of title insurance by Susan P. Wheeler, as executrix of the will of Charles Wheeler, deceased, against the Equitable Trust Company. From a judg-

ment for defendant, plaintiff appeals. Affirmed.

At the trial the plaintiff made the following offer: "Mr. Johnson: I am willing that the case shall be tried upon the acceptance of fact that, at the time the mortgage was sold by the holder of the judgment note, there was not then due upon the judgment note principal, interest, and costs in a sum greater than the \$53,000. The Court: Then you can make your offers, and we can have the whole question settled by the court in banc. Mr. Johnson: So that your honor's ruling will now be upon a state of facts appearing upon the record, which meets what was in your mind as to the only reason why you would permit proof. Upon this supposition of facts the plaintiff now offers to prove that the title of the mortgaged premises was defective, in that the right to the bed of the street had not been acquired, and also prove that the houses had not been completed in accordance with the plans and specifications; that they were incomplete in very important particulars; that without the knowledge or assent of the mortgagee, the holder of the judgment note, the plan of construction had been altered, so that the houses thus constructed were less valuable; that by reason of the noncompletion of the houses in accordance with the plans and specifications and title insurance policy, the houses themselves would require upwards of \$13,000 to complete, and that such expenditure would be required in order to make the construction in accordance with the title insurance contract; that by reason of the incompleteness of the buildings, the mortgage was less valuable than it would have been by about \$18,000. That is our offer. (Objection. Objection sustained. Exception.) We also offer to prove that at the sale of the mortgage made by the owner of the judgment note, there were but two bidders, Mr. Pharaoh, the debtor, who was at the time insolvent, and the owner of the judgment note. The Court: I assume the insolvency was known to the plaintiff at the time. Mr. Johnson: Yes; the insolvency was known to the owner of the judgment note, and that can be shown. (Objection. Objection sustained. Exception.)" The court gave binding instructions for defendant. Verdict and judgment for defendant. Plaintiff appealed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

John G. Johnson and O. Berkeley Taylor, for appellant. F. S. Brown, for appellee.

MESTREZAT, J. A brief statement of the uncontroverted facts in this case will show that the learned trial judge was right in directing a verdict for the defendant. John D. Pharaoh borrowed \$50,000 from the plaintiff, for which he gave his judgment note, dated

May 25, 1898. At the same time, and as of the same date, he executed and delivered to plaintiff, as collateral security for the payment of the principal and interest of the note, a bond and mortgage for \$61,500 upon 17 yearly ground rents, issuing and payable out of 17 lots of ground in the city of Philadelphia. The note given to secure the indebtedness refers to the bond and mortgage as collateral security for its payment, and authorizes the payee, the plaintiff, "upon the nonpayment of the semiannual interest for the space of thirty days after the same shall have become due, to sell and transfer [the bond and mortgage] without any previous demand or notice to me and without any public notice, and to apply the net proceeds \* \* \* to the payment of this note in full or partially as said proceeds may suffice \* \* \* and at any such sale as aforesaid the said Susan Farnum Wheeler, executrix as aforesaid, is expressly empowered to become the purchaser provided she shall be the highest bidder therefor." The defendant company on the same day, May 25, 1898, executed a policy of insurance to the plaintiff, in which it covenanted to indemnify and keep harmless the plaintiff "against all loss or damage, not exceeding \$50,000, which the said insured shall sustain by reason of defects or unmarketability of the title of the insured to the estate, mortgage or interest" in the ground rents included in the mortgage given by Pharaoh to the plaintiff, and therein also guaranteed the completion of 17 buildings upon the 17 lots out of which the ground rents issued. Default was made by Pharaoh in payment of the interest due on the loan, and on January 23, 1899, the plaintiff, by virtue of authority contained in the note, offered the bond and mortgage for sale at public auction, and purchased the same for the sum of \$53,000. The handbill or public notice of the sale contained on its face the following: "Accompanying this mortgage is a title policy of the Equitable Trust Company insuring title and completion of the houses." Subsequently the plaintiff proceeded to foreclose the mortgage, and purchased the ground rents mentioned therein for \$500, and later sued out the ground rents, and purchased the properties for \$50 each, finally becoming the owner of the properties on March 19, 1900. To March Term, 1901, of the court of common pleas No. 5 of Philadelphia county, the plaintiff brought an action of assumpsit on the policy of title insurance issued by the defendant company. The breach averred was the failure to complete the houses according to the plans and specifications filed by Pharaoh with the defendant company. The trial court entered a compulsory nonsuit, and the judgment was subsequently reviewed by this court in *Wheeler v. Equitable Trust Company*, 206 Pa. 428, 55 Atl. 1065. The action was brought, and the right to recover was claimed, on the theory that the provision of

the policy guaranteeing the completion of the houses was in law a guaranty, and that the plaintiff could recover by proving the loss. The judgment of the court below, however, was affirmed, and it was held that the title policy was a contract of indemnity and not a guaranty; that the plainly expressed intent was to indemnify against loss from defects or unmarketability of title; that if any loss should be sustained by the plaintiff by reason of the noncompletion of the buildings, such loss should come under the indemnification covenant of the policy. It was further held (page 433 of 206 Pa., page 1066 of 56 Atl.): "As preliminary to a recovery on the stipulation of the note to schedule B (guaranteeing the completion of the houses), plaintiff must show that she has not been indemnified and saved harmless on her collateral mortgage; that defendant has failed in that particular. Then she can go further, and show that the failure to complete the building caused, or tended to cause, the loss."

On January 28, 1904, the plaintiff brought another action of assumpsit on the same policy to recover the sum of \$15,000, with interest from February 25, 1899. The statement sets forth the loan and the collateral given to secure it; a copy of the note in the title policy guaranteeing the municipal improvements and the completion of the seventeen buildings; the proceedings by which the bond, mortgage, ground rents, and title to the property were vested in the plaintiff; alleges that the houses had not been completed according to the plans and specifications; that the mortgage was depreciated to the extent of the cost necessary to make the houses conform to the plans and specifications and the cost of opening the street and introducing the water through the same into the houses; and averred that the defendant would not indemnify the plaintiff according to the terms of its policy, whereby she had lost the sum of \$15,000. On the trial the plaintiff proved certain preliminary facts, and then offered to show that the title of the mortgaged premises was defective because the bed of the street had not been acquired, and the houses had not been completed in accordance with the plans and specifications; that the plan of construction of the houses had been altered without the knowledge of the mortgagee, so that the houses cost less to construct under the new plan, and were less valuable; that it would cost upwards of \$13,000 to complete the houses and make the construction in accordance with the title insurance contract, and that, by reason of the incompleteness of the buildings, the mortgage was less valuable than it would have been by about \$18,000. The plaintiff further offered to prove that at the sale of the mortgage she and Pharaoh, the debtor, who was insolvent, were the only two bidders. The plaintiff's counsel admitted that, at the time the mortgage was sold by the holder of the note, there was not due upon the note more than \$53,000, the price at

which the mortgage was sold. The offers were rejected, and a verdict was directed for the defendant.

As suggested above, the statement of the undisputed facts clearly disclose that the plaintiff cannot maintain this action. The facts presented or offered to be shown in the present action are substantially the same as appeared in the former case. The contention there was that Note B of the policy was a guaranty, and hence the plaintiff could show the loss sustained by reason of the failure of Pharaoh to complete the houses and secure certain municipal improvements. When the case was here before, we held that the title policy, Note B included, was a contract of indemnity against loss on the mortgage, and that therefore there could be no recovery for a failure to complete the houses or to secure the municipal improvements, unless the plaintiff prove a loss on the mortgage. In other words, the title policy indemnified the plaintiff, to the extent of \$50,000, against loss on the mortgage, which was given as collateral security for the payment of the loan made by the plaintiff to Pharaoh. Under that interpretation of the title policy, before the plaintiff could recover thereon she was required to show that she had sustained a loss on the mortgage. If no such loss occurred, then it was wholly immaterial whether the municipal improvements had been secured or the houses had been completed, so far as liability on the policy was concerned. The loan by the plaintiff to Pharaoh was \$50,000, for which the note of May 25, 1898, was given. The bond and mortgage were given as collateral security for the payment of the note. As a further security, the plaintiff procured the defendant's title policy in suit. The liability of the plaintiff in this action rests solely upon that policy. If there has been no breach of it, there can be no recovery here. That policy insured the plaintiff against loss on the mortgage. The defendant, therefore, according to our decision in the former case, indemnified the plaintiff against loss to her on the mortgage. That is the only liability which the defendant assumed in the policy. If there is no loss, there is no liability on the policy. The note given to secure the loan authorized, as we have seen, the plaintiff to sell the mortgage on default of Pharaoh to pay the semiannual interest. The mortgage was given as collateral security for the payment of the principal and interest of the note for \$50,000, and the title policy was given to secure plaintiff against loss on the mortgage to the extent of \$50,000, by reason of the unmarketability of the insured's title to the mortgaged estate. The plaintiff proceeded in the manner pointed out in the note to sell the mortgage. This was optional with her. She had the right to use any and all of the collateral securities she held to enforce payment of her loan to Pharaoh. She exercised the privilege and sold the mortgage. The sale was at public

auction, and the mortgage was sold for the sum of \$53,000. It is admitted by the plaintiff that that sum covered the principal, interest, and costs of the note given to secure the loan, and for which the mortgage was given as collateral security. How can it be, therefore, that the plaintiff has sustained any loss upon the mortgage? If a *scire facias* had been issued on the mortgage there could only have been a recovery for the debt, interest, and cost of the note which the mortgage was given to secure. The sum for which the mortgage sold at public auction, it is conceded, covers fully the note given to secure the loan. How, under the facts, can it affect the defendant's liability on the title policy that the houses were not completed or the municipal improvements were not secured? As we have distinctly ruled, the liability of the defendant is for loss on the mortgage, and the fact must be conceded that there was no loss upon the mortgage. The purchaser of the mortgage at public auction manifestly believed that the property, with the houses incomplete, and without the municipal improvements, was fully worth the amount bid and paid for the mortgage. That must be assumed; but if it were not so, and if the value of the property was less than the mortgage, wherein is the plaintiff, the mortgagee, injured? Fifty-three thousand dollars, covering the loan and note secured by the mortgage, were realized by the plaintiff from the sale of the mortgage. This is the full amount of indemnity to which the plaintiff was entitled on her title policy. It seems to us that there is no ground whatever, in view of our former interpretation of the contract evidenced by the policy, for the contention that there is any liability resting upon the defendant company by reason of anything contained in the offers of proof by the plaintiff on the trial of the cause.

It is claimed, however, that the liability of the defendant company on the policy is changed or is different by reason of the fact that the plaintiff, and not a stranger, was the purchaser of the mortgage at the sale, and therefore that she may show that the mortgaged property was not equal to the amount of the note or claim secured by the mortgage. Hence it is contended that the mortgage was less valuable than it would have been had the buildings been completed according to the plans and specifications filed with the defendant. But how can the fact that the plaintiff, and not a stranger, was the purchaser of the mortgage affect the question of the defendant's liability? It could not be contended that, if a third party had purchased the mortgage and paid \$53,000 in cash to the plaintiff, there could be any liability on the title policy. That sum, as we have seen, wiped out the entire indebtedness of Pharaoh to the plaintiff, and hence satisfied the mortgage given as collateral to secure its payment. That the plaintiff became the pur-

chaser of the mortgage can in no way, as it seems to us, present the matter differently from what it would be if a third party had been the purchaser. She sold the mortgage at auction by authority contained in the note securing the loan. She had control of the sale, and she was expressly empowered to become a purchaser of the mortgage at the sale. There was only one condition imposed upon her in becoming a purchaser, and that, as stipulated in the note, was that she "be the highest bidder therefor." The amount of her bid was of course wholly discretionary with her. She was not compelled to bid at all, nor was she required, by the terms of her contract or under the law, to bid any sum for the mortgage in order to protect her loan. All she was required to do, under the power contained in the note authorizing a sale of the mortgage, was to make the sale according to the terms of the authority conferred upon her. Had she complied with those terms, and made a bona fide sale of the mortgage, and a loss had resulted, she could have had recourse to the title policy to indemnify herself. Her bid on the mortgage was simply a matter of her own pleasure, and not required for the protection of her loan. She must therefore be regarded the same as any other bidder at the sale, and the amount of her bid must, as if made by a third party, be applied on the mortgage which fully satisfies it and the loan secured by it.

We are unable to see that the insolvency of Pharaoh, the other bidder at the sale of the mortgage, affects this case. We cannot go into the question and ascertain whether Pharaoh was bidding for himself or another party who was able to pay the purchase price. It may well be that he had made the necessary arrangements to protect his property by securing another party to purchase the mortgage. In fact it appears that he tried to secure delay in the sale of the mortgage for that very purpose. Be these facts as they may, the authority to sell and the control of the sale were entirely with the plaintiff. Unless she so desired, no sale could have taken place, and certainly no sale could have been consummated, without a bona fide purchaser who could and did pay the purchase price. Under these facts it must be assumed that the plaintiff made her bid for the mortgage, believing it to be worth the price she bid. She, therefore, as purchaser of the mortgage, occupies the position of a stranger, and must account for the \$53,000 and apply it to the mortgage. This is conceded to be the full value of the mortgage, and, the plaintiff having received that sum, she has sustained no loss which imposes a liability on the defendant company by reason of the issuance of its title policy to her.

We are of opinion that the cause was rightly determined by the court below, and therefore the assignments of error are overruled, and the judgment is affirmed.

(221 Pa. 326)

**PAGNACCO v. FABER et al.**

(Supreme Court of Pennsylvania. May 11, 1908.)

**1. MECHANICS' LIENS—RIGHT TO FILE—WAIVER—ALTERATION OF CONTRACT.**

A building contract, providing for a waiver of the contractor's right to file a mechanic's lien, after a change in the ownership of the building, was canceled, and an oral contract made with the new owner, by which the contractor agreed to finish the building without waiving his right to a lien. *Held*, that the contractor, as against the new owner, was entitled to enforce the lien, though a third person, not a party to the proceedings, had insured the completion of the building, relying on the waiver in the original contract.

**2. SAME — FORECLOSURE — RIGHTS OF THIRD PERSONS—ENFORCEMENT.**

In a proceeding to enforce a mechanic's lien, the rights of a third person who had insured the completion of the building, relying on a waiver of the right to a lien in a former contract, could not be enforced, where the claimant of such equity did not intervene and become a party to the lien proceedings.

Appeal from Court of Common Pleas, Philadelphia County.

*Scire facias* sur mechanic's lien by Joseph Pagnacco against Frederick F. Faber and another. Plaintiff had a verdict for \$5,145.85, but the court granted a motion for judgment for defendant non obstante verdicto, and plaintiff appeals. Reversed, and judgment directed on verdict.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

G. Von Phul Jones, for appellant. Joseph A. Slattery and Geiger, Brooks & Faries, for appellees.

STEWART, J. This was an action by *scire facias* sur mechanic's lien against Frederick F. Faber, owner and contractor, and another as reputed owner. Faber defended as owner. The one issue of fact was whether Pagnacco, the claimant, had waived his right to file a lien. The original contract was with one Nyce, then the owner and by that contract Pagnacco covenanted to complete the foundation, stonework, cellar walls, face stonework, rubble range work, porch floors, and excavation and grounding required for and in the erection and construction of the buildings, and expressly waived the right to file any lien therefor. Nyce, becoming financially embarrassed after the work had progressed, was unable to complete the building operation. He withdrew therefrom, and assigned his interest to Faber. At this time Pagnacco had furnished work and materials to the amount of \$11,557.98, and had received in cash \$7,931. Claiming that he had not received all that he was entitled to in cash, he declined to proceed further with the work. He testified that Nyce had told him of his assignment to Faber, and that he (Nyce) had nothing more to do with the operation. He further testified that he did not agree to resume work until after Faber told him

that he (Faber) had become the owner, and that he would pay him. Plaintiff's contention was that the work that was done thereafter was completed, not under the original contract with Nyce, but under a new and wholly distinct contract with Faber, the new owner, in which there was no waiver of the right to file a lien; and this was the one question of fact submitted to the jury. The agreement with Faber was entirely oral. The jury found that the original contract with Nyce had been superseded by the contract with Faber, and that under the latter there was no waiver of the right to file a lien. A verdict was rendered for the plaintiff. Subsequently the court entered judgment for the defendant non obstante verdicto, on the ground that inasmuch as the plaintiff under the contract with Nyce had waived his right to file a lien, and had given bond to Nyce to protect him against all such liens, which bond Nyce had assigned to the Land Title & Trust Company, on the strength of which the latter had incurred obligations prior to the purchase by Faber, the plaintiff was equitably estopped from setting up such right to file a lien, notwithstanding his contract with Faber.

Whatever may be the equities of the Land Title & Trust Company, there was nothing in the case that called for their protection, or even consideration, here. The evidence shows that before the contract with Faber, for the benefit of certain mortgagees who were advancing money for the enterprise, the Land Title & Trust Company had insured the completion of the building operation; and it is insisted that it did this relying upon the waiver of the right to file a lien in the contract with Nyce. But the evidence which shows this was admitted only that it might throw light upon the one question, as to whether or not a subsequent contract was entered into between the plaintiff and Faber, in which there was no stipulation for a waiver. In referring to this evidence the trial judge in his charge says: "All these matters have been introduced here as testimony from which you may find, if you can, anything corroborative or contrary as you view it on one side of this case or the other." The Land Title & Trust Company was not a party to this action, and its interests were not in the keeping of this defendant who was defending the action as owner. The company had the right, under the twenty-fourth section of the act of 1901, to intervene and assert its equities, if it chose to do so; but these could only be asserted by itself, and not by another. It by no means follows that, because plaintiff might be estopped from enforcing his lien to the prejudice of the trust company, he is estopped from enforcing it against the owner. The estoppel could extend no further than to protect the trust company from loss. The action of the court in entering judgment non obstante verdicto cannot be justified. In re-

versing the judgment we do so without prejudice to the right of the trust company to proceed in whatever way may be open to it to protect such equities as it may have, if any.

Judgment reversed, and judgment directed on the verdict.

(221 Pa. 294)

**LERNER et ux. v. CITY OF PHILADELPHIA.**

(Supreme Court of Pennsylvania. May 11, 1908.)

**1. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS—INJURIES—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.**

Where a pedestrian falls on a defective sidewalk in broad daylight, in consequence of an open and exposed defect in the walk, the burden is on him to show conditions outside of himself which prevented his seeing the defect, or which would excuse his failure to observe it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1725.]

**2. SAME—FAILURE TO OBSERVE DEFECT—EXCUSE.**

While a pedestrian is not bound to keep his eyes on a paved sidewalk continually to discover possible defects, he must observe where and how he is going, so as to avoid dangers which ordinary prudence would disclose, and hence, if injured by stepping into a depression caused by the displacement of bricks in the walk without having observed it, he cannot recover without showing how he was prevented from observing the defect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1677-1679.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Max Lerner and wife against the city of Philadelphia to recover for injuries to the wife by an alleged defective sidewalk. From an order refusing to take off a nonsuit, plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, STEWART, and ELKIN, JJ.

Eugene Raymond, for appellants. Harry T. Kingston, Asst. City Sol., and J. Howard Gendell, City Sol., for appellee.

STEWART, J. We have gone very far in holding municipalities liable for injuries received in consequence of defective pavements, but never yet so far as to excuse the pedestrian using the pavements from the duty of exercising ordinary care. When one abandons the use of his natural senses for the time being, and chooses to walk over a pavement by faith exclusively, and is injured because of some defect in the pavement, he has only himself to blame. It is, of course, the duty of municipalities to see that the pavements along its streets are reasonably safe for public use; but they are not insurers of the safety of those using them. It is impracticable, if not impossible, to maintain these pavements in such condition as to make them entirely free at all times from possibility of accident to those using them. Irregularities in grade, unevenness in surface, sharp

depressions at crossings, accidental displacement of brick or stone, and many other things which may or may not be defects, but yet sufficient in themselves to cause accident to the unwary, are so common and usual that it is the duty of the pedestrian to be observant of such fact, and not to walk blindly. If through no fault of his he is prevented from seeing the defect, obstruction, or whatever it may be, which it was the duty of the municipality to have corrected, and injury results to him, he is entitled to claim compensation. When the accident occurs in broad daylight, in consequence of an open and exposed defect in the sidewalk, the burden rests upon the party complaining to show conditions outside of himself which prevented him seeing the defect, or which would excuse his failure to observe it. If such conditions exist, there is excuse for walking by faith. When they do not exist, the law charges the party with failure to do what was required of him. And that is this case.

The accident occurred at half past 4 o'clock in the afternoon of an April day. The defect in the pavement was the displacement of some bricks. Into the depression caused by this displacement plaintiff stepped, with the result that she fell and injured herself. In bringing her action she assumed the burden of exhibiting a case clear of contributory negligence. Having testified that she stepped into the depression without having observed it, and having shown conditions which should have been sufficient, nothing intervening, to secure one exercising ordinary care from such accident, she would be entitled to recover only as she explained in a way consistent with ordinary care on her part, how and why she failed to see what was directly before her. Failing in this, it could not be said that her injury resulted exclusively from the defendant's negligence. It was insisted upon by counsel representing her that she was prevented from seeing the depression into which she stepped by the crowded condition of the pavement at the time. No other explanation is attempted. Unfortunately for the plaintiff this explanation advanced by counsel is without support in the evidence. Neither plaintiff herself, nor any witness called by her, testifies to such crowded condition. Plaintiff's testimony in chief is most meager on this point. All she says is that at the point where the accident occurred the open way was narrow, sufficient only for two or three people to pass. To the question, "Were there many people there at the time?" she replied: "Yes, sir; quite a number there." On cross-examination she was asked: "Was there anybody immediately in front of you?" To this she replied: "Yes, sir; there were people. We looked forward as much as we could, walking between the people." The next question was: "Were there people back of you?" Her answer was: "Yes, sir; walking back of us and front of us." Twice in the course of the cross-examination—not once



in her examination in chief—she was given the opportunity by direct questioning to say that the crowded condition of the sidewalk prevented her from seeing the defect, and each time the question was avoided by the reply that she did not see it. The testimony of her sister, who was with the plaintiff when she fell, and the only witness called to testify to the circumstances, is still more meager. Here is the whole of it: "Q. It was on Saturday afternoon, was it not? A. Yes, sir. Q. Was the neighborhood generally crowded at that time, and on that pavement? A. Usually on Saturday afternoons. Q. This Saturday afternoon? A. Yes, sir; there was several. Q. Which way were they going, and how were they going? A. Passing up and down." Upon such testimony as this, how could a jury find that plaintiff was prevented by the crowded condition of the street from seeing what was directly in her path? The plaintiff herself declined to say that she was so prevented, and her only witness testifies to a state of facts wholly inconsistent with the explanation advanced by the counsel. We are not undervaluing the testimony in the slightest when we say that it gives no support to the explanation advanced. Nor are we holding the plaintiff to a higher degree of care and circumspection than the law in all such cases requires. One is not required in walking along a traveled highway to keep his eyes fastened upon the ground continually to discover points of possible danger, nor is it necessary that he should in order to avoid exposed pitfalls lying directly in the path before him; but the law does require that he be observant of where and how he is going, so as to avoid dangers which ordinary prudence would disclose. The law governing cases of this character is so fully discussed, and so clearly and explicitly declared, in the opinion of Mr. Justice Mitchell in *Robb v. Connellsville Boro.*, 137 Pa. 42, 20 Atl. 564, that reference to other authority is unnecessary. So far as appears from the evidence offered on behalf of the plaintiff, her accident was due to her own want of care. It admits of no other conclusion.

The nonsuit was properly entered, and the judgment is affirmed.

(221 Pa. 329)

In re GLENTWORTH'S ESTATE.

Appeal of RUBINCAM et al.

(Supreme Court of Pennsylvania. May 11, 1908.)

#### CONVERSION—WILLS—CONSTRUCTION.

Where testatrix, who had acquired certain real estate ex parte paterna, directed her executor to sell the same and distribute the proceeds to those who would be entitled thereto under the intestate laws, and in a separate clause of the will bequeathed her personal property to such persons as would be entitled under the intestate laws, the direction to sell the real estate did not work a conversion thereof into personalty, so as to change the course of inheritance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Conversion, §§ 30, 31.]

Appeal from Orphans' Court, Philadelphia County.

Judicial settlement of the estate of Annie E. Glentworth, deceased. From a decree awarding a portion of the proceeds of real estate to Frances S. Buckingham and Andrew A. Butler, Caleb Rubincam and another appeal. Reversed.

From the adjudication it appeared that the decedent died on January 28, 1906, leaving to survive her Caleb Rubincam, and William M. Thomas, cousins ex parte paterna, and Frances S. Buckingham and Andrew A. Butler, cousins ex parte materna. The portions of the will material to the questions involved are quoted in the opinion of the Supreme Court. The auditing judge, Ashman, P. J., held that the will worked a conversion of the real estate, and awarded a portion of the proceeds of the sale of the real estate to the cousins ex parte materna. The cousins ex parte paterna filed exceptions to the adjudication. The court in an opinion by Anderson, J., Penrose, J., dissenting, dismissed the exceptions.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Joseph B. Townsend and John J. Gheen, for appellants. C. M. Bowman, for appellees.

PER CURIAM. The testatrix was possessed of both real and personal property; the former having come to her ex parte paterna. She knew the difference and had it in mind when she made her will, for she made a separate clause in regard to each class. For the real estate she directed that her executor should sell "all my real estate \* \* \* and distribute the proceeds thereof to and among such persons and in such shares as would be entitled thereto under the intestate laws of the State of Pennsylvania," while for the personalty her direction was: "Third. All of my personal property where-soever found I give and bequeath to such persons and in such shares as would be entitled under the intestate laws of Pennsylvania, and I request my executor to distribute the same as rapidly as possible." It is manifest that the testatrix had no intention of making a common fund for a common distribution. When she directed the sale of the real estate and the distribution of the proceeds, she meant the real estate as it was to her in her lifetime, with no intent to change the course of inheritance, but the proceeds to go to those who would be entitled to inherit the land. If she had designated the devisees of the proceeds by name, they would clearly have had the right to elect to take the land as land, with no standing at all for other relatives to claim. She did not name the devisees but she designated them as a class as clearly as if by name. The direction to sell was merely for convenience of distribution, and, as conversion never oper-

ates except to carry out the intention of the testator, it could not in this case alter the course of inheritance. On the other hand, when she was disposing of her personal property, she "gave and bequeathed" it directly to such persons and in such shares as would be entitled under the intestate laws. It is plain that she was intentionally dealing with a different class of property and a different set of beneficiaries.

Decree reversed and distribution ordered to be made in accordance with this opinion.

(221 Pa. 331)

TRUITT v. CITY OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. May 11, 1908.)

**1. MUNICIPAL CORPORATIONS—CIVIL SERVICE EMPLOYÉS—REMOVAL—PROCEEDINGS.**

No officer, clerk, employé, or laborer in the civil service of the city of Philadelphia can be appointed, transferred, reinstated, promoted, or discharged in any manner or by any means other than those specified in Act March 5, 1906 (P. L. 83).

**2. SAME—STATUTES—VALIDITY.**

Act March 5, 1906 (P. L. 83), regulating civil service employes in cities of the first class, is a constitutional exercise of legislative power, the provisions of which must be strictly pursued in appointments to or removals from office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 575.]

**3. SAME—GROUNDS FOR REMOVAL.**

Under Act March 5, 1906 (P. L. 83), regulating civil service employes in cities of the first class, and providing that they shall be removed only for "just cause, which shall not be religious or political," an employé can be removed only for some reason personal to him, rendering him unfit for the position he occupies, independent of religious or political reasons.

**4. SAME—RECORD OF GROUNDS FOR REMOVAL.**

Act March 5, 1906 (P. L. 83), providing an employé of a city of the first class shall not be removed "until he shall have been furnished with a written statement of the reasons for such action, requires the officer removing such an employé, in the exercise of his authority to dismiss, to specifically state in writing the cause or causes of the unfitness or incompetency of the employé, and is mandatory, and a condition precedent to the removal, so that the officer's failure to observe such provision renders the removal nugatory, as though no cause had been assigned.

**5. SAME—HEARING.**

Under Act March 5, 1906 (P. L. 83), prohibiting the removal of a civil service employé in cities of the first class, without giving the employé an opportunity to answer charges preferred against him, and requiring the removing officer to assign his reasons in writing, if the employé can satisfactorily answer the reasons assigned for his removal the removing officer has no power to dismiss him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 595.]

**6. SAME—REASONS FOR DISMISSAL—STATEMENT.**

A note of dismissal sent by the director of public safety of a city of the first class to the superintendent of a square, stating that he was dismissed "for the betterment of the service," was not a sufficient "written statement of the reasons" for the dismissal of a civil service employé, required by Act March 5, 1906 (P. L. 83).

**7. MANDAMUS—ANSWER—DEMURRER.**

Where a petition for mandamus, to compel petitioner's reinstatement to office under the

civil service laws applicable to the city of Philadelphia, averred that plaintiff was not furnished a statement of the reasons for his dismissal and given an opportunity to answer charges, as required by Civil Service Act March 5, 1906 (P. L. 83), and the answer, without admitting or denying the averment in the petition, alleged certain causes for removal, petitioner, by demurring to the answer, did not admit the truth of the charges contained therein.

**8. MUNICIPAL CORPORATIONS—CIVIL SERVICE OFFICERS—REMOVAL—REINSTATEMENT PROCEEDINGS.**

Where an officer of a city of the first class dismissed a civil service employé of the city from the service without assigning a cause, and without permitting him to respond to charges, required by Civil Service Act March 5, 1906 (P. L. 83), grounds for removal, though in themselves sufficient, for the first time assigned in an answer to a mandamus proceeding to compel the employé's reinstatement, could not be considered.

**9. SAME—REINSTATEMENT.**

Where a civil service employé of a city of the first class was illegally removed without being served with proper reasons or afforded an opportunity to be heard, as required by Civil Service Act March 5, 1906 (P. L. 83), the court would not refuse to reinstate the petitioner because the removing officer would immediately remove him for the causes stated in his answer in the mandamus proceedings; it being presumed that the removing officer would only remove such employé after first making a fair investigation of such charges.

Mitchell, C. J., dissenting in part.

Appeal from Court of Common Pleas, Philadelphia County.

Petition for mandamus by Harry W. Truitt against the city of Philadelphia and others. From an order sustaining a demurrer to defendants' answer, they appeal. Affirmed.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas D. Finletter and J. Howard Gen-dell, for appellants. Wm. Clarke Mason and Franklin S. Edmonds, for appellee.

MESTREZAT, J. In August, 1906, Harry W. Truitt, the plaintiff, passed a successful examination before the civil service commission of the city of Philadelphia for appointment to the position of superintendent of squares in the city, and on the eighteenth of that month was placed on the eligible list for appointment to the position. In October of the same year he was appointed to the office of superintendent of squares by the director of the department of public safety, and was assigned to duty as superintendent of Rittenhouse square. He continued to perform the duties of this position until October 14, 1907, when he was notified by letter from Henry Clay, director of public safety, of his "dismissal from the position of superintendent of squares, bureau of city property, for the betterment of the service, the same to date from Thursday, October 17, 1907." Since the date of this notice the mayor and the director of public safety have refused to recognize the plaintiff as a superintendent of squares, and he has been denied the right to perform the duties

of such position. On November 18, 1907, Truitt presented his petition to the court below, setting forth the above facts and praying for a writ of alternative mandamus to compel the mayor and director of public safety to place his name on the roll of superintendent of squares, and to recognize him as a superintendent of squares of the city, alleging as reasons therefor that "he has been unlawfully and illegally refused the right to act as superintendent aforesaid by said Henry Clay, director aforesaid," and because the mayor and director "have failed and refused to recognize and cause to be recognized your petitioner as superintendent of squares aforesaid." To this writ the defendants made return and filed an answer. The answer, like the petition, contains many irrelevant and immaterial averments which need not be noticed in disposing of the case. The answer concedes the appointment and service of the plaintiff as superintendent of squares in the city as alleged in the petition. It denies, however, that he performed his duties according to law and the rules of the department of public safety, and avers certain causes which are alleged to be sufficient to justify the plaintiff's removal from office. It further avers that the notice given by Director Clay to the plaintiff was in full compliance with the act of assembly regulating the dismissal of employes, from the civil service; and "that the said letter contains and is a written statement of the reasons for the dismissal of the said petitioner from the said office." The answer further avers that, if the court should be of opinion that the reasons for dismissal were not sufficiently explicit, the action upon the petition would be without practical effect, inasmuch as ample causes for the dismissal of the plaintiff from the office and reasons therefor exist. The learned court below awarded a writ of peremptory mandamus, President Judge Willson filing a clear and convincing opinion, which amply vindicates the correctness of his conclusion.

The Legislature of Pennsylvania passed an act, approved March 5, 1906 (P. L. 83), entitled "An act to regulate and improve the civil service of the cities of the first class in the commonwealth of Pennsylvania, making violation of its provisions to be a misdemeanor, and providing penalties for violations thereof." The act is very comprehensive, and contains ample provisions regulating the subject indicated in its title. It provides that appointments to and promotions in the civil service of cities of the first class shall only be made according to qualifications and fitness, to be ascertained by examination, which so far as practicable shall be competitive. No officer, clerk, employe, or laborer in the civil service of the city government can be appointed, transferred, reinstated, promoted, or discharged in any manner or by any means other than those provided in the act. Penalties are

prescribed for violations of its provisions. The act was manifestly intended to make full provision for the appointment and discharge of officers and employes in the civil service of the city, and to definitely prescribe the manner of exercising such authority, as well as to protect faithful and efficient appointees against removal for a political, religious, or other insufficient cause. Prior to the present act dismissals from the civil service of Philadelphia were regulated by the act of June 1, 1885 (P. L. 37), which provided, *inter alia*, that "the directors or chief officers of departments may by written order giving their reasons therefor, remove or suspend subordinate officers and clerks, provided the same is not done for political reasons"; and that "no policeman or fireman shall be dismissed \* \* \* except by the decision of a court and a trial upon charges with plain specifications and the right of the accused to be present with sworn witnesses." The restriction or limitation placed upon the removal or dismissal of an officer or employe from the civil service of the city is contained in section 20 of the act of 1906, which is as follows: "No officer, clerk, or employe in the competitive class or in the noncompetitive class of the classified civil service of any city of the first class, who shall have been appointed under the provisions of this act, or of the rules made pursuant thereto, shall be removed, discharged, or reduced in pay or position except for just cause, which shall not be religious or political. Further, no such officer, clerk or employe, shall be removed, discharged or reduced, except as provided in section 8 of this act, until he shall have been furnished with a written statement of the reasons for such action, and been allowed to give the removing officer such written answer as the person sought to be removed may desire." The same section provides—manifestly to show the public that the dismissal has been for a sufficient cause—that "in every case of such removal or reduction a copy of the statements of reasons therefor, and of the written answer thereto, shall be furnished to the civil service commission, and entered upon its public records." By section 27 of the act it is provided that all officers or employes in the service of the city on March 1, 1906, shall be construed to have been appointed under its provisions, and shall hold their offices in accordance therewith.

The only question for consideration raised by the pleadings in this case is whether Director Clay complied with the act of 1906 in dismissing the plaintiff from his position of superintendent of squares. The Legislature had the power to pass the act in question and legislate upon the subject (*Commonwealth v. Black*, 201 Pa. 433, 50 Atl. 1008), and hence officials appointing to or removing from office or employment are required to comply strictly with the provisions of the

statute. It may be suggested that neither the court nor the officials in whom is lodged the power of appointment and removal can have any concern with the policy of the law or the reasons for its enactment. Those are questions which are solely for legislative consideration, and neither the court nor the officials can be permitted to question or deny the authority of the Legislature to pass upon and determine them. The duty of the officer in appointing to or dismissing from the service of the city is to comply with the statute, and in good faith yield obedience to its provisions, so that the intention of the Legislature may be fully carried out. The purpose of the Legislature in passing the act was, as its title shows, "to regulate and improve the civil service of the cities" to which it applies, and thereby obtain for the city faithful and efficient employes, and protect them from removal for religious or political reasons. Legislation of a similar character has been enacted by the federal Congress and by the Legislatures of nearly every state of the Union. It unquestionably has the approval of the best thought of the present day, and we have recently so declared in *Commonwealth v. Black*, 201 Pa. 433, 50 Atl. 1008. In that case we said (page 433 of 201 Pa., page 1008 of 50 Atl.): "It is undeniable that much of the best recent thought devoted to municipal government tends to the elimination of politics and personal influences from consideration, and the establishment, as far as practicable, of a tenure of good behavior for all subordinate and nonpolitical positions."

Recurring now to the question to be decided in this case, it is to be observed that the act of 1906 provides that an officer or employe of the city shall not be discharged "except for just cause, which shall not be religious or political." Here is an explicit denial by the Legislature of the right to remove any employe of the city except for the cause named in the act. So long as the employe is without that exception, he is immune from dismissal by any superior officer. The only ground which authorizes a removal from the service is a "just cause," and before the employe can be deprived of his position that must be made to appear. The whim or caprice of the superior officer is entirely inadequate to justify his action in dismissing an employe from the city's service. The cause sufficient to warrant a removal must be personal to the employe, and such as to render him unfit for the position which he occupies. *City of Rockford v. Compton*, 115 Ill. App. 406. The statute denies specifically the right to remove for any religious or political cause. The cause must be substantial, and one which affects the efficiency of the employe and the good of the service. Until such "just cause" has been made to appear, the act of 1906 is a complete barrier to the dismissal of the employe. The statute not only requires that a just cause shall exist to justify the removal

of an employe, but it provides the way in which the incompetent or inefficient employe shall be discharged. No officer or employe shall be removed, says the act, "until he shall have been furnished with a written statement of the reasons for such action, and been allowed to give the removing officer such written answer as the person sought to be removed may desire." This language is explicit, and not to be misunderstood. It is an emphatic declaration by the Legislature prohibiting the removal of any employe except as authorized by its provisions. Before the removing officer exercises his authority to dismiss the employe the former must give to the latter a written statement of the reasons for his intended action. In other words, the officer must state specifically, in writing, the cause or causes of the unfitness or incompetency of the employe to perform the duties of his appointment. He must designate wherein the employe is incompetent to perform the service or is unfaithful in the performance of his duties. This is a condition precedent, imposed by the statute, before the removing officer can dismiss the employe from the service. It is mandatory, and the failure of the officer to observe this provision of the act will render the employe's removal as abortive as if no cause had been assigned. The purpose of the statute in requiring a written statement of the reasons for dismissing the employe is that he may have an opportunity to meet and refute the allegations of incompetency, unfitness, or unfaithfulness alleged against him, and thereby prevent his removal. Not only must the removing officer assign his reasons in writing for his intended action in dismissing the employe, but, before acting, he must also give to the employe an opportunity to answer the charges preferred against him. If he can satisfactorily answer the reasons assigned for his removal, and thereby show that there is no just cause for his dismissal from the city's service, the removing officer is prevented by the statute from dismissing him from the service. If the employe in his answer to the specifications of incompetency or unfitness fail to meet and refute the charges contained in the written statement furnished him by the removing officer, there will then exist a "just cause" for his dismissal, and the statute authorizes the removing officer to discharge him from the city's service. The statute, therefore, provides explicitly that an employe can only be removed for just cause, and in equally plain terms regulates the manner in which the dismissal must be accomplished.

The dismissal of Truitt from the city's service was, as we have seen, by the letter of Director Clay, written October 14, 1907. The only reason assigned for the director's action was "for the betterment of the service." It is apparent, we think, that the reason assigned by the director was not such "a written statement of the reasons" for his action as

the statute requires. The reason assigned is general, vague, and indefinite, and wholly fails to meet the requirements of the statute. It is true, as claimed by defendants, that it is the reason that was assigned by some of the predecessors of the present incumbent in the office of director of public safety, but that is no argument in its favor or justification for its use under the civil service act of 1906. Such a reason defeats the very purpose of the act itself, which unquestionably was to protect a faithful and efficient employé from removal for a political, religious, or other insufficient cause. It denies the employé an opportunity to answer his accusers, by failing to disclose the accusations against him. How is he to make a "written answer" to the charges of unfitness or inefficiency, as required by the act, if the charges against him are not specifically set forth in the statement furnished by the removing officer? The allegation that the dismissal is for "the betterment of the service" is simply the declaration of the removing official, and in no sense is it a written statement of the reasons for removal within contemplation of the civil service act. In passing upon a similar reason assigned for removing certain officers under the civil service law of the federal government, Jackson, J., in *Butler v. White* (C. C.) 83 Fed. 578, said: "Now, it seems to me no grounds have been shown for their removal, except 'for the good of the public service.' This is a reason that was employed by the officers of the government, when they desired to remove any one that was obnoxious to them, long prior to the passage of the civil service act. It is too general, vague, and indefinite to authorize the removal of an officer under existing law. By the other terms and provisions of the rule just referred to, he has to be confronted with the charges that are made against him, and to have full notice, and an opportunity to make defense." The demurrer to the answer admits the truth of the facts well pleaded, but not facts immaterial or irrelevant to the issue. Whether the plaintiff was justly open to the charges made against him is not involved in this litigation, and hence was improperly averred in the defendants' answer. Under the well-established rules of pleading he was not required to deny, and was clearly right in not denying, the truth of the charges contained in the answer. The application for the mandamus and reinstatement was based upon the averment in the petition that the plaintiff was not furnished a statement of the reasons for his dismissal and given an opportunity to answer them, as required by the act of 1906. The answer of the defendants should have admitted or denied the averment in the petition, and the demurrer admitted only such facts in the answer as were material and relevant to that issue.

It is contended by the defendants that a peremptory mandamus should not be awarded to reinstate the plaintiff in his position, be-

cause the answer to the alternative writ discloses a sufficient cause for the plaintiff's dismissal from the service, and, further, that his reinstatement would have no practical effect, inasmuch as the director could immediately dismiss him. This position is wholly untenable. The plaintiff is asserting a right conferred upon him by an act of the Legislature. He claims, and the pleadings disclose, that he was dismissed from the service of the city in direct violation of the civil service act of 1906. His application to the court for a mandamus requiring his reinstatement is based upon the ground that he was unlawfully dismissed from the service, and therefore he should be reinstated. It is not an answer to the alternative writ for the defendants to aver that the plaintiff was guilty of conduct which would warrant his removal. The statute provides that the cause shall be properly assigned and furnished him by the removing officer before his removal, and that he be given an opportunity to answer. It is not sufficient for the removing officer to dismiss an employé from the service without assigning a cause, and, when subsequently brought into court on a demand for his reinstatement, to assign the cause. The statute does not so provide, and hence the court cannot sustain such an answer by the removing officer to an alternative writ of mandamus. Until the employé has been confronted with the charge, and has been afforded an opportunity to give a written answer, the removing officer cannot declare that a just cause of removal exists.

The other reason assigned by the defendants, that it will be a vain thing for the court to reinstate the plaintiff because sufficient reasons for his removal exist, and the director will remove him, is also without merit. To sustain that proposition we must hold that Director Clay and his superior officer, the mayor, will discharge the plaintiff regardless of the sufficiency of his answer and explanation of the charges preferred against him. This would be a palpable violation of the statute and of the oath of office of both officers. We will not, therefore, assume for one moment that those officials, when judicially advised of the proper interpretation of the civil service act, will not obey its command. When Director Clay furnishes the plaintiff a written statement of the reasons for the proposed removal, the latter will have an opportunity to reply. It will then be the duty of the director to make an investigation, and determine whether the accusations against the officer or employé are well founded or groundless. He cannot, as a matter of course, discharge him. He must act upon the facts as they are made to appear to him; and, if the plaintiff meets and refutes the charges against him, the duty of the director is to retain the plaintiff in the service of the city. If the charges are shown to be true, it is then equally the duty of the director to remove the plaintiff and protect the city against an ineffi-

cient or unfaithful employé. The argument, therefore, of the defendants' counsel, that the reinstatement of the plaintiff will be vain because the director will at once discharge him, reflects upon the director as an officer; and, if we were to so hold, we would be assuming that the director would not in good faith, and as required by his official oath, make a full and fair investigation of the charges preferred against the plaintiff, and base his subsequent action in removing or refusing to remove him solely upon the facts as disclosed by the investigation. The statute imposes this duty upon the director, and we cannot assume that it will not in good faith be performed.

We are of opinion that the plaintiff was illegally removed from his position as superintendent of squares in the city of Philadelphia, and that the court below was right in issuing a peremptory writ of mandamus requiring the defendants to reinstate him in the position from which he was removed.

The judgment is affirmed.

ELKIN, J. (concurring). In the consideration of this case it should not be overlooked that the purpose of all civil service laws is to promote efficiency in the public service, and the test of the merit of the system must be increased efficiency in the discharge of public duties. Competency and faithfulness are essential to good service, and those who claim the protection of the civil service act, as well as those who enforce its provisions, are equally bound by the spirit and purpose of its enactment. It will not do to hold an official at the head of a department, clothed with the power to appoint and dismiss employes, to the strictest compliance with every requirement of the act, and at the same time permit the employé to exercise the widest latitude in the performance of his duties. Good faith and honest purpose on the part of an officer intrusted with the supervision of any branch of government are always presumed until the contrary is made to appear. In the administration of civil service laws something must be left to the sound discretion of those authorized to enforce the same. Every subordinate should be respectful and faithful to his superior officer, and should manifest a willingness to perform his duties as directed. It is the duty of the head of a department to direct the manner in which the work of his department shall be done, and ability and willingness on the part of the subordinate to do the work as directed are essential requirements of efficient service. Nothing could be more demoralizing to the public service than insubordination and disloyal indifference by the subordinate in the discharge of duties directed by the superior officer. In the construction and enforcement of civil service statutes these essential requirements of any efficient system of government should have due consideration. Civil service laws may, and in many instances no doubt do, prevent

abuses in the employment and dismissal of public officials, but, after all, the efficiency of the service depends upon the integrity, faithfulness, and capacity of the individuals who perform the service, and these are personal qualities which cannot be given any one by legislation, nor can any act of assembly make a man efficient if nature or personal habits have otherwise decreed. And it does not necessarily follow that educational qualifications are always the best test of efficiency in the discharge of public duties. While scholastic attainments are always desirable, manly attributes and personal qualities frequently count for much more. Hence it appears to me that the head of a department, having the power of dismissal, should be permitted, in assigning a just cause for removal under the twentieth section of the act of 1906, under which this proceeding was instituted, to take into consideration the moral character, the personal qualifications, the fitness, and all other qualities of the employé which affect the efficient and proper and decent discharge of his duties. It is true the act in question does provide that no officer, clerk, or employé shall be removed, discharged, or reduced until he shall have been furnished with a written statement of the reasons for such action, and shall have been allowed to give the removing officer such written answer as he may desire to make. I agree that the reason assigned in the present case was too general and indefinite to meet the requirements of the statute, and therefore concur in the conclusion reached by the court below and here. While there is much force in the suggestion that the error in this case is only technical, and that the situation is not of the character to demand intervention by the strong arm of the law in the nature of a writ of mandamus, on the whole, however, it seems to me, the integrity of the statute and the rights of the parties will be better preserved and protected by insisting upon a strict compliance with the initial step taken in a case of removal, to wit, a written statement containing the reasons assigned for such action. The record discloses that the only error committed by the removing officer in the case at bar was failure to specify in his written statement the real cause or causes which actuated him in making the removal. When this is done, as we have no doubt it will be if the facts subsequently set up are true, a just cause of removal will be shown to exist, and it would not only be the right of the director to remove, but it would be his duty to do so. There is nothing in the record to show that the director did not act in the utmost good faith, or that the real facts in the case did not justify a removal. Following a precedent in his department, he assigned as a reason for dismissal "the betterment of the service," which we all agree is not sufficient under the requirements of the act of 1906, and for this reason the judgment is affirmed.

MITCHELL, C. J. (dissenting). I agree entirely in the view of the learned judge below and this court that the removal of the relator, failing to comply with the statute, was not valid. But I do not see that under the admitted facts the court is required to reinstate him in office. The reason assigned for removal, as appears in the opinion of the court, was insufficient, but the actual causes, as they are set forth in the answer of the director, are ample. When these causes were stated in the director's answer they might have been denied, and naturally would have been if they were false. But they were demurred to, and thereby confessed to be true. A demurrer, of course, admits only facts that are well pleaded, but the rules of pleading cannot be strictly applied to anomalous and exceptional proceedings like those under the statute in question. The natural thing for a man to do when charges are made which are not true is to deny them promptly. But this relator made no such denial for a month, and then, the contest having begun, and having put himself in the hands of counsel, he was allowed to make a legal confession that the charges were true. It can hardly be assumed that able counsel would have advised this course unless informed by their client that a denial could not be made, or if made would not bear investigation.

It thus appears that if reinstated the relator will be immediately liable to removal again for conclusive reasons. To require reinstatement under such circumstances is a vain and useless thing, which the law compels no man to do. "While the propriety of the writ as a remedy for the wrongful removal of a municipal officer is clearly established, the relief will be withheld when it is either admitted by the party or is apparent from the return that, if restored to his franchise, he is liable to be again immediately removed for the same cause." *High on Extraordinary Remedies*, § 410. As it is apparent in this case that the removal of the relator, though irregular in method, was right in substance, I would refuse a reinstatement.

(221 Pa. 298)

#### COMMONWEALTH v. EMMERS.

(Supreme Court of Pennsylvania. May 11, 1908.)

#### 1. CONSTITUTIONAL LAW — DEPRIVATION OF PROPERTY—DUE PROCESS OF LAW.

Act April 22, 1905 (P. L. 260), prohibiting the discharge of sewage into the waters of the state, is not violative of the fourteenth amendment of the federal Constitution, prohibiting the abridgment of the privileges and immunities of citizens, and deprivation of property without due process of law.

#### 2. SAME—EQUAL PROTECTION OF LAWS.

Act April 22, 1905 (P. L. 260), prohibiting the discharge of certain kinds of sewage into the waters of the state, was not unconstitutional as a deprivation of the equal protection of the laws, in that it permitted water from coal mines or tanneries and the sewage from any public sewer system maintained and owned by any mu-

nicipality in operation and discharging sewage into any of the waters of the state at the time of the passage of the act to continue to flow into such waters, and at the same time prohibited individuals, private corporations, and companies to discharge into the waters sewage of the prohibited character.

#### 3. SAME—PRIVILEGES AND IMMUNITIES OF CITIZENS OF UNITED STATES—WATERS AND WATER COURSES—POLLUTION OF STREAM.

The alleged right of a riparian proprietor to pollute a stream flowing over his land or along the boundary thereof is not a privilege or immunity which he enjoys as a citizen of the United States, as distinguished from those of a citizen of the state in which the land and stream are situated.

#### 4. SAME—DEPRIVATION OF PROPERTY—DUE PROCESS OF LAW—APPEAL FROM ACTION OF HEALTH OFFICER.

The right of appeal to the court of common pleas conferred by Act April 22, 1905 (P. L. 260), prohibiting the discharge of certain sewage into the waters of the state, to any person aggrieved by the action of the health commissioner under such act, constitutes due process of law within the fourteenth amendment of the federal Constitution, prohibiting any state from abridging the privileges or immunities of citizens of the United States, or depriving them of property without due process of law.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

#### 5. SAME — EQUAL PROTECTION OF LAWS — CLASSIFICATION OF SUBJECTS—"SEWAGE."

Act April 22, 1905 (P. L. 260), prohibits the discharge of certain sewage, defined as any substance containing any waste products or excrementitious or other discharges from the bodies of human beings or animals, into the waters of the state, but permits the waters of coal mines and tanneries and the sewage from public sewer systems owned and maintained by municipalities in operation prior to the act to be discharged into the streams as before. *Held*, that such classification was based on a substantial distinction having a reasonable relation to the subject-matter of legislation, and the making of such classification was therefore within the discretion of the Legislature.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6457-6458.]

#### 6. SAME—POLICE POWER.

The privilege of discharging obnoxious sewage into the waters of the state is within the police power of the state, which has power to provide that it shall not be exercised by private individuals, but only by the state or its governmental agents or municipalities acting under the state's control.

#### 7. STATUTES—LOCAL AND SPECIAL LEGISLATION—SPECIAL OR EXCLUSIVE PRIVILEGES TO CORPORATIONS.

Act April 22, 1905 (P. L. 260), prohibiting the discharge of certain sewage into the waters of the state, but permitting sewage from any public sewer system maintained and owned by any municipality in operation and discharging sewage into such waters at the time of the passage of the act to continue to flow into them, is not invalid as a local or special law granting a special or exclusive privilege to any corporation, association, or individual, in violation of Const. art. 3, § 7.

#### 8. SAME—MUNICIPAL CORPORATIONS.

Municipal corporations are not within Const. art. 3, § 7, declaring that the Legislature shall not pass any local or special law granting any special or exclusive privilege or immunity to any corporation, association, or individual, but are within the clause prohibiting the passing of any local or special law regulating the affairs of cities, etc.



Appeal from Superior Court.

Edward Emmers was convicted of discharging sewage into the Schuylkill river, and he appeals. Affirmed.

The following is the opinion of Porter, J., of the court below:

"The defendant was indicted and convicted under the provisions of Act April 22, 1905 (P. L. 260), entitled, 'An act to preserve the purity of the waters of the state, for the protection of the public health,' of the offense of discharging sewerage into the Schuylkill river. The specifications of error raised but two questions: Does the statute under which the defendant was convicted violate the fourteenth amendment of the Constitution of the United States, which declares that 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law'? Does the statute contravene section 7, art. 3, of the Constitution of Pennsylvania, which prohibits the Legislature from passing any local or special law, 'granting to any corporation, association or individual any special or exclusive privilege or immunity'?

"The first section of the statute in question defines the term 'waters of the state,' whenever used in this act, as including 'all streams and springs, and all bodies of surface and ground water, whether natural or artificial, within the boundaries of the state.' The second section requires every municipality, private corporation, company, and individual supplying, or authorized to supply, water to the public within the state, to file with the commissioner of health a certified copy of the plans and surveys of the waterworks, and a description of the source from which the supply of water is derived; and forbids the subsequent use of any additional source of supply without a written permit from the commissioner of health. The third section forbids any municipal corporation, private corporation, company, or individual to construct waterworks for the supply of water to the public, or extend the same, without a written permit to be obtained from the commissioner of health, if, in his judgment, the proposed source of supply appears to be not prejudicial to the public health. This section provides for the filing of an application for the permit to construct or extend such waterworks, with a description of the source from which it is proposed to derive the supply, and gives to the applicant, in case the commissioner of health shall refuse the permit, the right to appeal, within 30 days, to the court of common pleas of the county, which court shall, after a hearing, make an order approving, setting aside, or modifying the decision of the commissioner of health, or fixing the terms upon which said permit shall

be granted. The sections of the statute upon which the learned counsel for the appellant bases his argument that the act offends against the Constitution of the United States and the Constitution of Pennsylvania are as follows:

"'Sec. 4. No person, corporation or municipality shall place, or permit to be placed, or discharge, or permit to flow into any of the waters of the state, any sewerage, except as hereinafter provided. But this act shall not apply to waters pumped or flowing from coal mines or tanneries, nor prevent the discharge of sewerage from any public sewer system, owned and maintained by a municipality, provided such sewer system was in operation and was discharging sewerage into any waters of the state at the time of the passage of this act. But this exception shall not permit the discharge of sewerage from a sewer system which shall be extended subsequent to the passage of this act. For the purposes of this act, sewerage shall be defined as any substance that contains any of the waste products, or excrementitious or other discharges from the bodies of human beings or animals.'

"'Sec. 8. All individuals, private corporations, and companies that, at the time of the passage of this act, are discharging sewerage into any of the waters of the state may continue to discharge such sewerage, unless in the opinion of the commissioners of health the discharge of such sewerage may become injurious to the public health. If at any time the commissioner of health considers that the discharge of such sewerage into any of the waters of the state may become injurious to the public health, he may order the discharge of such sewerage discontinued.'

"'Sec. 9. Every individual, private corporation, or company shall discontinue the discharge of sewerage into any of the waters of the state, within ten days after having been so ordered by the commissioner of health.'

"The tenth section makes it a misdemeanor, punishable by fine or imprisonment, or both, to discharge sewerage into the waters of the state contrary to the provisions of this act.

"'Sec. 11. Any order or decision, under this act of the commissioner of health, or that of the Governor, Attorney General and commissioner of health, shall be subject to an appeal to the court of common pleas of the county wherein the outlet of such sewer or sewer system, otherwise prohibited by this act is situated; and the said court shall have power to hear said appeal, and may affirm or set aside said order or decision, or modify the same, or otherwise fix the terms, upon which the permission shall be granted. But the order or decision appealed from shall not be superseded by the appeal, but shall stand until the order of the court, as above.'

"The defendant is the owner and operator of a hosiery mill, situated on or near the bank of the Schuylkill river, in Montgomery



county, where he employs from 150 to 200 men and women. There are in the mill nine water-closets, for the use of these employes, the sewerage from all of which is by a single pipe conducted from the mill and flows into the waters of the Schuylkill river. This condition existed at the time the statute in question became a law, and the commissioner of health on February 9, 1906, served upon the defendant a notice that this discharge of sewerage was injurious to the public health, and requiring that the same be discontinued within 10 days, as provided by the eighth and ninth sections of the statute. The defendants neither abated the nuisance nor appealed from the decision of the commissioner to the court of common pleas, as under the provisions of the statute he had the right to do, and, under the provisions of this statute, the discharge of such sewerage into the Schuylkill river became, after the expiration of 10 days, unlawful. The only question is whether this statute is a valid exercise of legislative power. The appellant contends that because the statute permits water from coal mines or tanneries and the sewerage from any public sewer system owned and maintained by a municipality, provided such sewer system was in operation and was discharging sewerage into any waters of the state at the time of the passage of the act, to continue to flow into the waters of the state, while forbidding individuals, private corporations, and companies to discharge into the waters of the state sewerage of the character designated by the act, the law is obnoxious to the constitutional provisions. The only alleged privilege or immunity of the appellant with which the statute in question could possibly interfere is that of discharging sewerage from his land into a stream which constitutes one of its boundaries. The right of the defendant to navigate the waters of the state remains unabated. His right to use the water to supply the natural wants of those lawfully upon the land, or to consume it for manufacturing purposes, is not affected by this legislation. The alleged right of a riparian owner to pollute the waters of a stream which flows over his land, or along the boundary thereof, is not among the privileges and immunities which belong to him as a citizen of the United States, as distinguished from those of a citizen of the state in which the land and the stream are situated. This statute does not, therefore, fall within the prohibition of the first clause of the fourteenth amendment of the Constitution of the United States, which declares that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' *Slaughterhouse Cases*, 83 U. S. 36, 21 L. Ed. 394; *Bradwell v. Illinois*, 83 U. S. 130, 21 L. Ed. 442; *Glozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599; *Commonwealth v. Finn*, 11 Pa. Super. Ct. 620.

"The appellant does not contend that this

act violates the second clause of the fourteenth amendment, which provides that, 'nor shall any state deprive any person of life, liberty, or property, without due process of law,' and it is manifest that such contention could not, if made, be sustained. The ownership of riparian lands does not involve the ownership of waters which flow over or along the margin of such lands. The owner of the land has a right to use the water for certain lawful purposes, and this right is a natural one, inherent in the ownership of the land, but he can in no sense be said to have an absolute ownership of the water as such. He has a right to the ordinary use of the water of the stream for the purpose of supplying the natural wants, for such things as are necessary to the preservation of life and health, of those occupying the land, even if such uses result in a substantial diminution of the stream. His right to use the water of the stream for manufacturing or other purposes, having no necessary relation to the use of his land, is limited to so much of the water as will not materially or sensibly diminish its quantity. *Haupt's Appeal*, 125 Pa. 211, 17 Atl. 436, 3 L. R. A. 536; *Lord v. Meadville Water Co.*, 135 Pa. 122, 19 Atl. 1007, 8 L. R. A. 202, 20 Am. St. Rep. 864; *Railroad Co. v. Pottsville Water Co.*, 182 Pa. 418, 38 Atl. 404; *Filbert v. Dechert*, 22 Pa. Super. Ct. 362. The riparian owner must permit the water to flow, subject to the diminution of its quantity resulting from these reasonable uses, in its natural channel, unpolluted, to lower riparian owners who take it subject to the same rights and the same restrictions. The erection of anything in the upper part of a stream of water which poisons, corrupts, or renders it offensive and unwholesome is actionable. *Howell v. McCoy*, 8 Rawle, 256; *Wheatley v. Chrisman*, 24 Pa. 298, 64 Am. Dec. 657; *McCallum v. Germantown Water Co.*, 54 Pa. 40, 93 Am. Dec. 656; *Commonwealth ex rel. v. Russell*, 172 Pa. 506, 33 Atl. 709. When, in the development of the natural resources of the land, the water from a mine must necessarily and unavoidably pass into a stream, and that consequence could only be avoided by an expenditure which would amount to a practical prohibition of the development of the land, the injury to a lower riparian owner resulting from such unavoidable mixture of the water of the mine with that of the stream is a private injury for which there is no remedy (*Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445); but whether this extreme exception to the general rule that a riparian owner has no right to pollute the waters of a stream could prevail against the right of the public is an entirely different question (*Commonwealth ex rel. v. Russell*, 172 Pa. 506, 33 Atl. 709). There can, however, be no question in the present case. The pollution caused by

the defendant did not result from the development of any natural resources of his land, nor was it unavoidable. He never had a right, recognized by law, to discharge sewerage, of the character shown in this case, into the stream which flowed past his land. He had, it is true, continued the practice for 14 years, but it was from first to last a wrongful act, and he took the chances of having to answer for its consequences. Had the practice resulted in an injury to a lower riparian owner, the wrong would have been a private one, for which the individual or individuals injured might have had redress by action. If the public had a right to take from this stream pure and unpolluted water for drinking purposes, and found in it the germs of disease, coming from this sewer of the defendant, his offense would be a public one, for which he could be indicted and punished at common law. *Commonwealth v. Yost*, 197 Pa. 171, 46 Atl. 845. The defendant was not, prior to the enactment of this statute, possessed of a right of property, in the privilege of discharging this sewerage into the stream, recognized by law. He was not, therefore, deprived of 'liberty or property' within the meaning of the second clause of the fourteenth amendment. But, even if the defendant had a property right in the privilege of discharging sewerage into the stream, he was not by this statute deprived of that right 'without due process of law.' The statute provided that the defendant, because he had been so discharging sewerage prior to the approval of the act, should be permitted to continue the practice until, 'in the opinion of the commissioner of health, the discharge of such sewerage may become injurious to the public health'; that, upon notice of such decision by the commissioner of health, the defendant should discontinue the discharge of sewerage within 10 days; and that after that period the discharge of such sewerage should be unlawful. The commissioner of health is a sworn official, and it is presumed that, under his oath of office, his duties as the representative of the commonwealth will be properly performed. The delegation by the Legislature to a state officer of the power to determine some fact or state of things upon which the law makes its own action depend is not an unwarranted delegation of legislative power. *Wilkes-Barre v. Garabed*, 11 Pa. Super. Ct. 355. The law imposes upon the officer in question the duty of enforcing the health laws of the commonwealth, and this statute clothes him with the power, and imposes upon him the duty, of ascertaining whether any sewer maintained by an individual, company, or private corporation is discharging into the waters of the commonwealth material which is a menace to the public health. The act does not make the decision of this official final. It gives the defendant the right of an appeal to the court of common pleas, a constitutional tribunal

clothed with full law and equity powers, and gives him in that court an opportunity to be heard upon the question whether or not the sewer so maintained involves danger to the public health. The statute placed at the disposal of the defendant this process of law to have determined in a court of competent jurisdiction the primary question whether the material which he was discharging into the stream had become a menace to the public health; and, before he could be convicted of the offense created by the statute, he was entitled to a trial in the court of quarter sessions, a court of record in which all misdemeanors are triable, and the burden was upon the commonwealth to establish that he had discharged sewerage into the stream, after the fact that such discharge involved a menace to the public health had been determined in the manner by the statute provided. The fourteenth amendment is not to be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land. This power of change is limited by the fundamental principles laid down in the Constitution. 'Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state.' *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678. The statute in question afforded the defendant a full and fair opportunity to have tried in a court of competent jurisdiction every question that arose, at the various stages of the proceedings, leading up to his conviction. The statute afforded to every individual, private company, and corporation the same opportunity for a trial, under like conditions, in every case; and there can in this case be no allegation that the courts have denied any right which the statute conferred. The conviction of the defendant resulted from due process of law. *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780.

"Does the statute contravene the provisions of the third clause of the fourteenth amendment, 'No state shall \* \* \* deny to any person within its jurisdiction the equal protection of the laws?' The appellant contends that the act of 1905 conflicts with this provision of the Constitution of the United States, for the reason that it permits 'water pumped or flowing from coal mines or tanneries, and sewerage from any public sewer system, owned and maintained by a municipality, provided such sewer system was in operation and was discharging sewerage into any of the waters of the state at the time of the passage of this act,' to continue to be discharged into the waters of the state, provided that no such sewer system be extended subsequently to the passage of the act. The statute was passed in the exercise of the police

power of the state. That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society. All sorts of restrictions and burdens are imposed under this power, and when these are not in conflict with any constitutional prohibition or fundamental principle they cannot be successfully assailed in a judicial tribunal. That the preservation of the waters of the state from pollution, involving danger to health, is a proper subject for the exercise of the police power, cannot be seriously questioned. Proceeding to an examination of the subjects excepted out of the operation of the statute, which exceptions the defendant asserts involve a denial of the equal protection of the laws, to those not within the exceptions, we must inquire whether the exceptions are founded upon substantial distinction, having reasonable relation to the subject-matter of the statute. That there might be no question as to the kind of sewerage that the Legislature intended to forbid individuals, companies, and private corporations from discharging into the waters of the state, when it had been determined, in the manner provided by the statute, that such discharge had become dangerous to the public health, the statute embodied a specific definition, in these words: 'Sewerage shall be defined as any substance that contains any of the waste products, or excrementitious or other discharges from the bodies of human beings or animals.' The exception of water flowing from coal mines was unnecessary. Such water does not naturally contain any of the ingredients of sewerage as defined by the statute. The water flowing from a coal mine may contain sulphate of iron, sulphate of lime, or other chemicals in solution, which would make it unpleasant for drinking purposes, and perhaps injurious to health, but it could not contain the specific germs of those diseases which sometimes abound in sewerage of the character defined by the statute. Should the water from a coal mine be mixed with sewerage of the kind prohibited, the compound would no longer be within the exception, but would come within the prohibition of the statute. The same rule is to be applied to water flowing from tanneries. Such waters would undoubtedly be offensive to both taste and smell, but the only waste products of animals which they would carry would be such as appertained to the hides. Those waste products had been long immersed in and saturated with chemical solutions, which give to them a character essentially different from the waste products of a slaughterhouse or the excretions of human beings. The waters flowing from the tannery are only within the exception so long as they remain unmixed with other materials. Whether the processes employed in the tanning of hides would, if applied to sewerage of the kind to which this statute applies, result in the destruction of the germ life with which it

is asserted by science that the dejecta of human beings sometimes abounds, it is not for us to affirm or deny. One has been subjected to a prolonged process in which powerful chemicals are made use of, and the other has not been subjected to such a process. It is not for the court to determine whether the classification adopted by the Legislature was wise or unwise. We are only to inquire whether it is founded in substantial distinctions having some reasonable relation to the subject-matter of the legislation. 'While the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.' *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385. What is necessary for the protection of the public health is primarily a legislative question. Whether the introduction of sewerage, of the kind prohibited by the statute, into the waters of the various streams of the commonwealth by private individuals, companies, or corporations, could be conducted in such a way, or with such secrecy, as to baffle ordinary inspection, or whether it involves such dangers to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the discharge of such sewerage as does not involve danger to the public health, are questions of fact and of public policy, which belong to the legislative department of the government. *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 32 L. Ed. 253. The question in each case is whether the Legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class. 'From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. The regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote with as little individual inconvenience as possible the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground for complaint, if they operate alike upon all persons and property,

under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' *Barbler v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. The exemption of the water discharged from tanneries, which must be construed as including only the liquid resulting from the operation of tanning without the admixture of such sewerage as is prohibited by the statute, involved only a classification of the kind of sewerage with which the legislation dealt. It did not exempt the tanner from liability to answer to any lower riparian owner for any injury which the discharge of the water from the tannery might cause, nor did it exempt him from prosecution under the law as it formerly existed in case the discharge of the waters from this tannery became a public nuisance. The exception was not limited to then existing tanneries, but this defendant or any other person who hereafter engages in the tanning business is entitled to its protection, to the extent that it is not affected by this statute in any manner whatever. The classification adopted by the statute, as to the character of the sewerage prohibited and that exempted from the provisions of the act, was founded upon substantial and material distinctions, and was one which was within the discretion of the Legislature to make.

"When we consider all the circumstances involved, the distinction drawn by the statute between public sewer systems, owned and operated by municipalities, and sewers controlled by individuals and private corporations, would seem to be equally well founded. A municipality is a governmental agent, and, although its existence is dependent upon the legislative will, while it exists it represents, within its sphere, the sovereign power of the state. The public sewer systems owned and maintained by the municipalities of the state have been constructed at the public expense and under express legislative authority. The necessity of providing some system of house drainage and of general sanitation for densely populated cities, and of providing for the inspection, regulation, and control of those matters by the state or the municipalities, as the representatives of the state, in the interest of the public health, had imperatively demanded the exercise of the police power of the state, and in the exercise of that power the Legislature had authorized the construction of these public sewer systems. Any person whose property suffers an injury because of the discharge of such public sewer systems into the waters of the commonwealth is, under the law of the state, entitled to compensation for such injury. *Good v. Altoona*, 162 Pa. 493, 29 Atl. 741, 42 Am. St. Rep. 840. The statute with which we are now dealing

does not deprive the private owner of the right to compensation for injury to his property. These public sewer systems and the house drains which lead into them have by the legislation of the state been made subject to the regulation, inspection, and control of the municipalities, and the duty of exercising such supervision has been imposed upon the municipal authorities. Density of population has been recognized as a proper basis for the classification of communities with regard to the necessity for and regulation of house drainage. 'In its nature it is a definition and regulation of the police power on a subject which is one of municipal concern. All the cases agree that such subjects are the principal basis of the legitimate classification of cities. That the control and regulation of cesspools and drainage in general are more important and require different conditions in closely built up neighborhoods from those sufficient for the open country does not need discussion. And for the same reasons the regulations may require to be different in cities of different volume and density of population. \* \* \* The subject being one which is germane to the proper basis of classification, its regulation and application to one or more classes are within the legislative discretion.' *Beltz v. Pittsburg*, 26 Pa. Super. Ct. 66; s. c. 211 Pa. 561, 61 Atl. 78. This necessity for house drainage, under state inspection, regulation, and control, in densely populated communities, was one of the elements of the problem which confronted the Legislature when in the exercise of its discretion it determined that a necessity had arisen for the exercise of the police power to preserve the purity of the waters of the state for the protection of the public health. If, as contended by the appellant, the only solution of the problem was to prohibit the discharge of all sewerage, under any conceivable circumstances and conditions, into the waters of the state, then the Legislature had no discretion to frame any act which would, without unnecessary oppression of any individual, impose regulations to guard the public health against one source of danger, unless it at the same time deprived the inhabitants of all densely populated communities of reasonable protection against another source of danger to the public health. Such a construction of the fourteenth amendment would deprive the states of all power to make the police regulations necessary to meet the varying needs and dangers of the different districts and communities within their borders. The most densely populated city in the commonwealth could not be permitted to discharge its sewerage into an estuary of the sea, unless at the same time all owners of riparian lands from where the waters of the state have their origin in mountain rivulets to where as rivers they meet the tides of the ocean were permitted, without state inspection, control, or regulation, to

pollute the waters for their own private profit. This contention of the appellant cannot be sustained. The authority of a state to make police regulations, to provide for the health of those residing in the different districts subject to its jurisdiction, and to classify those districts according to the widely varying circumstances and conditions therein prevailing, so long as that classification is based upon conditions having a substantial and reasonable relation to the general subject-matter of the regulation, cannot be questioned, and such classification is not within the prohibition of the fourteenth amendment of the Constitution of the United States. 'The question in each case is whether the Legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class.' *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. The power of a state since the adoption of the fourteenth amendment to enact a police regulation for the protection of the public welfare, which restricts a noisome business or condition to certain districts, and reserves to the state, or its representatives, the right to regulate and control said business, is not within the prohibition of the amendment. *Slaughterhouse Cases*, 83 U. S. 36, 21 L. Ed. 394. The privilege of discharging obnoxious sewerage into the waters of the state is a matter of public concern, and it was within the police power of the state to declare that this privilege was one which ought not to be exercised by private individuals, but only by the state, or its governmental agents, the municipalities, acting under the direct control of the state. That the state reserved to itself a privilege, which it denied to individual citizens, did not deprive this appellant, or any other person, of the equal protection of the laws. This statute required every individual, corporation, or municipality supplying the public with water to file in the office of the health department of the state a statement of its source of supply. It requires every municipality which, at the time of the adoption of the statute, was maintaining a system of sewerage, to file in that department a plan thereof. These provisions necessarily result in making a matter of public record, in the office of the commissioner of health, the sources from which the public water supply of every community in the state is taken, and a like record of every opening of a public sewer system into the waters of the state. Should an epidemic develop in any community, the health authorities immediately have accurate information as to the source from which the public water supply of that community is de-

rived, and whether any public sewer system is discharged into that water. The state legislation requiring physicians in municipalities to make reports to the health authorities of all cases of diseases will place at the disposal of the commissioner of health information as to the health conditions existing in the municipalities using the various public sewer systems. The commissioner of health and officers under his control will thus constantly have a large part of the information necessary to deal with the health conditions of any community.

'The contention that this statute violates that clause of article 3, § 7, of the Constitution of Pennsylvania, which declares that the General Assembly shall not pass any local or special law, 'granting to any corporation, association, or individual any special or exclusive privilege or immunity,' cannot be sustained. Municipal corporations do not come within this particular clause of the section, but are within the operation of the clause which relates to them specially, and forbids the passing of any local or special law, 'regulating the affairs of counties, cities, townships, wards, boroughs, or school districts.' Municipal and quasi municipal corporations are the agents of the state, authorized to perform such governmental duties as are by the state delegated, and there must be, from the very nature and purpose of their organization, delegated to them governmental powers, such as those of taxation and police, which it would be manifestly improper to delegate to an individual or private corporation. This is clearly recognized by this section of the Constitution, which places them in a distinct clause and constitutes them a class by themselves. Legislation which confers upon municipalities powers and privileges, properly relating to municipal affairs, while denying such powers to individual and private corporations, does not violate that provision of the Constitution of the state which the appellant seeks to revoke. *Commonwealth v. Vrooman*, 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603; *Clark's Estate*, 195 Pa. 520, 46 Atl. 127, 48 L. R. A. 587.

"The judgment is affirmed, and it is ordered that the defendant appear in the court below, to the end that the sentence be carried into execution."

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Henry Freedley and E. L. Hallman, for appellant. Moses Hampton Todd, Atty. Gen., and Reginald H. Innes, Louis J. Palmer, and Parker S. Williams, for the Commonwealth.

PER CURIAM. The judgment is affirmed on the opinion of the superior court.

(221 Pa. 346)

**KOCHER v. DELAWARE, L. & W. R. CO.**

(Supreme Court of Pennsylvania. May 11, 1903.)

**MASTER AND SERVANT—INJURIES TO SERVANT  
—ACTION—TRIAL—QUESTIONS FOR COURT OR  
JURY—DIRECTION OF VERDICT.**

Where, in an action for injuries to a servant, plaintiff claimed that the accident was due to the breaking of a certain appliance, while defendant claimed it was due to the breaking of another appliance, of the dangerous condition of which plaintiff had notice, and the evidence was conflicting as to the breaking of which appliance caused the accident, it was error to direct a verdict for defendant, on the ground that plaintiff was negligent in continuing to work after he knew of the condition of the defective appliance, alleged by defendant to have caused the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, §§ 1106-1112.]

Appeal from Court of Common Pleas, Luzerne County.

Action by Michael J. Kocher against the Delaware, Lackawanna & Western Railroad Company, to recover damages for personal injuries. From a judgment for defendant, plaintiff appeals. Reversed.

The facts relating to the accident are stated in the opinion of the Supreme Court. The court charged in part as follows: "There are other elements in the case which it will not be necessary for me, at this time, to go into, but I feel bound to declare, after the examination of the law and the testimony which I have made on the plaintiff's side of this case, that under the evidence the plaintiff is guilty of such manifest contributory negligence in remaining where he was, in the face of the imminent danger which he knew was threatening him, as to prevent him from recovering in this case." Verdict and judgment for defendant. Plaintiff appealed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

Rush Trescott, T. R. Martin, and L. A. Dymond, for appellant. A. H. McClintock, Arthur Hillman, and Daniel R. Reese, for appellee.

**STEWART, J.** It is only necessary to refer to such facts in the case as are pertinent to the particular ruling of the court here assigned as error. Plaintiff was engaged along with other workmen, in taking down what is known as a "headhouse," a structure built over a mine shaft. To accomplish this work a gin pole was employed, by means of which, with the necessary ropes and pulleys, the material of the structure, as it was separated from the building, was lowered to the ground. This pole was about 60 feet in length, and was supported by four guy ropes attached to the top and securely fastened at the other ends. The foot of the pole rested on timbers placed at a considerable elevation; and, as plaintiff was the pole runner, his place was on these timbers or platform at the foot of

the pole. While a load of material from the headhouse was being lowered, and when within a few feet of the ground, the appliance carrying the load from some cause gave way. The witnesses for the plaintiff attributed the mishap to the breaking of the pole; those for the defendant to the breaking of the hook at the top of the pole, by which one of the guy ropes, bearing in this instance the strain of the load, was attached to the pole. The former ascribed the breaking of the pole to its insufficiency because of decay in certain parts; the latter to the circumstance that in falling, after becoming detached from the guy, it struck against what is called a "cap," and thus broke. The plaintiff was not struck by the pole. His injuries were received by being thrown from the platform on which he stood by certain ropes, in which he became entangled, and which must have carried with them, to some extent, the force of the falling pole or that of the falling load. Immediately before the accident, and while the load was being lowered, the pole was seen by the plaintiff and other workmen to bend or buckle, and the danger of the pole breaking was spoken of between them. Both plaintiff and these workmen had seen the pole before it was put in place, and had noticed season checks in it, which made them question its sufficiency for the work. Notwithstanding what plaintiff saw as to the bending of the pole, and notwithstanding one of his fellow workmen had called to him of the danger, he continued at his place at the foot of the pole after he had ample opportunity to get away. The learned trial judge, on this state of the evidence, gave binding instructions for the defendant, on the ground that plaintiff was chargeable with contributory negligence in remaining on the platform on which the pole rested with these indications of danger present. This was error. If the contention of the defendant as to the cause of the appliance giving way was correct—and that was a question of fact exclusively for the jury—then the condition of the pole, and the plaintiff's knowledge of its condition, did not enter into the question of his negligence, and could not be considered. These were elements in the case only in the event of a finding that the collapse of the appliance was occasioned by a defective pole. If occasioned by the breaking of the hook, defendant's contention was that it was absolved from all liability, because such a break could not reasonably have been anticipated. If such circumstance was sufficient to excuse the defendant, it could hardly be used to convict the plaintiff. The logic that would exempt the one from liability would necessarily acquit the other of negligence. The error on the part of the court was in assuming a fact in regard to which there was conflicting evidence. We are not to be understood as saying, as matter of law, that the plaintiff would be chargeable with contributory negligence even if the fact

were found that the breaking of the pole caused the collapse. All we decide is that, so long as the cause of the collapse was undetermined by the jury, the question of plaintiff's contributory negligence was an open one, and could not be determined by the court. The case required a submission to the jury.

The judgment is reversed, and a venire facias de novo awarded.

(221 Pa. 314)

**In re KESSLER'S ESTATE.**

Appeal of STEWART et al.

(Supreme Court of Pennsylvania. May 11, 1908.)

**1. WILLS—SUBSCRIBING WITNESSES—"CREDIBLE WITNESS."**

One of the subscribing witnesses to a will containing a charitable bequest, after having been told by the other subscribing witness outside testator's office that testator desired him to be a witness to his will, went into the office, where testator was seated at a desk, with the will already signed by him in his hand. Testator's signature was in plain view of the witness, who, at testator's request, signed his name below that of the other subscribing witness, and opposite that of testator. *Held*, that such subscribing witness was a credible witness, within Act April 26, 1855 (P. L. 332) § 11, requiring such a will to be attested by two credible, and at the time disinterested, witnesses, it not being necessary that the witness see testator sign the will, testator's subsequent acknowledgment of his signature being sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 300.]

For other definitions, see Words and Phrases, vol. 2, pp. 1710-1711.]

**2. CHARITIES—CHARITABLE GIFTS—TIME OF MAKING.**

While charitable gifts are favorites of the law, they are not so when made at or near the time of impending dissolution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Charities, § 9.]

**3. WILLS—ATTESTING WITNESSES—COMPETENCY—EXECUTOR.**

An executor may be an attesting witness to a will bequeathing property to religious and charitable uses, provided he is not benefited by the will except as to his commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 289.]

**4. SAME—"INTEREST."**

An "interest" sufficient to disqualify a witness to a will containing charitable bequests, under Act April 26, 1855 (P. L. 332) § 11, requiring such wills to be signed by two disinterested witnesses, is such an interest as appears to exist at the time of the execution of the will, either by the terms of the will itself, or by reason of the attesting witness being then interested in a religious or charitable institution, for which provision is made by the testator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 286.]

For other definitions, see Words and Phrases, vol. 4, pp. 3692-3696; vol. 8, p. 7691.]

**5. SAME—"DISINTERESTED WITNESS."**

A subscribing witness to a will containing charitable gifts was an executor and trustee under the will. He was also an officer and trustee of a church to which the income and a portion of the corpus of the trust estate was bequeathed, and had an option to purchase certain shares of stock, which were a part of the trust, for religious and charitable uses, at a price to be agreed on by three disinterested persons, to be

selected in a particular manner, he being one of the two trustees to whom the stock of the corporation was given in trust to vote at corporate elections, and whose duties required that dividends received be paid by them to the persons named, and in the proportions fixed in the will. He was also a stockholder and director in the corporation, as well as an officer and employé. *Held*, that he was not a "disinterested witness," within Act April 26, 1855 (P. L. 332) § 11, requiring such a will to be subscribed by two disinterested witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 289, 290.]

For other definitions, see Words and Phrases, vol. 3, p. 2104.]

**Appeal from Orphans' Court, Philadelphia County.**

Judicial settlement of the estate of George Kessler, deceased. From a decree dismissing exceptions to the adjudication, Henry K. Stewart and others appeal. Reversed.

The portion of the adjudication relating to the subscribing witnesses and the validity of the charitable gifts was as follows:

"Objection was made at the audit that, while the will had subscribing witnesses, and was executed more than 80 days before the death of the testator, it was void, as it was not attested by two credible, disinterested witnesses. It was shown by the testimony that the will was drawn by the testator, who took some time to complete it, but, after the will had been written and signed, it was shown by the testator, who directed Kendig to take it out of his safe for that purpose, to Willis G. Kendig, who was made by it one of the executors and trustees under it, as well as counsel for the executors, and that at that time the testator wrote the codicil and executed it. The witness, Kendig, also testified that he warned the testator against having Wilmerton, who was also an executor and trustee, as well as trustee for one of the charitable legatees, witness it. Subsequently Mr. Wilmerton signed the will as a witness at the request of the testator, and Wilmerton also, at his request, went outside of their office, they having one together, and requested Mr. Fulgle to come inside to sign the will, stating to him that Mr. Kessler had finished it. Mr. Fulgle came into the office, and at the request of the testator signed his name, as a witness, below that of Mr. Wilmerton, and opposite that of the testator. He further testified that he was not told by the testator that it was his will.

"We have then these facts: First, that the will was signed by two subscribing witnesses, one of whom was not told that it was a will; second, that it was shown to three witnesses, two of whom knew from the testator that it was his will, and both of whom were trustees under it, one being also a trustee for a charity, a legatee under the will. The law requires that there shall be two disinterested witnesses, who shall attest the will one calendar month before the death of the testator. It was argued

with great force that Kendig and Wilmerton, being trustees under the will, and having certain rights thereunder, and the act speaking of deeds as well as wills, and as in a deed the parties thereto could not be witnesses, these gentlemen could not be witnesses to the will. However this might be in a deed, which is an agreement between the parties, it does not apply in the case of a will. In a deed it might very truly be said that neither of the parties can be a witness to it; but a will is not an agreement between the parties, being the act of one alone, and certainly, irrespective of any other person, he has a right to call any one whom he pleases to be his witness.

"It was also argued that the word 'attest' in the act was synonymous with the word 'subscribe'; that attesting witnesses spoken of there meant subscribing witnesses, and the auditing judge is free to confess that if the question were new, the argument would have great weight with him. But it has not been so held by the Supreme Court, and is therefore not the true interpretation. *Irvine's Estate*, 206 Pa. 1, 55 Atl. 795.

"Nor is the objection that Fulgle was not told by the testator that the document which he was signing was his will good. The fact that he did so sign it at the request of the testator, as a witness to his signature, which was affixed, makes him a witness; the courts holding that a man may have a document witnessed without being bound to disclose its contents. *Beswick's Estate*, 13 Pa. Dist. R. 711; *Combs' and Hankinson's Appeal*, 105 Pa. 155. The attesting clause, moreover, shows that it is his will he has witnessed. He is therefore one of the necessary witnesses, being admittedly disinterested, as required by law.

"We next have Kendig, to whom the testator showed the will signed, and in whose presence he drew the codicil. He was not a subscribing witness, but clearly, under all the decisions, is an attesting one; for, if the matter of subscription be left out, how could one be made more of a witness than by being shown the signed will, and it being discussed with him by the testator?

"The third witness, Wilmerton, saw the will, discussed it with the testator, and subscribed to it. Having, therefore, one witness undoubtedly competent, we have then to take up the question, are the others rendered incompetent by reason of interest? As to Kendig. He is, first, an executor under the will; second, a trustee under the will for the charities; third, he has a power of voting a part of the stock of the wheel works, with the further right to purchase some at a price to be fixed by appraisers; and, fourth, he is the attorney for the estate. As to Wilmerton, he is, first, executor under the will; second, a trustee under the will for the charities; third, he has a power of voting a part of the stock of the wheel works, with the privilege to purchase some at a price to

be fixed by appraisers; and, fourth, he is a trustee of the Kensington Methodist Episcopal church, one of the legatees. The question as to their being interested by virtue of the position of executor can be dismissed at once, for that such an office does not disqualify is decided in the case of *Jordan's Estate*, 161 Pa. 393, 29 Atl. 3, and the reasoning in that case will apply with equal force to the objection that they are trustees under the will. The fact that they may ultimately get some advantage is not such an interest as will disqualify. The fact of their having, in addition to the ordinary compensation of trustees, the power to vote the stock, and also the power to take it at an appraised value, is, in the mind of the auditing judge, no reason why they can be called interested as regards these legacies and devises. One who is interested in a will and not in the charities cannot, in the view of the auditing judge, be held to be an interested witness, their interests being a personal one, and not connected with the legacies to the parties. A devisee under a will can be a competent witness to it. *Patterson v. Shrader*, 12 Wkly. Notes Cas. 429.

"The witness Kendig, being, therefore, only interested as an officer or employé to carry out the terms of the will, is not such an interested witness as will disqualify him. Wilmerton, however, stands in a somewhat different light from Kendig, in that he is not only a trustee under the will, but also a trustee or officer of the charities. Now, the act prohibiting proof of such a will by those whose interest it was to have such a gift made, it seems to the auditing judge, on principle, that he in whose custody the funds of the church are to be placed comes squarely under the prohibition of the act. A gift to charity is not to an individual, but to a corporation or a number of people. The evil the act sought to eradicate was the proof of wills by those representing such corporations or bodies, or acting for them in their dealings as to testators or settlors. If we allow those who act for the charities in administering their funds, who, if anybody, was interested in their accumulation, to act as witnesses to a will, the word 'disinterested' has no meaning. An employé may have no interest, because he is not one who acts for the parties. A board or a church council has been decided to have no interest; but it would seem that those who gather its assets, conserve, and expend them, and upon whom the financial existence of the church depends, are such persons who, under the terms of the act, are interested. But the auditing judge is bound by the decisions, which, upon this point it seems to him, are clear, that the interest to disqualify must be a pecuniary one. There is no testimony here that this witness was to get any pecuniary benefit from his connection with the church, and that is what has been held to be the only interest which disqualifies. *Evans' Estate*,



12 Pa. Dist. R. 694; Combs and Hankinson's Appeal, 105 Pa. 155; Jordan's Estate, 161 Pa. 393, 29 Atl. 3; Davies v. Morris, 17 Pa. 205; Shortz v. Unangst, 3 Watts & S. 45.

"None of the witnesses being, in the opinion of the auditing judge, interested witnesses, such as are contemplated by the act, the objection is overruled, and the gifts to the charities are held valid."

The court, in an opinion by Lamorelle, J., dismissed the exceptions.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James Gay Gordon, Charles H. Hassert, and Sandberg & Heymann, for appellants. John G. Johnson, W. H. G. Gould, William R. Murphy, and Samuel H. Kirkpatrick, for appellees.

ELKIN, J. The question to be determined on this appeal is whether certain bequests to charitable and religious uses, contained in the last will and testament of the decedent, are valid under section 11, Act April 26, 1855 (P. L. 332). The will was prepared and executed more than one calendar month before the decease of the testator, and the only point pressed in the court below and raised here is that it was not attested by two credible, and at the time disinterested, witnesses as required by the act. There are two subscribing witnesses to the will, and if they are disinterested, the bequest to charitable and religious uses must stand, if not, they must fall. The whole case turns on the point what constitutes such an interest as will disqualify an attesting witness. It was held in a recent case that the attesting witnesses, required by the act of 1855 must be subscribing witnesses. Paxson's Estate, 221 Pa. 98, 70 Atl. 280. It was decided in Morgan's Estate, 219 Pa. 355, 68 Atl. 953, that where a subscribing witness knows that he is signing a testamentary paper, sees the testator sign it, and is asked by the testator, or by the other witness in testator's presence, to sign as a witness, it is not necessary that he should hear it read or know its contents. Under the rule of Paxson's Estate, supra, the only witnesses to be considered in the present case are Wilmerton and Fulgle, who attested the will by subscribing their names as witnesses to its execution. As to the subscribing witness Fulgle, the contention that he is not an attesting witness within the meaning of the act because he did not see the testator sign his name to the will, and was not made familiar with its contents, cannot prevail under the authority of Morgan's Estate above cited. To the same effect is Combs' and Hankinson's Appeal, 105 Pa. 155, wherein Mr. Justice Trunkey, who delivered the opinion of the court, said: "Hence if witnesses were present at that time of the execution, and saw the testator sign the

will, and they subscribed it in his presence, it is unnecessary that they should have known the contents, or that the testator should have declared to them that it was his will." It is not indispensable that the witness should see the testator sign the will. The testator may, after the will has been prepared, affix his name thereto, and subsequently acknowledge his signature in the presence of a subscribing witness. Irvine's Estate, 206 Pa. 1, 55 Atl. 795. This is what was done with the witness Fulgle, who went into the office where the testator was seated at a desk, with the will already signed by him in his hand, the name of the testator being in the plain view of the witness, who was requested to sign his name below that of the other subscribing witness, which he did, after having been told by the other witness out in the shop that the testator desired him to be a witness to his will. It was not necessary that he should have affirmative knowledge of the contents of the will, or of the devises, or bequests, or of the testamentary disposition made of the property by the testator, in order to qualify him to act as a witness to its execution. We, therefore, hold that Fulgle was a credible, and at the time of the execution of the will a disinterested, witness.

The act of 1855 is a remedial statute, and should be construed so as to give effect to the purpose for which it was enacted. While charities may be said to be favorites of the law, and when in times like the present vast wealth is accumulated in the hands of individuals, it is not only desirable, but highly commendable, for persons possessed of large estates to set apart portions thereof for religious and charitable uses, yet the law discourages such gifts at or near the time of impending death, when the mental faculties are impaired, the will power broken, and the vital forces weakened, because, under such circumstances, the importunities of designing persons, or the terrors of final dissolution, may induce dispositions of property contrary to natural justice, and without regard to the ties of kinship, which, under normal conditions, would be operative on the mind of the testator. A man may do what he will with his own. He may give all he has to his relatives and friends, or he may give it to religious and charitable uses if he so desires, but when he leaves the channels through which natural benefactions flow to extend aid to those objects or institutions intended to improve the morals and better the conditions of the general public, the law says to him such intention must be manifested by a deed or will, executed at such a time, and in such a manner, as to make it reasonably certain that the thing done was the free will act of the donor, and was not the result of undue solicitation on the part of interested persons. Hence the requirement that the deed or will be at-

tested by two credible, and at the time disinterested, witnesses. With the policy of the law involved in this legislation we have nothing to do, but as to the act itself, clearly within the power of the Legislature to pass, it is the duty of the court to enforce its requirements so as to effectuate the purpose for which it was enacted. It must therefore be determined whether Wilmerton, who attested the will as a subscribing witness, had such an interest as to disqualify him within the meaning of the act. He was one of the executors of the will; he was a trustee and officer in a church to which part of the income and ultimately a portion of the corpus of the trust estate was directed to go; he had an option to purchase certain shares of stock, which were a part of the trust for religious and charitable uses, at a price to be agreed upon by three disinterested persons, to be selected in a particular manner; he was one of two trustees to whom the stock of the Kessler Wagon Works Company was given in trust to vote at corporate elections, and whose duties required that dividends received be paid by them to the charities named and in the proportions fixed in the will; he was also a stockholder and director in the wagon company, as well as an officer and employé, and had whatever benefit accrued to him as a stockholder and officer in that company by reason of having the power to vote the stock so held in trust by him; he was also entitled to his commissions, not only as executor, but as trustee. Did these things create such an interest as to disqualify him as a witness to the will? It must be conceded that there is some confusion growing out of our own cases on the subject, and it must be accepted as finally settled that the nomination by a testator of a person to act as an executor does not in itself constitute such an interest as to disqualify the person so nominated to act as a witness. This is the doctrine of *Snyder v. Bull*, 17 Pa. 54, *Combs' and Hankinson's Appeal*, 105 Pa. 155, and *Jordan's Estate*, 161 Pa. 398, 29 Atl. 3. We recognize these cases as authority for the exact question decided therein; that is to say, an executor may be an attesting witness to a will making bequests to religious and charitable uses. *Snyder v. Bull*, decided in 1851, had no reference to the act of 1855. The matter for consideration in that case was the proper proof of a will under the act of 1833, and all that was said by Mr. Justice Gibson had reference to the law as it then stood. The test applied was the qualification of witnesses generally in legal proceedings, but this test can scarcely be held to apply to the act of 1855, which had not been passed at that time, and which was intended to accomplish a very different purpose. It is true that in *Combs' and Hankinson's Appeal* and in *Jordan's Estate* the line of reasoning sug-

gested in *Snyder v. Bull* was followed by the learned justices who wrote the opinions in the later cases. The rule of these cases is predicated on the theory that an interest such as would disqualify must be present, certain, and vested, and not uncertain, remote or contingent. In other words, it must be what has been called a substantial or legal interest. With such a definition of interest it naturally followed that an executor, though nominated in the will, did not have a present or vested interest because he might die before the testator, or his nomination as executor, or the will itself, might be revoked. While we consider the rule of these cases to have overlooked the spirit and purpose of the act of 1855, it is authority for what was therein decided, and will be so regarded, but the doctrine will not be further extended. We agree with the suggestion of the learned judge of the court below, who delivered the opinion on the exceptions to the adjudication in the present case, in reference to the logical result of the application of this doctrine, wherein it is said: "Carried to its logical extreme, such interpretation practically nullifies the purpose of the act, at least so far as a will is concerned, for as the testator may at any time revoke a will, and as, therefore, none of its provisions may ever become effective, every witness can necessarily have no interest, pecuniary or otherwise, at the time of signing; and as a deed is witnessed before delivery, and becomes effective only on delivery, by a parity of reasoning all witnesses to deeds are at the time disinterested." We think the test of qualification for witnesses in judicial proceedings generally, as given by Greenleaf and other text-writers, and followed by some decisions of our courts, does not, and should not, control in arriving at a proper interpretation of the act of 1855.

The words "disinterested witnesses," used in this act, must be read and understood in connection with the subject-matter of the statute, the evils to be avoided, the requirements intended to safeguard the rights and property of persons approaching death, and the remedy to be provided in such cases. When so read and understood, the interest which disqualifies a witness under the act is such an interest as appears to exist at the time of the execution of the will, either by the terms of the will itself, or by reason of the attesting witness being then interested in the religious or charitable institutions for which provision is made by the testator, or both, or either, as the case may be. Again, from what has been hereinbefore stated, and by reason of the specific requirements of the act, it seems clear that an interest in any part of the will is such as will disqualify a witness for the purpose of attestation. The act requires the execution of the deed or will to be attested by two disinterested

witnesses. It will be observed that the attestation of the execution of the whole instrument is what is required by the statute. The purpose of the act was to place the settlor or the testator, at the time of the execution of the instrument, in the presence of two disinterested witnesses, so that he would be entirely free from the importunities and solicitations of interested persons. If the attesting witness be interested as legatee or devisee under the will, or is to derive a pecuniary benefit or advantage from any part of it, or if he is interested at the time of attestation in a religious or charitable institution to be benefited thereby, he is not disinterested within the meaning of the statute. Under this view of the law, Wilmerton was disqualified to act as an attesting witness, and the bequests to religious and charitable uses must be held invalid.

Decree reversed, and record remitted to the court below, in order that distribution may be made in accordance with this opinion.

(221 Pa. 335)

**SPRING CITY BRICK CO. v. HENRY MARTIN BRICK MACH. MFG. CO., Inc.**

(Supreme Court of Pennsylvania. May 11, 1908.)

#### 1. COURTS—JURISDICTION.

Where plaintiff sued to recover back money paid on the purchase price of a machine for breach of warranty, and defendant in such action brought a separate suit against plaintiff on a note for the balance of the price, and the actions being tried together resulted in a verdict for defendant on the note for less than \$1,500, the judgment was for the payment of money and appealable to the Superior, and not to Supreme, Court.

#### 2. SAME—TESTS OF JURISDICTION.

Act May 5, 1899 (P. L. 248), relating to jurisdiction of appeals, and providing that in any suit, distribution, or other proceeding, if plaintiff recovers damages, the amount of the judgment shall be conclusive proof of the amount in controversy, but, if plaintiff recovers nothing, the amount in controversy shall be the amount of damages claimed, was intended to provide standards of proof in two classes of actions, which should include every possible case: First, issues involving title or possession of specific property, real or personal; and, second, issues involving the payment of money.

Appeal from Court of Common Pleas, Montgomery County.

Action by the Spring City Brick Company against the Henry Martin Brick Machine Manufacturing Company, Inc., to recover back money paid on the purchase price of a brick-drying machine for alleged breach of warranty, and cross-action by the brick machine company against the brick company on a note for the balance of the price. Judgment for defendant for \$663.60, and plaintiff appeals. Case remitted to the Superior Court.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Louis M. Childs and Charles D. McAvoy, for appellant. Samuel H. High and John Faber Miller, for appellee.

PER CURIAM. The only question before us at present is one of jurisdiction. The facts, stated merely for explanation of the present question and without reference to the merits, appear to be that the parties entered into a contract for the supply by the appellee to the appellant of a brick-drying machine. Appellant paid on account from time to time as the work progressed, and finally gave a note for the apparent balance. Dispute having arisen between the parties, appellant brought suit in assumpsit to recover back the money it had paid, on the ground of breach of warranty in regard to the work the machine was guaranteed to do, while appellee brought suit on the appellant's note. By agreement the two actions were tried together in the appellant's suit, and resulted in a verdict for the defendant for \$663. The appellant has brought its appeal in this court.

The language of the act of May 5, 1899 (P. L. 248), is that "In any suit, distribution or other proceeding \* \* \* if the plaintiff recovers damages \* \* \* the amount of the judgment \* \* \* shall be conclusive proof of the amount really in controversy, but if he recovers nothing the amount really in controversy shall be determined by the amount of damages claimed in the statement of claim or declaration." The present case is not within the literal words of any provision of the act. The appellant as plaintiff in its own action has recovered nothing, but its action was not tried singly, but as a double or composite action, in which the nominal defendant was really an actor or plaintiff, and recovered a verdict of less than \$1,500. This will settle the entire controversy—appellant's claim as well as defendant's.

The act of 1899 and its conclusive test of the amount actually in controversy were fully considered in *Prentice v. Hancock*, 204 Pa. 128, 53 Atl. 763, and *Astwood v. Wanamaker*, 209 Pa. 103, 58 Atl. 139, and the construction established that the Legislature intended to provide standards of proof, for purposes of jurisdiction, in two classes of actions, which should include every possible case: First, issues involving title or possession of specific property, real or personal; and, second, issues involving the payment of money. The present case, though somewhat complicated by being really a double action, is nevertheless a judgment for the payment of money, and therefore within the second class.

The appeal is remitted to the Superior Court.

(223 Pa. 72)

**SULLIVAN et ux. v. JONES & LAUGHLIN STEEL CO. et al.**

(Supreme Court of Pennsylvania. June 23, 1908.)

**1. INJUNCTION—VIOLATION—PROOF.**

A finding of contempt for violating an injunction will not be made, nor will a fine be imposed, nor an order of commitment passed, until the petitioner clearly and satisfactorily establishes the violation of the decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 514.]

**2. SAME—SCOPE OF INJUNCTION.**

The terms of an injunction should not be construed, in a contempt proceeding, to cover acts not fairly and reasonably within their meaning, nor should a rule for contempt be sustained unless a case of actual disobedience is presented.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 448.]

**3. SAME—EVIDENCE.**

Property owners in a residential neighborhood enjoined a steel company from emitting clouds of ore dust from its furnaces, which was destructive to complainant's trees, shrubbery, etc. On a petition for an attachment for contempt, there was evidence that ore dust escaped, from time to time, from plaintiff's furnaces, especially while changes and experiments were being made to prevent the escape of the dust. It also appeared that defendant had made an honest effort, at great expense, to lessen the evil, and had so far succeeded that between the date of the decree and the time of the filing of the petition for contempt, the trees and shrubbery in the neighborhood referred to in the injunction were not destroyed, nor were complainant's tenants driven from their houses, nor were the properties any longer being practically destroyed or confiscated, as alleged in the bill. *Held*, that the proof was insufficient to justify an attachment for contempt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 514.]

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Allegheny County.

Action by E. R. Sullivan and his wife against the Jones & Laughlin Steel Company and others. From a decree awarding an attachment against defendant for contempt in violating an injunction, on which defendants were found guilty, they appeal. Reversed.

The following is the opinion of Young, J., in the court below, who found the defendants guilty of contempt in the following opinion:

"This cause comes before us now upon the petition of the plaintiffs, reciting that on April 19, 1904, at the above number and term of this court, a decree was entered by this court, among other things, perpetually enjoining and restraining the defendant 'from such operation of its furnaces, situated in the Fourteenth ward of the city of Pittsburgh and described in the bill as to cause to be emitted therefrom clouds of ore dust working and causing the injury to the property of the plaintiffs as in the bill described and found by the court,' and that notwithstanding said decree, the defendants have persistently and at intervals, daily and frequently, many times during the day and night, since the day when

said decree was entered so operated its furnaces as to cause to be emitted therefrom clouds of ore dust working and causing the injury to plaintiffs' property, as in said bill described, and found by this honorable court, and in open and deliberate violation of the terms of said decree and injunction, and against the oft-repeated protests of your said petitioners,' and that the petitioners are 'advised, believe, and charge that the defendant, its officers, agents and employes are each and all in contempt of this honorable court,' and prays that Benjamin F. Jones, Jr., Willis L. King, William L. Jones, Henry S. Kiehl, W. W. Willock, William C. Moreland, James B. Laughlin, and George M. Laughlin, who are the directors of the Jones & Laughlin Steel Company, of whom Benjamin F. Jones, Jr., is president, Willis L. King, vice president, James B. Laughlin, treasurer, William C. Moreland, secretary, William L. Jones, general manager, and E. L. Messler, superintendent of the Eliza furnaces of said Jones & Laughlin Steel Company, be adjudged to be in contempt of this court, and that attachment be issued against them for failure to comply with the aforesaid terms of said decree.

"To this petition, presented to the court upon January 10, 1907, the defendants on January 19th filed an answer, admitting that the defendants are the officers, agents, and servants of the defendant company, and that they were duly notified of the entry of the decree at the time of its entry, but denying 'that the defendant the Jones & Laughlin Steel Company has persistently and at intervals, daily and frequently, many times during the day and night, since the day when said decree was entered, so operated its furnaces as to cause the injury to plaintiffs' property as in said bill described and found by this court, and in open and deliberate violation of the terms of said decree and injunction, and against the oft-repeated protests of the said petitioners.' The answer also admits that 'there have been at different times since April 19, 1904, escapes of ore dust from the Eliza furnaces, but not at all in character, extent, or effect such escapes of ore dust as were enjoined by the decree of this honorable court, and most of these escapes occurred during the time that new and very extensive appliances—adopted to do away with the escape of ore dust—were being attached to said furnaces, and were due to this cause; said new appliances being so extensive as not only greatly to disarrange and disturb the operation of the furnaces while the work of putting them up and attaching them was going on, but to render necessary the disconnecting and opening of certain pipes and parts of the furnaces which contributed to the escape of ore dust.' The answer also denies 'that they have violated said injunction in letter or spirit, but, beginning even before the entry of said injunction, and continuing to this

time, they have been unceasing in their efforts to prevent the escape of ore dust from the furnaces in question,' and avers that 'they have been watchful and careful in the operation of their furnaces; they have analyzed and selected all the ingredients used therein, ore, coke, and limestone; they have made important changes in their furnaces; they have adopted and used new and costly appliances, and, without stopping to consider cost, they have, in many other ways, done that which to them or to their engineers gave promise of good results in furtherance of their efforts to remove entirely every cause of annoyance, or even inconvenience, from escaping ore dust. And they are willing and ready in time to come, in the operation of said furnaces there, to do any and everything further in this behalf, which will prevent entirely, or still further reduce, the escape of ore dust'; and that, 'speaking from their own observations, from what the changes in the furnaces and the new appliances themselves show; from the expressed opinions and beliefs of their engineers, superintendents, and persons in charge of said furnaces; from what they have learned and heard from many persons living in the Oakland district, and even nearer to the site of said furnaces—they are enabled to say, and do say, that great progress and advancement have been made towards preventing the escape of ore dust from the said furnaces, or at least reducing it to such an extent that no inconvenience or annoyance will be suffered therefrom,' and denying 'that the defendants, its officers, agents, servants, and employes are each and all, or any of them, in contempt of this honorable court, and they pray, therefore, that the rule for an attachment entered in this case, may be discharged.'

"Upon this petition and answer being filed, this court, upon February 7th began taking the testimony to determine the question as to whether said defendants, its officers, and agents should be adjudged guilty of contempt of this court, and an attachment be issued against them for failure to comply with the terms of the decree; and the court continued to take testimony submitted, taking in all 1,962 pages of testimony, and finally, having heard counsel both in oral argument and by written brief, we come now to determine the question whether the defendants in this case, its officers, agents, and employes are in contempt of this court, and have violated its decree. The sole inquiry, then, before the court is whether the Jones & Laughlin Steel Company, the defendant, or the persons named as its officers, employes, and agents have since April 19, 1904, refused or failed to comply with the decree of this court in enjoining and restraining them 'from such operation of its furnaces, situated in the Fourteenth ward of the city of Pittsburg, and described in the bill, as to cause to be emitted therefrom clouds of ore dust, working and causing the

injury to the property of the plaintiffs, as in the bill described and found by this court.' There lies at the very foundation of this inquiry the question as to the meaning of this injunction because, until we shall have determined exactly its meaning we shall not be able to determine whether or not the defendants have disobeyed it. Ordinarily the meaning of a decree and the purpose to be accomplished by it are easily determined from the words of the order or decree; but, where there may be any doubt concerning either the meaning of the decree or the purpose of the court in making it, we are entitled to have such light from proper sources as to make it clear beyond question, and especially is this true when the proceeding is one for the punishment of persons for its violation, the proceeding becoming a quasi criminal proceeding, and we are required to examine and strictly construe the order disobeyed as though it were a criminal statute. It is especially important, in the case at bar, to determine these things accurately and definitely because of the magnitude of the operations on the one hand, and the great alleged injury on the other hand, arising out of conditions in a great manufacturing city, subject to many injuries and annoyances by reason of its being a manufacturing city, that would not occur elsewhere, aside from the duty of the court to compel obedience to its decree. In seeking the meaning of the decree and the objects of the court in making it, the decree naturally falls into two propositions or inquiries: First, what is meant by such operation of its furnaces as to cause to be emitted therefrom clouds of ore dust; and, second, what injury to plaintiffs' property is described in the bill and found by the court? and to the answer to these two propositions or inquiries we must first apply ourselves. To determine this we must look to the findings of fact by the learned judge of the court below, on the original trial of the case, and to the opinion of the Supreme Court.

"Such operation of the furnaces must include therein rebuilding, improving, or enlarging, as found in the ninth finding of fact, in these words: 'That between March, 1898, and May, 1901, the three furnaces at that time constituting the Eliza furnaces were rebuilt, improved, and enlarged, upon the site then and now occupied by them, and a fourth furnace added upon that site. The first of the rebuilt furnaces was "blown in" September 1, 1899; the second May 13, 1900; the third January 21, 1901; and the fourth on May 8, 1901. These furnaces as rebuilt, improved, and enlarged are constructed in accordance with modern and approved plans, and in their construction are in every respect equipped with modern appliances and improvements, and are equal, in many respects superior, to other furnaces in this locality, in which pig iron is manufactured, and are among the largest known in the iron business,

having a capacity each of about 500 tons daily production, and consuming together about 4,000 tons of ore daily.' And again in the fifteenth finding of fact: 'The ores known as the Mesaba ores are mined in the state of Minnesota, and in their physical structure are finer than the Old Range ores. Mesaba ores have been used in all furnaces in this district, in making pig iron, since the year 1892, in increasing quantities, until the year 1902, when the relative quantities of Old Range and Mesaba ores brought to Lake Erie ports was about 50 per cent. of each. That the amount of Mesaba ores brought to lake ports had increased from 5,000 tons in 1892 to 12,000,000 tons in 1902. That the defendant company now uses in its furnaces, and has been using for the past seven or eight years, a portion of Mesaba ores known as Adams, Lincoln, and Duluth, which are among the best in quality of all Mesaba ores. The amount of Mesaba ores used by the defendant company in its furnaces in the past seven or eight years has averaged 30 per cent. of the total ore used, which is a less proportion than is used generally in blast furnaces in this district. That at the present time the percentage of Mesaba ore used at the Eliza furnace is about 23 per cent.' And again in the sixteenth finding of fact: 'That the escape of ore dust due to "slips" in the furnace is a financial loss to the operator, both in the matter of production and in the loss of ore. That the defendant has been diligent in its efforts to find means, or to adopt appliances or inventions, which will prevent the escape of dust from its furnaces. That up to the present time no appliance has been found which will effectually prevent, or reasonably diminish the escape of the ore dust from blast furnaces, when "slips" occur. That the use of Old Range ores exclusively would not materially lessen the number of "slips" occurring in furnaces, but would, to a considerable extent, decrease the amount of ore dust discharged into the air at each explosion.' As found by the court below, the operation complained of was the building and enlarging of the furnaces, the use therein of large quantities of Mesaba ore, and the emission into the atmosphere of unconsumed portions of that ore in great quantities, carried by currents of air in heavy clouds. An examination of the opinion of Mr. Justice Brown in the case when it was in the appellate court, in 203 Pa. 549, 57 Atl. 1065, 1067, 68 L. R. A. 712, shows that the court had these findings of fact in mind. There the learned justice says: 'Their complaint is that the appellee, in tearing down the three furnaces and replacing them with the four new ones, of immense size and several times the capacity of the old, and in using in them the fine "Mesaba" ore dust, without so operating them as to prevent the escape of the dust from "slips," causing admitted devastation, is practically confiscating their properties. \* \* \* Here the furnaces were artificially brought by ap-

pellee onto its lands by being built there by it, and the "Mesaba" ore converted by the furnaces into iron is also artificially brought there by it. It knew, when about to erect these new furnaces of immense size and great capacity, that in their operation the rights of others, among them those of the appellants, to the use and enjoyment of their property, situated in what for years had been a portion of the city given up to residences, were not to be utterly disregarded; and when it began to use the fine ore dust which has manifestly caused the serious injury to the property of the appellants, it was again bound to consider the effect of the use of this ore upon the near-by residences.' We must therefore conclude that the words 'such operation of its furnaces as to cause to be emitted therefrom clouds of ore dust' mean the building, the enlargement and the use of its furnaces, and the use of Mesaba ore in the furnaces in such a way as to cause clouds of ore dust to be cast from them into the atmosphere. As said by the Supreme Court, it is not the enlargement of their furnaces and the use of Mesaba ore in the furnaces, but it is the enlargement of the furnaces and the use of Mesaba ore in the furnaces, they being so operated as to cause slips and explosions and the emission into the air of clouds of ore dust, that makes the injury of a new kind, and not one of degree, when compared with the operations of other furnaces within this manufacturing district. The complainant, then, having alleged this new kind of injury, the court below having found the nature of the act, and the Supreme Court having distinguished it as differing in kind, we have no difficulty in understanding that the final decree of the court, which was made in the identical language used by the learned justice at the close of his opinion, meant that what was perpetually enjoined was that operation of the furnaces, that use of Mesaba ore in the furnaces, so that the slips and explosions occur, and so that clouds of dust are emitted from them.

"We next turn to the second inquiry—what is meant in the decree by clouds of ore dust working and causing the injury to the property of the plaintiffs as in the bill described and found by the court below? This is defined by the learned judge of the court below in the seventeenth finding of fact: 'That ore dust was first noticed settling upon properties in the neighborhood of defendant's furnaces as early as 1899, but that deposit did not become serious until about July, 1901. Since that time dust, in greater or less quantities, has been carried from defendant's furnaces and deposited upon and about plaintiffs' premises. That the effect of the dust is not only annoying, but injurious to property; that it chokes rain conductors upon the houses, discolors fabrics and paints, and injures carpets and curtains; that it is of a greasy nature, and difficult to remove from both garments and paints; that it has also been destructive to fruit and shade trees and vegeta-

tion generally, and has depreciated the value of plaintiffs' properties from 25 per cent. to 50 per cent.' Turning now to the opinion of Mr. Justice Brown, as found on page 550, of 208 Pa., on page 1069 of 57 Atl. (66 L. R. A. 712), we find this expression: 'When, however, as the result of the improvements voluntarily made by the appellee, and its use of a new ore, the annoyance, inconvenience, and injury to which appellants are now subjected do not differ merely in degree from those to which they formerly submitted as part of their lot as citizens of the "Iron City," but in kind, and practical destruction and confiscation of their properties confront them, a very different situation is presented to a chancellor from those cases in which the rule is laid down that people who live in such a city, or within its sphere of usefulness, do so of choice, and therefore voluntarily submit themselves to its peculiarities and its discomforts. That very rule, as announced in Huckenstine's Appeal, supra, recognizes their right to live and have their homes there; and a case cannot be found as authority for the right of any manufacturing company, located in a manufacturing district of a city, to so rebuild and operate its furnaces as to actually destroy homes and other property in a residential portion of the same city. That this is what the appellee is doing is an irresistible conclusion, and the only relief is by injunction. If it is to be permitted to so operate its furnaces that the burning and corroding dust emitted from its stacks is borne by the winds and scattered over the properties of the appellants with destroying effect, simply because of the plea that it cannot be helped, for the same reason it might ask a chancellor to stay his arm from arresting the descent of showers of fire from the same stacks down on the same near-by homes. If the appellee possessed the right of eminent domain, it might take the properties of the appellants and do with them what it pleases, but, not having such high right, it cannot do so, even indirectly. It has a right to the use and enjoyment of its own property, but so have the appellants to theirs, for whom the law says to the former, "*Sic utere tuo ut alienum non lædas.*"' We must conclude, therefore, that the injury which it was intended to prevent by this decree, under the words 'working and causing the injury to the property of the plaintiffs, as in the bill described and found by this court,' means the injury resulting from the casting of ore dust upon the complainants' property, and that, 'the effect of the dust is not only annoying, but injurious to property; that it chokes rain conductors upon the houses, discolors fabrics and paints, and injures carpets and curtains; that it is of a greasy nature, and difficult to remove from both garments and paints; that it has also been destructive to fruit and shade trees and vegetation generally, and has depreciated the value of plaintiffs' properties from 25 per cent. to 50 per cent.'

"We turn, then, to the evidence in this case, to determine, in the first place, if the defendant since the granting of the injunction on April 19, 1904, has been operating its furnaces, using the finely pulverized Mesaba ore, and thereby allowing slips and explosions to occur, throwing out clouds from which the ore dust settles upon the property of complainants, causing, not only an annoying, but an injurious, effect to the property in the manner found by the court below. From the admissions of the answer and the evidence we must conclude that ore dust does, from time to time, escape from the Eliza furnaces. We must also conclude that large quantities of ore dust escaped while changes and experiments were being made, in an honest effort to prevent the escape of ore dust in the operation of the furnaces, but the evidence shows that frequently, when changes and experiments were not being made, but when the furnaces were being operated in the ordinary and usual way, there have been escapes of clouds of ore dust from the furnaces. All of the plaintiffs' and many of defendants' witnesses testified that clouds of ore dust came from the furnaces. The evidence conclusively shows that defendants have persistently and frequently, both day and night, so operated their four old furnaces, and a fifth furnace built since the granting of the injunction, as to be emitted therefrom clouds of ore dust. The evidence shows conclusively that ore dust from the furnaces has been deposited upon and about plaintiffs' premises frequently since the making of the decree. The evidence also shows conclusively that the effect of the ore dust is not only annoying, but injurious to property; that it chokes rain conductors upon the houses, discolors fabrics and paints, and injures carpets and curtains; that it is of a greasy nature, and difficult to remove from both garments and paints. The evidence does not satisfy us that it has been destructive of fruit and shade trees, and vegetation generally, since April 19, 1904. Neither does the evidence satisfy us that there has been any further depreciation of the value of petitioners' property since the granting of the injunction; but it is nevertheless true that there has been no substantial improvement in values since that time, although real estate values elsewhere in the city not subjected to similar injury, have greatly increased. But the evidence shows just as conclusively that the frequency of the clouds of ore dust, and the quantity escaping from defendants' furnaces and depositing upon plaintiffs' property, is not in such quantities as prior to the making of the decree. A careful consideration of the evidence, produced by both plaintiffs and defendants, irresistibly leads to the conclusion that the clouds are not so frequent, and the quantities of ore dust escaping not so great. The defendants' witnesses, especially those of the defendants in charge of the furnaces, including the general manager, the

general superintendent, and the president of the company, estimate that the escape of ore dust has been lessened 80 per cent. This does not indicate what quantity escapes, and is only evidence that the quantity escaping is much less than formerly. This is the sole defense of the defendants. They say, in answer to the petition asking for an attachment, that the escapes of ore dust were not of such character, extent, or effect as were enjoined by the decree. They deny that they violated the injunction in letter or spirit, but say that, beginning before the entry of the injunction, and continuing to the present, they have been unceasing in their efforts to prevent the escape of ore dust from the furnaces; that they have been watchful and careful in the operation of their furnaces; have analyzed and selected all the ingredients used therein, ore, coke, and limestone; that they have made important changes in their furnaces; they have adopted and used new and costly appliances, without considering cost, in their efforts to remove entirely every cause of annoyance, or even inconvenience, from escaping ore dust; and that they are now willing and ready at all times to come, in the operation of said furnaces, to do any and everything which will prevent entirely, or still further reduce, the escape of ore dust; and they say they have made great progress and advancement towards preventing the escape of ore dust, or at least have decreased it so that no inconvenience or annoyance will be suffered in the future.

"The evidence in this case shows most conclusively that neither trouble nor expense has been spared by the defendants to prevent the escape of ore dust from their furnaces and the consequent injury to plaintiffs' property. Every known method of operation, every experiment, however costly, has been carefully investigated, and thoroughly tried, to prevent the escape of ore dust. The defendants have expended, for this purpose alone, \$285,000. The defendants, in addition to expending these large sums of money, have suffered great loss, estimated at over \$200,000, in their output by shutting down their furnaces to make experiments, in reducing the capacity of their furnaces, and in the selection of coal, limestone, and other material. We are satisfied that the defendants have made every effort to comply with the decree, and there can be nowhere found in the evidence anything which could be regarded as evidence of the obstinate refusal to obey the decree of the court, except in so far as their operation of the furnaces at all has been a violation of the decree. These defendants, we are satisfied, have done everything human ingenuity could suggest, or human experience indicate, to prevent their furnaces from emitting ore dust. It is insisted by counsel for defendants that these efforts upon the part of defendants are conclusive evidence that the defendants have not violated the spirit of the

decree, and therefore that they should not be attached for contempt. We cannot agree with the position of the defendants that this is a good answer to the charge that defendants have violated the decree. The decree in plain words forbade the emission of clouds of ore dust, working the injury found by the court as injurious to property in the way described by the court, and the defendants have, since the granting of that decree, so operated their furnaces as to frequently cause to be emitted clouds of ore dust causing the same kind of injury, although the emission of clouds is not so frequent, the amount of ore dust cast upon plaintiffs' property, and the consequent injury, not so great as when the decree was granted. We cannot understand that this decree was intended to enjoin the defendants from causing their furnaces to emit a certain number of clouds, or that such clouds should contain less than a certain quantity of ore dust, or that they must not deposit more than a certain quantity of ore dust upon plaintiffs' property, or that the injury must not exceed a certain percentage of the value of the property. We understand that decree to mean, in the light of the findings of fact as interpreted by the Supreme Court, that the injury differed in kind from the ordinary injury suffered by residents of a manufacturing city, in that the defendants had enlarged their furnaces, brought there fine Mesaba ore, and so operated their furnaces as to permit this ore to be cast upon plaintiffs' property, thereby causing the injury found by the court. As the defendants are still causing their furnaces to be operated so as to cause to be emitted from them clouds of ore dust which is cast upon plaintiffs' property, causing substantially the same kind of injury, though not as great in extent, they have been guilty of refusing to obey the decree of the court, and are to be adjudged guilty of contempt in doing so. Whatever views we might hold upon an original hearing of the case as now presented, however we may be inclined by the facts as presented by the defendants to the belief that they have done the best they could, and however we may be affected by the belief that the defendants did not intend to disobey the decree, we are sure that it is our duty to enforce the decree. We have no discretion in deciding this question. The appellate court has determined the question, it has defined the duty of defendants, and by its decree declared that these defendants should not do the things which they had theretofore done, and which the evidence shows conclusively they are still doing. If they cannot obey the decree and operate their works, they must cease to operate them until they can obtain a modification of the decree.

"The defendants must be adjudged to be in contempt of this court, and an attachment must issue against them for failure to comply with the terms of its decree."



Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

David T. Watson, George C. Wilson, Clarence Burleigh, Wm. D. Evans, and John M. Freeman, for appellants. Thomas Patterson, for appellees.

BROWN, J. The decree in this case perpetually enjoins Jones & Laughlin Steel Company from such operation of its furnaces, situated in the Fourteenth ward of the city of Pittsburg, as to cause to be emitted therefrom clouds of ore dust, working and causing the injury to the property of the appellees as in their bill of complaint described and found by the court below. *Sullivan v. Jones & Laughlin Steel Co.*, 203 Pa. 540, 57 Atl. 1065, 66 L. R. A. 712. For an alleged violation of this injunction the appellants were found guilty of contempt, and their appeal is from that finding and the penalties imposed upon them.

The relief given the appellees was what they specifically asked for in the first prayer of their bill. It was that the steel company "be enjoined and restrained from such operation of its furnaces, situated in the Fourteenth ward of the city of Pittsburg, as above described, as to cause to be emitted therefrom clouds of ore dust, working and causing an injury to your orators' property, as in said bill described." The injuries arrested were those "in the bill described and found by the court below"; and if they were continued by the appellants, in violation of the decree forbidding them, the order of the court in the proceedings for contempt will not be disturbed. After deliberate and mature consideration our decree went forth for relief to the appellees, and, as made, it will be enforced. It is not, however, to be stretched to reach what was not forbidden and what would not have been enjoined.

When those enjoined by a decree in equity are charged with having violated it, its violation must be made to clearly and satisfactorily appear by the petitioner asking for its enforcement. *Appeal of Philadelphia & Reading Railroad Company*, 2 Walk. 243. Until its violation so appears there can be no finding of contempt, and a fine will not be imposed nor an order of commitment made. "No punishment should be inflicted unless the facts constituting the contempt have been clearly and satisfactorily established." *Woodruff v. North Bloomfield Gravel Mining Co. et al.* (C. C.) 45 Fed. 129. In a proceeding such as this now before us the injunction must, like a penal or criminal statute, be construed strictly in favor of the person charged with having violated it (*Wisconsin Central Railroad Co. et al. v. Smith*, 52 Wis. 140, 8 N. W. 613), and a chancellor will not punish unless the guilt of the enjoined be clearly established (*Probasco v. Probasco*, 30 N. J. Eq. 61). "The procedure by rule for contempt should not be exercised

unless a case is presented of actual disobedience. \* \* \* The entry of an order of injunction is, in some respects, analogous to the publication of a penal statute. It is a notice to the party that certain things must be done, or not done, under a penalty to be fixed by the court. The language of such notice should not be stretched to cover acts not fairly and reasonably within its meaning." *Louisville & N. R. R. Co. v. Miller*, 112 Ky. 484, 66 S. W. 5. "An order of commitment for breach of an injunction being strictissimi juris, it will not be granted, except upon a clear and satisfactory showing of the actual violation." *High on Injunctions* (3d Ed.) § 1449.

The first inquiry in passing upon appellants' alleged violation of the decree is as to what was enjoined. The injunction was to stop the injuries "in the bill described and found by the court below." What we regarded as those injuries can readily be ascertained from the following findings of the court below, recited in our opinion: "Ore dust was first noticed settling upon properties in the neighborhood of defendants' furnaces as early as 1899, but the deposit did not become serious until about July, 1901. Since that time, dust, in greater or less quantities, has been carried from the defendants' furnaces and deposited upon and about plaintiffs' premises. The effect of the dust is not only annoying, but injurious to property; it chokes rain conductors upon houses, discolors fabrics and paints, and injures carpets and curtains; it is of a greasy nature, and difficult to remove from both garments and paints; it has also been destructive to fruit and shade trees and vegetation generally, and has depreciated the value of plaintiffs' properties from 25 per cent. to 50 per cent. \* \* \* The residence district in which plaintiffs' property is situated, and which is a part of the Fourteenth ward of the city of Pittsburg, was, prior to the year 1899, a pleasant and habitable part of the city. While subject, as most parts of the city are, to smoke, it occasioned no special inconvenience to the inhabitants, and the testimony shows that flowers, trees, and shrubs were kept and cared for, and were not injured by any smoke or dust which might prevail throughout the district. Some of the witnesses for the plaintiffs testify that they first noticed the ore dust as early as 1899, but it did not become serious until the year 1901. In the latter year, when all four furnaces were completed and in operation, the ore dust was thrown out in large quantities, and at more frequent intervals, and has increased from that time down until the filing of the bill. The plaintiffs' property, by reason of its location near the defendants' furnaces, receives the full effect of the discharge of ore dust therefrom. Almost all the trees in the orchard, which formerly produced some 80 bushels of pears in a season, the shade trees, of which there were something over

20 in number, and the shrubbery about the house have been, for the most part, destroyed. The whole property has been blackened and disfigured. A number of tenants have been forced to leave the dwelling houses by reason of the penetrating and damaging deposits of ore dust. From the conductors leading from the porch roofs in front of these houses the plaintiffs had removed, on one occasion, three barrels full of ore dust, the weight of the amount thus removed being some 1,200 pounds. \* \* \* The effect of the ore dust upon properties upon which it is deposited is very damaging. It corrodes tin and metal work which are exposed to it, it chokes and fills conductors, it discolors and removes paint, it affects injuriously fabrics in the interior of houses, both by impregnating them with dust, and by attacking and injuriously affecting the fiber. People are compelled to keep their doors and windows closed during the passing of a dust shower, and, even with these precautions, the ore dust sifts in through the crevices to such an extent that it is easily traceable upon window sills, floors, books, furniture, and carpets. The ore dust frequently descends in such large quantities that persons caught in it are compelled, in some instances, to hold umbrellas and seek refuge on porches and in houses. Their clothing is sometimes stained and otherwise injured. It is of a greasy nature, and any garment or surface affected by it is difficult to cleanse." From this intolerable condition relief was granted, because it amounted, in the judgment of this court, to "practical destruction and confiscation" of appellants' properties, and but for this effect, the decree dismissing the bill would have been affirmed, for we said: "The appellants are not complaining because appellee is operating its furnaces. They would not be heard, if that were their only complaint. The city of Pittsburg is a busy manufacturing center, and by day and by night clouds of smoke ascend from the stacks of its numberless mills, factories, and furnaces, oftentimes hanging over it like a pall. In a manufacturing district of this city the appellee has established its furnaces, and is engaged in an important and lawful business. The appellants, in a residential portion of the same city, close by this manufacturing district, own houses in which their tenants live. So situated, they must expect a measure of annoyance and discomfort, arising from the dust and smoke, which cannot be avoided in their manufacturing metropolis, and are borne to the homes of the city and fill the air that is breathed. To this general annoyance and discomfort appellants submitted for years without complaint, and they were bound to do so, for they chose to erect their houses, not only in sight of great manufacturing plants, but within certain reach of the smoke and dust, without which the fires of the furnaces and factories could not burn. Of all this there is now no com-

plaint by them. What, in common with all other citizens, they had endured for years, up to the summer of 1901, they were willing to continue to endure; and they are not now complaining of appellees' manufacture of iron, even with 'Mesaba' ore. Their complaint is that the appellee, in tearing down the three furnaces and replacing them, with the four new ones of immense size and several times the capacity of the old, and in using in them the fine 'Mesaba' ore dust, without so operating them as to prevent the escape of the dust from 'slips,' causing admitted devastation, is practically confiscating their properties. To preserve these to them, and to protect them in their absolute right to the enjoyment of their private property, subject to the general conditions of the city in which they live, this bill was filed, and its prayer is not to restrain the appellee from operating its furnaces and manufacturing iron, but is to enjoin it from such operation of them as causes the serious and exceptional injuries alleged in the bill and proved by the testimony. \* \* \* If this bill were for relief from personal inconvenience and interference with the appellants' full and free enjoyment of their property, due merely to the conditions of smoke and dust that have existed for years, and will exist as long as the city itself continues to be the great steel and iron manufacturing center, it would be promptly dismissed. Of the smoke and dust now coming from all the other surrounding mills and furnaces no complaint is made, and of what used to come from the old furnaces of the appellee the appellants made no complaint, and would not be complaining now but for the changed conditions brought about by the appellee. The court below, though requested by it, refused to find that 'the matters complained of by plaintiffs are only such discomforts and inconveniences as are, and always have been, incident to and consequent upon close proximity to an exclusively manufacturing section of a manufacturing city.' \* \* \* We are not to be understood as saying, or even intimating, that the large furnaces could not be erected and operated, that 'Mesaba' ore cannot be used, or that if, in the operation of the furnaces and the use of this fine ore, the discomfort and annoyance of the appellants had simply been increased in degree, they would be entitled to equitable relief." Nothing could be clearer than that the decree was not intended to enjoin the operation of the furnaces nor the use of "Mesaba" ore.

The averment of the appellees in their petition for an attachment is that, notwithstanding the entering of the decree, the "Jones & Laughlin Steel Company has persistently, and at intervals, daily and frequently many times during the day and at night, ever since the day when said decree was entered, so operated its furnaces as to cause to be emitted therefrom clouds of ore dust, working and causing the injury to

plaintiffs' property as in said bill described and found by this honorable court, and in open and deliberate violation of the terms of said decree and injunction." To this appellants answered: "It is denied that the defendant the Jones & Laughlin Steel Company has persistently, and at intervals, daily and frequently, many times during the day and night, since the day when said decree was entered, so operated its furnaces as to cause to be emitted therefrom clouds of ore dust, working and causing the injury to plaintiffs' property as in said bill described and found by this court, and in open and deliberate violation of the terms of said decree and injunction, and against the oft-repeated protests of the said petitioners. They admit there have been at different times since April 19, 1904, escapes of ore dust from the Eliza furnaces, but not at all in character, extent, or effect such escapes of ore dust as were enjoined by the decree of this honorable court, and most of these escapes occurred during the time that new and very extensive appliances—adopted to do away with the escape of ore dust—were being attached to said furnaces, and were due to this cause, said new appliances being so extensive as not only greatly to disarrange and disturb the operation of the furnaces while the work of putting them up and attaching them was going on, but to render necessary the disconnecting and opening of certain pipes and parts of the furnaces which contributed to the escape of ore dust. They deny that they have violated said injunction in letter or spirit, but beginning even before the entry of said injunction, and continuing to this time, they have been unceasing in their efforts to prevent the escape of ore dust from the furnaces in question. They have been watchful and careful in the operation of their furnaces; they have analyzed and selected all the ingredients used therein, ore, coke and limestone; they have made important changes in their furnaces; they have adopted and used new and costly appliances, and, without stopping to consider cost, they have, in many other ways, done that which to them, or to their engineers, gave promise of good results in furtherance of their efforts to remove entirely every cause of annoyance, or even inconvenience, from escaping ore dust." On this issue it was for the court below to find whether the injunction had been violated, and, if it had, to impose proper penalties for its violation. The decree as made must be obeyed, and it will be enforced without regard to consequences to the steel company in the operation of its furnaces. If it cannot operate them without practically destroying the properties of appellants, it must close them. The excuse that every possible effort has been made to avoid this destruction will not be heard. This was taken into consideration when the decree against the company was made forbidding it to continue the operation of its furnaces in such a manner as to

cause the injuries found to have been sustained by the appellees; but, that the scope of the decree may not be misunderstood, it is again to be noted that the injunction was not to relieve the appellees merely from discomforts and annoyances resulting from smoke and dust emitted from the furnaces and factories surrounding their properties, for such relief could not have been granted. *Huckenstine's Appeal*, 70 Pa. 102, 10 Am. Rep. 689.

What were the findings of the court upon which the appellants were adjudged guilty of contempt? We give them in the court's own words: "From the admissions of the answer and the evidence we must conclude that ore dust does, from time to time, escape from the Eliza furnaces." This was not enjoined. "We must also conclude that large quantities of ore dust escaped while changes and experiments were being made, in an honest effort to prevent the escape of ore dust in the operation of the furnaces." This was not forbidden. On the contrary, the decree contemplated honest efforts on the part of the steel company to prevent the destructive escape of the "Mesaba" ore dust in the operation of the furnaces, and the injunction was not to prevent its escape in large or small quantities while changes and experiments were being made to prevent its escape at all, but only such escape, in the ordinary and usual operation of the furnaces, as worked the injuries described in the bill and found by the court. "The evidence shows that frequently, when changes and experiments were not being made, but when the furnaces were being operated in the ordinary and usual way, there have been escapes of clouds of ore dust from the furnaces. All of plaintiffs' and many of defendants' witnesses testified that clouds of ore dust came from the furnaces. The evidence conclusively shows that defendants have persistently and frequently, both day and night, so operated their four old furnaces, and a fifth furnace built since the granting of the injunction, as to cause to be emitted therefrom clouds of ore dust. The evidence shows conclusively that ore dust from the furnaces has been deposited upon and about plaintiffs' premises frequently since the making of the decree." The mere emission of ore dust and the escape of clouds of it are not forbidden, even if deposited upon the plaintiffs' premises, unless the deposits result in the injuries "in the bill described and found by the court." "The evidence also shows conclusively that the effect of the ore dust is not only annoying, but injurious to property; that it chokes rain conductors upon the houses, discolors fabrics and paints, and injures carpets and curtains; that it is of a greasy nature, and difficult to remove from both garments and paints." This is the sum total of the injuries found by the court to have been inflicted upon the appellee since the decree was made, and the foregoing are all the findings upon

which the appellants were adjudged guilty of contempt. If, on the appeal from the decree dismissing complainants' bill, nothing more had appeared than that the ore dust from the steel company's furnaces, of a greasy nature and difficult to remove from both garments and paints, had been deposited upon the premises of the appellees, causing annoyance and injuries by choking up rain conductors upon the houses, and discoloring fabrics and paints, and injuring carpets and curtains, the decree would unquestionably have been affirmed, and nothing in our opinion can be found to indicate anything else. What the court found in this proceeding was nothing more than "annoyance, inconvenience, and injury," to which the appellees must submit "as part of their lot as citizens of the 'Iron City,'" from which relief cannot be given them in equity by closing the plant of the steel company. The injunction issued against it, and that now hangs over it went out because it so operated its furnaces as to destroy the trees and shrubbery of the appellees, to drive tenants from their houses, and to blacken, disfigure, and practically destroy and confiscate their whole property. The court failed to find, and could not have found under the evidence, that any such condition has continued since the injunction was issued. On the contrary, the affirmative finding is, "the evidence does not satisfy us that it [dust] has been destructive of fruit and shade trees and vegetation generally since April 19, 1904. Neither does the evidence satisfy us that there has been any further depreciation of the value of petitioners' property since the granting of the injunction; but it is nevertheless true that there has been no substantial improvement in values since that time, although real estate values elsewhere in the city, not subject to similar injury, have greatly increased. But the evidence shows just as conclusively that the frequency of the clouds of ore dust, and the quantity escaping from the defendants' furnaces and depositing upon plaintiffs' property, is not in such quantities as prior to the making of the decree. A careful consideration of the evidence, produced by both plaintiffs and defendants, irresistibly leads to the conclusion that the clouds are not so frequent, and the quantities of ore dust escaping not so great. The defendants' witnesses, especially those of the defendants in charge of the furnaces, including the general manager, the general superintendent, and the president of the company, estimate that the escape of ore dust has been lessened 80 per cent. This does not indicate what quantity escapes, and is only evidence that the quantity escaping is much less than formerly." To what this changed condition is due appears from the following, taken from the opinion of the court: "The evidence in this case shows most conclusively that neither trouble nor expense has been spared by the defendants to prevent the escape of ore dust

from their furnaces, and the consequent injury to plaintiffs' property. Every known method of operation, every experiment, however costly, has been carefully investigated and thoroughly tried to prevent the escape of ore dust. The defendants have expended, for this purpose alone, \$285,000. The defendants, in addition to expending these large sums of money, have suffered great loss, estimated at over \$200,000, in their output by shutting down their furnaces to make experiments, in reducing the capacity of their furnaces, and in the selection of coal, limestone, and other material. We are satisfied that the defendants have made every effort to comply with the decree, and there can be nowhere found in the evidence anything which could be regarded as evidence of the obstinate refusal to obey the decree of the court, except in so far as their operation of the furnaces at all has been a violation of the decree. These defendants, we are satisfied, have done everything human ingenuity could suggest, or human experience indicate, to prevent their furnaces from emitting ore dust."

True the court found that the steel company is still so operating its furnaces "as to cause to be emitted from them clouds of ore dust, which is cast upon plaintiffs' property, causing substantially the same kind of injury, though not as great in extent" as before the injunction was issued. The finding is not that the same injury is being inflicted. It states just what the injury now is, viz., the choking of rain conductors upon the houses, the discoloring of fabrics and paints, and the soiling of carpets and curtains. But these are not the serious and exceptional injuries "in the bill described and found by the court below," to arrest which the injunction was awarded. Trees and shrubbery are no longer being destroyed; tenants are no longer being driven from the houses of the appellees; their properties are no longer being blackened, disfigured, and practically destroyed and confiscated; and the depreciation in their value no longer goes on. The scope of the injunction was manifestly misunderstood by the learned trial judge. Another judge of the same court understood and properly construed it in *McWilliams v. Jones & Laughlin Steel Company*, as appears in his opinion filed December 4, 1905. What it was intended to arrest has been arrested, and the unbearable condition to which the appellees had been subjected has been relieved, for the court so finds. If it had found that the steel company, in the operation of its furnaces, was still inflicting serious and exceptional injuries upon the appellees, and the work of destruction and confiscation was still going on, the penalties imposed upon the appellants would not be too severe. This appeal must be sustained, for, on the case as presented at the hearing of the application for the attachment, the injunction would not have gone out. The finding adjudging the ap-

pellants guilty of contempt is set aside, and the order imposing the fines upon them is reversed, with costs.

MESTREZAT, J. (dissenting). I regard this case as a reargument on the merits of the former case, and I submit that the majority opinion shows that this court has reconsidered this case, and entered a decree reversing its former decree and denying the plaintiffs the relief which in our adjudication four years ago, after argument and reargument, we held they were entitled to. It is true that three members of the court dissented from the decree then entered, and held that the plaintiffs were not entitled to any relief. The majority of the court, however, reversing the trial court, ordered an injunction to be issued, "perpetually enjoining Jones & Laughlin Steel Company from such operation of its furnaces \* \* \* as to cause to be emitted therefrom clouds of ore dust, working and causing the injury to the property of the appellants as in the bill described and found by the court below." The learned trial judge, in entering the decree from which this appeal was taken, after finding the facts and correctly interpreting our decree in an exhaustive and unanswerable opinion, states in conclusion the gist of the case as follows: "As the defendants are still causing their furnaces to be operated, so as to cause to be emitted from them clouds of ore dust, which is cast upon the plaintiffs' property, causing substantially the same kind of injury, though not as great in extent, they have been guilty of refusing to obey the decree of the court, and are to be adjudged guilty of contempt in doing so." The opinion of the learned judge amply vindicates the decree which he entered, adjudging the defendants guilty of contempt, and, upon that opinion, I would affirm the decree of the court below.

(221 Pa. 324)

#### In re McCOWN'S ESTATE.

##### Appeal of ALLEN.

(Supreme Court of Pennsylvania. May 11, 1908.)

#### JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—ACCOUNTING OF EXECUTOR—EXISTENCE OF TRUST.

Where, on the audit of an executor's final account, a fund was awarded to a trustee for the sole and separate use of testator's daughter, and the daughter did not appeal, such award constituted an adjudication that she was not entitled to the gift absolutely, precluding her from raising such question on exceptions to the account of the trustee subsequently filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1214.]

Appeal from Orphans' Court, Philadelphia County.

Judicial settlement of the accounts of the executors of Andrew R. McCown, deceased. From an order dismissing exceptions to the adjudication, Eliza B. Allen appeals, and assigns error on the dismissing of her exceptions. Affirmed.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James Gay Gordon, for appellant. Thos. Biddle Ellis, for appellees.

STEWART, J. Were this an appeal from the adjudication of a partial or final account of the executors of Andrew R. McCown, deceased, the right of the appellant to have the claim she makes again considered, notwithstanding an adverse adjudication on a former account, would be unquestionable. An account finally confirmed and unappealed from is conclusive only of what it contains, and a decree of distribution operates only upon the fund distributed. An erroneous distribution of one fund is not conclusive in the distribution of another fund in the same estate. The cases cited by the learned counsel for appellant are all to this effect; but they go no further. It is not necessary to refer to them, except to say that all are cases where the party was held not to be concluded by a former adjudication, on the ground that the fund out of which he was claiming was not the same. But this case does not fall within that class. The executors of Andrew R. McCown, deceased, filed their final account more than 20 years ago. Under the adjudication then made April 22, 1887, the share or legacy of Mrs. Eliza B. Allen, a married daughter of the testator, here the appellant, was adjudged to have been given in trust for her sole and separate use, under the terms of the will, and was accordingly awarded to trustees to hold for purposes of the trust. Mrs. Allen at the audit claimed to have the fund awarded to herself on the ground that no separate estate was intended or created by the will, and that the gift was to her absolutely. From the adjudication adverse to her claim she never appealed, and her share passed to the trustees. So far as concerns the fund distributed under that adjudication, an end was reached to the estate of Andrew R. McCown. Thereafter the fund so distributed rightfully belonged to the parties to whom the court had awarded it. The account adjudicated in the proceeding from which this appeal is taken is not an account of anything belonging to Andrew R. McCown's estate. It is the account of the trustees to whom was awarded the share or legacy of Mrs. Eliza B. Allen. It is not an account to be followed by distribution of an ascertained balance, but an account of trustees exhibiting the state of the trust for the information of the parties interested therein. These trustees held the fund, for the purpose of the trust declared, by virtue of a decree of the court, which, never having been appealed from, establishes their right. The question sought to be raised is *res adjudicata*.

The appeal is dismissed, at the costs of the appellant.

(221 Pa. 432)

**OVIATT v. BROWNELL.**

(Supreme Court of Pennsylvania. May 18, 1908.)

**JUDGMENT—CONCLUSIVENESS—MATTERS CONCLUDED.**

On a bill to restrain the issuance of an execution on a judgment obtained on a scire facias sur mortgage, the judgment on the scire facias is conclusive on plaintiff, not only as to matters directly litigated and decided, but also as to any grounds of recovery or defense that might have been presented and decided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, § 1241.]

Appeal from Court of Common Pleas, McKean county.

Bill in equity for an injunction by Carrie A. Oviatt against F. W. Brownell, administrator of the estate of Miller Stickles, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Rufus B. Stone and Allan Oviatt, for appellant. E. R. Mayo & Son, for appellee.

**PER CURIAM.** Briefly stated, the material allegations in the bill are that the plaintiff's uncle held a mortgage on a farm owned by her mother; that in 1893, 10 years before his death he agreed with the plaintiff that, if she would perform certain services for her mother and for him, she should have the farm at the death of her mother clear of incumbrance; that the services were performed, but that her uncle had failed to satisfy or release the mortgage; that the defendant, the administrator of his estate, had obtained judgment on the mortgage and threatened to issue execution thereon. The prayer is for an injunction restraining the defendant from issuing execution, and requiring a transfer of the judgment to the plaintiff.

It is averred in the answer that the whole subject of controversy was adjudicated in the proceeding on the mortgage. It appears from the record of that proceeding attached to the answer that the writ was issued against the plaintiff in this bill as administratrix of her mother's estate; that she filed an affidavit of defense in which she alleged that she was the sole owner of the property, and the scire facias was amended by naming her as terretenant; that one ground of defense at the trial distinctly raised by a request for charge was that the agreement recited in the bill in this case had been made and fully performed on her part. At that trial a verdict was directed for the plaintiff because of the insufficiency of the evidence to establish any valid defense, and the judgment was affirmed by this court. See *Brownell v. Oviatt*, 215 Pa. 514, 64 Atl. 670. It is evident from that record that there had been a final adjudication of the controversy presented by the bill and answer in this case. But, whether adjudicated or not, the plaintiff is concluded for the reason that a judgment is conclusive, not only

as to matters directly litigated and decided, but as to any grounds of recovery and defense that might have been presented and decided. *Long v. Lebanon Nat. Bank*, 211 Pa. 165, 60 Atl. 556.

The decree dismissing the bill is affirmed at the cost of the appellant.

(221 Pa. 366)

**KEYSTONE BREWING CO. v. CANAVAN (FORESTAL, Garnishee).**

(Supreme Court of Pennsylvania. May 11, 1908.)

**1. GARNISHMENT—DAMAGES—ASSESSMENT—PROCEDURE—RULE.**

On an assessment of damages in foreign attachment after judgment against the defendant for want of appearance, mere figures and a calculation on the back of the præcipe, directing the entry of judgment, are not sufficient to support the assessment; there being nothing on the docket to show that damages were assessed or that judgment had been entered for any amount, it being necessary that the record should show that a rule for the assessment of damages had been taken by plaintiff pursuant to which damages had been assessed on evidence produced before the prothonotary.

**2. SAME—DEFECTIVE ASSESSMENT OF DAMAGES—OBJECTIONS BY GARNISHEE—PLEADING.**

A defective assessment of damages in a judgment on a foreign attachment against the defendant may be objected to by the garnishee under a plea of nulla bona on the trial of the case.

**3. SAME—DUTY OF GARNISHEE.**

It is a garnishee's duty to protect his creditor by resisting the plaintiff's claim if the latter has not strictly complied with the statute in procuring the judgment against the principal defendant and assessing damages thereon, unless the principal defendant is in court to protect his own interest.

Appeal from Court of Common Pleas, Luzerne County.

Action by the Keystone Brewing Company against Thomas Canavan and Thomas Forestal, garnishee. From a judgment in favor of the garnishee non obstante veredicto, plaintiff appeals. Affirmed.

See 218 Pa. 161, 67 Atl. 48.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

M. J. Mulhall, for appellant. Edward A. Lynch, James H. Shea, and Mose H. Salsburg, for appellee.

**MESTREZAT, J.** This is an action of foreign attachment against Thomas Canavan, defendant, and Thomas Forestal, garnishee. The writ was issued January 31, 1901. There was no appearance for the defendant, and on August 7, 1901, the plaintiff's counsel by præcipe filed with the prothonotary directed him to "enter judgment against defendant in above case for want of an appearance." Thereupon the prothonotary made the following entry in the record of the case on the continuance docket: "Now, August 7, 1901, by præcipe of plaintiff's attorney filed, judgment is entered against de-

fendant for want of an appearance. (See files.)" It appears from the statement in the opinion of the learned trial judge, although the record as certified to us does not disclose the fact, that the prothonotary entered judgment against the defendant for \$2,370.12. Aside from certain figures and a calculation on the back of the *præcipe* directing the entry of judgment, there is nothing to indicate by what method, or upon what proof, the prothonotary assessed the damages. The continuance docket does not show that the damages were assessed at all, or that judgment was entered for any amount whatever. That record should show that a rule had been taken by the plaintiff, that in pursuance of the rule the damages had been assessed, and that evidence had been produced before the prothonotary upon which the assessment had been made. The proceeding is statutory, and the record should disclose that the damage had been assessed in compliance with the statute. The *scire facias* accompanying the writ of attachment was served upon the garnishee and properly returned on the day the writ was issued. On the same day the plaintiff filed interrogatories, and entered a rule on the garnishee to appear and answer on or before August 30, 1901. The garnishee filed an answer to the interrogatories, denying that he had any estate or effects of the defendant in his hands, and on November 11, 1904, pleaded *nulla bona*, with leave, etc. The case was tried in 1905, and a compulsory nonsuit was entered against the plaintiff, which the court subsequently struck off. The case was again tried in April, 1906. At the conclusion of the testimony in this trial the garnishee's counsel requested the court to direct a verdict for the defendant. The court, however, submitted the case to the jury, which returned a verdict in favor of the plaintiff. Subsequently, on motion of the garnishee's counsel, the court directed judgment *non obstante veredicto* in favor of the garnishee. From that judgment we have this appeal by the plaintiff.

The ground on which the learned trial judge entered judgment in favor of the garnishee was that the damages had not been assessed against the defendant in the attachment in compliance with the act of April 9, 1870. P. L. 60, (2 *Purd.* [13th Ed.] 1721). The court also held that this irregularity or defect in the judgment against the defendant could be taken advantage of by the garnishee under the plea of *nulla bona* on the trial of the cause. The plaintiff denies the correctness of both these propositions, and contends that the damages were properly assessed, and, if not, the garnishee could not raise the question under his plea of *nulla bona* on the trial of the cause, or subsequently on a motion for judgment *non obstante veredicto*.

The act of 1870 provides that, after judgment has been entered against the defendant

by default, "It shall be lawful for the plaintiff to enter a rule for the prothonotary to assess the damages, which the prothonotary may do, upon evidence produced to him, or upon the affidavit of the plaintiff, or some other person cognizant of the transaction." Prior to this act damages were assessed by a writ of inquiry. Now, the act of 1870 provides the appropriate method for assessing damages against the defendant in default of an appearance. It will be observed that, under the act, the plaintiff must enter a rule and have the prothonotary assess the damages. The initiative in the assessment of damages must be taken by the plaintiff, and the prothonotary should not act until a rule has been entered by the plaintiff. After the rule has been taken, the act authorizes the prothonotary to assess the damages, "upon evidence produced to him, or upon the affidavit of the plaintiff, or some other person cognizant of the transaction." The record in the case shows that there was no assessment of damages whatever by the prothonotary, much less a compliance with the act of 1870 in assessing the damages. The continuance docket shows that a judgment was entered as directed by the plaintiff's *præcipe*, but there is no further entry on the docket showing that the damages were assessed. We will assume, as it has been so stated by the trial judge, that a judgment was entered for a specific sum, but it was only in the judgment docket. The record certified to us does not contain a copy of the judgment index, and hence we do not know what that record contains. There is, however, absolutely nothing in the record to show that the prothonotary assessed the damages, or that there was any evidence produced before him upon which he could do so. The figures on the back of the plaintiff's *præcipe* directing the entry of judgment are of no consequence whatever. They may show a calculation resulting in the sum which was entered on the judgment docket, but they are not the evidence required by the statute on which the prothonotary could act to assess the damages. In fact, the record does not show that the figures on the back of the *præcipe* were made by the prothonotary, or that the sum entered on the judgment docket, representing the damages, was ascertained by that calculation. The record is barren of even any pretended compliance with the act of assembly in the assessment of damages in the attachment proceedings against the defendant. The law requires, not only the entry of judgment, but the assessment of damages, in the manner pointed out by the statute.

It is contended, however, by the plaintiff's counsel that the garnishee could not take advantage of the defects or irregularities in the record on the trial of the cause under the plea of *nulla bona*. There is some apparent conflict in our cases on this question, but we think they can be reconciled when the

facts of the cases are considered. *Thornton v. Bonham*, 2 Pa. 102, was foreign attachment in which judgment was entered against the defendant for want of an appearance, but the damages were not assessed by writ of inquiry as they were required to be at that time. On the trial of the scire facias the court directed a verdict in favor of the garnishee. In sustaining the judgment entered on the verdict Mr. Justice Sergeant, after saying that the damages should have been assessed by a writ of inquiry before the scire facias was issued, continued: "It seems, also, that he [garnishee] may take advantage of the objection [that the damages had not been assessed], on the trial of the issue on the scire facias, for in *Pancake v. Harris*, 10 Serg. & R. 109, it was decided that the declaration being in substance a declaration in assumpsit for goods sold and delivered, and the judgment not for a liquidated sum, the plaintiff could recover nothing from the garnishee, without executing a writ of inquiry, and he was allowed to take advantage of the objection on the plea of nulla bona." In *Pancake v. Harris*, the garnishee pleaded nulla bona, and successfully defended on the ground that prior to the issuing of the scire facias against him the damages had not been ascertained by a writ of inquiry. The doctrine of the above cases is reaffirmed in *Melloy v. Burtis*, 124 Pa. 161, 16 Atl. 747. There, on motion of the garnishee, the trial court struck off the judgment entered against the defendants for want of an appearance. The plaintiffs appealed, and contended that the garnishees were strangers to the judgment and had no standing to question its validity. In declining to sustain the position Mr. Justice Sterrett, delivering the opinion of the court, said, *inter alia* (page 167 of 124 Pa., page 749 of 16 Atl.): "We cannot assent to that proposition. While the garnishee in foreign attachment is not a party to the judgment against defendant in the writ, it is not quite accurate to say he is a stranger thereto in the sense intended by plaintiff. The judgment is necessarily the foundation of subsequent proceedings against the garnishee, by which it is sought to take the property or effects of the defendant, attached in his hands, and apply the same to plaintiff's claim. As a general rule the garnishee is bound to see that the proceedings to that end are not illegal. In a legal point of view his relation to the defendant in a writ of foreign attachment is not always the same. In some cases he is simply bailee of defendant's property. In others he is his debtor, or he may be either bailee or debtor with a counterclaim of his own, consisting of a special lien or a set-off; or he may be a trustee of money or property under a valid trust created by the defendant in favor of another party. In either case, when he occupies the position of bailee or trustee, it is his right, as well as his duty, for his own protection, if nothing more, to insist that

no property or effects be taken out of his hands except upon valid process. That duty, if it has not existed before, certainly arises when the garnishee is called upon by scire facias to show cause why plaintiff should not have satisfaction of his judgment out of the estate or effects of the defendant in his hands or possession. The scire facias is predicated of a valid judgment against the nonresident defendant, and if the garnishee is aware that no such judgment exists, or if he has any other just ground of defense, he has a right to interpose it. If he neglects to do so, and the attached property is taken from him, he may become personally liable to those whose interests he could and should have protected. 2 Tr. & Haly Prac. § 2289; Serg. on Att. 113," etc.

Under these authorities, there is no doubt that it has been the practice in this state to permit the garnishee, on the trial of a scire facias, to attack a defective or irregular judgment against the defendant under the plea of nulla bona. While that plea logically would only allow the garnishee to deny that he had in his hands the estate or effects of the defendant, and thereby defeat any judgment against him for the plaintiff's claim, yet for the reasons well stated by Mr. Justice Sterrett, quoted above, the garnishee may attack the validity of the judgment against the defendant. There is reason for holding it to be the duty of the garnishee to protect his creditor's interest by resisting the claim of the plaintiff, unless the latter has complied strictly with the statute in procuring the judgment against the defendant. The plaintiff in foreign attachment seeks to enforce a claim against an absent debtor. The absence of the debtor deprives him of an opportunity to appear and defend the action brought against him. So far as he is concerned, it is a proceeding in rem to compel his appearance, although he is absent and his appearance is not expected. The only party who has an opportunity to appear and defend is the garnishee who has possession of the defendant's property. It is therefore the garnishee's duty to see that the property of the defendant is not applied in satisfaction of the plaintiff's claim, unless the latter has established his demand against the defendant in strict compliance with statutory requirements. Assuming such to be the duty of the garnishee, he should be permitted to attack the regularity and legality of the attachment at any step of the proceedings. In *Melloy v. Burtis*, *supra*, the garnishee had the judgment vacated, and in the other cases cited the garnishee defeated a recovery against them on the trial by reason of a defect or irregularity in the proceedings. Under the statute, the scire facias against the garnishee cannot issue until after the judgment has been entered against the defendant; and hence the former has no knowledge of the proceedings until he is served with the writ. His opportunity, therefore, to attack the pro-



ceedings does not arise until after judgment has been obtained against the defendant. Our cases hold, as we have seen, he may do so on the trial of the cause.

It is contended by the counsel for the plaintiff that *Poor v. Colburn*, 57 Pa. 415, and *First National Bank v. Trainer*, 209 Pa. 387, 58 Atl. 816, support his contention that the failure to assess the damages or irregularity in assessing the damages cannot be taken advantage of by the garnishee after a plea of *nulla bona*. In both of those cases, however, the reasons for the rule permitting the garnishee to attack the regularity of the proceedings did not exist, and hence the cases cannot be regarded as sustaining the defendant's position. In *Poor v. Colburn*, the defendant as well as the garnishee appeared to the attachment, and they both pleaded *nulla bona*. In *First National Bank v. Trainer*, Trainer was, individually, the defendant, and as executor was the garnishee, and therefore, although in a different capacity, he was both defendant and garnishee. In both cases it will be observed the defendant was in court and could protect his own interests. If he did not attack the judgment before pleading, there is reason for holding that neither he nor the garnishee under a plea of *nulla bona* should be permitted to attack either the judgment or the regularity of the proceedings leading up to it. He may waive an irregularity or defect in the attachment proceedings, and he does so, if, without attacking them, he pleads and goes to trial. If on the trial he may not attack the legality or regularity of the proceedings, of course, the garnishee cannot be heard to do so. In both the cases relied upon by the plaintiff, the defendant was in court to protect himself, and, having waived the irregularity of the proceedings, the garnishee could not be permitted to attack them on the trial.

In the case in hand, when the testimony was closed and the garnishee requested the court to direct a verdict in his behalf, the evidence in the case disclosed that there had been no assessment of damages in the judgment entered against the defendant, as required by the act of 1870; and, as that was a condition precedent to the plaintiff's right to a verdict and judgment against the garnishee, the latter was entitled to a verdict, and, the court having refused to direct a verdict for the garnishee, the latter was subsequently entitled to a judgment non obstante veredicto. The judgment is affirmed.

(221 Pa. 330)

In re BENTZ'S ESTATE.

(Supreme Court of Pennsylvania. May 11, 1908.)

#### 1. WILLS — CONSTRUCTION — PERSONS ENTITLED.

Testator bequeathed a full share of the residue, consisting of personality, to each of his four sisters, two brothers, and niece. He then

gave one-half of a full share to five of the eight children of a deceased brother, specifically named, and declared that the estate given to two of his brothers, one of his sisters, and his niece should be for life only, and that, after the death of the sister to whom a life estate was given, her share should "revert to her sisters and brothers mentioned or to their heirs." Held, that such share after the death of the sister should be distributed to the sisters and brothers named in the will to the exclusion of the niece, and that all of the children of the deceased brother should share in one full share of the residue as the representative of their father.

#### 2. SAME—"SURVIVING ISSUE."

Testator, having bequeathed a share of the residue to each of his four sisters, two brothers, and a niece, gave one-half of a full share to five of the eight children of a deceased brother specifically named. Held, that the three children of such deceased brother not named in the will were his "surviving issue" within Act May 3, 1844 (P. L. 564), providing that no devise or legacy made in favor of a brother or sister or the children of a deceased brother or sister of any testator not leaving any lineal descendants shall be deemed to lapse by reason of the decease of the devisee or legatee in the lifetime of the testator, if he shall leave issue surviving the testator, but such devise or legacy shall be good in favor of such surviving issue.

#### 3. SAME—WORDS OF LIMITATION—"HEIRS."

Where a remainder of one share of the residue of an estate was bequeathed to the life tenants, sisters and brothers mentioned or their heirs, the word "heirs" would be construed as a word of limitation, so that the brothers and sisters took the estate in fee.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3241-3264; vol. 8, pp. 7677-7678.]

Appeal from Court of Common Pleas, Cumberland County.

Judicial settlement of the estate of Abner W. Bentz, deceased. From an order sustaining exceptions to the auditor's report, Cecilia L. Beetem appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Conrad Hambleton, John Hays, and John W. Wetzel, for appellant. S. B. Sadler, for appellee.

MESTREZAT, J. Abner W. Bentz died testate on December 6, 1883, unmarried and without issue. After directing the payment of his debts and certain specific legacies, he disposed of his estate as follows: "I will and bequeath to my sisters Elizabeth Bentz, Catherine Bentz, Mrs. Annie M. Parsons and Mary M. Strohm, also my niece, Mrs. Cecilia L. Beetem, and my brothers John Bentz, James Bentz, a full and equal share of all my estate and William Bentz my brother William Bentz Heirs the names that are mentioned one-half of a full share that my other brothers and sisters get equally divided between Mary Bentz, Mrs. Elizabeth Broomall, Joseph Z. Bentz, Samuel Bentz, George Bentz. Brother John Bentz to have the use of his share during his lifetime, and then after his death to be equally divided between all his heirs. Mrs. Mary M. Strohm to have the use of her full share during her

lifetime, after her death to revert to her sisters and brothers here mentioned or to their heirs. Mrs. Cecilia L. Beetem to have the use of her full share during her lifetime, and if she dies without children to revert to my brothers and sisters mentioned in my will or to their heirs. James Bentz, Brother James Bentz to have the use of his full share during his lifetime, after his death to revert to his children equally divided." William Bentz, a brother of the testator, died during the lifetime of the testator, and the other brothers and sisters interested in the fund for distribution, except Mrs. Mary M. Strohm, died after the testator, but prior to April 3, 1906. Mrs. Strohm died on that day without issue. Prior to the death of Mrs. Strohm the estates and interests of the brothers and other sisters of the testator had all been distributed. The fund for distribution in this proceeding is the remainder of the estate given to Mrs. Strohm for life. The court below awarded it equally to the heirs and distributees of the deceased brother and sisters who were mentioned in the testator's will. From this decree Mrs. Cecilia L. Beetem, a niece of the testator, has taken this appeal. She contends that she is entitled to an equal share in the fund for distribution with the brothers and sisters of the testator; that only the five children of William Bentz, named in the will, should participate in the distribution and to the extent of only one-half of a full share.

By reference to the will, it will be observed that the testator in the first instance bequeaths one full share of the residue of his estate to each of his four sisters, two brothers, and his niece, Cecilia L. Beetem. He then gives one-half of a full share to five of the children of his deceased brother William Bentz, specifically naming the children. He next proceeds to declare that certain of his former bequests shall be for life only. Such are the estates given to his brother John, his brother James, his sister Mrs. Strohm, and his niece, Mrs. Beetem. The language of the will creating a life interest in Mrs. Strohm and disposing of the remainder is as follows: "Mrs. Mary M. Strohm to have the use of her full share during her lifetime, after her death to revert to her sisters and brothers here mentioned or to their heirs." The remainder, after Mrs. Strohm's life interest, is the estate for distribution.

While the will is most inartificially drawn, and was doubtless written by the testator himself, yet we think his intention is clear, and that there is no difficulty in determining what disposition he intended to make of this part of his estate. The property for distribution is personalty. Mrs. Strohm was bequeathed the estate for her life, and then it was disposed of in the following words: "After her death to revert to her sisters and brothers here mentioned or to their heirs." This language is plain, and does not need

the aid of any rules of interpretation to construe it. Nor does it need transposition to determine the intention of the testator as to this part of his estate. He had "mentioned" in his will prior to this bequest the names of his four sisters and of his three brothers. To them the bequest was made. It is true that the testator had not theretofore given his brother William any part of his estate, but the remainder over, after Mrs. Strohm's life estate, was not bequeathed to sisters and brothers to whom the testator had already given an estate or interest, but to the sisters and brothers "here mentioned." No general intent is required to determine the significance or meaning of this language. We need not inquire as to the testator's reasons for not giving his brother William any other part of his estate. That is immaterial, and can have no effect on the construction of this part of the will. Many reasons might be suggested, but they are immaterial. Neither need we inquire as to why the testator primarily gave one-half of a full share of the residue of his estate to the five, instead of to the eight, children of William. These were matters solely for the consideration of the testator, and his will as to that question is the law of the case. It can have no bearing upon the interpretation of the Strohm bequest. The remainder after Mrs. Strohm's estate the testator declared should go "to her sisters and brothers here mentioned or to their heirs." The sisters and brothers mentioned in the will, whether or not they had been given anything in the will, were the parties to whom the testator bequeathed the remainder after Mrs. Strohm's life estate. There can be no doubt that such was the intention of the testator, because no other meaning or inference can properly be drawn from the language he used in making the bequest.

It is contended by Mrs. Beetem, the appellant, that the words in this bequest, "to revert to her sisters and brothers here mentioned," refer to the persons who had previously been given in the will a full share and a half share of the estate. This construction of the will would give Mrs. Beetem a full share, and the five children of William Bentz, named in the will, a one-half share of the remainder of the estate given to Mrs. Strohm for life. It is urged by the appellant that to hold otherwise would defeat the clearly expressed intention of the testator; that it would exclude Mrs. Beetem, who is expressly given a full and equal share, and would let in three of the eight children of William Bentz, who are not given in express terms any portion of any share of the estate. But, as we have pointed out, this contention is not supported by the language of the will. It is, on the contrary, antagonistic to the plain and unequivocal language used by the testator in disposing of the remainder after Mrs. Strohm's life estate. That portion of

his estate was not to go to the persons to whom one full share or one-half of a full share had been given, but to the sisters and brothers of Mrs. Strohm "here mentioned." In this designation of legatees a niece is not included, nor are five of the eight children of William Bentz named or included. No other relative than a brother or sister, mentioned in the will, or his or her heirs, can participate in this bequest. The plain terms of the bequest permit of no other conclusion. Hence, it is useless to speculate on the general intent of the testator as affecting the disposition of this part of his estate. There is no ambiguity in this bequest, it is plain, and hence must speak for itself. The word "heirs" must be regarded as a word of limitation. The remainder is given to the brothers and sisters, and they take the estate in fee. And this is true as to William Bentz, who died prior to the death of the testator and left issue to survive him. He is "mentioned" in the will, and therefore becomes a legatee. The act of May 8, 1844 (P. L. 564, 2 *Purd.* [12th Ed.] 2103), prevents any lapse of the bequest by reason of the prior death of the legatee who leaves issue surviving him. The estate was therefore given to all the brothers and sisters "mentioned." The three children of William Bentz, not named in the will, are his "surviving issue," and there can be no discrimination against them in favor of the other five children. In the language of the act of 1844 the legacy given to William Bentz is "good and available in favor of such surviving issue, with like effect as if such devisee or legatee had survived the testator."

Aside from Mrs. Strohm, the brothers and sisters named in the will are Elizabeth Bentz, Catherine Bentz, Mrs. Annie M. Parsons, John Bentz, James Bentz, and William Bentz. These persons or their representatives will, therefore, take the estate for distribution; each of the primary legatees or his representatives being entitled to the undivided one-sixth thereof. This was the distribution made by the learned judge of the court below, whose opinion amply vindicates his conclusion, and therefore the decree is affirmed.

(221 Pa. 399)

#### IN re BARNES' ESTATE.

(Supreme Court of Pennsylvania. May 18, 1908.)

#### 1. APPEAL AND ERROR—REVIEW—FINDINGS.

Under Act June 16, 1836 (P. L. 1835-36, p. 682), requiring the Supreme Court on appeal from the orphans' court to hear, try, and determine the merits and decree according to the justice and equity thereof, the Supreme Court will not disturb a finding of fact by an auditing judge confirmed by the court, unless there is no evidence to support it, or it is so clearly erroneous that it would be an injustice to uphold it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4015-4018.]

#### 2. EXECUTORS AND ADMINISTRATORS — ADVANCES BY EXECUTORS—BONDS—PAROL EVIDENCE.

Where an executor took successive bonds from the distributees to secure himself for advances made by him to protect the estate, and at the audit presented all the bonds as existing liabilities against them, evidence that the executor in taking the last bond which was much smaller than the others had done so on the representation that the sum represented by the bond was all that was due him and that he would destroy the others was admissible, and not objectionable as an attempt to set aside a written instrument for fraud, accident, or mistake.

#### Appeal from Orphans' Court, Philadelphia County.

Judicial settlement of the estate of Charles Barnes, deceased. From a decree of the Orphans' Court dismissing exceptions to the adjudication. Charles Henry Barnes, as administrator, appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

E. B. Seymour, Jr., for appellant. James H. Wolfe and Samuel A. Whitaker, for appellees.

BROWN, J. This is an appeal from a finding of fact by the orphans' court. In asking us to reverse the decree that followed it counsel for appellant cite the act of June 16, 1836 (P. L. 1835-36, p. 633), which makes it our duty, on an appeal from the orphans' court, "to hear, try and determine the merits" of the case, and "decree according to the justice and equity thereof." We are not, however, in discharging this duty, to disturb a finding of fact by an auditing judge, confirmed by the court, unless there be no evidence to support it, or it is clearly so erroneous that to uphold it would be injustice. Thompson's Appeal, 103 Pa. 603; Lazarus' Estate, 142 Pa. 104, 21 Atl. 492. We might affirm the decree below without saying more, for it is based upon a fact found upon sufficient evidence. Charles Barnes died April 8, 1882, leaving to survive him a widow and five children, one of them a daughter by a former marriage. He gave her a legacy of \$150, and devised and bequeathed the remainder of his estate, real and personal, to his wife for life, directing that upon her death it should be sold by his executors and the proceeds divided equally among his four children by his second marriage—James, William, John, and Mary, wife of Henry Linaka. James and William were named as executors. The former having died in July, 1906, and the latter in September of the same year the Commonwealth Title Insurance & Trust Company was appointed administrator d. b. n. c. t. a., and the fund before the court for distribution consisted almost entirely of the proceeds of the sale of the testator's real estate, sold some time after the death of the widow, which occurred in November, 1906. Three claims were presented against the fund for

distribution by the administrator of William Barnes, two of which were disallowed. From their disallowance we have this appeal.

The contention of the appellant is that William Barnes became the acting executor of his father's will, and from time to time advanced from his own funds, for the benefit of the estate, moneys for the payment of an assessment on building association stock, taxes, water rents, repairs, etc., taking to secure repayment of what he had advanced obligations from the widow, his two brothers and sister, in all of which he joined. The first of these, a bond for \$150, dated May 22, 1893, was given to pay an assessment on building association stock. It was signed by the widow, James, William, John, and Mary Linaka. On May 22, 1894, July 1, 1895, and November 20, 1897, three additional obligations, amounting in the aggregate to \$375, were given to William by the same parties. On July 22, 1898, the four bonds so given to him were consolidated, and a new one given for \$643.63—the amount of principal and interest then due. Subsequently the same parties gave him three more bonds aggregating \$350. These three bonds and the one for \$643.63 were consolidated on March 23, 1903, and a new obligation for \$1,500 was given to William. This was secured by a mortgage on the interests of the parties in the real estate of Charles Barnes. In 1904 another bond for \$200 was given to William by the same parties. On October 6, 1893, Mary Linaka gave him her promissory note for \$300, payable one year after date, accompanied by an assignment of her interest in her father's estate as collateral security. According to the testimony of her son, she received no consideration for this obligation. He testified that it was given at his uncle's suggestion to prevent his mother's interest in her father's estate from being seized by creditors whose claims were then embarrassing her. On April 2, 1906, William took a bond from his mother, his brother John, and his sister Mary for \$462.65. This claim was allowed by the court below, and the other two, the mortgage for \$1,500 and Mary Linaka's note for \$300, were disallowed, because the court found as a fact that the obligation for \$462.65 had been given to William and accepted by him as representing all that was due him on the other obligations held by him against his mother, brothers and sister.

William Barnes, as the acting executor, received the rents from his father's real estate for a period of 24 years. He never formally accounted for these, but on April 2, 1906, when he took from his mother, his brother John, and his sister Mary their obligation for \$462.65, he evidently gave them credit for the rents received, less what he had paid to his mother. While it does not appear how the sum of \$462.65 was agreed upon and fixed by the parties as the amount due William from the estate of his father

for the advances made by him for the benefit of those interested in it, it does appear from sufficient evidence that the obligation was given to him upon his assurance that nothing more was due him, and that he would destroy all the other obligations held by him. John Linaka, a son of Mary Linaka, testified that, when his uncle William asked his mother to sign the bond for \$462.65, he said to her that that was all he had against the estate, and that he would destroy the other papers held by him. John Barnes, the brother of William, made a competent witness by being called by the appellant, testified in the same way, and Mary, also made a competent witness by the appellant, confirmed the statement of her son, saying that she told her brother she would not sign the bond for \$462.65 until she understood it, and that he said to her that that was every cent he had against the property. These three witnesses having been believed by the court, their testimony was sufficient for the finding.

This appeal seems to have been taken on the theory, encouraged by the dissenting opinion of a learned judge of the court below, that the appellees were attempting to impeach their obligations for \$1,500 and \$300, and had not done so by clear, precise and indubitable evidence. This is not the situation at all. On the contrary, the two obligors called by the appellant testified that they had signed the obligations to their brother William, but further stated that he had procured from them their obligation for \$462.65 upon the distinct representation that that sum was all that was due him from their father's estate, and that he would destroy all the other obligations that had been given to him. Counsel for appellant seem to entirely overlook the distinction between impeaching an obligation and showing the balance remaining due upon it as fixed and agreed upon by the parties to it. The court below recognized this distinction, and, through the learned judge speaking for it, said: "This is not an attempt to set aside written instruments on the ground of fraud, accident or mistake; on the contrary, the oral testimony tends to show that a new agreement was made between all the children, then living and the widow, and that the inducement for the signatures was the statement that all previous agreements were to be destroyed, and that the amount of the advances to be repaid was fully set forth in such agreement and covered all advances made by the obligee."

Appeal dismissed, and decree affirmed at appellant's costs.

(221 Pa. 374)

In re LINE'S ESTATE.

(Supreme Court of Pennsylvania. May 11, 1908.)

1. WILLS—CONSTRUCTION.

In construing a will, the testator's intention must be sought from the whole instrument;

and, having been ascertained, cannot be defeated by canons of interpretation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 955, 988.]

## 2. SAME—"HEIRS."

The word "heirs," while strictly defined to consist only of those of a decedent's kindred who on his death are entitled to inherit his real estate, is nevertheless often used by a testator to include those entitled to share both in his real and personal property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1100-1102.]

For other definitions, see Words and Phrases, vol. 4, pp. 8241-8264; vol. 8, pp. 7677-7678.]

## 3. SAME—"HEIRS."

Testator died possessed of both real and personal property. His will divided all the residue of his estate among his "heirs" according to the intestate laws of the state. He appointed his half-brother, who was designated as "my brother," as one of his executors. By a codicil he directed: "In addition to what I have given to my brother (naming the half-brother) as one of my heirs and distributees under the foregoing will, I give, devise and bequeath unto him" certain corporate stock. Testator left surviving the half-brother, and nephews and nieces, surviving children of a deceased brother and sister of the whole blood. *Held*, that the word "heirs" included those entitled to inherit personal, as well as real, property, and that testator's use of the word "brother" did not indicate an intention to treat the half-brother as a brother of the whole blood, and that the half-brother was therefore not entitled to share in testator's real estate, but only in the personalty; the intestate laws providing for such action under the circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1100-1102.]

## 4. SAME—CODICIL.

A specific change of a disposition of testator's property made by a codicil to the will impliedly negatives an intention to make any other change in the provisions of the will.

## 5. SAME—INTENTION—PAROL EVIDENCE.

Where a will is sufficiently definite to disclose testator's intention, parol evidence is incompetent to explain the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1016.]

Appeal from Orphans' Court, Cumberland County.

Judicial settlement of the estate of William R. Line, deceased. From a decree dismissing exceptions to the auditor's report, Lute A. Line appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

E. M. Biddle, Jr., for appellant. S. B. Sadler, for appellee.

MESTREZAT, J. William R. Line, the testator, died May 7, 1905, leaving to survive him Lute A. Line, a half-brother, a niece, the sole surviving child of a deceased brother, and two nephews and a niece, the children of a deceased sister. As shown by the report of the auditor, appointed to distribute the funds in the hands of the executor, the testator was at the time of his death the owner of personal property of about the value of \$31,000 and of real estate of the value of about \$23,000. The will, dated October 4, 1904, is quite brief. After the

payment of his debts and funeral expenses and a bequest of \$5,000 to his stepdaughter, the testator devises and bequeaths as follows: "All the rest and residue of my estate I direct shall be divided among my heirs under and according to the intestate laws of Pennsylvania." He then names his executors as follows: "I nominate and appoint my brother Lute A. Line and my friend John Hays Esq. to be my executors." Two weeks after he executed the will he added the following codicil: "In addition to what I have given to my brother Lute A. Line, as one of my heirs and distributees under the foregoing will, I give, devise and bequeath unto him my \$5,000 in the capital stock of the Carlisle Manufacturing Company." The executors filed an account, and the auditor appointed to distribute the funds in their hands, after the payment of the legacy to the stepdaughter and the \$5,000 legacy to Lute A. Line, awarded the proceeds of the real estate per capita to the testator's nephews and nieces, and the proceeds of the personal property equally among the nephews, nieces, and Lute A. Line, the half-brother of the testator. The court confirmed the distribution, and Lute A. Line has taken this appeal. He contends that, under the provisions of the will, he is entitled to a share of the proceeds of the realty as well as of the proceeds of the personalty. Under the intestate act of April 8, 1833 (P. L. 1832-33, p. 317, § 4, 2 Purd. Dig. [13th Ed.] 1998), in default of issue and subject to the estates and interests of the widow, husband, father, and mother, the real estate of an intestate who leaves neither brother nor sister of the whole blood, but nephews and nieces, being the children of a deceased brother or sister, descends to and vests in such nephews and nieces per capita. By the same section of the act the personal estate of such intestate is distributable among his brothers and sisters and their issue, as is provided for the descent and division of the real estate of the intestate, but without any distinction of blood. It will therefore be observed that under the intestate laws of the commonwealth Lute A. Line was entitled to share equally with the testator's nieces and nephews in the personal fund, but was not entitled to participate in the distribution of the proceeds of the real estate.

The appellant, by his counsel, contends that by the provisions of the testator's will the residuary estate was to be divided among his heirs, which was a class that was to take the whole residuum of the estate, and the reference to the intestate laws was merely to indicate how the division among the class was to be made. The learned counsel for the appellant concedes that the will proper gives Lute A. Line no share whatever in the decedent's estate, either real or personal, if evidence was competent to show that the appellant was a half-brother of the intestate. It is claimed, however, on behalf of the ap-

pellant that the codicil shows that he was to share in the proceeds of the realty; that the words "in addition" in the codicil show that Lute A. Line had been given something under the will, which was one-third of the entire residue of the testator's estate. It is further claimed that such intention on the part of the testator is shown by the fact that he speaks of Lute A. Line as "my brother" in appointing him as one of his executors. We think the conclusion of the learned auditor is correct. We agree with the counsel for the appellant that the intention of the testator must be sought from the whole instrument, and, having thus been ascertained, must be enforced. Canons of interpretation and precedents are simply the means by which the intention of the testator is to be ascertained when his words are uncertain and equivocal. They cannot, however, be permitted to defeat the intention of a testator which is expressed in clear and unequivocal language. In construing such a will, no aids to interpretation are needed and none should be employed. The will speaks for itself. By his will, William R. Line directed his estate to be divided "among my heirs under and according to the intestate laws of Pennsylvania." As to kindred of the whole and half blood, these laws vest real estate and personal property in different persons. Instead of naming the persons he denominated his "heirs," the testator simply used the shorter expression of directing the division of his estate to be made "under and according to the intestate laws" of the state. He did not use the word "heirs" in its legal or technical sense, but in the broader and more comprehensive sense of those who inherit personal property as well as real estate. The word "heirs" is often used in a double sense, meaning the heirs at law in relation to real estate and those persons who would be entitled under the statute of distributions in relation to personal estate. 15 Am. & Eng. Ency. of Law (2d Ed.) 328. The testator intended that his relatives should share his estate, and that the division should be made as though he had died intestate. He could not have used the word "heirs" in its technical sense, otherwise he would not have disposed of the greater part of his estate. The heirs of a decedent are those of his kindred who upon his decease take his real property. Dodge's Appeal, 106 Pa. 216, 220, 51 Am. Rep. 519. If, therefore, we limit the word "heirs" to its legal signification, the testator only disposed of his real property, which was much less than one-half of his entire estate. He died possessed of personal property of about the value of \$31,000, but of real property of only about \$23,000. It is clear, however, as declared in his will, that he intended to dispose of "all the rest and residue of my estate." We must therefore conclude that by the use of the word "heirs" the testator intended that it should apply not only to

those who took the real estate, but to those who should participate in the proceeds of the personal property; in other words, it meant heirs and distributees. As a distributee, the half-brother would share the testator's personalty with the nephews and nieces. The portion that each relative should receive was to be determined, as declared in the will, "under and according to the intestate laws of Pennsylvania." As noted above, the intestate act of 1833 divides the real estate of the testator among his nephews and nieces, and his personal estate among his nephews and nieces, and his brother of the half blood.

We do not agree with the appellant's counsel that the testator in describing Lute A. Line in the will as a "brother," instead of a "half-brother," disclosed an intention to treat the appellant as a brother of whole blood, and thereby give him the one-third of his entire estate. In the distribution of the estate by the auditor, it was necessary that the parties entitled to the fund should be identified and their relation to the testator should be made to appear. It therefore became necessary to show that Lute A. Line was one of the parties interested in the estate, who he was, and his relationship to the testator. The simple fact that the testator called the appellant a "brother," instead of a "half-brother," in naming him as one of his executors, cannot overcome the fact that he was in reality a half-brother, nor disclose an intention on the part of the testator to give him the share to which a brother of the full blood would be entitled. As observed by the vice chancellor in *Grieves v. Rawley*, 10 Hare, 63, 64, in general when one speaks of his brothers and sisters he does so without reference to the definition of the word by lexicographers, but as a class, standing in the same relationship to one or both of his parents as he himself stands.

Nor do we think that the codicil puts a different interpretation upon the will than the one we have given it. The purpose of a codicil is to make a disposition of the testator's estate other than that made in the will. If any specific change is made, it negatives by implication an intention to make any other in the provisions of the will. The use of the words "in addition" in the codicil clearly shows that the testator thought he had given his brother something in the original will. If, standing alone, the will itself did not show a devise or bequest to Lute A. Line, the codicil clearly shows that something was given him. It not only discloses that fact, but it defines the words "my heirs" used in the will. The codicil says: "In addition to what I have given to my brother Lute A. Line as one of my heirs and distributees under the foregoing will." "My heirs," as used in the will, therefore, are construed by the testator to mean "my heirs and distributees." Hence it is apparent that "heirs" in the will was used in the sense of "heirs and

distributees." Such interpretation of the word "heirs" renders the will effective in disposing of the entire estate. This concurs with the presumption of the law, and gives a harmonious reading to the will and the codicil.

The learned counsel for the appellant very properly concedes that parol evidence was not competent to explain the will or show the intention of the testator. The will is sufficiently definite, and speaks for itself. It may be, as claimed by the appellant's counsel, that the testator intended that his half-brother should receive the share of a brother of the whole blood, but he has not so clearly manifested such intention as to warrant the court in declaring it.

The assignments of error are overruled, and the decree of the court below is affirmed.

(321 Pa. 287)

**BRINDLEY v. WALKER et al.**

(Supreme Court of Pennsylvania. May 11, 1908.)

**1. CORPORATIONS—OFFICERS—REMOVAL.**

Officers in ordinary private corporations, below the grade of directors and other officers are elected by the corporation at large, hold their offices during the pleasure of the directors, and may be removed by them without assigned cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1250, 1263.]

**2. SAME—SECRETARY AND TREASURER.**

The secretary and treasurer of a business corporation organized under the general law (Act April 29, 1874 (P. L. 73)) are ministerial officers of the corporation, and are removable by the board of directors without assigned cause.

**3. SAME—STATUTES.**

Act May 14, 1891 (P. L. 61), amending General Corporation Act April 29, 1874 (P. L. 73), and declaring that the business of corporations chartered thereunder shall be conducted by a president, a board of directors or trustees, a secretary or clerk, a treasurer, and such other officers, agents, and factors as the corporation authorizes for that purpose, does not make the secretary and treasurer other than ministerial officers, nor protect them from removal by the directors.

Appeal from Court of Common Pleas, Erie County.

Petition for mandamus by Zachary T. Brindley against Edwin Walker and others. From a judgment overruling a demurrer to defendant's answer, plaintiff appeals. Affirmed.

The following facts appear from the opinion of the court below:

The Erie Specialty Company is a business corporation duly chartered in 1902 under the general act of April 29, 1874 (P. L. 73), and its supplements, and located at Erie, Pa. It has an authorized capital stock of \$100,000, divided into 1,000 shares of the par value of \$100 each. It has a paid-up capital of \$70,000, consisting of 700 shares of stock, of which the plaintiff, Zachary T. Brindley, owns 350 shares, and defendant Edwin Walker owns 349 shares, and defendant Clarence L. Walker owns 1 share. That said

corporation has always been, and still is, managed by a board of three directors, which directors are said stockholders, and have been elected annually at the stockholders' meeting held in the month of August of each year, and were again re-elected at such meeting held in August, 1907. And the said board of directors thereupon immediately, organized by the election of said Edwin Walker as president, and said Zachary T. Brindley as secretary and treasurer, and the said Clarence L. Walker was appointed superintendent for the ensuing year. That said Edwin Walker had held the said office of president and the said Zachary T. Brindley had held the said office of secretary and treasurer ever since the organization of said corporation. That about one month after said last annual election the said president of the board of directors requested the secretary to call a meeting of said board in a letter as follows, viz.: "Erie, Pa., Sept. 28, 1907. Z. T. Brindley, Secretary Erie Specialty Company, Erie, Pa. Dear Sir: I want you to call a meeting of the board of directors for Monday, at 8 p. m. I have a proposition I desire to present to the board, so please notify Clarence. I am going down to Westfield to see the Welch Grape Juice Company, and may go to Hamburg, so may not be back until Monday noon. Yours, etc., Edwin Walker, Pres." Pursuant to this the secretary called a meeting of the board for Monday, September 30, 1907, at which all the directors were present, and at which resolutions as follows were adopted by the votes of said directors, Edwin Walker and Clarence L. Walker: "Resolved, that the president of the Erie Specialty Company is hereby authorized and directed to employ counsel and defend the Erie Specialty Company in the suit brought by Z. T. Brindley v. Erie Specialty Company. Resolved, that Z. T. Brindley is hereby removed and dismissed from the office of secretary and treasurer of the Erie Specialty Company, to take effect immediately. Resolved, that Henry L. Morse is hereby elected secretary of the Erie Specialty Company, to take effect immediately. Resolved, that Clarence L. Walker is hereby elected treasurer of the Erie Specialty Company, and that his salary as treasurer and superintendent shall be two hundred (\$200) dollars per month from and after September 30, 1907." And that said director, Zachary T. Brindley, protested and voted against the adoption of each of said resolutions. That at such directors' meeting in August, 1907, the salary of Edwin Walker as president was fixed at \$300 a month, and that of Zachary T. Brindley as secretary and treasurer was fixed at \$250 a month, and that of Clarence L. Walker as superintendent at \$175 a month for the ensuing year. That at a subsequent meeting of said board the action of said board in increasing the salary of said Clarence L. Walker to \$200

a month was rescinded. That said plaintiff, by virtue of his said appointment at the August meeting of said board, continued to act as secretary and treasurer of said corporation until said meeting on September 30, 1907, but had not taken the secretary's oath as required by law, nor filed a new bond as required by the by-laws of said corporation, but did tender such a bond on October 28, 1907, before bringing this suit. That on said September 30, 1907, after the adoption of said resolutions, the said president of the board gave Mr. Brindley written notice of his removal, and directed him to surrender the property which he held as such secretary and treasurer, and to transact no further business as such; and since which time he has not been permitted to act as such officer. No charges were preferred against Mr. Brindley, and no reason given for his removal. He is still a director of said company, and brings this writ of mandamus to be restored to the said office of secretary and treasurer. There is nothing in the by-laws of said corporation fixing the length of the term of any of the officers of said company nor the manner of their removal.

The court entered judgment for defendants on the demurrer to answer.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Frank Gunnison, John S. Rilling, and Henry E. Fish, for appellant. T. A. Lamb and J. C. & H. M. Sturgeon, for appellees.

STEWART, J. By the action of the board of directors of the defendant corporation the appellant was removed, without cause being assigned, from the office of secretary and treasurer to which he had been elected by the board. He seeks by this proceeding to be reinstated, on the ground that in removing him the directors exceeded their power. The general rule with respect to officers in private corporations such as this is that all below the grade of directors, and such other officers as are elected by the corporation at large, hold their offices *durante bene placito*, and are removable by the directors without cause being assigned. The reason for the rule is as obvious as the distinction made. The supreme authority in every corporation resides in its membership. The expressed will of the majority at a regular shareholders' meeting governs in all matters within the limits of the charter. Therefore, when action has been taken by the corporation at such a meeting on any subject pertaining to the affairs of the association, it is beyond the power of any of the agents of the corporation to undo or change what has been done. The directors are the immediate representatives of the corporation charged with the management of its affairs, and are necessarily invested with large discretionary powers; but they can act only where the corporation has not. Ord-

inarily the selection of the secretary and treasurer is committed to the board of directors, as was the case here; but, when the corporation has itself elected these officers, the directors must accept them, and the officers so elected hold on the terms and conditions prescribed by the corporation, and none other. They derive their title to their respective offices from the same source as the directors do theirs, and they can be removed only by the power that appointed them. It is otherwise when the corporation has committed the election to the board of directors. In such case the board stands for the corporation, the officers selected are its appointees, and its power to remove is necessarily implied. "The directors and managing agents of a corporation have undoubted authority to revoke the powers of the inferior agents whom they have appointed. It would be practically impossible to carry on the business of a corporation without this power. It is therefore always implied. The power is a discretionary one, and the rightfulness of its exercise cannot be investigated by the courts. But the directors of a corporation have no implied authority to revoke the power of those agents who are appointed by a vote of the stockholders, or whose office is fixed and regulated by the charter." *Morawetz on Private Corporations*, § 541. "The ministerial officers who are not elected by the corporation at large, for stated terms, but who are appointed by the board of directors, and who, therefore, sustain toward the corporation the relation of an employé toward an employer, serving for a compensation, which in general the directors do not receive, have no franchise in their office, and hence are removable at the mere pleasure of the directors, without the assignment of any cause, without the giving of any notice, and without any trial or investigation into the grounds of the removal." *Thompson on the Law of Corporations*, § 805.

The secretary and treasurer in corporations such as this are purely ministerial officers. The effort here made to show that under our act of assembly they are something more is unavailing. The act of 1891, under which this corporation is said to have been chartered, provides that corporations chartered under it "shall be managed and conducted by a president, a board of directors or trustees, a secretary or clerk, a treasurer, and such other officers, agents and factors as the corporation authorizes for that purpose." The effect and purpose of this provision is to require of every corporation that it shall have the officers named, viz.: a president, directors, secretary, and treasurer, as a necessary part of the equipment of its organization. The act does not attempt to define the powers and duties of any of the officers named, but leaves these to be implied from the established custom and the nature and character of the places filled. The construction that would



make the act invest the secretary and treasurer with discretionary power—something which a ministerial officer has not—would extend that discretionary power to all the agents and factors which the act allows the corporation to employ. Manifestly nothing of this kind was intended. From what we have said it follows that in removing the appellant from the office of secretary and treasurer the board of directors was exercising a power which rightfully belonged to it. Whether it was wisely or considerably exercised is not for us to determine.

The assignments of error are overruled, and the judgment is affirmed.

(221 Pa. 255)

### DU BOIS v. WALNUT.

(Supreme Court of Pennsylvania. May 11, 1908.)

#### POWERS—EXECUTION—POWER OF REVOCATION AND DISPOSITION — MODE OF EXERCISE — WILLS.

Where certain real estate had been conveyed for the use of testatrix for life, with remainders over, by a deed providing that she at any time, by any writing or writings sealed and attested, etc., might revoke, annul, change, and alter all and every use or uses, estate, or estates previously and expressly limited and declared concerning the premises granted, etc., testatrix properly executed such power by a will reciting that as to all her estate, real and personal and "with intent to execute all powers vested" in her, she gave, devised, bequeathed, and appointed the property, as follows, etc.

Appeal from Court of Common Pleas, Philadelphia County.

Action by H. M. Du Bois, as executor of the will of Eliza L. B. Wagner, against Charles P. Walnut to determine title to certain real estate. From a judgment for plaintiff, defendant appeals. Affirmed.

The following is the opinion of Kinsey, J., in the court below:

"This is an amicable action in assumpsit by the plaintiff as executor of Mrs. Eliza L. Burt Wagner and defendant Charles P. Walnut, a proposed purchaser, to determine the marketable title to certain real estate situated at No. 702 Locust street, upon certain facts agreed upon as follows: It appears that said premises, by deed of Isaac Hazlehurst, dated June 6, 1847, were conveyed to one Schaffer in trust for life of Mrs. Mary L. Burt, and at her death in undivided equal shares to her two daughters, Clarissa Ashmead and Eliza L. Burt, for life, with cross-remainders, and, in case they should die without lawful issue, then to the right heirs of the said Mrs. Burt. Both daughters died without issue. Clarissa Ashmead died first in 1893, leaving her residuary estate to her sister, Eliza L. Burt Wagner, of whose estate the plaintiff is executor. By the deed creating the said trust it was further provided: 'Provided always nevertheless and it is hereby expressly agreed and declared by and between the said parties that notwithstanding

ing anything herein contained, it shall and may be lawful for the said Mrs. Burt at any time hereafter by any writing or writings under her hand and seal and attested by two or more credible witnesses to revoke, annul, make void, change and alter all and every use and uses, estate and estates hereinbefore expressly limited and declared of and concerning the premises hereby granted or any part thereof.' The said Mary L. Burt died February 7, 1867, leaving a will signed, sealed, and attested by two credible witnesses, and dated June 16, 1860, wherein she provided as follows: 'As to all my estate, real and personal and with intent to execute all powers vested in me, I do give, devise, bequeath and appoint as follows: One moiety of said estate real and personal to my daughter, Eliza L. Burt, her heirs and assigns.'

"The question to be decided is: Was this provision in the will of Mary L. Burt a valid exercise of the power of revocation as required by the language of the deed of trust of said Hazlehurst? In Pennsylvania, as to whether there has been the exercise of a revocation, the criterion is the intention of the donee of such power. This intention is specifically averred in the words of her will.

"The next question thereupon arises: Was this provision a sufficient exercise of the power of revocation granted in the original deeds? We are of opinion that such expression of intention under a will is such a writing as fulfills the requirement of the deed creating the power. It is contended by defendant that as testatrix owned absolutely certain properties and had powers of appointment as to two other properties, to wit, 138 South Eighth street and Morgan street, near Tenth street, she has not defined clearly to what property she refers. The language used is: 'All my estate real and personal.' And: 'All the powers vested in me.' It is certainly to be inferred that this language, which is comprehensive, simple, and intelligible, should not be deemed applicable to less than all her property and all her powers. And other view would be to force a construction other than implied by the ordinary meaning of the language used.

"It has also been argued that by the use of the word 'my' in her will, in connection with 'my estate,' she intended to restrict her will to her own property as distinct from property over which she had power of appointment. We do not feel such an inference would be justified, save by a violation of the customary understanding of language. Indeed, the facts show the fallacy of such contention.

"Therefore, in accordance with the terms of the case stated, the court directs that judgment be entered in favor of plaintiff and against the defendant in the sum of \$10,000, with costs of action."

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

T. Henry Walnut, for appellant. Henry M. Du Bois and Thomas A. Gummey, for appellee.

**PER CURIAM.** Judgment affirmed on the opinion of the court below.

(221 Pa. 418)

**FREDERICK v. MARGWARTH et al.**  
(Supreme Court of Pennsylvania. May 18, 1908.)

**1. ARBITRATION AND AWARD—RECONSIDERATION BY ARBITRATOR.**

Where an arbitrator through mistake failed to consider and decide a part of the dispute submitted to him, the award was invalid because incomplete, but the agreement was still in force, and it was competent for the arbitrator to finish his work by making a full and complete award.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arbitration and Award, § 855.]

**2. SAME — REVOCATION OF ARBITRATION AGREEMENT.**

Where an agreement to arbitrate was a part of the contract into which the parties had entered, it could be revoked only by mutual consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arbitration and Award, § 64.]

Appeal from Court of Common Pleas, Luzerne County.

Assumpsit on an award of arbitrators by S. Y. Frederick against William H. and Frank J. Margwarth, trading as Margwarth Bros. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

Richard B. Sheridan, Samuel Gustine Thompson, and John T. Lenahan, for appellants. John H. Bigelow, C. W. Kline, and James L. Lenahan, for appellee.

**FELL, J.** This action was on the award of an arbitrator named in a building contract, and empowered to settle all disputes that might arise between the parties in relation to the contract or the building to be erected, to fix the allowance to be paid for improper materials or work, or for delay in completing the building, and to "decide any and every dispute" that might arise. A dispute arose, and the arbitrator, after hearing the parties, made an award in the plaintiff's favor on which suit was brought. At the trial of that action it was claimed by the defendants that the award was invalid because not coextensive with the submission, and it appeared from the testimony of the arbitrator that he had failed to pass upon a number of disputed matters that had been submitted to him. The court directed a verdict for the defendants for the reason set out on the record, that the award was incomplete. The arbitrator subsequently gave the parties written notice of the time and place of a meeting when he would hear them as to all matters in dispute

arising under the contract. At this meeting the plaintiff presented his claims. The defendants refused to present any testimony, denied the authority of the arbitrator to act, and served on him a written notice of the revocation of his appointment. The arbitrator passed upon the disputed matters not before considered by him, and made the award on which this action is based.

The main contention of the appellant is that the arbitrator's authority ended with the making of the first award. The rule undoubtedly is that, when an arbitrator has made and delivered his award, the special power conferred upon him ends. But an award must be final, complete, and coextensive with the terms of the submission. The arbitrator, through mistake, failed to consider and decide a part of the dispute submitted to him, and the award was invalid because incomplete. But the agreement was still in force, and it was competent for the arbitrator to finish his work by making a full and complete award. *Hamilton v. Hart*, 125 Pa. 142, 17 Atl. 226, 478. The agreement to refer was a part of the contract into which the parties entered, and the defendants could not withdraw from it. *Kennedy v. Poor*, 151 Pa. 472, 25 Atl. 119; *Gowen v. Pierson*, 166 Pa. 258, 31 Atl. 83; *McCune v. Lytle*, 197 Pa. 404, 47 Atl. 190. In the case last cited it was said by our Brother Brown: "If the agreement was a mere naked submission, either party could have revoked it before the award; but, if it had become a contract between them, it bound each as such, and could then be revoked only by mutual consent."

The judgment is affirmed.

(221 Pa. 387)

**DELAWARE, L. & W. R. CO. v. MONROE COUNTY WATER POWER & SUPPLY CO.**

(Supreme Court of Pennsylvania. May 18, 1908.)

**CONTRACTS—PERFORMANCE—DEVIATION FROM SPECIFICATIONS.**

Defendant power company being about to dam a stream, the effect of which was thought to endanger the embankment of plaintiff railroad company, defendant, to avoid a lawsuit, contracted with plaintiff to build a retaining wall, and fill in back of the wall as a protection to the railroad embankment, in accordance with certain plans and specifications required by the railroad. Defendant built the wall, and then entered into a new contract with plaintiff, by which plaintiff agreed to make the fill in accordance with the specifications contained in the original agreement for a specified price per cubic yard, to be paid by defendant, not to exceed a specified number of cubic yards. The railroad made the fill, using more than the maximum number of cubic yards, but did not tamp it, or place it as high up against the retaining wall as the specifications required. Held, that the railroad company, having accepted the wall and fill as satisfactory, notwithstanding such departures from the specifications, was entitled to recover from defendant the cost of the fill up to the maximum number of cubic yards specified in the supplemental agreement.

Brown, Mestrezat, and Potter, JJ., dissenting.

Appeal from Court of Common Pleas, Monroe County.

Action by the Delaware, Lackawanna & Western Railroad Company against the Monroe County Water Power & Supply Company and others. From a judgment for defendants, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

A. Mitchell Palmer, for appellant. C. C. Shull, for appellee.

ELKIN, J. The appellee, an incorporated power company, was about to build a dam across a stream which ran through lands owned by it upon which a power plant was to be constructed. The stream at this point runs through a deep gorge, and alongside of it is the right of way of appellant railroad company. It was apparent to all interested parties that the construction of the dam would necessarily cause the water to back flow upon the right of way of the railroad company which skirted the base of the mountain at this point, and do injury to its embankment, which extended down almost to the water line. In order to protect its property from threatened injury, the railroad company was about to institute proceedings to restrain the power company from obstructing the stream in such manner as to do injury to its right of way by causing the back flow of water. At this juncture the two companies got together amicably, and entered into an agreement whereby the controversy between them was settled without resort to a restraining order. Under the terms of this agreement the power company was required to build a solid concrete retaining wall alongside of and between the creek and the right of way of the railroad company, and to fill in with earth backing the space between the wall and the embankment, in accordance with the specifications and requirements of the railroad company. The power company complied with its agreement to build the retaining wall; but, finding it inconvenient, and perhaps expensive, not having easy access to the place where the fill was to be made, or to materials with which to make it, concluded to make an arrangement with the railroad company to furnish the materials and do the work necessary to make the fill as required by the railroad company. This agreement is dated October 31, 1905, and refers to the former agreement, whereby the power company had undertaken to construct the retaining wall and make the earth fill, and in express terms covenanted to pay the railroad company the sum of 40 cents per cubic yard for furnishing the materials and doing the work necessary to make the fill and complete the undertaking of the power company. The engineer of the railroad company had estimated that 8,930 cubic yards would make the fill, and the contract limited the liability of

the power company to this amount. The railroad company, as shown by the testimony, completed the fill to its own satisfaction, caused 10,780 cubic yards of earth to be put in the fill, and then demanded payment from the power company, claiming \$3,572, the maximum liability under the contract. The power company refused payment, and this suit was brought to enforce it.

It was successfully contended in the court below that there could be no recovery of any amount whatever on the contract, because the railroad company had not strictly complied with the original specifications and requirements provided therein for making the fill. The learned court below, at the conclusion of the plaintiff's testimony, directed the jury to return a verdict for defendant on the ground that there can be no recovery for part performance of an entire contract, or where there has been failure to complete according to the terms thereof. It was held that inasmuch as the testimony showed that the fill had not been tamped in, and had not been placed as high up on the retaining wall as the specifications required, there was not a substantial compliance with the provisions of the contract, and the right of recovery was thus defeated. We agree with the contention of the learned counsel for appellant that this position fails to take into consideration the true relation of the parties to this contract and the rights and duties of each thereunder. This position would seem to assume that the power company is the owner, and the railroad company the contractor, when, in the legal sense, under the facts of this case, the railroad company is the owner and the power company the contractor. It is true the railroad company did perform the work, but it did so in the capacity of a subcontractor of the power company, which in the first instance undertook to do the work and subsequently arranged with the railroad company to do it, and agreed to pay a certain amount when completed. It may be conceded that where an owner enters into a contract with a contractor for the construction of a building, or other improvement, to be erected according to plans and specifications agreed upon, which construction is under the supervision of an architect, who has authority to pass upon the kind and quality of materials used, and the character of work done, and who is authorized to determine disputes between the owner and contractor, substantial compliance with the plans and specifications must be shown, and, when required, a certificate from the architect showing completion must be produced before there can be a recovery.

But this rule can have no application to the present case because the owner here, the railroad company, is not raising any question about the character of work done, or the quality of materials used, or that there is any dispute concerning the work between the parties, and concedes that there has been sub-

stantial compliance with the requirements of the contract. The railroad company concedes that the work was done to its entire satisfaction under the direction of an inspector, its own employé, authorized by the terms of the contract to pass upon and approve the work. Under these circumstances, it is not within the legal rights of the power company to say the railroad company demanded the work to be done in a certain way for its protection. "Our company agreed to do it in that way, but, it not being convenient for our company to do the work, we agreed to pay your company for doing it according to its own specifications and requirements, and now that your company has done the work to its own satisfaction our company will not pay for doing it, as it agreed to do, because your company made some changes in the method of doing the work required in the original specifications." It cannot be doubted, if the power company had performed the work itself, instead of employing the railroad company to do it, and while doing the work the railroad company had suggested the changes made, and the power company, acting on these suggestions, had done the work in precisely the same manner as the railroad company did it, that there would have been substantial performance by the power company, and it would be relieved from further liability thereunder. When the work was done to the satisfaction of the railroad company, the party at whose instance and for whose protection it was done, and accepted by it in full compliance with the contractual obligation of the power company, there was substantial performance of the contract and the right to recover attached. This would be true between the owner and contractor even in a building contract, as, for instance, suppose the owner had the right under the contract to insist upon the contractor completing the building according to plans and specifications, and in point of fact it was not so completed, but, being satisfied with the building as completed, the owner accepted it as a substantial performance of the contract, surely, in such a case, it could not be successfully contended that there could be no recovery on the ground of failure to complete according to plans and specifications. It does not appear in the pleadings, or in the evidence produced at the trial, or in the argument of counsel here, that the retaining wall and the earth fill were constructed for any purpose connected with the business for which the power company was incorporated; but the whole record shows and the parties themselves concede that this construction was intended as a protection to the embankment and right of way of the railroad company. The earth fill, the subject-matter of this controversy, was not even located on the property of the power company. From the beginning of the negotiations between the parties, every step taken indicates the sole purpose of the con-

tracting parties to be the protection of the embankment and right of way of the railroad company. Protection from the back flow of water is what the railroad company demanded and what the power company agreed to give. When, therefore, the railroad company which demanded this protection to its property and specified the kind of construction that would satisfy its demand accepted the wall and fill as complete performance of the undertaking of the power company, how can the power company either in equity or in law deny its responsibility to pay what it agreed to pay by alleging that the work was not done according to the specifications and requirements of the railroad company?

Again, the power company is not injured by the changes made by the railroad company in the method of making the fill. No additional financial burden is imposed at present, and there can be no increased liability in the future. If at any time the construction should prove to be inadequate for the protection intended to be secured, and the embankment should give way at this point, and the railroad company should attempt to recover damages from the power company, or should undertake to compel additional protection, it would be a complete answer for the power company to say that the railroad company had taken the responsibility of changing the requirements of the construction intended for its protection, and had accepted the wall and fill as complete performance of the undertaking of the power company, and, if this protection is inadequate, the fault is that of the railroad company, and not of the power company, and the railroad company is precluded by its own acts from claiming damages or demanding additional protection.

Judgment reversed, and a venire facias de novo awarded.

BROWN, J. (dissenting). It seems to me to be impossible to reach the conclusion that the court below erred in this case, unless such conclusion is the result of a misapprehension of the undisputed facts. I shall state them as they appear in the documentary evidence and from the brief testimony of the only witness examined by the plaintiff.

It was discovered that the construction of a dam by the appellee would back the waters of a stream over on the property of the appellant. Instead of a resort to the courts to prevent this trespass, the appellant and appellee agreed in writing that the latter should build a retaining wall along the creek between it and the former's right of way. It was agreed, not only that this wall should be built, but that the appellee would place against it as a support a bank of earth to "be deposited in layers and well tamped," and to extend, according to the testimony, to within five feet from the top of the wall. This tamped, supporting earth was not to

extend to the embankment of the railroad company, but there was to be a space between them at the foot of the support. That there may be no mistake as to this feature of the case, I quote from the appellant's paper book the words of its counsel: "A blueprint accompanying the specifications showed the proposed fill against the wall, and thence running down to a point near the foot of the railroad company's embankment." An inspector, to be appointed by the railroad company and paid by the power company, was to see that the material and workmanship in the construction of the wall and the placing of the support against it should conform to the specifications; and such variations of sizes and dimensions from those shown on the drawings or plans as might be required by the emergencies of the construction and the development of the work were in all cases to be determined by said inspector. The solid concrete retaining wall, a little more than 2,000 feet in length, was built by the appellee, and of it the appellant makes no complaint. The appellee, instead of putting the support against the wall, made an agreement on October 31, 1905, with the railroad company that it should do that work. The agreement provided, not merely that the work should be done as required by the railroad company, but "in accordance with the specifications" contained in the original agreement. For this work, which the appellant agreed to do for the appellee, the latter agreed to pay, not a fixed sum, but at the rate of 40 cents per cubic yard, "for the number of yards actually contained within the said fill," provided that it should not be liable in any event to pay for more than 8,930 yards. The following is the stipulation as to the extent of its liability: "If, however, when the said materials shall be furnished and the work performed, the same shall measure less than the number of yards mentioned, the said power company shall only be liable for the number of yards actually contained within the said fill." The appellant claims that it is entitled to recover from the appellee \$3,572, the maximum sum named in the agreement for placing the support against the wall. Let us turn to the testimony showing exactly what the appellant did, for this ought to be done in determining what, if anything, it is entitled to under the agreement, upon which it bases its right to recover.

Martin Gill, the only witness who testified in the case, stated that 10,780 cubic yards of earth had been dumped from the cars on the tracks at the top of the embankment 40 feet from the wall down over the embankment with such force that some of it ran down against the wall. His testimony was as follows: "Q. It was not tamped? A. No, sir. Q. It was just one load dumped in on top of the other and shoveled down the bank? A. Shoveled down the bank, and plowed down with scrapers. Q. Are there a

number of places along that wall where it is 10 feet and over from the top of the wall to the dirt? A. I should judge there was." When asked who instructed him how to do the work, his answer was that his instructions came from A. J. Neafie, the principal assistant engineer of the company. What the instructions were and what the witness did appear from the following extract from his testimony: "Q. Did he instruct you how it was to be filled? A. Not any more than to strengthen our bank. Q. Were you instructed to take care of the wall in any way, fill it, to back up the wall? A. Only to let it run down against the wall as it would come out of the cars, and to make room with the men shoveling it in, until we got in our 8,930 yards. Q. You had no instructions to place an earth backing against this wall in accordance with certain requirements? A. No, sir. Q. It was simply to fill it in from the standpoint of protecting your bank, or protecting the railroad bank? A. Yes, sir." Here is affirmative proof by the plaintiff itself that it not only had not done that which it had agreed to do for the defendant, and for which the defendant had agreed to pay, but had done that which the defendant had never at any time been requested to do and had not agreed to do in the agreement of October 31, 1905. What the appellant required was that its land be protected from the backing of the waters of the stream upon it after the erection of the dam; and, if the wall with its earth support, which the appellee agreed to erect to keep the waters out, was sufficient for that purpose, the land could not be flooded. Strengthening the embankment, the top of which was 40 feet away from the wall, would not strengthen the wall or make it any more water-tight. Besides, the appellee never agreed, and it is not pretended that it did, to deposit earth in layers and tamp it "from the standpoint of protecting" appellant's embankment. The wall alone was to be strengthened by it. The purpose of the wall was to protect the embankment and the intervening space from the waters of the stream, and all the power company ever agreed to do, or was ever asked to do, was to protect the embankment by the construction of the wall with proper support. But now it is asked to pay for strengthening the embankment, which needs to be strengthened only to give better support for the tracks of the railroad company, and for this the railroad company alone should pay. How much of the earth dumped down over the embankment reached the wall does not appear. It may have been but a few hundred cubic yards, and it certainly could not have been the maximum of 8,930 yards, for Gill admits that at but a single point, a "key," as he terms it, did the earth extend up to within 5 feet of the top of the wall, and at a number of places it was 10 feet below.

One of the contentions of appellant's coun-

sel is that even if the embankment, and not the wall, was strengthened, the change was made by the authorized inspector of the company. This may be very briefly answered. An inspector appointed by the company could not change the contract nor the character of the work to be done under it. His power was limited to varying the sizes and dimensions from those shown on the drawings or plan, when such variations might "be required by the emergencies of the construction and the development of the work." He could not change a contract for the strengthening of the wall into one for strengthening an embankment which the appellee was under no duty to strengthen and which needed no strengthening as against the waters of the stream, if the wall was itself strong enough to keep them out. But, even if an inspector could have done what is alleged was done here, no inspector was ever appointed by the company, and counsel for appellant very well knew this when he asked Gill the following question: "Q. Who was the inspector, if you might call him such, in charge of the filling in, seeing that the fill was done according to the requirements of the railroad company? A. I was." A moment before this witness had testified that he was merely a division road master of the appellant company.

As the defendant was not called upon to make any defense, we are unable to say whether the assumption that the appellee has not been injured by the changes is correct or not; but, if an averment in the affidavit of defense, offered in evidence by the plaintiff, be true, it unquestionably has been injured. That averment is: "The defendants allege that the labor performed in filling in the said space by the said plaintiff was not done in accordance with the plans, specifications, and requirements, but was done in such careless and negligent manner that it turns the surface water, running from the embankment and roadbed of the said plaintiff, against the said retaining wall, and that the said water flowed along the said retaining wall into and under the power house of the said Monroe County Water Power & Supply Company, thereby putting the machinery and belts under water and washing out and carrying away an embankment and a fill placed back of the power house of said defendant and along said retaining wall, to the great damage of the said defendant." When the appellee agreed to pay for the support to be given to the wall, and which it would have given to the same if it had done the work itself, it might very naturally have had in mind protection to itself from what it complains of in its affidavit of defense; and, if the support which was to be given to the wall by the appellant under its contract had been given, the surface water running from the embankment and roadbed of the railroad company could not flow along the retaining

wall and into and under the power house of the appellee.

Again, it is urged, and with apparent sincerity, that, when the railroad company agreed to put the earth support against the wall, it became a subcontractor for the appellee, and as it, in its dual capacity as owner of the property to be protected, is satisfied with the work which it itself did in its other capacity as subcontractor, it is none of the appellee's business how the work was done, and it must, therefore, pay. This is a process of reasoning I am not able to follow. It logically means that, if but one cubic yard of earth reached the wall and the remaining 10,779 yards were put upon the embankment as a support to it, the appellee must pay, if the appellant is satisfied to do without the support against the wall, and yet that support is all the appellee agreed to pay for. I have always understood that, when a contractor for the erection of a building makes a contract with some one else for a portion of the work to be done, the subcontractor can recover from the contractor only for the work done under the subcontract, and only such sum as the contractor agrees to pay for work actually done; and, if the owner of the property upon which a building is erected happens to become a subcontractor under his contractor, his rights as against the contractor are no higher than those of a stranger. No change of plans made by the owner with a subcontractor can affect the right of the contractor to recover from the owner his full contract price to be paid for the erection of the building, unless the changes are made with his consent. The power company did not agree to pay the railroad company any sum, much less a fixed one, to be relieved from any duty. Its agreement was to pay the railroad company for performing a duty for it, not, however, to exceed a certain sum, and as much less as the quantity of earth actually contained in the fill might be less than the estimate made by the railroad company of the amount that would be required. The duty which the power company was to perform was not performed by the railroad company, though that company agreed to perform it for a consideration. That consideration was not to exceed \$3,572, and this maximum sum is now demanded of the appellee for being relieved from the duty. It never agreed to pay anything for such relief. Its agreement was to pay for something to be actually done. What the railroad company contracted it would do it has admittedly not done, but has done something which it was never the appellee's duty to do, which it had never contracted to do, and which it never authorized the railroad company to do for it. That company sues on a contract in writing, but cannot turn to a word in it that says the appellee must pay for what has been done. The learned trial judge, in his opinion overruling the motion for a new trial, unanswer-

ably said: "The material was dumped out of the cars of the plaintiff company right along by its track, and was dumped with such force that some of it ran down against the wall; but the filling was not piled against the wall to the height and depth as shown on the plans, admitted in evidence, and the filling was not deposited in layers and well tamped. While the agreement was that the filling should at all places be within 5 feet from the top of the wall, there were some places where it was 10 feet and over from the top of the wall to the dirt, and no place where the dirt was within 5 feet of the top of the wall. The dirt was merely dumped from the cars and shoveled down the bank and plowed down with scrapers. In short, the plaintiff company failed to do the work as provided for in the specifications and plans, nor was there even any substantial compliance with the same."

In remanding the case for another trial, the majority of my Brethren do not seem to decide what the appellant may be permitted to recover. The agreement says the appellee "shall only be liable for the number of yards actually contained within the said fill." Is the appellant to recover more? What it did was not to support the wall with a fill, but "to strengthen" the embankment, is the testimony of Gill. If the wall was sufficient without the support, as appellant seems to have thought it was, to keep the waters from its land, the embankment needed no strengthening as against the waters, and therefore, if appellee is to pay, it must pay for work which the appellant would have been required to do, assuming that its bank needed strengthening, if the dam had not been erected. The situation being just what I have stated it to be, the judgment clearly ought to be affirmed.

MESTREZAT and POTTER, JJ., concur in this dissent.

(221 Pa. 448)

#### SPEER v. HUIDEKOPER.

(Supreme Court of Pennsylvania. May 18, 1908.)

#### APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT—FINDINGS OF REFEREE.

A referee's finding on a question of fact, based on sufficient evidence, and confirmed by the court of common pleas, will not be reversed in the absence of manifest error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4015-4018.]

Appeal from Court of Common Pleas, Crawford County.

Action by Harriet D. Speer, executrix, etc., of Samuel B. Dick, deceased, against Arthur C. Huidekoper. From an order dismissing exceptions to the referee's report, plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Ernest C. Irwin, George F. Davenport, and Watson & Freeman, for appellant. Samuel S. Mehard, John O. McClintock, John E. Reynolds, and Churchill B. Mehard, for appellee.

PER CURIAM. The appeal in this case was from an order confirming the report of a referee appointed to state an account between partners. Upon the argument of the appeal in this court, it appeared that there was a material matter as to which there was no distinct finding, and the case was recommended to the referee. On all other questions the opinion of the court was expressed in the order filed in which it was said: "In this case we have not discovered error in connection with any question of fact or of law that was raised and passed upon below. On the material question of fact, as to whether Dick advanced for Huidekoper in the nature of a loan 3,000 shares of the capital stock of the Pittsburg, Shenango & Lake Erie Railroad Company, in what is known as the Carnegie deal, there is no distinct finding, and the record is remitted with direction that the court recommit the case to the referee, that he may pass upon, subject to its review, this one question, on the evidence already taken before him." The referee, after a careful consideration of this question, reported that Dick had not advanced stock for Huidekoper, and his report was confirmed by the court of common pleas. The only open question in the case is one of fact as to the correctness of the referee's finding. We see nothing in the evidence that would warrant a reversal of the decree.

The decree is affirmed.

(221 Pa. 431)

#### MARSH v. PLATT et al.

(Supreme Court of Pennsylvania. May 18, 1908.)

#### WILLS—CONSTRUCTION—LIFE ESTATES—RULE IN SHELLEY'S CASE.

Testator directed that his executors should hold his real estate as follows: That his son should have the income therefrom for life, paying \$200 a year rent, to be paid by the executors as part of a \$400 annuity previously directed to be paid to the widow for life, and, after her death, the rent should cease, but the son should pay all taxes and assessments against the land, and, on his death, the land should vest in his heirs at law. Testator also declared that, if his executors at any time after the wife's death could get \$12,000 or more for the land and considered it advisable to sell the same, they might do so with the son's consent, the proceeds to be invested and held for the same use as the land. Held, that the executors were the holders of the title on a dry trust, and that the son took the fee under the rule in Shelley's Case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1372-1378.]

Appeal from Court of Common Pleas, Clearfield County.

Ejectment by Zack Marsh against John Platt and others. Tried by the court without

a jury as authorized by Act April 22, 1874 (P. L. 109). From a judgment for defendants, plaintiff appeals. Affirmed.

The plaintiff was a son of William W. Marsh, who was a son of William Marsh, who in turn was a son of Zacheus Marsh. Plaintiff claimed to recover an undivided two-fifths of the land in dispute as one of the sons of the second William Marsh. The defendant claimed under a deed from William Marsh the first.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and STEWART, JJ.

A. L. Cole, for appellant. Thos. H. Murray, Pentz & Calkins, Jas. P. O'Laughlin, and Hazard Alex Murray, for appellees.

· PER CURIAM. The testator devised: "Fourth. My executors will hold the real estate which I own in Clearfield County, Pa., as follows: My son William shall have the use and income therefrom during his life and shall pay Two Hundred dollars a year, rent therefor as long as my wife lives, which rent shall go through my executor to my said wife as part of the said Four Hundred dollars per year hereinbefore directed to be paid to her. After my wife's death he shall pay no more rent therefor, but shall pay all taxes and assessments against said land and upon his death said land shall descend to and the title thereto shall at once vest in his heirs at law. If my executors at any time after my wife's death can get Twelve Thousand dollars or more for said land and consider it advisable to sell said real estate they may do so provided my son William W. consents to, and the proceeds shall be carefully invested on bond and mortgage and held and used as directed concerning the land itself."

The gift prima facie was of a life estate to the son, with provision that upon his death the land "shall descend to, and the title thereto shall at once vest in his heirs at law." This is within the express language of the rule in Shelley's Case, and the only question that can arise is whether the conditions and the trust take the devise out of the rule. The son took under the will all the substantial rights and powers of ownership during his life. He was to have the use and income of the land, was to pay all taxes and assessments upon it, had a veto on the sale of it during his life, and, if sold with his consent, the proceeds were to be held for him under the same terms as the land itself. The only active duty of the trustees in connection with the land was to receive from him the annual rent of \$200 charged on the land for the benefit of testator's widow. But this duty was imposed in regard to the widow to whom. In paragraph 3, testator directed \$400 a year to be paid, of which \$200 was to come from this life tenant, "to go through my executor to my said wife." It had nothing to do with the life estate, except to collect the widow's

rent charged upon it. It is manifest that the executor was a mere holder of the title on a dry trust. Carson v. Fuhs, 131 Pa. 256, 18 Atl. 1017.

Judgment affirmed.

(221 Pa. 446)

STAYMAN et al. v. PAXSON.

(Supreme Court of Pennsylvania. May 18, 1908.)

1. WILLS—CONSTRUCTION—ESTATES CREATED—FREE SIMPLE.

Under a codicil devising to testator's grandchildren a farm, from which they were to receive the income after the death of testator's wife, their grandmother, and at their death the farm to descend to their issue, an estate tail is created, which, by virtue of the act of April 27, 1855 (P. L. 368), is enlarged to a fee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1368–1369.]

2. WILLS—CONSTRUCTION—"ISSUE."

The word "issue" in a will means prima facie "heirs of the body."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1087–1089.]

For other definitions, see Words and Phrases, vol. 4, pp. 3782–3792; vol. 8, p. 7693.]

Appeal from Court of Common Pleas, Cumberland County.

Case stated to determine the marketable title to real estate by Gordon S. Stayman and others against Thomas Paxson. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

William A. Kramer, for appellant. S. B. Sadler, for appellees.

PER CURIAM. The plaintiffs claimed ownership in fee of the land in question under the following codicil to the will of their grandfather: "I hereby change the monied bequest of \$20,000 dollars named in my will of Nov. 29th, 1881, and in Stead thereof, give those three children, two sons and one daughter, children of my deceased daughter A. E. Stayman, The Fallor Farm at a valuation of \$12,500, from which they will receive the income after the death of my wife their Grandmother, and at their death it will descend to their issue."

The statement that they will receive the income after the death of their grandmother had reference to a charge on the land of its full rental value in her favor for life, and it may be doubted whether there was an intention to give less than an absolute estate. If the intention was to give a life estate only, the rule in Shelley's Case applies to the devise. The word "issue" in a will means prima facie, "heirs of the body," and an estate tail was created into which the life estate merged, and which, by virtue of the act of 1855 (Act April 27, 1855 [P. L. 368]), was enlarged to a fee. Carroll v. Burns, 103 Pa. 386.

The judgment is affirmed.



(221 Pa. 423)

**LYNCH v. LYNCH.**

(Supreme Court of Pennsylvania. May 18, 1908.)

**EJECTMENT—SUCCESSIVE ACTIONS.**

Act May 8, 1901, § 1 (P. L. 142), provides that where one verdict shall, in ejectment between the same parties, be given for plaintiff or defendant and judgment be entered thereon, no new ejectment shall be brought, but such verdict and judgment shall be final and conclusive and bar the right. Section 3, as amended by Act April 23, 1903 (P. L. 293), provides that nothing in the act shall be construed to apply to lands as to which any writ of ejectment was pending and final judgment not entered at the time of the approval of the act. *Held*, that Act May 8, 1901, § 1 (P. L. 142), did not apply to an action of ejectment begun on February 19, 1889, and in which final judgment was entered September 18, 1903.

Appeal from Court of Common Pleas, Luzerne County.

Ejectment by Edward A. Lynch against Sarah A. Lynch. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the opinion of Halsey, J., of the court below:

"This is an action of ejectment brought by the plaintiff to recover an undivided one-fourth interest in a piece of land in the township of Pittston, this county, containing 527 acres and 122 perches, being parts of three respective tracts of land in the warrantee names of Jesse Fell, Jonathan Hancock, and David Young. The action has been pending in this court since February 19, 1889. It has been on appeal in the Supreme Court. It has been heard upon motion for a new trial in this court, and it is now here in this action brought by the plaintiff against the defendant upon a writ that issued on September 15, 1903.

"In trying the action we were governed by the lines marked by the several respective courts in the prior trials of the same issue in such courts. The reasons alleged for a new trial are almost entirely those that have been contended for by the defendant in the trials of the action heretofore. The one exception is as to whether or not the plaintiff was not concluded by a former verdict in this case on December 18, 1902, upon which judgment was entered on September 18, 1903. Under an act of assembly approved on May 8, 1901 (P. L. 142), the first section of this act provides that, where one verdict shall in any writ of ejectment between the same parties be given for plaintiff or defendant and judgment entered thereon, no new ejectment shall be brought, but such verdict and judgment thereon shall be final and conclusive and bar the right. Section 3 of the same act provides: 'Nothing in this act shall be construed so as to apply to any writ or writs of ejectment now pending.' In explanation of the proviso of this act, the Legislature on April 23, 1903 (P. L. 293), amended section 3 of the act of 1901 by enacting that nothing in this act shall be construed to apply to lands or tenements as to which any writ or writs of ejectment were

pending and final judgment not entered at the time of the approval of the act thereby amended. As we have seen, the act was approved on May 8, 1901.

"We cannot conclude that the acts of May 8, 1901, and April 23, 1903, apply to these actions. It is our conclusion that they are excepted by the said two respective acts out of the applicability of the first section of the act of May 8, 1901. The original act was approved on May 8, 1901. The action in No. 416, February Term, 1898, was begun on February 3, 1898, and no final judgment was entered in that case until September 18, 1903. The act of April 23, 1903, specifically excludes the operation of the act of May 8, 1901, as to all cases in which any writ or writs of ejectment were pending and final judgment not entered at the time of the approval of the act hereby amended. The act was approved on May 8, 1901, the amended act approved April 23, 1903, and final judgment was not entered until September 18, 1903. By exact application of the two respective acts to the facts of this case, the act of May 8, 1901, does not apply. It is our judgment that it does not apply under the ruling of the Supreme Court in the case of Neeld, Appellant, v. Cunningham, 216 Pa. 523, 65 Atl. 1095.

"Rule discharged."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

A. Ricketts, for appellant. James L. Lenahan and John T. Lenahan, for appellee.

PER CURIAM. Judgment affirmed on the opinion of the court below refusing a new trial.

(221 Pa. 425)

**FEUERSTEIN v. BERTELS (FEUERSTEIN et al., Interveners).**

(Supreme Court of Pennsylvania. May 18, 1908.)

**WILLS—NATURE OF ESTATES CREATED—FEE SIMPLE.**

Under a will giving to testator's wife the residue of his real estate, together with title in lands which he might thereafter acquire, the wife took an estate in fee, notwithstanding elsewhere in the will an absolute bequest to the wife of household goods, with power "to dispose of them if she wishes to," and a gift of the income of stocks and bonds declared to be in lieu of her dower.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1319-1326.]

Appeal from Court of Common Pleas, Luzerne County.

Case stated to determine the marketable title to real estate by A. Maria Feuerstein against Anna M. Bertels, in which Charles F. Feuerstein and others intervened. Judgment for plaintiff, and defendant and interveners appeal. Affirmed.

From the record it appeared that the plaintiff claimed title under her husband's will, which was as follows: "Known all Men by

these Presents that I Charles F. Feuerstein of Wilkes-Barre, Luzern Co. Pa. Being of Sound disposing Mind and Memory do Make and Publish this my last will and Testament. I give and bequeath \* \* \* [small legacies]. I give and bequeath to my Wife A. Maria all my household goods. Excepting those at Lake Cary Wyoming Co. Pa. and all the rest of my Personal property. Excepting the Boats at Lake Cary Wyoming Co Pa. After payments of my Debts and legacies. I give and bequeath to my Wife A. Maria. all the rest and residue of Real Estate together with any and all Estate right of Interest in Lands which I may acquire after the date of this Will. I give and Bequeath to my wife A. Maria. all the Income from Stocks and Bonds which I may have. (This given in lieu of her Dower) to have and hold During her life. But on her decease The remainder there of I give and Devise, to Maud G. Shotwell to her own use and separate use free from the Interference or controle of her Husban. Three Eight Intrst. To Charles F. Feuerstein three eight Intrst. to Mary L. Miller. and Justine N. Miller. and Pauline M. Miller. of N. Y. and Justine Miller of N. Y. each one Sixteenth interest. My wife to Dispose if she wishes to of all household goods Excepting those at Lake Cary."

The following is the opinion of Fuller, J., in the court below:

"The sole question here presented is whether the plaintiff took an estate in fee or only for life under the will of her husband, Charles F. Feuerstein, who died without issue. If she took in fee, she is entitled to judgment; otherwise not. In disposing of real estate the will says: 'I give and bequeath to my wife, A. Maria, all the rest and residue of real estate, together with any and all estate, right or title in lands which I may acquire after the date of this will.' This provision is contained in a sentence distinct and complete by itself, and, of course, passed the whole estate of the testator, unless it appears elsewhere in the will that he intended to devise a less estate. Elsewhere in the will are provisions which leave upon the mind of the reader an impression that the testator perhaps did intend to devise a less estate. For example, in the sentence succeeding the one above quoted, it says: 'I give and bequeath to my wife, A. Maria, all the income from stocks and bonds which I may have (this given in lieu of her Dower), to have and to hold during her life.' But we discover no good reason for extending the effect of the parenthetical and subsequent words in this provision beyond their immediate context and antecedent.

"Again, in the beginning of the will is an absolute bequest to the wife of household goods, while at the end is a provision authorizing her 'to dispose of them as she wishes to,' which was, of course, superfluous, if an absolute bequest was intended. But that provision would not limit even the bequest of

household goods, much less the devise of land. If the testator really intended, as we may indeed conjecture, to devise less than a fee in his land, he has not expressed the intention in a manner to overcome well-established canons of construction which prefer an absolute to a defeasible estate a fee simple to a life estate, a vested to a contingent interest, the primary to the secondary intent, the first taker to the second taker, and a wife to collateral relatives, in determining the object and extent of a testator's bounty. In its use of punctuation and of legal terms the will affords no clue by which we can safely depart from the strict and literal interpretation of the provision relating to real estate, as passing the entire estate of the testator and vesting a fee in his wife.

"Therefore, now, January 6, 1908, judgment is entered in accordance with the terms of the case stated in favor of the plaintiff and against the defendant in the sum of \$1,525."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

Anthony L. Williams, for appellants. W. Alfred Valentine and G. Fred Lazarus, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the court below.

(221 Pa. 433)

## HUBBARD v. CRAWFORD COUNTY.

(Supreme Court of Pennsylvania. May 18, 1908.)

COUNTIES — LIABILITY—INJURIES — NEGLIGENCE OF COMMISSIONERS — GOVERNMENTAL DUTIES.

A county is not liable for injuries to a person while using a footwalk going to and from a polling place by the negligence of the county commissioners in failing to provide a guard rail or to light it at night, under the rule that counties acting as public agencies in the performance of governmental functions are not responsible for the neglect of their officers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 210.]

Appeal from Court of Common Pleas, Crawford county.

Action by E. S. Hubbard against Crawford county. From a judgment for defendant non obstante verdicto, plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

George F. Davenport and Otto Kohler, for appellant. B. B. Pickett, Jr., and L. D. Edson, for appellee.

PER CURIAM. The assignment of error in this appeal relates to the liability of a county for the failure of the commissioners to make safe a footwalk used by persons going to and from a polling place by providing a guard rail or by lighting it at night. Our cases have gone farther than those in most

jurisdictions in holding counties liable for negligence in the performance of statutory duties, where no right of action is given and the line of distinction between liability and nonliability rests on precedent rather than principle. *Ford v. School District*, 121 Pa. 543, 15 Atl. 812, 1 L. R. A. 607; *Briegel v. Philadelphia*, 135 Pa. 451, 19 Atl. 1038, 20 Am. St. Rep. 885. But this case clearly comes within the class where counties acting as public agencies in the performance of governmental functions have been held not to be liable for neglect of their officers. It does not differ in principle from *Bucher v. Northumberland County*, 209 Pa. 618, 59 Atl. 69, in which the subject is fully discussed in the opinion by our Brother POTTER.

The judgment is affirmed.

(221 Pa. 435)

### DILLEN v. DILLEN.

(Supreme Court of Pennsylvania. May 18, 1908.)

#### 1. JUDGMENT — VACATION — GROUNDS — DEFENSE.

No court or judge has jurisdiction to open a regular judgment without some evidence of a valid defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 717.]

#### 2. SAME—CONSIDERATION.

A judgment confessed by father to son, without consideration, is not void against the father's widow and heirs, in the absence of proof of an attempt to defraud the widow of her dower.

#### 3. SAME—JUDGMENT TO DEFRAUD CREDITORS.

A judgment confessed by father to son to defraud creditors is binding on the father and his estate and all persons claiming through him.

Appeal from Court of Common Pleas, Clearfield County.

Action by Gettie Dillen, as administratrix of David L. Dillen, deceased, against David. Dillen, administrator of Jesse E. Dillen, deceased. On rule to open the judgment. From an order making the rule absolute, plaintiff appeals. Reversed.

The following is part of the opinion of Smith, P. J., in the court below:

"The testimony of disinterested witnesses taken on behalf of the petitioners is to the effect that David L. Dillen, at different times up until a very short time prior to his death, stated, or in effect admitted, that the judgment did not represent any value, and had been given originally to protect his father. No testimony was taken on behalf of the plaintiff in the judgment, but in her behalf the legal principle is invoked that the judgment was either originally a gift from father to son or given with intent to hinder, delay, and defraud the creditors of Jesse E. Dillen, and that as he, Jesse E. Dillen, could not have made a defense in his lifetime against his own fraud, the widow and children should not be permitted so to do. David L. Dillen in 1884, at the time this judgment was given, was a young man of 24 or 25 years of

age, working at home on the farm for his father; and the testimony of disinterested witnesses is to the effect that he could not have had any such sum of money to loan his father or to anybody else. It seems to us, therefore, from a consideration of this testimony, that the petitioners have established an equity sufficient to appeal to the discretion of the court to open this judgment and give them their day in court. It is not apparent that these petitioners are guilty of any laches in proceeding to open the judgment, for the reason that David L. Dillen handled both sides of the case from the death of his father in 1898 until his own death in 1906, and that no knowledge of the existence of the judgment is necessarily brought home to any of the parties now petitioners. They learned of its existence when the widow and administratrix of David L. Dillen, after his death, proceeded by issuing on said judgment to sweep from them practically all of the real estate which they then supposed they owned. While it is true that if this judgment was given by Jesse E. Dillen to his son, David L. Dillen with intent on his part to hinder, delay, or defraud his creditors, he, Jesse E. Dillen, could not in his lifetime have had this judgment opened by alleging such fact, yet it is not clear to us that, even if such were the fact as between Jesse E. Dillen and his son, a defense could not now be made as against the son by the widow and children who were not parties to the fraud. It is not, however, necessary for us to pass upon this question now, because on the face of the papers and on the testimony produced the allegation is squarely made that the judgment, as originally given, was without consideration, and therefore void as to the petitioners, and we think that on this ground there can be no legal objection to opening the judgment and giving all the parties their day in court. If the judgment were originally given by Jesse E. Dillen to his son in order to defeat the inchoate right of dower in Sarah Dillen, she certainly ought to have the right to maintain her defense. Whatever the purpose for which the said judgment was originally given, we are of the opinion that justice cannot be worked out in this case except by opening the judgment so that all parties may have a hearing. We do not care to discuss the merits of the case any further, or to prejudge any matters which may be the subject of proof at the trial.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and STEWART, JJ.

S. V. Willson and Jeff Wingert, for appellant. David L. Krebs and A. M. Liveright, for appellee.

PER CURIAM. The question in this case is not one of discretion, but of jurisdiction. No court or judge has jurisdiction or authority to open a regular judgment without some

evidence of a valid defense. In this case there is none whatever. A father gave a judgment note to a son. It was entered up and twice revived by scire facias in the father's lifetime without any objection by him. Presumably, in the absence of evidence of a debt, it was a gift, but there was some testimony of loose declarations that it was "to protect the father's estate"; i. e., to defraud creditors. Under neither aspect was any consideration required. Counsel and even the court below seem to have entertained the extraordinary view that a judgment without consideration was void against the widow and heirs of the defendant in the judgment. There is no authority for any such notion. On the contrary, it has been long settled that, unless there is evidence of intent to defraud the widow of her dower, a judgment confessed to defraud creditors is valid and binding on the party confessing it and on all claiming through him. *Candor & Henderson's Appeal*, 27 Pa. 119; *Hummel's Estate*, 161 Pa. 215, 28 Atl. 1113; *Cosgrove v. Cummings*, 195 Pa. 497, 46 Atl. 69. In no aspect of the case was there any authority to open the judgment.

Order reversed, and rule directed to be discharged.

(221 Pa. 432)

CLAY v. WESTERN MARYLAND R. CO.  
(Supreme Court of Pennsylvania. May 18, 1908.)

1. APPEAL AND ERROR — PRELIMINARY EXAMINATION OF JURORS—GROUND FOR REVERSAL.

In an action against a railroad company for injuries to an employé of another railroad company, a refusal to permit an examination of jurors to determine whether any of them were employés of the company by which plaintiff was employed was not ground for reversal where there was nothing to show that such company was interested in or in any way connected with the litigation, or would be affected by any verdict that might be rendered.

2. JURY—PRELIMINARY EXAMINATION.

It is proper to permit a general inquiry as to the direct or contingent interest of jurors in the result of the litigation, or in the parties thereto, when any reasonable ground to believe that some of them may have a possible interest in the result or the parties appears.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 81, Jury, §§ 565, 566.]

3. TRIAL—INSTRUCTIONS—POINTS REQUESTED—READING TO JURY.

Act March 24, 1877 (P. L. 88), requiring the points requested to be read to the jury, does not require the court to read such points as are answered in writing by the court in the negative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 673.]

4. RAILROADS—ACCIDENTS TO TRAINS—INJURIES TO EMPLOYÉS—JOINT USE OF RAILROAD YARD.

Where defendant railroad company and the railroad company by which plaintiff was employed jointly used the tracks in a railroad yard at the place of a collision between a train of each company in which plaintiff was injured, plaintiff was entitled to recover against defendant company on proof that it caused the collision

by failing to comply with the rules and regulations adopted by the two companies for use in the yard in order to guard against collisions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 938.]

Appeal from Court of Common Pleas, Cumberland County.

Action by A. M. Clay against the Western Maryland Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Sadler, P. J., in the court below, charged in part as follows:

"The plaintiff in this case has brought his action to recover from the Western Maryland Railroad Company, the defendant, damages to compensate him for the injuries he received on February 21, 1906, from the alleged negligence of the employés of the said defendant.

"It appears: That the plaintiff was the baggage master on train No. 97, which daily makes two trips from Gettysburg to Harrisburg and return, over the lines now controlled and operated by the Philadelphia & Reading Railroad Company. That the scheduled time for the return of this train to Gettysburg from its second trip was at or about five minutes after 9 o'clock in the evening. That on February 21, 1906, it arrived there about 9:28 or 9:30, being almost a half hour late, and having unloaded its passengers and baggage, the train was pushed back on what is called a "wye," in order that the engine might be turned, and made ready for the first trip to Harrisburg on the following morning. That the train consisted of a combination car in which the baggage was carried, of a passenger coach, and of a mail car. That as the train approached the station the brakeman on the train dropped off, in order that he might open the switch to permit the train to enter the wye. That Garvin, the conductor of the train, and the plaintiff, the baggage agent, took their positions on the rear platform, the latter intending, as it seems was his duty, to be there in order to drop off and open the second switch on the wye. That the engineer backed the train in the direction of and upon this wye. That the night was misty or foggy and very dark. That after entering the switch a short distance the train ran into a train of cars which had been placed on one of the legs of the wye, and, as a result of the collision, Garvin and Clay were thrown down; Clay, the plaintiff, falling on the tracks and seriously injured, both legs being broken. He was taken to a hospital in Harrisburg, was treated as has been testified to, and you have heard how long he was treated, when he left the same, and his further treatment in his home, and when he was again able to go to work, and you have seen and heard of his present condition. It appears that the Western Maryland Railroad had a short time previously brought in a train on this same leg of the wye, consisting of ten cars

and a caboose—nine of the cars being loaded with coal; that it had cut the engine off from the front of the train and gone to another point to secure additional cars, which were to be added to the train. No light was put on the front of the train, or any one left in charge, nor any signal of any sort, to warn others who came on the siding that cars were standing there, but the testimony is that there were lights on the caboose, which was on the rear of the same, and the plaintiff contends that the very fact that lights were put on one end is a recognition of a like duty to give like information that the train was on the wye, at its other or front end.

"The plaintiff contends that the wye was entered at the usual rate of speed by the train on which he was; that the same was under control, and due care exercised in its movement, and on his part; and that, while he and Garvin were looking in front of them, the car of defendant's train was not visible until they were almost upon it, and, when observed, it was impossible to prevent the collision. The rules of the respective companies were offered in evidence, and witnesses were called who testified as to the manner in which trains were to run under them on the tracks when the accident occurred—for the purpose of showing, on the one hand, that they had not been violated by the plaintiff, or by those in charge of the train, the conductor and engineer; and, on the other hand, that they had been violated on their part; and also, on the other hand, rules were offered to show that they had been so violated by the plaintiff, or his railroad, and to show that by the exercise of due care on part of the plaintiff that the accident would not have occurred. Both sides also claim a violation of the rules of the other. The defendant claims that the Reading violated its rules. The Western Maryland claims that the Reading violated its rules. Both parties urge that they obeyed the rules or the practice under them. The testimony is contradictory, and you will have to find what the truth is. We leave for you to find what the rules are which governed the operation of trains at the place of accident, and on that night, from the printed ones offered in evidence, and the practice under them, as to the movement, conduct, and control and care of trains of cars, as it has appeared to you to be from the testimony of the witnesses, on one side and the other.

"The defendant also insists that the plaintiff, conductor, and engineer could or should have been made aware of the presence of the train by reason of the lights on the caboose, and electric lights on the streets of Gettysburg, which were located some distance from the tracks or from the train. On the other hand, testimony was adduced for the purpose of proving that owing to obstructions which intercepted the rays of the same, and also owing to the character of the

night, the misty and foggy condition of the atmosphere and the intense darkness, this was impossible. Much testimony was also offered as to what was meant by the control of a train; one set of witnesses insisting that at the rate of speed at which the train admittedly ran it was not under control, and especially under the conditions of the night and of the atmosphere and the intense darkness, while this, as already stated, was testified to the contrary by the witnesses called on behalf of the plaintiff.

"Contradictory testimony was also given as to the duty and practice under the rules of the respective companies. These disputed questions of fact will be for your consideration and determination, keeping in mind that as the plaintiff has brought this action, the burden is on him to establish his right to do so by satisfactory evidence, and by the weight of the same."

Verdict and judgment for plaintiff for \$15,000. Defendant appealed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

F. E. Beltzhoover, El. M. Biddle, Jr., and C. S. Duncan, for appellant. S. B. Sadler, Lyman D. Gilbert, and W. C. Sheely, for appellee.

ELKIN, J. When an appellant in a negligence case deems it necessary to specify 44 assignments of error, the reasonable inference is that the case was either very well tried, or very poorly tried, in the court below. If there is anything in the record to justify the numerous assignments, the case must indeed have been carelessly and indifferently presented and considered at the trial. On the other hand, it may be that the case was so well tried that the learned counsel for appellant, finding it difficult to assign any material and reversible error, have concluded to strengthen a weak case by making a formidable array of assignments. After a careful consideration of the whole record, we have concluded that the latter is the proper inference to draw in the present case, which was presented and defended by capable and able counsel, and every objection and motion made on either side, all points submitted, and the rulings of the learned trial judge clearly show that the cause was tried with more than ordinary skill and care. The record is a demonstration that, not only the court, but counsel on both sides, knew the law and carefully applied it to the facts of the case. The assignments are so numerous as to be suggestive of firing at random in the bushes in the hope that a stray shot might produce a favorable result. Well directed aim is better marksmanship and, as a rule, more satisfactory to the marksmen. At the argument it occurred to the writer of this opinion that if the defendant company had a right to the joint use of the track, and the train collided with was rightfully on the leg of the wye at the time of the accident, no

negligence could be imputed to it for doing what it had a right to do. On consideration, however, it is clear this view loses sight of the fact that the arrangement for the joint use of the track was subject to the rules and regulations governing that joint use, and if the defendant company failed to comply with the rules to which the joint use was subjected, of which proper guards and protection to a standing train was one, there could be a recovery of damages because of failure to perform its duty in this respect. As to negligence of the defendant, and the contributory negligence of the plaintiff and his fellow servants, we are all of opinion that it was a case for the jury and that there was no reversible error committed in its submission.

The first assignment seeks to convict the learned trial judge of error in refusing to permit an examination of jurors on their voir dire to determine whether any of them were employes or stockholders of the Reading Railway Company. There was nothing in the record to show that this company was interested in, or was in any way connected with, this litigation, or that it would be affected by any verdict that might be rendered. In such matters something must be left to the sound discretion of the trial judge who is always presumed to act in good faith, and refusal to permit such a preliminary examination will not constitute reversible error where, as in the present case, there was nothing to show that the result of the inquiry, if allowed, would afford any ground of challenge for cause, or show such an interest as would disqualify a juror, or that the jurors had formed an opinion, or had any bias, or relationship, or had such a connection with the parties, or the subject-matter of the controversy, as to affect their impartiality. It must not be overlooked that the purpose of the inquiry was not to discover whether the jurors had any interest in the case, or were connected in any manner with the parties to the controversy, or that they had any bias, or had formed any opinion on the question involved, but it was directed to the single purpose of ascertaining whether they were stockholders or employes of another railroad company. Under these circumstances the rule of *Comfort v. Mosser*, 121 Pa. 455, 15 Atl. 612, does not apply. In this connection, it may be remarked that the better practice is to allow a general inquiry as to the direct or even contingent interest of jurors, in the result of the litigation, or in the parties to it, when there appears to be any reasonable ground to believe that some of them may have a possible interest in the result of the litigation, or in the parties, in order that an impartial jury may be selected, free from bias or interest. However, failure to do so will not constitute reversible error, unless established rules of law are violated, or cause for challenge be shown, or the right to show bias or interest of the jurors be denied, or

inquiry into such material facts as might interfere with the selection of an impartial jury be refused.

Under the second assignment it is contended the act of March 24, 1977 (P. L. 38), imperatively requires all points and answers to be read to the jury, and that failure to do so is reversible error. All of the points submitted by the defendant were correctly answered in writing by the court, but those answered in the negative were not read to the jury, and this court has said in several cases that this is not required. *Kroegher v. McConway & Torley Co.*, 149 Pa. 444, 23 Atl. 841; *Kreamer v. Smith*, 187 Pa. 209, 41 Atl. 43; *Carey v. Buckley*, 192 Pa. 276, 48 Atl. 1019. The points affirmed, and the answers thereto, were read to the jury, while those refused were answered in writing, but not read to the jury. All of the points, affirmed or refused, together with the answers thereto, were filed by the learned trial judge and did become a part of the record in the case. This seems to be the established practice throughout the commonwealth, and is all that is required under the rule of our cases.

Assignments of error overruled, and judgment affirmed.

(221 Pa. 449)

#### COMMONWEALTH v. McKWAYNE.

(Supreme Court of Pennsylvania. May 18, 1908.)

#### 1. CRIMINAL LAW—APPEAL—RECORD—RULINGS ON EVIDENCE.

Assignments of error, addressed to rulings on evidence, must, under rule 81, set forth the evidence and the rulings of the court.

#### 2. SAME—INSTRUCTION—CREDIBILITY—ACCUSED AS WITNESS.

On a trial for murder, it was proper for the court to charge that the interest of the prisoner might be taken into account in determining his credibility as a witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1895-1901.]

#### 3. HOMICIDE—SELF-DEFENSE—DUTY TO RETREAT.

The right to take life does not arise while there are other means of escape open to the person attacked.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 163-171.]

Appeal from Court of Oyer and Terminer, York County.

Richard McKWayne was convicted of murder in the first degree, and he appeals. Affirmed.

The court charged in part as follows:

"The commonwealth's witnesses swear that accused demanded his time from Peterson at the cut, and threatened if he did not give the accused his time one of them would be in hell before night; that a man by the name of Porter there on the ground handed Peterson a hatchet during the controversy between him and the accused, which he immediately handed back to Porter; further, that when the prisoner left the cut the last time he was there for the camp. He said he would

see Peterson at dinner time. The defendant swears that Peterson called for a hatchet, and retained possession of it in his hand when he left the cut for the camp. He also swears that Peterson said there to him, instead of he saying to Peterson, when he refused to give him his time, that he would not give him his time that day, 'if both of them were in hell before night,' or words to that effect, and, instead of him using that language to Peterson, Peterson used that language to him. Now, the testimony of the commonwealth is, as I said before, that he made threats against Peterson, and he said he would see Peterson at noon, and his own testimony is that Peterson said they might both be in hell before he would give him his time that day. Now, that is a matter that the jury will have to decide again. If you can reconcile the commonwealth's testimony and the defendant's own testimony, you should do so. But if both cannot be true—if both statements cannot be true—it will be a question for the jury to determine whether they believe a man who is not accused of any crime, and is a disinterested witness for the commonwealth, or whether they will believe the testimony of the defendant who is swearing in his own behalf, with the interest of his life at stake. The jury have a right to remember, as the Supreme Court has said, when they consider the testimony of a defendant, it is their duty to consider the fact that at the same time he is swearing in his own behalf with the interest of swearing to escape punishment."

Defendant presented these points:

"(4) If the jury believe that the deceased threatened the life of the defendant, and that he approached the defendant in a manner which threatened defendant's life, producing in his mind such great fear and terror that he was unable to think, reflect, and weigh the nature of his act, he cannot be convicted of murder in the first degree. Answer: This point is affirmed, with the qualification that by the acts of the deceased, as stated in the point, the prisoner's mind was in the condition stated in this point at the time of the shooting by the prisoner of the deceased."

"(8) If the jury find that the deceased approached the defendant in a threatening manner, and the defendant had a reasonable belief of great bodily harm, although mistaken, he cannot be convicted of murder in the first degree. Answer: This point is affirmed, with the qualification that if the jury believe from the evidence that the prisoner believed further that he had no other means of escape."

"(9) If the jury find that deceased approached the defendant in a threatening manner, and the defendant had a reasonable belief of bodily harm, although mistaken, he cannot be convicted of murder in the first degree. Answer: This point is affirmed, if the jury believe that at the time of the shooting

the prisoner so believed, and, further, that he believed he had no other means of escape."

"Although the defendant was not in actual imminent peril of his life, or of great bodily harm at the time of the killing, he cannot be convicted of murder in the first degree, if in good faith he reasonably believed from the facts, as they appeared to him at the time, that he, the defendant, was in such imminent peril, even if it afterwards appears that he was mistaken. Answer: This point is affirmed, if the defendant believed he had no other means of escape."

Argued before FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

G. W. Albert Rochow, for appellant. James G. Glessner, Ex District Atty., McClean Stock, Ex Asst. Dist. Atty., and Robert S. Frey, for the Commonwealth.

PER CURIAM. Two of the assignments of error, the second and the seventh, are not in compliance with rule 31, which requires that the testimony and the rulings of the court shall be set out in the assignment. But, because of the nature of the case, we have examined these assignments to see whether there was any merit in them. We find none.

The remaining assignments that need be considered relate to two subjects: (1) The instruction in the charge that the interest of the prisoner might be taken into account in determining his credibility as a witness; (2) the statement, qualifying the affirmance of defendant's points that the right to take life did not arise while there were other means of escape open to the prisoner. The first instruction was fully warranted by the case of *Commonwealth v. Orr*, 138 Pa. 276, 20 Atl. 866, and the second was in entire accord with numerous decisions. See *Commonwealth v. Drum*, 58 Pa. 9; *Commonwealth v. Mitchka*, 209 Pa. 274, 58 Atl. 474; *Commonwealth v. Johnson*, 213 Pa. 432, 62 Atl. 1064. The case was tried with great care, and was submitted to the jury with full and accurate instructions, and we find no error in the record.

The judgment is affirmed, and the record is remitted for the purposes of execution.

(221 Pa. 428)

GLICK et al. v. LEHIGH VALLEY COAL CO.

(Supreme Court of Pennsylvania. May 18, 1908.)

MINES AND MINERALS—LEASES—CONSTRUCTION.

Under a coal lease defining "pea" coal to be "coal which passes with the dirt through a screen of three-quarters of an inch mesh," lessee cannot avoid payment of royalties on coal known as "buckwheat," "rice" and "barley" coal, all of which passed through a screen of three-quarters of an inch mesh, on the ground that such sizes were not known as "pea" coal.

Appeal from Court of Common Pleas, Luzerne county.

Assumpsit by George C. Glick, administrator d. b. n. c. t. a. of Henry Smith, deceased, for the use of Albert P. Smith and others, assignees, and others, against the Lehigh Valley Coal Company for royalties. From an order making absolute rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

The following is the opinion of the court below:

"By written contract under seal entered into of June 1, 1868, Smith et al. demised and to mine let unto Swoyer and Mitchell all the coal lying and being in, under, and upon 134 acres and 88 perches of land, being lot No. 63, first division, certified township of Pittston, Luzerne county, Pa., together with the right to open, mine, and remove said coal through the surface of the land, to have and to hold the coal and surface and the interest, the estate, right, and privileges hereby demised, with the appurtenances, their executors, administrators, and assigns, until all the merchantable coal upon the premises available by proper, skillful, and careful working shall have been mined out and exhausted. In consideration thereof the parties of the second part covenant and agree to pay certain rentals therein specified for all coal mined and removed in any one year over 25,000 tons and under 50,000 tons, 15 cents per ton, and for all coal mined and removed in any one year over 50,000 tons, 14 cents per ton, the rentals at above rate to be paid on all merchantable coal, 'excepting, however, that coal which is known to the trade as pea coal, the rental for which shall be at half price. Pea coal is hereby defined to be that coal which passes with the dirt through a screen of three-quarters of an inch mesh.' The miners agreed to mine the said coal in a careful, skillful, and prudent manner, and by the best possible way, and to take out all available coal. The weights returned by the transporting companies to be taken as evidence of the amount mined and removed, and the lessors are given free access to all shipping and sales books. By sundry conveyances the property and all the rights of Swoyer and Mitchell passed to and became vested in defendant company, which is now and has for several years been operator and lessee of the premises.

"The amended statement of plaintiff, filed September 25, 1907, concisely sets out the facts relied upon for the judgment. They are: (1) The defendant has mined and shipped 163,430 tons and 16 hundredweight of merchantable coal denominated by defendant as 'buckwheat coal'; 26,601 and 5 hundredweight merchantable coal denominated by defendant as 'rice coal'; 5,509 tons and 19 hundredweight merchantable coal denominated by defendant as 'barley coal,' as shown by a table furnished by defendant to plaintiffs and annexed to and made part of their statement. (2) For the purpose of making

power, defendant has consumed under its boilers 80,217.7 tons merchantable coal, and that defendant has paid for coal mined of the sizes larger than buckwheat, rice, and barley only. The supplemental affidavit of defense (the original affidavit of defense purports to have been made by Mr. Warriner, manager for defendant, but is signed and sworn to by Mr. Woodward only) admits defendant mined, shipped, and sold buckwheat, rice, and barley coal, of the quantity set out in plaintiffs' statement of August 27, 1906, but denies that the tonnage of this coal was of the amount set out in the amended statement, and denies that such was pea coal as known to the trade at the time when the lease was made, or at the present time, or was pea coal as defined by the lease, and denies it has consumed under its boilers any coal which the defendant is liable to pay for. On October 30, 1907, exceptions were filed to this affidavit of defense.

"By the terms of the contract the lessors demised all the coal, with the right to open mines and remove the coal; the lessee to have and to hold until all the merchantable coal available by skillful and proper working should be exhausted. It was agreed by the parties that certain rentals should be paid on all merchantable coal, that pea coal shall be paid for at half price. The contract makes it unnecessary to search elsewhere for what the parties considered such coal. They provided in apt and explicit words what they meant it should be, as follows: 'Pea coal is hereby defined to be that coal which passes, with the dirt, through a screen of three-quarters of an inch mesh.' What pea coal is in this agreement was not left to guess, construction of language, or evidence, either at the time of the execution of the agreement or now. The court should not against protest now make a new contract for the parties. Pea, by the terms of the agreement, is defined to be 'that coal (all the coal) which passes with the dirt' through a certain mesh. Defendant does not deny, indeed it admits, the coal sued for was such coal, that it was mined, removed, sold, or used by it and paid for, but seeks to avoid judgment by a statement that the coal mined was not pea. With equal force it could say that any other definition contained in the lease is not what it specifically states it is, and thus, by parol evidence, raise a question to be construed and decided. This, in our opinion, cannot be done in an affidavit of defense, and therefore the rule for judgment, notwithstanding the affidavit of defense, is made absolute."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

F. W. Wheaton, for appellant. George R. Bedford, J. Q. Creveling, and D. L. Rhone, for appellees.



**PER CURIAM.** The judgment is affirmed by a majority of the court on the opinion of the court below.

(221 Pa. 408)

**HUNN v. PENNSYLVANIA INSTITUTION FOR INSTRUCTION OF THE BLIND.**

(Supreme Court of Pennsylvania. May 18, 1908.)

**1. CONTRACTS — CONSTRUCTION — TIME AS OF THE ESSENCE OF THE CONTRACT.**

Under a building contract providing, not a forfeiture of the right to recover on failure to complete on a fixed date, but for liquidated damages to be deducted from the contract price, it was not necessary either to aver or prove completion on the date fixed in order to recover such balance as might be due on the contract, since time was not of the essence thereof in the sense that failure to complete on the date fixed forfeited the right to recover for work done or yet to be done at that time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 940.]

**2. SAME — ACTION ON CONTRACT — ISSUES — PROOF.**

Under a building contract providing that, on certain contingencies, the owners should have the right to enter on the premises, take possession of materials, employ men, and complete the building, in which event the final payment of any balance due the contractors was to be held in abeyance, until the building was thus completed, when, on settlement, the owners were authorized to deduct from the balance due the contractors the cost of completion and such damages as might have resulted by their default, an averment of complete performance, in so far as the construction of a building is involved, is sustained by proof that the contractors performed a large part of the work, and that the building was finally completed by the owners in accordance with the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1731, 1732.]

**3. SAME—ACTIONS—CONDITIONS PRECEDENT.**

Every matter included in a building contract and referred to architects must be determined by them.

**4. SAME—ARBITRATION CLAUSES.**

Arbitration clauses in building contracts are in derogation of the common-law right of trial by jury, and are not to be extended beyond the express covenants of the parties.

**5. SAME — PRESUMPTIONS AND BURDEN OF PROOF.**

The law recognizes the right of parties to a contract to stipulate the method of arbitrating questions that may arise between them in the performance of mutual covenants, but no such right exists in the absence of an express covenant, and he who asserts it has the burden of establishing its existence.

**6. SAME.**

The usual arbitration clause in a building contract is not to be construed as showing an intent that the arbitrators should have the right to finally determine questions involving their own failure in the performance of duties.

**7. SAME—QUESTIONS FOR JURY.**

Where, under a building contract, the owners after part performance by the contractors have taken possession and completed the building, it is not essential to entitle the contractors to recover that they produce a certificate of the architect that the building has been properly completed; but, if the owners accept the building as completed by themselves, take possession, and occupy it as a completed building, it is, at least, for the jury whether they have not waived their right to insist on the architect's certificate.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit for money due on a building contract by E. Hunn, Jr., assignee for the benefit of creditors of J. Watts and Ulysses Mercur, late trading as J. W. Mercur & Co., against the Pennsylvania Institution for the Instruction of the Blind. Judgment for defendant, and plaintiff appeals. Reversed, and a venire facias de novo awarded.

At the trial it appeared that J. Watts Mercur and Ulysses Mercur, trading as J. W. Mercur & Co., were contractors for the erection of a building for the Pennsylvania Institution for the Instruction of the Blind.

The contract contained, inter alia, the following provisions: "Should the contractors at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements on their part herein contained, such refusal, neglect, or failure being certified by the architects, the owners shall be at liberty, after three days' written notice to the contractors, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractors under this contract, and, if the architects shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owners shall also be at liberty to determine the employment of the contractors for the said work, and to enter upon the premises and take possession of all materials thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and, in case of such discontinuance of the employment of the contractors, they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owners in finishing the work, such excess shall be paid by the owners to the contractors, but, if such expense shall exceed such unpaid balance, the contractors shall pay the difference to the owners. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificates thereof shall be conclusive upon the parties as respects the amount due by either of them."

At the trial the plaintiff made the following offer: "We offer to prove by this witness the completion of the contract, admitting that the building was not turned over until 153 days after the time fixed by the contract. But also propose to prove by this witness that, although the contract was dated June 30, 1897, the contractors were unable to pro-

ceed without the plans for the work, which were with the architects and retained by them; that, though they then requested the furnishing of these plans, the architects did not furnish them until about August 1, 1897; that, by reason of the failure of the architects on demand to furnish the plans, they were delayed in the progress of their work to that extent; and that, therefore, to that extent of time the noncompletion of the building is one for which they are not responsible. We also offer to prove by the witness that the original estimates for the work contemplated by the defendant were too high for the means the defendant had at hand to pay for them; that action was taken on the part of the defendant requiring the architects to cut down the estimates and to revise the plans; and that, by reason of the delay which the architects made in arranging for the alterations in the plans, the work was delayed to the extent of a considerable number of days, which will be detailed in the testimony. We also offer to show by the witness that the plans of the architects upon which the work was built, and the drawings, rested the beams on the center walls at an improper point over the cellar arches; that in consequence of this imperfection in the plan after the beams had been put in proper position under the plan they broke the arches down; that by reason of this a very considerable delay was occasioned to the contractors in the completion of their work. The amount of this delay was upwards of about one month. We also propose to prove that the architects required, in accordance with the plans, certain alterations and work to be done in accordance with these alterations; that the witness demanded compensation for the extra work and an allowance of time; that the architects allowed the compensation for the work, but did not pass upon or determine the question of an allowance of time; that this required and consumed extra time to the extent of many weeks, the amount of which the witness will state. We will also show that certain roofing tiles were to be furnished in accordance with the plans; that those roofing tiles were submitted to the architect in accordance with the plans, but that he determined to change the sort of tiles, but did not determine what new kinds of tiles he would supply for upwards of a month; and that in consequence of that delay the work was delayed and a delay in completion to the extent of a month or upwards thereby arose. We offer in connection with that to prove that the work was finally accepted and completed, but with this delay in completion, and has ever since been in the occupancy of the owner. The alterations referred to were by written direction of the architects named in the contract."

In connection with this offer Mr. Johnson admits that, owing to the bankruptcy of the Mercurs before the final completion, the de-

fendant took possession of the premises, finished the work, and charged the plaintiffs with the amount which they allowed credit for, of the cost of such finishing. Therefore Mr. Johnson says that, while the statement of claim appears to be for about \$61,000, the real claim is practically but \$300 or \$400 more than \$15,300, the amount charged by the defendant against the plaintiff for delay; that there were other payments made out of the funds for completion with our consent, and that those payments are allowed, reducing the claim that is nominally made of about \$61,000 by virtue of these deductions to practically a claim only for substantially the amount that has been retained for delay in completion. There were quite a number of liens filed, and they were all settled up and the building was finally accepted when completed in the way stated by the owners, and the outlays for such work will be credited against the amount claimed here. This is a claim, in the first place, that the alterations did not delay the other work, but that they required an amount of time to complete those alterations. It is a claim, not that other contractors delayed the work or that there was an abandonment by the employes or destruction by fire. It is a claim that the architects did not furnish the plan. It is a claim that the architects altered the plan so that it required, in order to take up the work, the waiting until they determined upon it. They altered the designs with regard to the tiles so that until we got those alterations we could not go on. Those are the delays of the agent of the owner so made in the contract and not of an independent contractor.

Objected to. Objection sustained. Exception.

The court charged as follows: "I have sustained, as you have heard, the objection made to certain testimony that was offered. Counsel for the plaintiff announces that he has no further testimony to offer. Therefore the case goes to you without any testimony and you will have to find for the defendant. Of course, you could not find for the plaintiff as he has offered no testimony. You will render a verdict, therefore, for the defendant."

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John G. Johnson, for appellant. Abraham M. Beltler and H. Gordon McCouch, for appellee.

ELKIN, J. The plaintiff brought an action of assumpsit to recover an alleged balance due on a building contract and in his statement of claim averred performance. The defendant entered a plea of nonassumpsit, payment, and set-off, to which plaintiff replied non solvit, no set-off, and issue. When the case came on for trial, the plaintiff offered in evidence the contract, plans, and specifica-

tions, and then produced as a witness J. W. Mercur, a member of the contracting firm. Counsel, being asked what he intended to prove by this witness, placed on record an elaborate offer covering the purpose of the testimony to be given. Counsel for defendant objected on the ground that the contract between the parties showed that final payment was not to be made until the architects had certified that the work had been completed in accordance with the plans and specifications, and it was not proposed to show that the architects had passed upon questions in dispute between the parties, and for the further reason that, complete performance having been averred, proof which shows nonperformance or part performance is not sufficient to sustain the allegata, which objection was sustained by the court.

No further testimony was offered, and the learned trial judge directed the jury to return a verdict for defendant. This appeal raises the question whether the proof offered, but rejected, should have been admitted, and, if so, was it sufficient to sustain the averments of the declaration. It is elementary that the probata must sustain the allegata, and, of course, one who avers performance and falls to prove it has no right to recover. In the present case, however, the contention is not only that performance was averred, but that the proof offered showed performance within the meaning of the law. Whether the contention can prevail necessarily depends upon the facts. The suit was brought to recover the balance due for the construction of a completed building, and the facts show that the building was completed at the time the action was commenced. The performance averred and necessary to be proven was the completion of the building, not the completion within the time fixed in the contract. Failure to complete within the specified time did not forfeit the right to recover, if completed at a later date, but subjected the contractors who might be in default in this respect to the payment of a certain sum for each day of delay as liquidated damages. It was not necessary either to aver or prove completion on August 1, 1898, in order to recover such balance as might be justly due under the contract. Time is not of the essence of the contract in question in the sense that failure to complete within a fixed period forfeits the right to recover for work already done at the date fixed for completion, or yet to be done at that time. The contract provides, not a forfeiture of the right to recover upon failure to complete on a certain date, but for liquidated damages to be deducted from the contract price. Nor, as we construe the contract, did the right to recover depend upon the completion of the building by the contractors themselves, because it is therein provided in clause 11 that upon the happening of certain contingencies the owners shall have the right to enter upon the prem-

ises, take possession of materials, employ men, and complete the building, which right was exercised in this case. The final payment of any balance due the contractors, in the event of the owners electing to complete, was to be held in abeyance until the building was thus completed, when upon settlement the owners were authorized to deduct from the balance due the contractors the cost of completion and such damages as may have resulted to the owners by the alleged default of the contractors. By the express covenants of the contract it clearly appears the parties had in contemplation, first, completion by the contractors, and, second, under certain circumstances part performance by the contractors, and final completion by the owners, and the right to recover such balance as was justly due did not depend upon entire completion by the contractors, but, upon completion, either by the contractors or partly by the contractors and partly by the owners, and, when completed in either way, final settlement was to be made in the manner provided. We therefore hold that the averment of complete performance in so far as the construction of the building is involved is sustained by proof which shows that the contractors performed a large part of the work, and that the building was finally completed by the owners in accordance with the contract. When the owners completed the building, the day of final settlement had arrived, subject, of course, to the respective rights of the contracting parties as defined by the contract. The contract itself pointed out the method of settlement, which was that the contractors were entitled to receive the total contract price for a completed building, with such allowance or deduction as should be made for alterations, less advances made from time to time, and, in the event of the building being completed by the owners, then the cost of completion to be deducted, together with an allowance for such damage as may have resulted by delay or otherwise in completing according to contract. The contracting parties themselves provided an orderly and sensible method of making settlement, and we can see no reason why pleadings framed and proofs offered, in an action brought to determine the legal rights of the parties, which produce and sustain an issue by means of which an alleged balance claimed to be due may be ascertained in accordance with the terms of the contract, should be held insufficient.

Another and perhaps more important question to determine is that which relates to the failure of the offer to show that matters in dispute between the parties had been submitted to the architects, as required by the contract, or that the architects had certified proper completion. By the terms of the contract the architects were made the arbiters of questions that might arise between

the parties, and it was their duty to certify when the building was finally completed, and it must be conceded that if the contract referred to the arbitration of the architects, the questions of fact involved in the rejected offer of testimony, or if the architects were made the sole arbiters of these questions, and they have not in point of fact done so, the appellant would have no right to have a jury pass upon them. On the question of arbitration it may be stated that every matter included in the contract and referred to the architects must be determined by them. This is the rule of our cases, and, while in some instances it would seem to be a harsh one, it is so firmly established that it must be accepted as settled law in this state. It is, however, in derogation of the common-law right of trial by jury, and should not be unduly extended. As indicated in *Payne v. Roberts*, 214 Pa. 568, 64 Atl. 86, the arbitration clauses in such contracts refer to questions arising between the contractors and owners, and not to questions that concern the performance of duties by the architects themselves, and certainly the rule should not apply at all beyond the express covenants of the contracting parties. The law recognizes the right of parties to a contract to stipulate the method of arbitrating questions that may arise between them in the performance of mutual covenants, but no such right exists in the absence of an express covenant and he who asserts it has the burden of establishing its existence. If questions arise between the contracting parties not included in the arbitration clauses, or if the questions raised relate to failure or dereliction in the performance of duties by the architects themselves, the right to have these matters passed upon by a jury cannot be denied upon the ground of failure to arbitrate. Nearly all of the rejected offer of testimony relates to default in the performance of duties imposed upon the architects by the contract, and certainly it could not have been the intention of the parties to deliberately enter into a covenant providing that the arbiters should have the right to pass upon and finally determine questions involving their own failure in the performance of duties. At this stage of the case, it is perhaps only necessary to say that the arbitration clauses only refer to the questions therein specified, and do not relate to questions concerning the performance, or failure to perform, the professional duties of the architects. Nor do we agree that it is absolutely necessary for appellant to produce a certificate from the architects showing that the building had been properly completed before there can be a recovery under the circumstances of the present case. This covenant was intended as a protection to the owners, and, if the building had been completed by the contractors, they clearly had the right to insist upon it, but it is equally clear that the owners could waive

their right in this respect. If they chose to accept the building as completed by themselves, took possession of and occupied it as a completed building, it ought at least to be for the jury to say whether they had not waived their right to insist upon the certificate of the architects showing final completion. Indeed, if the facts warrant it, and this we cannot now determine, it might be the duty of the court to say as a matter of law that the acceptance by the owners amounted to a waiver of this provision of the contract.

Judgment reversed, and a *venire facias de novo* awarded.

(221 Pa. 412)

# RICHARDS v. WALP et al.

(Supreme Court of Pennsylvania. May 18, 1908.)

## 1. PAYMENT—PRESUMPTIONS—LAPSE OF TIME.

A presumption of payment of a debt arises 20 years after it has become due, and increases in strength each succeeding year thereafter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 178-180.]

## 2. SAME—QUESTIONS FOR COURT.

Whether the presumption of payment of a debt arising from lapse of time is rebutted by a given state of facts is a question of law for the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 243.]

## 3. SAME—SUFFICIENCY OF EVIDENCE.

The presumption of payment arising from lapse of time will prevail until overcome by direct proof of nonpayment, or of facts and circumstances from which nonpayment may be clearly inferred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 188.]

## 4. SAME.

A *scire facias* sur mortgage was issued in 1903 to collect two installments of purchase money of \$933.33 each, one due in 1876, the other in 1877. The mortgage also secured the payment of \$1,000 on the death of a widow who had a dower interest, but who was living when the *scire facias* issued. Plaintiff offered evidence to rebut the presumption of payment that in 1886 the mortgagor, after mortgagee's death intestate, leaving a husband and children surviving her, had asked her son-in-law to aid him in getting her heirs "to sign off the back money due on the mortgage," and had offered to pay the heirs sums of money amounting to \$600, and was told that they could not sign off because they were not of age. *Held*, that the evidence was insufficient to rebut the presumption of payment, since all that was said would apply as well to the \$1,000 which was then unpaid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 220.]

Appeal from Court of Common Pleas, Luzerne County.

*Scire facias* sur mortgage by John Richards, administrator of the estate of Eliza Ballet, deceased, against Hiram Walp and others. Plaintiff was nonsuited, and, from an order refusing to take the same off, appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

Wm. C. Johnston and James R. Scouton, for appellant. J. Q. Creveling and D. L. Creveling, for appellees.

**FELL, J.** The question raised by this appeal is whether the proofs presented at the trial were sufficient to rebut the presumption of payment arising from the lapse of time. The proceeding was on a mortgage to collect two installments of purchase money of \$933.83 each, one due in 1876 and the other in 1877. The mortgage also secured the payment of \$1,000 on the death of a widow who had a dower interest, but who was living when the scire facias issued in 1903. The testimony relied upon to rebut the presumption of payment was that in 1886 the mortgagor, after the death of the mortgagee intestate, leaving a husband and nine children surviving her, asked her son-in-law to aid him in getting her heirs "to sign off the back money due on the mortgage," and had offered to pay the heirs sums of money amounting to \$600, and was told that they could not sign off because they were not of age. The learned trial judge regarded this testimony as insufficient to show that the installments of \$933.33 each were not paid at that time, since all that was said would apply as well to the \$1,000 which was then unpaid, and a nonsuit was entered. The debt sought to be recovered was due and demandable 26 years before suit was brought. The presumption of payment arose at the end of 20 years, and it had increased in strength each succeeding year afterwards. The burden of overcoming it was upon the plaintiff, and the sufficiency of the evidence offered was for the court. *Reed v. Reed*, 46 Pa. 239; *Beale's Executor v. Kirk*, 84 Pa. 415. "In a case like this the defendant stands upon a presumption of law, which is binding alike upon the court and jury until invalidated by proof, and the plaintiff in rebuttal upon a presumption of fact only, which he claims to arise out of the evidence. Whether or not the matters sought to be established are true is a question for the jury, but whether the facts and circumstances relied on, if true, would legitimately give rise to the presumption of fact referred to, is necessarily a question of law for the court." *Gregory v. Commonwealth*, 121 Pa. 611, 15 Atl. 452, 6 Am. St. Rep. 804. This presumption is equal to direct proof of payment (*Sellers v. Holman*, 20 Pa. 321), and it will prevail until overcome by direct proof of nonpayment or the proof of facts and circumstances from which nonpayment may be clearly inferred.

The plaintiff's testimony did not come up to this standard. The conversation testified to was 17 years before suit brought or a demand of payment made. The mortgagee lived on the farm for 20 years, and the mortgagor and her children lived in the same neighborhood, and no reason was shown that would account for a postponement of payment. The conversation itself had greater

application to the \$1,000 secured by the mortgage than to the installments, because the amount of the proposed payment was near the value of the present interest of the mortgagee's heirs in the sum to be paid after the death of the widow who had a dower interest.

The judgment is affirmed.

(221 Pa. 420)

#### FELLBUSH v. EGEN.

(Supreme Court of Pennsylvania. May 18, 1908.)

#### 1. EVIDENCE — PAROL EVIDENCE AFFECTING WRITINGS.

Where the language used in an instrument is fairly capable of but one construction, the intent of the maker must be gathered therefrom, and resort cannot be had to extrinsic evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2066-2084.]

#### 2. WILLS — CONVEYANCES DISTINGUISHED FROM OTHER TRANSACTIONS.

A husband by an instrument styled an "indenture" granted and conveyed to his wife land described. Following the description were the words: "The full intent and meaning of this conveyance is that the party of the second part shall enjoy said property for and during the term of her natural life. Said life estate to take effect upon the death of the grantor herein, and the remainder to go to the children of the said parties of the first and second part." *Held*, that the instrument was a deed, and, over any technical objection that no present estate passed from the grantor, the deed would be good as a covenant to stand seised.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 208, 209.]

Appeal from Court of Common Pleas, Luzerne County.

Case stated to determine the marketable title to real estate by Justus Fellbush against William F. Egen. Judgment for defendant, and plaintiff appeals. Affirmed.

From the record it appeared that the defendant objected to the title because of a recorded paper, the material portions of which were as follows: "This indenture made the ——— day of December, 1901, in the year of our Lord one thousand nine hundred and one between Justus Fellbush, of the city of Wilkes-Barre, Luzerne county, Penna., of the first part, and Frances Fellbush, his wife, of the same place, on the condition and stipulation below referred to, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar and other good and valuable considerations, said one dollar being lawful money of the United States of America, well and truly paid by the said parties of the second part to the said party of the first part, at and before the ensailing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed by these presents, doth grant, bargain, sell, alien, enfeoff, release, convey and confirm, unto the said parties of the second part, the surface and right of soil only

of and to the following lot, piece or parcel of land, situate, lying and being in the city of Wilkes-Barre, Luzerne county, Pa., bounded and described as follows: \* \* \* The full intent and meaning of this conveyance is that Frances Fellbush shall enjoy said property for and during the term of her natural life, said life estate to take effect upon the death of the said Fellbush—the grantor herein and the remainder to go to the children of the said Justus and Frances Fellbush. Together with all and singular the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances to the same belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, both in law and equity, of the said party of the first part, or, in and to, the said premises with the appurtenances, excepting and reserving, however, as aforesaid. To have and to hold the said described surface, hereditaments and premises hereby granted and released, or mentioned and intended so to be, with the appurtenances, as herein stipulated unto the said party of the second part, to the only proper use, benefit and behoof of the said party of the second part, excepting and reserving, however, as aforesaid. And the said Justus Fellbush and his heirs, executors, and administrators, doth by these presents, covenant, grant, and agree to and with the said party of the second part, that he, the said Justus Fellbush, and his heirs, all and singular, the hereditaments and premises hereinbefore described and granted, or mentioned, and intended so to be, with the appurtenances, unto the said party of the second part, against him the said Justus Fellbush and his heirs, and against all and every other person or persons, whomsoever, lawfully claiming or to claim the same or any part thereof, subject to the reservations herein before set forth shall and will warrant and forever defend. In witness whereof, the said part of the first part to these presents hereunto set my hand and seal. Dated the day and year first above written. Justus Fellbush. [Seal.]

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

W. Alfred Valentine and G. Fred Lazarus, for appellant.

**PER CURIAM.** This case is clearly ruled by *Fellbush v. Fellbush*, 216 Pa. 141, 65 Atl. 28. It was there held that the instrument in question is a deed. It is unquestionably a deed in form, and where the language used is fairly capable of only one construction, as it is here, the intent of the maker must be gathered from his language. It is sometimes said that the question is not what he may have meant, but what is the meaning of his

words, a most unfortunate form of expression, for the construction must always be according to his actual intent, whatever the words used, but, where the meaning of his words is clear, his intent is to be gathered solely from them. It is only where his words are ambiguous to the extent of being capable of more than one construction that resort can be had to other evidence dehors the instrument to discover his intent. In 216 Pa. 141, 65 Atl. 28, it was clearly held that the instrument is a deed, and, even conceding (what is not an allowable concession) that it was capable of more than one construction, there was no evidence dehors to rebut the prima facie character.

As to the technical objection that no present estate passed from the grantor, even if that were of more weight than it is, the deed would be good as a covenant to stand seised.

Judgment affirmed.

(221 Pa. 415)

**LAZARUS et al. v. LEHIGH & WILKESBARRE COAL CO.**

(Supreme Court of Pennsylvania. May 18, 1908.)

**ACCOUNT—EQUITY—JURISDICTION—EXISTENCE OF REMEDY AT LAW AND EFFECT.**

Equity is without jurisdiction of a bill to compel an accounting for royalties for coal mined, where defendants deny complainants' title to the land under which the coal was mined, as an accounting cannot be demanded until complainants have established their right at law.

Appeal from Court of Common Pleas, Luzerne County.

Bill for an injunction and for an account by George Lazarus and others against the Lehigh & Wilkes-Barre Coal Company. Decree for defendant, and plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

W. Alfred Valentine and G. Fred Lazarus, for appellants. A. H. McClintock, Arthur Hillman, and Henry W. Palmer, for appellee.

**FELL, J.** It was averred in the bill filed that the plaintiffs' predecessors in title in 1871 leased to parties whose rights have become vested in the defendant all the coal under 225 acres of land described, with the right to mine and remove the same; that the agreement provided that a fixed royalty should be paid for all coal mined that would pass over a screen of five-eighths of an inch mesh; and that, in violation of the agreement, the defendant was using screens of a larger mesh, which decreased the amount of coal for which a royalty was to be paid under the agreement; that included in the lease were two acres and 143 perches from which the defendant was mining coal for which they refused to account. The prayers were for an injunction to compel the use of a screen of five-eighths of an inch mesh, for an

account for royalties for coal that would have passed over a screen of five-eighths of an inch mesh, and for an account for the coal mined from the 2 acres and 143 perches.

Before the hearing of the case the parties adjusted all matters relating to the use of a larger mesh, and by agreement filed they were withdrawn from the consideration of the court. The only matter in controversy remaining was the plaintiffs' right to royalties for coal mined from the 2 acres and 143 perches. The answer denied that the plaintiffs owned this land, and denied their right to maintain a proceeding in equity or to ask for an accounting until they had established their right at law. The only question remaining was as to the ownership of the land in dispute. All other subjects of controversy mentioned in the bill had been withdrawn, and were out of the case as fully as if they had been eliminated by an amendment or had never been in it. At the hearing the defendant set up a title which had become vested in it by a chain of conveyances, orphans' court proceedings, and by possession and recognition by the plaintiffs' predecessors in title. The learned judge found that the agreement of 1871, although termed a lease, was a sale of the coal, and that there was a disputed question as to the title to the land in controversy which a court of equity was without jurisdiction to determine.

The appellants' contention was based on the assumption that the agreement of 1871 create the relation of landlord and tenant, and that the defendant in possession as tenant could not dispute its landlord's title. While the rules applicable to sales are not to be applied indiscriminately to all conveyances of the right to mine and remove all the coal in a given tract of land (*Denniston v. Had-dock*, 200 Pa. 426, 50 Atl. 197), the construction to be placed on the agreement of 1871, on which the plaintiffs' claim is based, has been settled by decision. It was before this court on the appeal in *Lazarus' Estate*, 145 Pa. 1, 23 Atl. 372, and it was held that, although in form a lease for 90 years, it was a grant of an interest in the land itself; not a mere license to take the coal but a sale of it, conditioned on its being removed in the time specified.

The decree is affirmed at the cost of the appellants.

(221 Pa. 481)

PENNSYLVANIA R. CO. v. SOUTHWESTERN ST. RY. CO.

(Supreme Court of Pennsylvania. May 25, 1908.)

INDEMNITY—BREACH OF CONTRACT—RECOVERY OF DAMAGES PAID.

In an action by a steam railway company against a street railway company to recover the amount of damages plaintiff was compelled to pay because of a collision between one of plaintiff's trains and a wrecking car of the defendant on which the injured persons were riding, the

statement of claim set forth a contract between the two companies as to the crossing, and alleged that the accident was caused by a violation of defendant's agreement as to stopping the car before crossing. Defendant in its affidavit of defense averred that the car was run in a proper manner and had stopped at the crossing, and that the provision of the contract as to the direction of the running of cars did not apply to a wrecking car. *Held*, that the affidavit of defense was sufficient.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Pennsylvania Railroad Company against the Southwestern Street Railway Company. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

E. J. Sellers, for appellant. John C. Bell, for appellee.

STEWART, J. This appeal is from an order of court discharging a rule for judgment for want of a sufficient affidavit of defense. The action was brought to recoup from the defendant company damages which had been recovered against the plaintiff company by certain parties for injuries sustained in a collision at a grade crossing; the plaintiff contending that the collision was in consequence of a violation by the defendant company of the terms of an agreement under which it was permitted to maintain and use the crossing. By this same agreement, the defendant company undertook to indemnify and save harmless the plaintiff from and against all loss or damage which might be imposed upon or recovered against it in consequence of any negligence on the part of the defendant company in the use of said crossing, or failure on its part to use the same in the way stipulated and provided for in the agreement. The parties injured in the collision, and who recovered against the plaintiff company, were at the time of the accident riding in what is known as a "wreckage" or repair car of the street railway company. As the car was moving upon and over the grade crossing, it was run into by an engine on plaintiff's road. The statement of claim filed in the case sets out the agreement between the two companies with respect to the construction, maintenance, and manner of use of the crossing, and avers two distinct breaches of the agreement by the defendant company, from which it is claimed the accident resulted. The line of road of the defendant company is composed of two parallel tracks. These are so operated that the cars employed in passenger travel moving eastward proceed on the southern track, and those moving westward on the northern. The derailing switch placed at the approaches to the railroad tracks at either side are effective as

this order of movement of cars is observed. A car moving eastward on the northern track would have no interruption at the grade crossing by reason of the switch at that point. In this particular instance the car that was struck by the passing engine was moving eastward on the northern track, and this the plaintiff avers was a distinct breach of the agreement between the two companies. The agreement also provided that the defendant company would cause each and every car on its railway when approaching the crossing to be stopped at a safe distance therefrom, and not permit them to cross until the track should be free from passing or approaching engines, cars, or trains, etc. The statement avers, as another distinct breach, that the defendant failed on this occasion to stop the car at a safe distance from the crossing before moving forward upon the tracks. The affidavit of defense admits the agreement between the two companies, but denies any and all liability on its part thereunder for any damages resulting from this particular occurrence. It contains a positive and specific denial of the averment that its car was not stopped at a safe distance from the crossing before the crossing was attempted, and asserts that the car was brought to a full stop at a proper and safe distance; that the safety gates at that point operated by the plaintiff were negligently raised and opened, admitting defendant's car to the crossing; and that defendant's employé in charge of the car, after looking carefully forward to see whether the track was clear, was proceeding with due care and caution to cross, when his car was suddenly struck by the engine of the plaintiff which had given no signal or warning, and was without a headlight. As to the other alleged breach, the affidavit admits that it was defendant's custom to run the cars employing the same track in the same direction, but asserts that this order was not required by the agreement between the companies, but was adopted for defendant's own convenience. It denies that any such custom had been observed by it with respect to its repair or wreckage cars, and asserts that it had always been its custom, before and since the agreement, to run and operate such cars in any direction and to any point when and wherever the same were needed, of which fact the plaintiff had full knowledge. It further denies that it was ever contemplated or intended by the parties to the agreement, or that it is within the purview or meaning of the agreement, that the direction and movement of the defendant's wreckage or repair cars should be controlled or governed by the agreement, and asserts that the agreement in this regard had relation only to the direction and movement of defendant's passenger cars.

It is quite manifest, as contended for by appellant's counsel, that had the car been on the other track the accident would not

have occurred. The derailing switch it would have there encountered would have prevented any collision. But that is a circumstance not to be considered in this connection. The plaintiff's action is founded on a breach of the agreement, not on defendant's negligence as a thing apart. Does or does not the agreement between the companies require the street railway company to regulate the movement of all of its cars, including its wreckage and repair cars, so that all, without exception, should be controlled at the crossing by the derailing switch? If it does, then a breach having been averred in this regard and there being no denial of the fact constituting such breach in the affidavit, the plaintiff would be entitled to judgment. But the defendant denies that the provision in the agreement relating to the use of the derailing switch applies to the movement of its wreckage and repair cars, and asserts that it extends only to the movement of passenger cars. Here is an issue squarely raised. What is included in the subject-matter of the agreement—all of the defendant's cars, or only some of them? Were this an attempt to contradict or vary the written agreement, a serious objection might be urged to the affidavit of defense; but it is not. It is always competent to explain and define the subject of a written agreement. *Barnhart v. Riddle*, 29 Pa. 92; *Centenary M. E. Church v. Clime*, 116 Pa. 146, 9 Atl. 163. A construction of the agreement that would except wreckage cars from the switch regulation could not be said to nullify any of its terms, or contradict any part of the writing, since the agreement contains no express reference to such cars, nor are they necessarily included in the terms used. In view of what is set up in the affidavit as supporting the defendant's contention in this regard, what the agreement includes becomes a question for the jury to decide. The traverse in the affidavit is quite sufficient with respect to both of the alleged breaches of the agreement to carry the case to the jury.

The order of the court discharging the rule is affirmed.

(221 Pa. 503)

HILLIARD et al. v. STERLINGWORTH RY.  
SUPPLY CO. (COOLBAUGH,  
Intervener.)

(Supreme Court of Pennsylvania. May 23,  
1903.)

#### 1. RECEIVERS—REMOVAL.

The court has power to remove a receiver where he is not impartial as between the parties to the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 109–111.]

#### 2. APPEAL AND ERROR—REVIEW—DISCRETION OF COURT.

The appellate court will not review the exercise of the power of the trial court on a motion to remove a receiver where there has been no abuse of discretion.



### 3. SAME—REMOVAL OF RECEIVER—REFUSAL.

The refusal to remove a receiver of a corporation will not be reversed on appeal, where an application is soon to be made for a termination of the receivership, and the matters complained of could be remedied by surcharging the receiver on his final accounting.

Appeal from Court of Common Pleas, Northampton County.

Action by Clinton Hilliard and others against the Sterlingworth Railway Supply Company and F. W. Coolbaugh, intervenor. From a decree discharging rule to remove a receiver, defendant appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Samuel Scoville, Jr., Frank Reeder, and Charles H. Edmunds, for appellant. F. W. Edgar and H. J. Steele, for appellees.

POTTER, J. Appellant in this case has failed to print the docket entries in the court below, but we find from the paper book of the appellee that on February 12, 1907, a bill in equity was filed by Clinton Hilliard et al. against the Sterlingworth Railway Supply Company, a corporation. On the same day the court appointed William J. Kuebler receiver of the defendant corporation, and the bond of the receiver was approved and filed. On February 18, 1907, F. W. Coolbaugh, the present appellant, asked leave to intervene, and on March 18, 1907, he filed a petition, in which he was joined by other stockholders, asking the court to dissolve the receivership. Hearing upon the motion to dissolve was postponed from time to time, and it does not appear that it was ever argued or disposed of. On November 9, 1907, the court authorized a sale by the receiver, for the sum of \$10,250 cash, of the machinery, tools, appurtenances, and materials of the defendant company, which were contained in the rolling mill and car shop departments of the Sterlingworth plant at Easton, Pa., and directed that the proceeds of such sale should be applied to the payment of certain mortgage bonds of the company owned by the receiver in his individual right. On December 5, 1907, F. W. Coolbaugh petitioned the court to vacate the order of sale made upon November 9th preceding, and, further, asked that the receiver be restrained from selling or removing any part of the property of the company from its premises; and also asked for the removal of William J. Kuebler from the office of receiver. In response to this petition rules were granted upon the receiver to show cause. An answer was filed to the petition by the receiver, and on January 13, 1908, both rules were discharged. The present appeal is taken by F. W. Coolbaugh from the order of the court below, discharging the rule for the removal of the receiver, and dismissing the petition of appellant.

It appears from the opinion of the court below that a hearing was begun on December

23, 1907, when petitioners filed an amended petition, and that defendants moved the court to discharge the rules upon the ground of the insufficiency of the petition, and that the order of January 13, 1908, from which this appeal is taken, was based solely upon the insufficiency of the petition, which the court considered as amended. The petitioners alleged that Kuebler was appointed as receiver without notice; that he had no experience which would qualify him properly to discharge the duties of receiver, and that he was not an impartial person; that, after his appointment, he purchased most of the bond issue of the corporation at a price below par, and then sold the equipment of the rolling mill and machine shop at a small fraction of its value, and applied the proceeds to the payment of the bonds at par and accrued interest. The conclusion of the court, as set forth in its opinion, is as follows: "We have considered the matters in the petition as if no answer had been filed. This proceeding is not one between parties. It is addressed to the sound discretion of the court, and affects an officer of the court in his conduct of the business in the charge of the court. He ought not to be compelled to answer matters done under decrees of the court, unless specific charges of fraud are made. Matters alleging individual profit can be heard upon final settlement of his account. We have also considered the fact that it was stated that the annual election of officers of this company occurs this month, and that an application would probably be made to take this corporation out of the hands of the court shortly thereafter. As a general rule, an officer of a corporation ought never to be appointed as a receiver. We were of the impression at the time of the appointment of this receiver that as between the two contending factions he was an indifferent party, and he was also appointed because of his well-known financial responsibility and ability to secure funds upon his personal credit to operate the plant."

It goes without saying that a receiver, who is the officer of the court and whose actions are under its control, ought to be disinterested, unbiased, and impartial as between the parties; and, where any breach of propriety in any such respect occurs, it is the duty of the court to remove the receiver and substitute another. But in the exercise of this power the court must be guided by sound discretion under the circumstances of the particular case. No definite rule can be framed, but the power of removal is to be exercised under the broad discretionary jurisdiction of a court of equity. In setting forth the controlling principle, the text-book writers say: "It has been held that the removal or discharge of a receiver rests within the discretion of the court. The discretion of the court referred to, however, is not an arbitrary or capricious discretion, but a law-

ful and reasonable discretion." 23 Am. & Eng. Encyc. of Law (2d Ed.) 1128. And, since the propriety of removing a receiver is a question for the sound discretion of the court, its decision in this respect will not ordinarily be subject to review. Thus in *Alderson on Receivers*, § 640, it is said: "Inasmuch as the appointment of a receiver are matters which rest essentially in the discretion of the court, it is a general rule that a court of appeal will not review questions which have been passed upon by a lower court in relation thereto, and the rule is the same whether the one party or the other—the party of the receiver or the party opposed—attempts to prosecute the appeal." In *Milwaukee & Minnesota R. R. Co. v. Scutter*, 69 U. S. 440, 17 L. Ed. 860, it was held that the removal or appointment of a receiver rested in the sound discretion of the court, and was not revisable on appeal. But in a later appeal in the same case, 69 U. S. 510, 17 L. Ed. 900, it was held that, while the appointment or discharge of a receiver is ordinarily matter resting wholly within the discretion of the court below, it is not always and absolutely so. In that case, however, the question was not as to the removal of the receiver for cause, but as to his discharge on the ground that the purpose of the receivership had been accomplished. An order dismissing an application for his discharge was reversed and the discharge was ordered, upon compliance by the petitioners with certain requirements. In *Misselwitz Lunacy Case*, 177 Pa. 359, 35 Atl. 722, the appeal was from a decree appointing a receiver pendente lite over the property of an alleged lunatic. The decree was affirmed, and this court said (page 362 of 177 Pa., page 723 of 35 Atl.): "The appointment of such temporary custodian or receiver pendente lite, to prevent mismanagement or waste of the alleged lunatic's property, etc., rests in the sound discretion of the court in which the inquiry is pending; and it requires a clear case of abuse of that discretion to justify the interposition of an appellate court."

We have no doubt whatever but that, if a proper case for its exercise be made out, it is the right and duty of an appellate court to review the judgment of the court below, as to the removal or discharge of a receiver. But we are equally clear that this duty is one to be exercised only in cases showing a manifest abuse of discretion. The application here was for the removal of the receiver. The request was refused by the court below, partly on the ground that an application was soon to be made for a termination of the receivership. This was in itself sufficient to justify the court in exercising its discretion as it did. In view of the probable speedy end to the receivership, the removal sought would have been useless, and would have involved the additional expense of a new appointment for a short time only. The

court also based its decision on the ground that the allegations of the petition were not sufficiently specific, with the exception of those relating to the sale of the machinery by the receiver and the application of the purchase money to the payment of the bonds held by him. In so far as the sale is concerned, it appears that it was made by the order of the court, after due investigation into the facts and circumstances bearing thereon. If there be any question of surcharge as to the receiver, that may come up on the filing of his account on the termination of the receivership, and is not to be considered on this appeal.

The assignments of error are overruled, and the appeal is dismissed, at the cost of appellant.

(221 Pa. 490)

HANLON et al. v. LEHIGH VALLEY R. CO.  
(Supreme Court of Pennsylvania. May 25, 1908.)

RAILROADS—ACCIDENT AT CROSSING—QUESTION FOR JURY.

In an action for injuries to a traveler at a railroad crossing, the question of the negligence of defendant held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1152-1192.]

Appeal from Court of Common Pleas, Luzerne County.

Action by Mary Hanlon and John J. Hanlon against the Lehigh Valley Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

J. B. Woodward, for appellant. M. H. McAniff, for appellees.

FELL, J. The plaintiff was injured at a grade crossing of the defendant's road under the following circumstances, as shown by her testimony and that of her witnesses: When she reached the crossing, at which there were two tracks, a train was passing east on the track farther from her, and a train not then in view was approaching the crossing from the east on the nearer track. Because of a curve in the tracks, a view of the approaching train was cut off beyond the distance of 500 feet by the east-bound train and by a tree and a barn that were near the tracks. She stood 15 feet from the crossing until the east-bound train had passed and its last car was 500 feet from her, and then listened for a train and looked up and down the tracks and found them clear. She continued to watch as she approached the crossing, but to what point was not shown. At the edge of the first rail her foot struck a plank, which was raised out of place or from the side of which the earth had been washed, and she dropped a package she was carrying and almost fell on the rail. She was struck after she had

crossed the track by the crossbeam of the engine, which was running 30 or 40 miles an hour and of the approach of which no notice was given until an instant before the accident.

This testimony required the submission of the case to the jury. It tended to establish negligence on the part of the engineer and care by the plaintiff. Before starting to cross from a point 15 feet from the tracks, where she could see 500 feet, she looked and listened for a train and continued to watch for it as she walked towards the track. When she committed herself to the act of crossing, she was very near the track, which was then clear for 500 feet, and no train was within hearing. She had ample time to cross before a train not then in sight could reach the crossing, and would have done so in safety if she had not been tripped by the plank. If she had looked after she had picked up her package, she would no doubt have seen the train, but she was then on the first rail and acted on the natural impulse to hurry over. Whether in this emergency she acted imprudently was not a question to be determined by the court. The fact that she was delayed by tripping and dropping her package while crossing the track takes the case out of the operation of the rule that a person who steps in front of a moving train which he saw or could have seen will be conclusively presumed to have been negligent.

The judgment is affirmed.

(221 Pa. 518)

**MCVAUGH v. PHILADELPHIA RAPID  
TRANSIT CO.**

(Supreme Court of Pennsylvania. May 26,  
1908.)

**STREET RAILROADS—INJURY TO PEDESTRIAN—  
CONTRIBUTORY NEGLIGENCE.**

In an action against a street railway company to recover for the death of a pedestrian, evidence of contributory negligence held sufficient to require the entry of a nonsuit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 248-250.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Sophia McVaugh against the Philadelphia Rapid Transit Company. From an order to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

George Demming and Edgar W. Lank, for appellant. Thomas Leaming and Russell Duane, for appellee.

POTTER, J. This is an appeal from the refusal of the court below to take off a judgment of compulsory nonsuit. The plaintiff sought to recover damages under the allegation that the death of her husband was caused by the negligence of the de-

fendant company. Mr. McVaugh, a man about 60 years old, undertook to cross Germantown avenue, a wide, unobstructed highway, about 6 o'clock on the evening of February 5, 1906, at or near the intersection of East Sharpnack street. He was caught in the space between two passing cars, and killed. At the close of the testimony for plaintiff, in granting the nonsuit, the trial judge said: "He [the deceased] does not appear to have looked at the proper place, nor did he cross the street at the regular crossing, but went over it diagonally; Germantown avenue being a street with two tracks on it, and cars running in different directions." It appears from the testimony that Mr. McVaugh, the deceased, walked slowly from the sidewalk to the nearest street car track, and crossed it in front of an approaching south-bound car, which came to a standstill within a few feet of the place where he crossed. The motorman of that car says that he realized Mr. McVaugh's peril from an approaching north-bound car, and shouted to him as he was passing, and he responded, "Oh, all right," and then stepped across the first rail of the next track, but, instead of drawing back or proceeding rapidly straight ahead to clear the second track, he curved to the left, and turned back into the space between the two tracks, and stood there by the side of the gate of the south-bound car. Just then the north-bound car reached the spot, and, the space between the two cars being very narrow, Mr. McVaugh was caught between the two cars and injured so severely that he died shortly afterwards. The second car was stopped before it had entirely passed the first one, but too late to avoid the accident. There was no evidence of negligence upon the part of the defendant company unless it was in the failure to stop the north-bound car before it reached Mr. McVaugh, but his action in stepping upon the track in front of the north-bound car and then in swerving back against the side of the south-bound car must have been, under the evidence, almost instantaneous. And, under all the circumstances, the accident was clearly the fault of the deceased in walking deliberately across in front of the south-bound car without at the instant taking note of the near approach of the north-bound car upon the track farthest from him. It is not uncommon for pedestrians to step into danger by passing behind one car over the second track and directly in front of another approaching car, which is hidden from them temporarily by the first car. But in this case the deceased had not even that excuse, for he passed in front of the first car, directly into the path of the second, and when he realized its proximity, and probably by reason of confusion or fright, instead of drawing directly back from the second track, as he might readily have done, he curved around against the side of the first car, and stood in the space between the two tracks, where

he was inevitably caught between the two cars.

The learned trial judge could not, under the evidence, have reached any other conclusion than that the accident was the result of negligence of the deceased in passing with heedless steps directly into danger.

The judgment is affirmed.

(221 Pa. 466)

# COMMONWEALTH v. SHULTS.

(Supreme Court of Pennsylvania. May 25, 1908.)

## 1. CRIMINAL LAW — INSTRUCTIONS — WEIGHT OF EVIDENCE.

A judge on a trial for murder may give an instruction conveying to the jury the impression that he considers the testimony in favor of defendant of little weight, where he allows the jury to exercise freely their own judgment as to the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1732-1748.]

## 2. SAME—EXPERT TESTIMONY—WEIGHT.

In a trial for murder, the court charged on the subject of insanity that the jury were not bound to decide the case according to the views of the doctors; that, as related to expert testimony, it was merely opinion evidence; that it might be of value, and that it might be of no value as it appealed to the jury, but it was for them to decide whether such testimony was worthy of consideration, and, if the jury considered the testimony of no particular good, they might dismiss it, but whether they dismissed it or not was entirely a matter for the jury. *Held* not error.

Mestrezat, Brown, and Stewart, JJ., dissenting.

Appeal from Court of Oyer and Terminer, Philadelphia County.

Francis Marion Shults was convicted of murder in the first degree, and appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Sidney L. Krauss, William A. Carr, and W. Horace Hepburn, for appellant. Wm. Findlay Brown, Asst. Dist. Atty., and Samuel P. Rotan, Dist. Atty., for the Commonwealth.

MITCHELL, C. J. The only assignments of error that need be noticed are those relating to the evidence of the experts as to insanity, and, these are practically all condensed in the exception to that portion of the charge in which the judge said to the jury: "We will now come to the medical testimony. I will say to you on that score that you are not bound to decide this case according to the views of the doctors one way or the other. The doctors are not the jury. They cannot take the stand, and say such and such is the case, and then decide the case. Although you have been told that you are bound by the evidence, or as much of it as you believe, when you come to medical testimony or any other expert testimony, that is merely opinion testimony. It may be of

value and it may be of no value, just as it appeals to you. One side puts an expert on the stand and he gives his opinion, and the other side puts an expert on the stand and you get the opinion of that doctor. They are both cross-examined, and it is for you to decide in considering all their evidence whether you will be guided to any degree by their opinions, whether you think they are worthy of any consideration, or whether you think they are not worthy of consideration at all. If you think they are worthy of consideration, you will decide how much they are worth and how much you will give to them, judging by the examinations and cross-examinations and the whole probabilities of the testimony as applied to the facts as you find them. If you consider the testimony cannot do you any particular good, you will dismiss it, but whether you will dismiss it or not is entirely a matter for you, and what effect you will give to it is also a matter for you." The law as laid down in this passage, even taking it as it is, separated from its context, is entirely accurate. "The jury are not bound to decide this case according to the views of the doctors one way or the other." That is correct. "It may be of value or it may be of no value, just as it appeals to you. \* \* \* It is for you to decide whether they are worthy of any consideration or whether they are not worthy of consideration at all, and, if you think they are worthy of consideration, you will decide how much they are worth and how much you will give to them." This is no more than telling the jury that the credibility of the testimony and the weight it is entitled to in reaching a verdict is exclusively for the jury to determine. That is the settled law of all the cases. And, even if we seem to see in the phrasing of the charge that the judge did not think the testimony of much weight, that was not error. He might have gone further and told the jury in explicit terms that he considered it "very weak." *Com. v. Van Horn*, 188 Pa. 143, 41 Atl. 469. So long as the jury were left in the free exercise of their own judgment, there was no error. That the jury in this case were so left is beyond question. Even the particular passage excepted to concluded with the words, "whether you will dismiss it or not is entirely a matter for you, and what effect you will give it is also a matter for you."

So far the passage of the charge excepted to has been considered by itself, apart from its context. But that is not the rule. The charge can only be considered fairly as a whole, and the charge in the present case repeatedly and most explicitly told the jury that the weight and effect of the testimony on every branch of the case was for them to decide on their own judgment. The killing was admitted, and even the premeditation, the deliberate preparation for the murder, was not denied. The only possible point of

doubt in the case arose from the apparent absence of any sane motive for the act. This was altogether a question for the jury, and if they took a severe view it was not from any error of the judge.

Judgment affirmed, and record remitted to the court of oyer and terminer for the purpose of execution.

MESTREZAT, J. (dissenting). I would sustain the assignments of error, so far as they allege inadequacy in the charge of the court on the question of insanity. I am convinced that the charge in this respect was insufficient, and to a certain extent misleading, and that the case was not submitted to the jury in accordance with the law as determined by this court. In *Pannell v. Commonwealth*, 86 Pa. 260, the defense was insanity. As here, the trial judge seemed to regard the testimony of medical experts as of little or no value. There was a verdict of guilty of murder of the first degree. In reversing the judgment this court said, *inter alia* (page 269 of 86 Pa.): "It is well settled that the knowledge and experience of medical experts is of great value in questions of insanity. They are like those of experts in all other branches of science and of art. Evidence had been given of the observation, experience, and skill of these medical experts sufficient to enable them to form intelligent opinions, and they had testified to those opinions. We cannot understand on what principle the learned judge said to the jury that in this case he questioned very much whether they would realize much, if any, valuable aid from their testimony. True, the jury were not bound to adopt the conclusions of the experts, yet they should have been instructed to give a careful consideration to the testimony of those who had made the diseases of the human mind a special study. In a former part of the charge the jury was told that 'great respect should be paid to the opinion of that class of witnesses,' followed by other remarks equally correct. Yet, when the court came to apply the testimony to the case trying, its effect was almost destroyed. We see no especial circumstances in this case to justify taking from the evidence of these medical witnesses that consideration to which the testimony of experts is generally entitled." The doctrine announced in this case has never been doubted or overruled by this court. It is unquestionably sound, and should be followed in all cases where the defense is insanity. The testimony of medical experts is frequently, and sometimes the only, testimony upon which a defendant must rely to support the defense of insanity. Who can know so well the action or operation of the human mind as the medical expert who has made it a special study and matter of assiduous inquiry? He is universally recognized as the most competent to speak on the subject, and hence it is that

in our system of jurisprudence his testimony is to be given very careful consideration by the jury where the defense is insanity. This being true, it devolves upon the trial court to explain to the jury the character of such testimony and the weight to be given to it. This is a duty incumbent upon the trial judge, and a failure to perform it should be ground for reversal. It is error for the trial judge to ignore the testimony, or to place it on a par with the testimony of a layman. It is true that it is for the jury in considering the defense of insanity to determine what weight the testimony of a medical expert shall have, but the court should have instructed the jury that, in weighing his testimony, they should consider that he had fitted himself to testify by a special study of the subject. Such testimony must not be discredited by stating that it is merely opinion testimony, without reference to the opportunities of the witness for qualifying himself to speak on the subject. Even in civil cases, where there is a conflict in the testimony, it is the duty of the trial judge to direct the attention of the jury to the opportunities the witnesses have for knowing what they are testifying about. The opportunity of the witness for obtaining a knowledge of the subject, as well as his superior ability to judge of the matters of which he speaks, are always matters which a jury should consider in giving weight to testimony, and hence the duty rests upon the trial judge to point out such distinction between witnesses, when it occurs, so that the jury may consider properly and intelligently the testimony for and against the proposition submitted for their determination. This is true in civil cases, and the rule should be strictly observed in cases involving a human life.

The majority opinion quotes the part of the charge bearing upon the evidence given by the medical experts on the question of the insanity of the defendant. No other part of the charge cures the error it contains. It is impossible to reconcile it with our decisions. The judge said: "I will say to you on that score [medical testimony] that you are not bound to decide this case according to the views of the doctors one way or the other. The doctors are not the jury." This proposition, as stated, is not sound. The jury were bound to decide the case according to the testimony of the medical experts if that testimony outweighed the conflicting testimony in the case. If it convinced the jury, they were bound to render a verdict in accordance with it. The tendency of the language just quoted was to discredit the medical testimony with the jury, if not to compel them to ignore it. It was not intimated in the case anywhere, even in the heated arguments of counsel, that the doctors were the jury. The suggestion that they were not the jury was ill-timed, and should have been omitted from the charge. It might

have been permissible in the arguments of counsel, but should have had no place in the charge of the court. The learned judge, however, did not stop with this expression of his views on the subject. He further said: "They [the doctors] cannot take the stand, and say such and such is the case, and then decide the case." The counsel for the defendant advanced no proposition of that kind. It was not suggested nor even intimated in the case until the learned judge, by this unfortunate expression, left the impression that the medical testimony was offered for that purpose. He again says in his charge: "When you come to medical testimony, or any other expert testimony, that is merely opinion testimony." What was the jury to infer from that remark? Simply that the medical or expert testimony was to be considered the same as the testimony of the laymen, without the jury taking into consideration the fact that the physicians had qualified themselves to speak upon the subject. The judge did not stop there in discrediting the testimony of the medical experts, but he continued: "It [medical testimony] may be of value and it may be of no value, just as it appeals to you." In other words: "You may give it consideration or you may ignore it. If, like many laymen, you think expert testimony is of no value, then you may, as you doubtless will, disregard it in determining the question of the prisoner's sanity." The learned judge then proceeded to say: "It is for you to decide, in considering all the evidence, whether you will be guided to any degree by their opinions, whether you think they are worthy of any consideration, or whether you think they are not worthy of consideration at all." In the broadest manner possible, therefore, the jury were told that it was wholly a question for them to determine whether they would give any consideration whatever to the testimony of the medical experts. The attention of the jury was not directed to what this court said was important, viz., that they should "give a careful consideration to the testimony of those who made the diseases of the human mind a special study." On the other hand, and directly in opposition to the ruling of this court, the trial judge in the case at bar told the jury that it was entirely with them to say whether such testimony was worthy of consideration at all. In view of the fact, undisputed and uncontroverted, that the two medical experts called by the defendant were of the highest standing in their profession and of recognized ability, the error of the trial judge is so palpable and does such great injustice to the defendant that the conviction should be reversed without any hesitation whatever.

The charge was not only erroneous and inadequate as to the effect and weight which should have been given to the medical testimony, but it was also clearly inadequate in not pointing out the absence of any sane

motive whatever for the commission of the offense by the defendant. In fact, it cannot be pretended under the testimony in the case that there was any motive which a sane mind could have for the commission of the atrocious crime of which the defendant was convicted. It is true that where the accused denies that he committed the act, or where it is admitted or established that he did commit it, the motive is unimportant in determining guilt, but we distinctly ruled in *Commonwealth v. Buccieri*, 153 Pa. 535, 26 Atl. 228, that, where insanity is set up as a defense, the absence of any motive which would prompt a sane man to commit the deed adds to the strength of positive evidence of unsoundness of mind. Here the defense was insanity, and, if the medical testimony on the part of the defendant was believed, that defense was sustained. The absence of a sane motive for the defendant taking the life of his five year old child was therefore important, and would have tended strongly to support the defense of insanity. In a very lengthy charge the court does not refer to the absence of a motive for the commission of the offense, and hence that important element in sustaining the defense is not brought to the attention of the jury, as it unquestionably should have been. It was the duty of the trial judge to charge fully upon the law applicable to the facts of the case without any special request on the part of the defendant. In cases of this character the court performs its duty only when it instructs the jury upon the law which is applicable to the facts disclosed by the evidence in the case. As correctly said by Mr. Justice Paxson in *Meyers v. Commonwealth*, 83 Pa. 181, 143: "The rule that a judge is not to be convicted of error for what he omits to say, unless his attention is called to the subject by a point or request to charge, is well enough in civil cases, but ought not, in my judgment, to be applied to a capital case. The prisoner has a right to have the jury properly instructed upon every question of law legitimately raised by the evidence. This right he cannot waive, nor can his counsel do so for him."

The facts of this case made it especially important that the trial judge should have directed attention to the testimony of the medical experts and the weight which it should receive. A father wandered with his five year old daughter to Fairmount Park, there wrote a letter in which he spoke most endearingly of the child and other members of the family, and within a short time thereafter was found in the park with his dead child pressed to his breast with a fatal bullet wound in her body and his own throat cut. The defense was psychic epilepsy or epileptic insanity, and there was evidence showing that the defendant had received a blow on the head in his early youth which might have resulted in insanity; that at

times he suffered with his head, had convulsions, was melancholy and morose, and had spent a year in an insane asylum. No motive which could have prompted a sane mind to commit the horrible deed was given or even intimated on the trial. In my judgment the facts of this case required the trial judge, not to minimize the value and weight of expert testimony as he did in his charge, but, as we held in the Pannell Case, he should have told the jury "that the knowledge and experience of medical experts is of great value in questions of insanity," and should have instructed them "to give a careful consideration to the testimony of those who made the diseases of the human mind a special study."

I would reverse the judgment, and award a new trial.

BROWN and STEWART, JJ., concurred in the dissent.

(221 Pa. 463)

WALSH et al. v. PITTSBURG RY. CO.  
(Supreme Court of Pennsylvania. May 25, 1908.)

1. NEGLIGENCE—INJURIES TO TRESPASSER—WANTONNESS.

It is the duty of the owner of a city lot on which there was an electric motor to avoid intentional or wanton injury to a trespasser by any act which would expose him to danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 87, Negligence, §§ 45-47.]

2. SAME—DUTY OF DEFENDANT.

Where plaintiff, a minor, went on a lot owned by defendants on which was an electric power house, while the employes of the owner were not bound actively to care for such minor by keeping her off the lot, or by protecting her after she had entered it from injury that might result from the condition of the property, there was a duty not to injure her negligently.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 87, Negligence, §§ 45-47.]

3. SAME—QUESTIONS FOR JURY.

Where a minor trespassing on property of defendant was injured by the starting of the machinery of an electric motor thereon, whether the employé starting the machinery observed where the minor stood and realized the consequences resulting from his act in starting the machinery, and that it would expose the minor to danger, were questions for the jury.

Appeal from Court of Common Pleas, Allegheny County.

Action by Dorothy E. Walsh, by her next friend, T. F. Walsh, and T. F. Walsh, against the Pittsburg Railway Company. Verdict for plaintiffs, and defendant appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William A. Challener, Clarence Burligh, and James C. Gray, for appellant. Rody P. Marshall and Thos. M. Marshall, for appellees.

FELL, J. The defendant was the owner of a lot 185 by 400 feet, at the corner of Preble avenue and Juniata street, in Allegheny city,

on the end of which furthest from Preble avenue it had an electric power house. A part of the lot nearest Juniata street was unoccupied, and was at times used by children who lived in the neighborhood as a playground. Back of this part were piles of coal, paving stones, ties, and rails; and back of these a railroad track, used for the transportation of coal cars, extended from Preble avenue to the power house. At the side of this track on an embankment seven feet high there was a track on which a car used to remove ashes was operated by means of a wire cable. At the end of this track 50 feet from the top of an incline rising from ash pits connected with the power house, there was a building 10 feet square, in which there was an electric motor and a drum around which the cable was wound. The ash car when loaded was drawn from a tunnel in front of the ash pits up the incline and on the embankment, and the ashes were dumped into a railroad car on the lower track. There had been no permissive use of any part of the lot, except that fronting on Juniata street and nearest to it. The plaintiff, a girl eight years and eight months old, went to the lot to witness a fight in which some boys were engaged. She walked from Juniata street across the vacant part of the lot, a distance of 130 feet, to the vicinity of the power house and up the embankment, and stood between the rails close to the cable and a foot and a half or two feet from the door of the motor house. While she was standing there, an employé of the defendant whose business it was to operate the motor came along the track from the power house, passed by and close to her, "so close he nearly brushed her clothes," and entered the motor house. Within a few seconds after he entered the house the machinery was put in motion. The cable when in motion was raised a foot or two from the ground. It was worn and frayed, and at places loose ends of wire stuck out. It caught the plaintiff's dress, and she was drawn into the drum and injured.

The plaintiff was on the private property of the defendant, where she had no right to be. Its employes were not bound actively to care for her by keeping her off the lot or by protecting her after she had entered it from injury that might result from the condition of the property. The standard of duty in such a case is the same whether the person injured is an adult or a child. *Thompson v. Railroad*, 218 Pa. 444, 67 Atl. 768, 120 Am. St. Rep. 897. There was, however, a duty not to injure her intentionally, or wantonly by any act to expose her to danger. "Even trespassers are entitled to human consideration." *Barre v. Reading City Pass. Ry. Co.*, 155 Pa. 170, 26 Atl. 99. If the man who started the motor knew at that time that the plaintiff was standing between the rails close to the frayed cable, which would touch her dress when in motion, and from his knowledge of

the circumstances was conscious that she would be exposed to danger if the machinery was put in motion, a duty of care arose, as it would in the case of an engineer who sees a child on the track in front of his engine. The case would then come within the class of which *Biddle v. Railway Co.*, 112 Pa. 551, 4 Atl. 485, *Levin v. Traction Co.*, 194 Pa. 156, 45 Atl. 134, *Enright v. Railroad Co.*, 198 Pa. 166, 47 Atl. 938, 53 L. R. A. 330, 82 Am. St. Rep. 79, and *Pollack v. Railroad Co.*, 210 Pa. 634, 60 Atl. 812, 105 Am. St. Rep. 846, where children were driven from moving cars, are types. The presence of this man could not be secured at the trial by either party, and the jury were left to inference as to his knowledge of the situation. The facts established by the testimony as a basis for the imputation of knowledge to him were that he had been in charge of the machinery for several months, and that he walked 50 feet up the track towards the plaintiff and passed close by her at the door of the building as he entered it. He must have known that the cable would be raised when in motion, because it was a part of the machinery he operated. Presumably he knew that it was frayed, because it was constantly before his eyes. He had the fullest opportunity to see the plaintiff, to observe where she stood in relation to the cable, and to realize the consequences that would probably result from his act. Whether he actually saw her, and was conscious that his act exposed her to danger, were questions for the jury.

The judgments are affirmed.

[21 Pa. 508]

In re HARRISON'S ESTATE.

(Supreme Court of Pennsylvania. May 25, 1908.)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—ALLOWANCE TO EXCEPTANT'S ATTORNEY.

Where the funds belonging to an estate were in the hands of the court, an allowance of attorney's fees to an exceptant for services to the estate in objecting to the allowance of certain excessive commissions and payment of certain taxes and broker's charges was error.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Joseph Harrison, Jr., deceased. From a decree sustaining exceptions to adjudication, Clara A. Durant appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

M. Hampton Todd, for appellant. Charles Biddle, for appellee.

POTTER, J. Our consideration of the facts upon which this appeal is based leads us to agree with the view taken by the orphans' court; and that is that this case is not properly to be classed with *Kennedy's Estate*, 141 Pa. 479, 21 Atl. 671, where an allow-

ance for counsel fees was made to an exceptant out of the fund. In that case the allowance was only approved upon the peculiar facts stated in the opinion of the court below; and warning was expressly given that the action "must not be drawn into a precedent for the broad doctrine that, where exceptions are filed to the account of an executor, administrator, or trustee in the orphans' court, the exceptant is entitled to an allowance for counsel fees out of the fund. The rule in such case is that the exceptant must pay his own counsel." We regard this as a most salutary rule, and not to be entrenched upon or impaired in any way. To do so would be to open the door to great abuses. This is pointed out in the opinion of Justice Dean, in *Commonwealth v. Order of Solon*, 193 Pa. 244, 44 Atl. 827, where he elaborates the principle involved, and points out the distinction between securing or raising a fund—the actually bringing it into existence, and the mere dealing with a fund which is at the time safely in the custody of the court. He says (page 242 of 193 Pa., and page 828 of 44 Atl.): "It is conceded that the distribution of a fund in the hands of a receiver or other trustee is to be governed by equitable principles; and where the attorney of one of several parties, all equally interested, secures a fund which would otherwise have been embezzled or lost, and all share equally in the distribution, it is but equitable that all should share in the expense which produced the fund, although but one moved in the matter. But there is no such case here. \* \* \* It is urged that Mr. Quincy, from his argument and some evidence produced by him, induced the auditors to reject many thousand dollars of spurious claims on the fund, and thereby all holders of certificates, whether purchased by or originally issued to them, were benefited. Admit it; but he did only what he was bound to do under his professional obligation to his own clients. If he had done less, he would have failed in duty to them. In this particular he owed no duty to other claimants and performed none to them, although an incidental benefit may have resulted to them from the performance of a duty to his own clients. This, however, gives him no claim on them for contribution to his compensation. Suppose, as there might easily have been from the large number of claimants, 30 lawyers representing 30 separate claims, and 50 unrepresented certificate holders before the auditors, and every lawyer had urged successfully a point which induced the rejection of some unfounded claim, then compensation to each at the rate here allowed would have swept away the whole fund. That this claim being only for one lawyer, in no degree under the facts raises an equity in his favor. It would have been otherwise if the fund in the beginning had been raised or saved by him as counsel for his particular clients."

We are unable in any way to distinguish



the present case in principle from that just cited. The fund was in the hands of the court, and in no jeopardy except from possible mistake of the court in dealing with it; and in that event nothing more was required for the correction of the error than the filing and argument of proper exceptions in the court below, and, if necessary, following the matter to the appellate court. There is no evidence that anything out of the ordinary routine of legal procedure was required. The appellant was protecting her own interest, and, although it may be that by means of her efforts others were benefited also, yet we know of no rule of law which will entitle her to be reimbursed for payment of counsel fees expended by her in order to protect her own interest. The services she rendered to the common interest were voluntary, and, however beneficial they may have been, no legal charge for them can be sustained, in the absence of a contract of employment, either expressly made or superimposed as a matter of law or equity upon the facts. The assignments of error are overruled.

The decree of the orphans' court is affirmed, and this appeal is dismissed, at the cost of appellant.

(221 Pa. 485)

**MITTLEMAN v. PHILADELPHIA RAPID TRANSIT CO.**

(Supreme Court of Pennsylvania. May 25, 1908.)

**1. CARRIERS—STREET RAILROADS—DUTIES OF CONDUCTOR.**

The conductor of a street car must control the operation of the car, and enforce the rules of the company as far as they affect the transportation of passengers.

**2. SAME—DUTY OF PASSENGER—DANGEROUS POSITION.**

A passenger on a street car should take the place on the car assigned to him by the conductor, unless the danger in so doing is so apparent that a reasonably prudent person would not assume it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1375-1382.]

**3. SAME—NEGLIGENCE OF PASSENGER.**

A passenger with numerous bundles attempted to enter an open summer car, and the conductor, after accepting his fare, directed him to occupy the platform. *Held*, that the passenger, in following the directions of the conductor, was not guilty of negligence as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1375-1382.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Abraham Mittleman against the Philadelphia Rapid Transit Company. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Bernard Harris, for appellant. Thomas Leaming and Sydney Young, for appellee.

**MESTREZAT, J.** This is an action of trespass to recover damages for injuries received under the following circumstances: On the morning of September 2, 1903, the plaintiff, with a companion, went to Sixth and Pine streets, in the city of Philadelphia, to board a street car. The plaintiff is a paper hanger and painter, and had with him on this occasion a bundle of paper, a bucket of paste, a satchel, and a small stepladder. He and his companion desired to go west on a Pine street electric car. He testifies: "A. When I approached the car with the intention of boarding it, I approached it from the back near the conductor, and I attempted to board the car, and he said: 'Go to the front.' Q. Did you go to the front? A. Yes, sir. Q. You boarded the car in front? A. Yes, sir; in front. Q. Where did you remain after the car started? A. Near the motorman. Q. On the platform? A. On the platform." The car was an open summer car with transverse seats extending the entire width of the car, and with no openings from the platform into the body of the car. When it reached Sixth street, it collided with another car of the defendant company passing south on that street, and in the collision the plaintiff was seriously injured. The accident occurred about 7:30 o'clock in the morning. At the close of the plaintiff's testimony, the trial judge granted a nonsuit, giving as a reason therefor the following: "We simply have the case of a conductor saying to a passenger when he attempts to enter the rear of the car, 'Go forward,' and that passenger going forward to the very extreme front of the car, to wit, the front platform, and placing himself in that which has been decided by our courts to be a position of danger, and a position where, if an accident happens to him, he is debarred from recovering." The court in banc refused to take off the nonsuit, holding that the plaintiff in occupying a position on the platform was guilty of negligence per se. The opinion says: "It was a mere direction to him [plaintiff] to 'go to the front,' and, even if it be assumed that this was a direction to him to go to the front platform, as there was no constraint or compulsion, it was not a sufficient excuse for him to place himself in and remain in a position of danger."

We have repeatedly held that it is negligence per se for a passenger to voluntarily take a position on the platform of an electric street car when there are vacant seats in the body of the car. The body of the car, as is well understood, is the place prepared for and assigned to the passenger for transportation, and it is his duty to enter and remain there until he arrives at his destination. If he fails to observe this duty and voluntarily places himself on the platform or on the running board of the car, positions not intended to be occupied by a passenger, and which are more or less dangerous, he must assume the risk incident to such a place. But there are exceptions to this rule. Special reasons may

obtain which justify a passenger in occupying a position on the platform while a car is in motion. If, as sometimes occurs, a seat is placed on one or both platforms of an open summer car, it is a sufficient reason for a passenger occupying the seat; and in doing so he is not guilty of negligent conduct. The act of the carrier company in placing the seat on the platform is an implied invitation to the passenger to use it, and estops the carrier from alleging that it is a place of danger to be avoided by the passenger. Where a passenger enters a car, and by reason of its overcrowded condition there is no vacant space in the body of it, he may occupy the platform with the acquiescence and knowledge of the conductor. *McCaw v. Union Traction Co.*, 205 Pa. 271, 54 Atl. 893. Such conduct does not convict him of negligence per se. His action is justified by the necessities of the case, and, by accepting his fare and permitting him to occupy the position, the conductor tacitly invites him to stand on the platform. These and other exceptions to the general rule that a passenger must not occupy the platform of a street car are recognized not only in our own, but in other, jurisdictions.

Turning now to the case in hand, we are clearly of the opinion that the facts disclosed by the testimony make it an exception to the general rule that a passenger on an electric street railway is guilty of negligence per se if he occupies a position on the platform of a moving car. The trial judge, as well as the court in banc, evidently misapprehended the facts of this case, and the inferences to be drawn from them. When the plaintiff approached the car to enter it, the conductor did not simply direct him to "go forward," thereby intending that he should take a seat in the front part of the car. So far as the evidence discloses, there is no reason why the plaintiff should not have been seated in the rear as well as the front of the car. There were vacant seats in both the rear and the front, and there is nothing in the case to show that the conductor could have had any reason for assigning the plaintiff a seat in the front rather than the rear of the car. On the other hand, a jury would have been fully justified, and it was for the jury, in finding that the direction to the plaintiff was to go to the front platform and occupy it with his incumbrances until he reached his destination. The plaintiff attempted to board the car and take a seat in the rear. When he did so, the conductor said to him: "Go to the front." As we have said, there is no reason appearing in the case why, if the plaintiff was to be permitted to enter the body of the car at all, he should not have done so then and have occupied a seat in the rear of the car. The plaintiff was carrying several articles which might have been objectionable to other passengers, and would certainly have obstructed ingress and egress to and from the body of the car, and the

reasonable inference is that the command or direction of the conductor was that the plaintiff should enter the front platform and occupy it. This is also manifest and conclusively shown when we consider that the plaintiff frequently used the cars on this street with the same incumbrances he had on this occasion, and was always, as testified by him, told when he would attempt to enter the inside or body of the car: "You can't go there because there are passengers there. The seats are for passengers. You go with your bundles to the front of the car." We therefore have the case where a passenger laden with numerous bundles attempts to enter the body of an open summer car, and is directed to occupy the platform by the conductor who accepts fare from the passenger for his transportation. Under such circumstances, the court cannot declare as a matter of law that the passenger is guilty of negligence per se in occupying the position.

In *Duggan v. Baltimore & Ohio Railroad Company*, 159 Pa. 248, 254, 28 Atl. 182, 186, 39 Am. St. Rep. 672, the present chief justice delivering the opinion of the court said: "The conductor has general power and control over the train and all persons on it, with authority to compel observance of the regulations of the company, to preserve order, and to employ the whole force of trainmen, and of passengers willing to assist, for these purposes." The conductor of an electric street car is invested with a like authority. It is his duty to control the operation of the car, to protect and regulate the seating of the passengers, and to enforce the rules and regulations of the company affecting the transportation of the passengers. He is the representative and acts for the company in transporting the passengers. It is the duty of the passenger to submit to the authority of the conductor and to observe such reasonable directions as he may give. *O'Donnell v. Allegheny Valley Railroad Co.*, 59 Pa. 239, 98 Am. Dec. 336. This is necessary for the safe transportation of all the passengers aboard the car. A passenger would not be justified in obeying the instructions of a conductor to occupy a place on the car which was imminently or manifestly dangerous, but he should take the place on the car assigned him by the conductor, unless the danger is so imminent or apparent that a reasonably prudent man would not assume it.

Applying these principles to the case under consideration, we think that the conductor had the authority to direct the passenger to occupy the platform. It was within the powers conferred upon him by the company. The place assigned to the passenger, while not regarded as safe as the body of the car, yet it is so frequently used by passengers that it cannot be regarded as imminently dangerous. It is common knowledge that in a city where the travel on electric street cars is very heavy both platforms of the cars are constantly occupied by passengers with the

knowledge and assent of the conductor, and that he collects the fares for their transportation. This is so well known that it must be taken to be within the knowledge of the company and done with their approval. Therefore, the conductor having the authority to require the plaintiff to occupy the platform and the plaintiff having done so in obedience to the direction of the conductor, the plaintiff was not guilty of negligence as a matter of law, to be declared by the court, in standing on the platform while the car was in motion. The case should have been submitted to the jury to determine the question of the plaintiff's negligence. If the jury found that the plaintiff when attempting to board the body of the street car was directed by the conductor to occupy the platform, and that in pursuance of such instructions from the conductor he did take his place on the platform, he is relieved from the charge of negligence. In other words, the plaintiff was not guilty of negligence per se in standing on the platform under the circumstances.

We are all of the opinion that the nonsuit was improperly granted, and therefore the second assignment of error is sustained, and the judgment is reversed, with a procedendo.

(121 Pa. 496)

#### COOLBAUGH v. HERMAN.

(Supreme Court of Pennsylvania. May 25, 1908.)

##### 1. CORPORATIONS—DIRECTORS—ELECTION—OBJECTIONS TO BALLOTS.

Under Act May 26, 1893 (P. L. 141), regulating the election of directors of corporations, an objection to the voting of stock at such an election is not too late, because not made simultaneously with the offer of the ballot, but after a delay of a few moments.

##### 2. SAME—RIGHTS OF TRUSTEES.

Under Act May 26, 1893 (P. L. 141), prohibiting an inactive trustee from voting stock standing in his name contrary to the wishes of the beneficial owners thereof, election judges at a meeting of the shareholders of a corporation are bound to reject votes offered in the name of an undisclosed trust.

##### 3. SAME.

The intent of Act May 26, 1893 (P. L. 141), relating to the election of directors of a corporation, and prohibiting inactive trustees from voting stock contrary to the wishes of the beneficial owners, was to prevent the voting of stock by an undisclosed trustee; and an objection to such voting must be made at a time when it may be considered and passed upon by the officers conducting the election, when the disputed ballot must be rejected if unlawfully offered.

##### 4. SAME.

Under Act May 26, 1893 (P. L. 141), if a person offering to vote stock at an election of directors of a corporation is not the owner thereof, either in his own name or as active trustee, with the character of his trusteeship shown on the face of the certificate or transfer books of the corporation, he is not entitled to vote.

Appeal from Court of Common Pleas, Northampton County.

Action by Frank W. Coolbaugh against

Asher W. Herman. Judgment for defendant and plaintiff appeals. Reversed.

The court below charged in part as follows:

"Now, as I have already said, the certificate of stock and the books of the company and this list, which was furnished under the provisions of the act of 1874, that would be prima facie, or, in the first instance, to start off with, the evidence which these election officers had as to who had the right to vote. 'But if objection'—I am reading from the act of assembly—'is taken by an actual stockholder'—it is admitted that Mr. Coolbaugh was an actual stockholder—'at the time the ballot is tendered.' It does not say at the time when the ballot was tabulated. It does not say at the time when the calculation is made, but at the time when Kuebler and Kinsey and the other party—Hilliard, I believe it was—tendered their ballots. Was there, then, an objection made in writing? Was there an objection, accompanied by a written statement in writing, made? Now, if there was, then it shall be the duty of the judges of election to inquire and determine summarily. It does not mean that the judges of election should wait until after they had gotten in all the rest of the ballots; but they should determine summarily whether the facts are as represented in such statement. So it seems to me that it is a preliminary and necessary thing that when these ballots were tendered to these election officers that Coolbaugh ought to put in his protest. There is no question about the fact that he did protest. Everybody admits that; but did he protest in time? Was his protest put in at the time when these ballots were tendered by Kuebler and by Kinsey and by Hilliard, when they voted this trustee stock which went to make up these 1,930 votes which are in dispute? If you find as a matter of fact, from a consideration of all this testimony, that he did not make his protest in time, as I have indicated what the time is, then it would be your duty to find a verdict in favor of the defendant. But if you find, from all the testimony in the case, that Mr. Coolbaugh did make his protest when these gentlemen tendered their ballots to the election officers, then it would be your duty to find a verdict in favor of the plaintiff, remembering that the burden is upon the plaintiff to satisfy you by the weight of the evidence that he did get his protest in at the right time. Now, by time the law does not mean that he should do it in the next second, or that he should be right there and hand it in just as soon as the other man handed in his ballot; but it must be within a reasonable time. That is to say, a party who is intending to protest and who is intending to object ought to be present, and he ought to watch and see when ballots are offered, just as you would challenge a voter at a general election, and when the man walks up with his ballot he ought to walk up with his protest, and the one event ought to follow the other in a natural and orderly sort of way."

Plaintiff presented these points:

"(3) That it now appearing by said certificates and transfer books, the character of the trusteeship of the several persons claiming the right to vote on said stock, and the evidence in the case that the said stock was not owned by the persons claiming the right to vote thereon in their own right or as trustees, the character of whose trusteeship was disclosed on the face of the certificates and transfer books, the jury must render a verdict in favor of the plaintiff. Answer: That is refused, because it requires that the case should be taken away from you. I submit the question to you.

"(4) The provision in the act of 1893 that the objection to the vote of any person claiming a right to vote shall be offered at the time the ballot is tendered is not mandatory, but directory only. Answer: I refuse that point. It seems to me that this direction that objection should be made at the time when a ballot is tendered is of the very essence of the act of assembly, and, when taken in connection with the fact that the judges are to act summarily, it seems to me that it is a mandatory provision, as I have already charged you."

"(6) Under all the law and the evidence the verdict of the jury should be for plaintiff. Answer: That point is refused."

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Frank Reeder, Jr., Samuel Scoville, Jr., and Charles H. Edmunds, for appellant. H. J. Steele and El. W. Edgar, for appellee.

POTTER, J. This is a quo warranto to try the right of the defendant, Asher W. Herman, to hold the office of director of the Sterlingworth Railway Supply Company, a corporation of the state of Pennsylvania. At the annual election held January 22, 1907, certain shares of stock standing on the books in the name of "William J. Kuebler, Trustee," and "Howard P. Kinsey, Trustee," and "Zearfoss and Hilliard, Trustees," were voted by the parties named as trustees in favor of the defendant as a director. It was claimed by relator that these votes were illegal, and this was conceded by defendant, if objection thereto at the election was made in time. It was admitted on the trial that during the election objection to the contested votes was made and a statement under oath furnished to the election officers as required by the act of May 28, 1893 (P. L. 141); but the testimony was conflicting as to whether this was done at the time the ballots were tendered, or later. It is conceded that, if the objection was made and statement filed in time, sufficient contested votes must be rejected to change the result of the election so far as the relator is concerned. The court submitted to the jury the question of fact whether the objection was made and a statement filed at the time the ballots were tendered to the election officers, saying in his charge:

"Now, by time the law does not mean that he should do it in the next second, or that he should be right there and hand it in just as soon as the other man handed in his ballot; but it must be within a reasonable time." But the learned judge went on to charge the jury that, if there was an interval of perhaps 15 minutes after the ballots were tendered before the protest came and was filed with the judges of the election, the verdict then ought to be in favor of the defendant in this case. Under this charge, the jury found for the defendant, and judgment was entered upon the verdict.

While the testimony is conflicting as to whether the protest was made immediately upon the contested ballots being offered, or 10 or 15 minutes later, it clearly appears from the evidence that at the time when the protest was made the election was still in progress, and there was no question as to the identity of the ballots which had been objected to. This case seems to have been tried upon the theory that the election board did not act upon the protest which was filed, and that it was not required to do so, if the protest was not filed substantially at or about the time when the ballots were tendered. But it appears from the evidence that the election board did take action upon the protests, and that they determined to accept the votes as offered, in accordance with the list of stockholders furnished to them by the secretary, and that they pursued this policy in the face of and without regard to the protests. The testimony shows that the election board listened to argument as to the legality of the votes before the voting was concluded or the result announced, and that they deliberated upon and talked over the matter before deciding whether or not they would exclude the votes which were objected to. Conrad Miller, one of the tellers, testified: "The vote was tendered, and was accepted and passed upon, and shortly after—I am unable to say just when—those papers were presented, those objections. Then we stopped awhile, and considered whether it was legal—whether we would pick out those ballots out of the hat again." It is apparently conceded by every one that, if the decision of the election board had been to exclude instead of accepting them, there could have been no doubt as to the particular ballots objected to, and no difficulty in identifying and removing them from the receptacle in which they had been deposited.

The real question which arises in this case is not whether the election board should have taken action respecting the protests, for clearly that is what they did. But the point is whether the effect of their action is to be permitted to stand, under the plea that they should not have considered the protest at all, because it came a few minutes after the ballot was tendered. We do not consider the reference in the statute to the objection being taken at the time the ballot was tender-

ed as a peremptory requirement that the objection and the offer of the ballot shall be simultaneous. The learned judge of the court below conceded this; but he instructed the jury that the protest, in order to be effective, must follow almost immediately after the deposit of the ballot. We are not persuaded that the Legislature intended that a delay of a few moments upon the part of the objector should render his protest void. No rights were impaired thereby. "In general, it may be laid down as a rule that, when a statute directs certain proceedings to be done in a certain way or at a certain time, the law will be regarded as directory, and the proceedings under it will be held valid, though the command of the statute as to form and time has not been strictly obeyed; the time and manner not being the essence of the thing required to be done." *Potter's Dwarrris on Statutes*, 221, 226 (note 28). The purpose of the statute under consideration was to prevent the voting of stock by one not the owner, or who was an undisclosed trustee; and the essence of the requirement as to the objection is that it must be made at a time when it may be considered and passed upon by the election officers, and the disputed ballot rejected if unlawfully offered.

Under the facts of the case at bar no difficulty appeared in identifying the ballots to which objection in writing was made at the time when the election board were considering the protests. The act of 1893 was passed to further define evidence of stock ownership and the right to vote thereon. Under its provisions, if the person in whose name the stock stands, and who is offering to vote thereon either in person or by proxy, is not the owner thereof, either in his own right or as active trustee, with the character of his trusteeship disclosed on the face of the certificate or transfer books in connection with his name, he is not entitled to vote the stock. Clearly, therefore, it was the duty of the election judges to reject the votes offered in the name of an undisclosed trust. Obviously, in so far as the stock to the voting of which objection in this case was made was concerned, the character of the trusteeship was not disclosed, and the votes so tendered should have been rejected. The plain intention of the statute is to prevent voting by an inactive trustee, or in behalf of an undisclosed trust. It cannot be said that such a requirement is destroying any property right. It is merely regulating the exercise of the right. If the trust be not active, the right to vote the stock is expressly reserved to the

real owner by the second section of the act.

The fifth, sixth, and seventh assignments of error are sustained.

The judgment is reversed, and it is here entered for the plaintiff.

(321 Pa. 434)

PENCE et al. v. POET.

(Supreme Court of Pennsylvania. May 18, 1908.)

JUDGMENT—PLEADING—AFFIDAVIT OF DEFENSE—RULE FOR JUDGMENT.

Where plaintiff, to accelerate a trial, had his rule for judgment for want of a sufficient affidavit of defense discharged, and defendant thereafter for delay ruled the case out for arbitration to keep it off the trial list, the court in its discretion might grant a second rule for judgment.

Appeal from Court of Common Pleas, Blair County.

Action by Charles A. Pence and another, doing business as Pence & Swisher, against Philip W. Poet. From an order making absolute a rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

The following is the opinion of Bell, P. J., in the court below:

"Plaintiffs' attorney, on his own motion, before argument of the first rule for judgment, had said rule marked 'Discharged' in order to place the case on the trial list. Defendant, in order evidently to keep the case off the trial list, entered a rule to refer. Under such circumstances, it would seem but right and just to reinstate the first rule for judgment, or grant a second rule, and I know of no law, rule of court, or precedent preventing such procedure. The fact that the case is ruled out for reference does not prevent the court from entering judgment for want of an affidavit of defense. Act May 14, 1874 (P. L. 150)."

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and STEWART, JJ.

H. Price Graffius, for appellant. J. S. Leisenring, for appellees.

PER CURIAM. The plaintiff, having had his first rule for judgment discharged merely in order to accelerate the trial, had done nothing to mislead the defendant. The latter then ruled the case out for arbitration. The learned judge below, being of opinion that this was done "evidently to keep the case off the trial list," granted a second rule for judgment. It was within his discretion to do so. Judgment affirmed.

(31 Vt. 400)

## STATE v. AUDETTE.

(Supreme Court of Vermont. Windsor. Sept. 26, 1908.)

## 1. ADULTERY—PERSONS LIABLE.

A man free to marry, who marries a woman representing herself to be single, and who cohabits with her under a mistake of fact honestly entertained on reasonable ground and without negligence, is not guilty of adultery on proof of her existing marriage to another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adultery, § 4.]

## 2. STATUTES — CONSTRUCTION — LEGISLATIVE INTENT.

In ascertaining the intent of the Legislature in enacting a statute, regard must be had to the subject-matter thereof, as well as its language, and to the consequences that will follow from a proposed construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 259-263.]

Exceptions from Windsor County Court; George M. Powers, Judge.

Merrill C. Audette was convicted of adultery, and he brings exceptions. Sustained.

Edward R. Buck, State's Atty., for the State. Herbert N. Blanchard and Herbert G. Tupper, for respondent.

MUNSON, J. The respondent has been adjudged guilty of adultery on an agreed statement of facts. The acts relied upon to sustain the charge were sanctioned by the marriage relation, as the respondent supposed. They were in fact the acts of an unmarried man with a married woman, for the supposed wife had a husband living when she espoused the respondent. So we are again called upon to consider the relation of mistakes of fact to criminal intent.

The state rests its claim, in part, upon the reasoning and decision in *State v. Ackerly*, 79 Vt. 69, 64 Atl. 450, 118 Am. St. Rep. 940. It was said there, upon a citation of previous decisions of this court, that when a statute makes an act penal, without reference to knowledge, ignorance of the fact is no defense. Among the cases referred to were some in which the act done, as the respondent understood it, was blameless. It is claimed by some text-writers, and held by some courts, that there can be no criminal liability without there having been some wrong in the act as it was understood to be, or some negligence in ascertaining the facts. But the view taken by this court in *State v. Tomasi*, 67 Vt. 312, 31 Atl. 780, and in *State v. Ward*, 75 Vt. 438, 56 Atl. 85, with reference to offenses purely statutory, accords with the main current of authority. *Com. v. Boynton*, 2 Allen (Mass.) 160; *Com. v. Wentworth*, 118 Mass. 441; *Com. v. Finnegan*, 124 Mass. 324; *Farmer v. People*, 77 Ill. 322; *State v. Hartfel*, 24 Wis. 60; *Ulrich v. Com.*, 6 Bush (Ky.) 400; *Crampton v. State*, 37 Ark. 108; *Flelding v. La-Grange*, 104 Iowa, 530, 73 N. W. 1038. See, also, *Com. v. Farren*, 9 Allen (Mass.) 489; *State v. Smith*, 10 R. I. 258; *Barnes v. State*, 19 Conn. 396; *Com. v. Weiss*, 139 Pa. 247, 21

Atl. 10, 11 L. R. A. 530, 23 Am. St. Rep. 182; *Jamison v. Burton*, 43 Iowa, 282; *McCutcheon v. State*, 69 Ill. 601; *State v. Cain*, 9 W. Va. 559; *State v. Heck*, 23 Minn. 549.

In *State v. Ackerly* the charge was bigamy, and it was held that one having a consort living, who marries again within the time fixed in the exception, is not excused by an honest belief in the death of the consort, based upon reasonable grounds. The decision was not put especially upon the omission from the prohibitory clause of words pertaining to knowledge, but upon what seemed to be the plain intent of the enactment considered as a whole. The same view has been taken of similar statutes in other jurisdictions. *Com. v. Mash*, 7 Metc. (Mass.) 472; *Com. v. Hayden*, 163 Mass. 453, 40 N. E. 846, 28 L. R. A. 818, 47 Am. St. Rep. 468; *Jones v. State*, 67 Ala. 84. See *Parnell v. State*, 126 Ga. 103, 54 S. E. 804. It was said in the *Ackerly* Case, and said correctly, that the rule precluding the defense of ignorance of fact had been applied in cases of adultery. It should be noticed, however, that cases are sometimes cited in support of this statement that are not directly in point. In some of the cases the question was whether it was necessary for the prosecution to allege and prove knowledge. *Com. v. Elwell*, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; *Fox v. State*, 3 Tex. App. 329, 30 Am. Rep. 144; *State v. Cody*, 111 N. C. 725, 16 S. E. 408. In some cases the parties marrying had relied upon improper advisers as to the legal effect of steps taken by themselves or others. *State v. Goodenow*, 65 Me. 30. In other cases a decree dissolving the defendant's prior marriage had been annulled, because procured by his fraud. *State v. Whitcomb*, 52 Iowa, 85, 2 N. W. 970, 35 Am. Rep. 258; *State v. Watson*, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871. But in *Com. v. Thompson*, 11 Allen (Mass.) 23, 87 Am. Dec. 685, the defendant married a woman who had left her husband for good cause 11 years before, and had not seen or heard from him since, but who had read of the killing of a man who bore the full name of her husband and whom she believed to have been her husband, and who told the defendant before she married him that she was a widow. The court submitted nothing to the jury as to the good faith of the respondent or the grounds of his belief, but instructed them that the facts testified to were not a legal justification. The Supreme Court sustained the conviction, saying that the seven-year provision did not apply, because it was the wife that left, instead of the husband, and making that fact conclusive against the defendant. But even in this extreme case it could be said that the defendant knew that there had been a marriage, and that there was a former husband to be accounted for.

In the case before us the respondent, 24 years of age, met at a party a woman 22

years of age, whom he supposed to be single. He afterwards corresponded with her, and saw her from time to time, and called upon her where she was living, and she visited his parents at their home. Through all this acquaintance she represented herself to be a single woman, and he believed her to be such; but he made no inquiries about her, and received no information regarding her history, except from herself. When the license was procured, she said it was her first marriage. The marriage occurred about five months after the acquaintance commenced. During all this time she had a husband living in Massachusetts. There is a plain distinction between this case and the case of one who has an illicit connection with a woman whom he mistakenly supposes to be unmarried, or above the age of consent, or not of the prohibited relationship, and is thereupon charged with adultery, statutory rape, or incest, as the case may be. In such a case there is a measure of wrong in the act as the defendant understands it, and his ignorance of the fact that makes it a greater wrong will not relieve him from the legal penalty. Here the connection was had after the performance of a marriage ceremony, in the full belief that the marriage was legal, and in the absence of any circumstance calculated to suggest the contrary. The only thing that can be suggested as a want of circumspection on the part of the respondent, if it ought to be considered such, is that he failed to make inquiries in the family and neighborhood where the woman lived as to her being what she held herself out to be. But, in the view taken by the state, if he had made a full inquiry and failed to ascertain the fact, his erroneous belief would have been no defense.

It has appeared from what has already been said that we do not consider the decision in the *Ackerly Case* controlling here. The fact that both statutes are without words referring to knowledge or intent does not require that they receive the same construction, for the absence of such words is but one of the matters to be considered in determining the construction. In ascertaining the intent of the Legislature, regard must be had to the subject-matter of the statute, as well as its language, and to the consequences that would follow the proposed construction. There is ample authority in the decided cases for saying that penal statutes framed precisely alike in the respect indicated may be given opposite constructions. We have declared it to be the manifest intent of the bigamy statute that a person once married, who marries again within the seven years on a supposition of the consort's death, shall do so at his peril. But it by no means follows that all persons who marry, honestly believing upon reasonable grounds that the other party is single, do so in peril of a conviction for adultery if the fact proves to be otherwise. The two respondents whose cases

we have considered stand different before the law. The one knows there is an obstacle to his marriage unless it has been removed by death, and takes the risk of a present marriage on inconclusive evidence, rather than await the time when he can marry with the sanction of the law. The other knows beyond peradventure that he is free to marry, and takes no risk of his marriage being invalid, except through the deceit of the other contracting party. The Legislature cannot have intended that one so defrauded should incur the penalty of adultery, although squarely within the terms of the statute. A court may well construe the prohibitory clause of the bigamy section according to its letter, and yet class the adultery section with those general prohibitions which are held susceptible of limitation by implied exceptions.

The connection complained of was had in the supposed relation of husband and wife, by virtue of a marriage contracted when the respondent was under no prohibition based on a prior marriage, and where the relation, as we construe the agreed statement, was entered upon and continued in by reason of a mistake of fact, honestly entertained upon reasonable grounds and without negligence; and upon these facts we hold the respondent not guilty of adultery.

Exceptions sustained, judgment and sentence reversed, and respondent discharged.

#### PIVER v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey.  
June 17, 1907.)

Error to Circuit Court, Camden County.  
For majority opinion, see 67 Atl. 109.

Thomas L. Gaskill, for plaintiff in error.  
John W. Wescott, for defendant in error.

GARRISON, J. (dissenting). Upon the question of the defendant's liability the trial court left it to the jury to say whether in the construction of the street crossing the defendant had left "an improper space between the planking and the rail, or the main rail and the guard rail, in which the horse's hoof or shoe had caught." If the horse's hoof had caught between the planking and the rail, an inference of negligence could be drawn. There was testimony competent to prove that this was so. Whether it was so or not depended upon the meaning and force ascribed to the plaintiff's testimony, and whether it was believed in face of contradictory proof given by the defendant's witnesses. This presented essentially a jury question, which it was not error to leave to the jury.

I shall vote to affirm.

I am authorized by Judge VROOM to say that his vote is upon the ground stated in this memorandum.

(74 N. J. L. 623)

**GIADNEY v. PENNSYLVANIA R. CO.**  
(Court of Errors and Appeals of New Jersey.  
June 17, 1907.)

Error to Circuit Court, Camden County.  
For majority opinion, see 67 Atl. 109.

Thomas L. Gaskill, for plaintiff in error.  
John W. Wescott, for defendant in error.

GARRISON, J. (concurring). This case is similar to the Case of Piver (decided at this term) 67 Atl. 109. On the authority of that case I vote to reverse in this case.

Judge VROOM votes to reverse upon the same grounds.

(221 Pa. 511)

**ADAMS v. HUBBARD et al.**  
(Supreme Court of Pennsylvania. May 25, 1908.)

**1. PARTNERSHIP—DISSOLUTION — ACCOUNTING — SHRINKAGE OF ASSETS.**

Where a partnership is dissolved and a statement of account prepared by one of the two partners, and the agreement to dissolve shows that a liquidation of assets was intended and a shrinkage anticipated, one partner cannot assert that the statement was an account stated, and that the amount found due in his favor could not be reduced by a subsequent shrinkage in the assets.

**2. SAME—DISTRIBUTION OF CAPITAL.**

On dissolution of a partnership and the winding up of its affairs, the capital must be returned to the partners contributing it; such contribution being regarded as a firm debt to each partner, which must be repaid before division of profits, so that, where one partner has advanced capital in excess of another, the amount advanced is a preferred claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Partnership, §§ 700-703.]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by John Quincy Adams against George L. Hubbard and others, partners of the firm of George K. Hubbard & Co., and Dilworth P. Hibberd, administrator. Decree for defendants, and plaintiff appeals. Dismissed, and decree affirmed.

The following is the opinion, in part, of Andenreld, J., in the court below: "The partners were George K. Hubbard, who had a five-eighths interest in the business, and John Quincy Adams, whose interest was three-eighths. By this is meant that these two parties were entitled to share in the profits of the partnership venture, and bound to bear its losses in the proportions mentioned. Hubbard was the head of the firm. Adams had a particular charge of its bookkeeping. On November 30, 1892, the firm was dissolved by a verbal agreement, which was subsequently embodied in a written memorandum dated November 30, 1892. By a statement of the firm's condition on December 1, 1892, prepared by Adams, it appears that the assets were on that date reckoned at \$176,029.08. This estimate was based in the case of certain items on their appraised valuation in the

case of other items on their book value. Sundry insurance rebates, copyrights, trademarks, and old merchandise unappraised were excluded from the estimate. The liabilities of the firm were estimated at \$104,192.76. It appears also by this statement that Hubbard had contributed \$49,005.56 to the firm's capital, and that Adams had contributed \$22,030.76."

The formal agreement of dissolution signed by the partner was as follows: "This agreement made the 30th day of December, 1892, between George K. Hubbard and J. Quincy Adams, heretofore trading together under the firm name of George K. Hubbard & Co., is wholly dissolved except as far as may be necessary for the final liquidation and settlement of the business thereof. It is agreed and understood that the said George K. Hubbard shall continue the business heretofore carried on by the late firm of George K. Hubbard & Co. That he shall take, hold and keep the merchandise and partnership assets which he desires to retain and keep for that purpose at prices to be agreed upon between the said parties. (This does not include the trademarks and copyrights owned by the said firm of George K. Hubbard & Co.) It is agreed that the remaining partnership assets, merchandise and other property which shall not be taken and kept by the said George K. Hubbard will be sold to the best advantage of the said parties. It is agreed that the said George K. Hubbard shall take the store, fixtures and teams heretofore used by and belonging to the late copartnership for \$3,350. It is agreed that the said J. Quincy Adams shall retire from the said firm of George K. Hubbard & Co., and shall take an advanced payment on account of the distribution to be made in final settlement of the said partnership affairs as follows: One store and contents situate in New Jersey, \$1,200; one store and contents in W. Philadelphia for \$4,359.81; cash, \$2,140.19. It is also agreed between the parties that the premises situate at the corner of Twelfth street and Diamond street shall be valued and appraised at the sum of \$3,500, subject to a mortgage of \$5,500, and that the said J. Quincy Adams shall have the right and privilege of taking the said premises should his share of the partnership assets upon final settlement distribution exceed the sum of \$3,500, in addition to what has been already advanced under this agreement as before set forth, to wit: the sum of \$7,700."

Other facts appear by the opinion of the Supreme Court.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. Barton Rettew, for appellant. D. P. Hibberd and Samuel P. Tull, for appellees.

POTTER, J. The firm of George K. Hubbard & Co., which was composed of George



K. Hubbard, J. Quincy Adams, and Edwin Halpen, was organized June 1, 1876, for the purpose of carrying on a wholesale grocery business in the city of Philadelphia. On June 1, 1883, Halpen retired from the firm, having assigned his interest to his copartners, and Hubbard and Adams continued the business under the same partnership name until 1892. Hubbard owned a five-eighths interest in the firm and Adams a three-eighths interest. On November 30, 1892, the partnership was dissolved by mutual consent; the terms of dissolution being afterwards embodied in a written agreement signed by both parties under date of December 30, 1892. A statement prepared as of the date of dissolution from the private ledger of the firm showed that, as regarded the capital account, the amount to the credit of George K. Hubbard was \$49,805.56, and the amount to the credit of J. Quincy Adams was \$22,030.76, and the sum of these two amounts represented the net assets over liabilities, provided that all the assets could be converted into cash at the amount at which they were carried upon the books. In accordance with the agreement George K. Hubbard took as much of the merchandise of the old firm as was acceptable to him, and the store fixtures, etc., and formed a limited partnership which continued the business under the same name and at the same location. On February 27, 1895, George K. Hubbard died, and letters of administration were granted to George L. Hubbard. On July 9, 1896, J. Quincy Adams filed this bill for an accounting against the surviving partners of the firm of George K. Hubbard & Co., and the administrator of George K. Hubbard, deceased. An answer was filed, and the case was put at issue and referred by agreement to Horace M. Rumsey, as referee. On September 10, 1901, the referee filed an interlocutory report, recommending a decree for an accounting by the administrator of George K. Hubbard, deceased, only. Upon exception the court in an opinion by Arnold, P. J., held that the complainant was entitled to an account, as found by the referee, and sent the case back to the referee to take further testimony and report the facts and law thereon to the court, together with a proper form of final decree. In his opinion Judge Arnold used this language: "We are also of opinion that the account stated between the parties at the time of the dissolution of the partnership in December, 1892, shall be considered as a finally stated account, and not open to correction at this late day. By it Mr. Adams' share of the assets of the copartnership amounted to \$22,030.76."

It is upon this language of Judge Arnold that counsel for appellant bases his main contention in this controversy. In fact, the only thing which he presents in his statement of the question involved is whether this account in the private ledger, existing at the time of the dissolution of the partnership,

was an account stated between the partners which fixed conclusively the amount which was due to the plaintiff and payable to him, without regard to the actual liquidation of the assets, and their conversion into cash thereafter. The referee found upon further consideration of the account, after it was sent back to him, that while the settled balance between the partners as of November 30, 1892, precluded him from going back of it to inquire into any errors or omissions which might have existed in that respect, yet it did not prevent him from taking into consideration the items of which the account was composed, nor the elements which entered into the balances due to each partner. This was the plain common-sense construction of the statement of Judge Arnold, and, if he did not mean it to be so understood, his statement was clearly wrong. He could not have intended to say that the amounts shown by the account represented a net amount of money on hand in the treasury of the partnership, and ready to be drawn out by the partners. Manifestly the actual amount to be divided would depend entirely upon what could be realized out of the assets. And, when the final report of the referee was made to the court below, Judge Audenried, in passing upon it, said: "It is proper to add here that when we said, after hearing the argument on exception to the interlocutory report of the referee, that the account stated 'at the time of the dissolution of the partnership in December, 1892, shall be considered as a final stated account and not open to correction,' we had reference only to its effect so far as it fixed the respective contributions of the partners." So that the court below fully adopted and approved the view of the referee in this respect. And that this statement was not intended to set forth the amount due in cash to the partners, but represented only the condition of things as shown by the books at this date, is conclusively shown by the agreement subsequently signed by both parties dated December 30, 1892. This agreement recited that the partnership is dissolved, "except so far as may be necessary for the final liquidation of the business thereof." It further provides that Hubbard, who continued the business, may take partnership assets "at prices to be agreed upon between the said parties." Assets not so taken by Hubbard "will be sold to the best advantage of the said parties." It was further agreed that Hubbard was to take the store fixtures and teams at a specified price, and Adams was to have two stores and a specified amount in cash "as an advance payment on account of the distribution to be made in final settlement of the said partnership affairs." Adams was also to have the premises at the corner of Twelfth and Diamond streets, appraised at \$3,500, subject to a mortgage of \$5,500, "should his share of the partnership assets upon final distribution exceed the sum of \$3,500 in addition to what had been already advanced un-

der this agreement as before set forth, to wit, the sum of \$7,700." This whole agreement clearly contemplated a liquidation of the assets. If they realized the amount at which they were carried upon the books, the amount shown to be due the partners could be paid, but otherwise not. Whatever shrinkage might result in the assets would reduce, by that much, the amount for actual distribution. And, when we recall the fact that this statement as made up included the sum of \$116,849.09 of open book accounts, it is not at all strange that there should have been considerable shrinkage in converting them into cash. Accepting, therefore, the statement of the account of December 1, 1892, for what it really was as showing the settled amount contributed by each partner to the capital of the firm, the learned judge of the court below took the view that these contributions to capital were to be repaid before there could be any division of the profits. He stated Hubbard's contribution as \$49,005.56, which seems to involve a clerical error of \$800, as the figures in the private ledger account are \$49,805.56, but appellee has accepted this slip without complaint. The contribution of Adams is \$22,030.76. As a result of the findings of the referee, approved by the court, the net balance in Hubbard's hands as liquidating partner, was \$23,139.40, and the total amount received by Adams was \$14,210.93, making total assets of \$37,350.33, which, deducted from the capital account contributed by both partners of \$71,036.82, shows a loss of \$33,685.99. This loss was to be shared in the proportion of five-eighths to one partner and three-eighths to the other. So that, crediting Hubbard with his contribution to the firm, \$49,005.56, and charging him with the amount received by him, \$23,139.40, and his proportion of the loss, \$21,063.75, total \$44,193.15, leaves a balance of \$4,812.41 due him. Charging Adams with the amount received by him, \$14,210.93, and his proportion of loss \$12,632.24, makes \$26,843.17, which is in excess of his amount contributed to the capital by \$4,812.41, which is awarded to Hubbard's estate and thus balances the account.

The method pursued by Judge Audenreid was entirely correct, and is in accordance with the authorities which are well summed up in 22 Am. & Eng. Ency. of Law (2d Ed.) 86, 87, as follows: "Where a partnership is dissolved and its affairs are wound up, there must be a return of the firm capital to the partners contributing it, in order that there may be a distribution of the profits. Each partner's contribution is regarded as a firm debt to such partner, which must be repaid before there are any profits to be divided. Where one partner has advanced capital in excess of another, the amount advanced is a preferred claim upon the property of the firm. The distribution of capital upon dissolution is in the same proportion in which such capital was furnished." A Pennsylvania case clearly establishing this principle and apply-

ing in its facts to the present case is Plumly's Appeal, 1 Monag. 177, 178, 16 Atl. 728, where the master said: "When the partnership came to an end, December 31, 1884, it was the plaintiff's right to have the assets converted into money, to have all liabilities to non-partners satisfied therefrom, and, out of what remained, to have returned to each partner his capital. If there was not sufficient for the return of the capital of each, the sum that was wanting should have been treated as a partnership loss (Nowell v. Nowell, L. R. 7 Eq. 538), and paid as other losses are payable, and, as has appeared, that was two-thirds by the defendant and one-third by the plaintiff." In this particular the report of the master was confirmed by the court below, and by this court.

What we have said disposes of the questions raised by the assignments of error covered by appellant's "Statement of Question Involved." The remaining assignments of error are not properly before us, but, if they were, it would be sufficient to say that they relate to questions of fact, upon which the findings of the referee have been confirmed by the court below, and therefore they would not be disturbed except for manifest error. Nothing of that kind has been shown.

This appeal is therefore dismissed; and the decree of the court below is affirmed.

(221 Pa. 493)

YEVSACK v. LACKAWANNA & W. V. R. CO.

(Supreme Court of Pennsylvania. May 25, 1908.)

# 1. CARRIERS — INJURY TO PASSENGERS — CONTRIBUTORY NEGLIGENCE.

Where a passenger alights from an electric car at a place where there are platforms along the tracks, and goes behind the car from which he alights, and is struck by a car on the next track, he cannot recover, where he did not look for it, and took the chance of crossing in front of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1396, 1397.]

# 2. SAME.

That a passageway was provided by an electric car company from a platform on which passengers alighted to a platform on the other side of the tracks does not relieve the passenger, alighting from one car on the platform and passing behind such car over such passageway onto another platform, from the duty of looking for a car approaching on the other track, over which he knows cars constantly pass.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1396, 1397.]

Appeal from Court of Common Pleas, Luzerne County.

Action by Michael Yevsack against the Lackawanna & Wyoming Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

John P. Lenahan and Richard B. Sheridan, for appellant. John McGahren and John A. Mangan, for appellee.

FELL, J. The defendant operates a double-track electric railroad 18 miles in length between Wilkes-Barre and Scranton. Midvale, where the accident happened, is on the line of this road; but it is not a regular stopping place. Cars stop there only on signal to take on or let off passengers. There is a platform on either side of the tracks, raised 3 or 4 inches above them. A plank walk, 12 feet wide and 23 feet long, level with the tracks, extends from one platform to the other. Between the tracks there is a fence about 4 feet high, which extends 130 feet in either direction from the walk. The town of Midvale is west of the tracks, and persons going from it to the east platform, or to it from this platform, are required to use the plank walk.

The plaintiff lived in Midvale, rode on the cars frequently, and was familiar with the situation. On a September evening, when it was dusk, he got off a north-bound car onto the east platform, and as the car moved from the station, he crossed the track behind it on the plank walk, and was struck by a south-bound car when stepping from the west track to the west platform. He testified that he looked north when on the east platform, again when on the east track, and again when between the rails of the west track; that the last time he looked he saw the car from which he had alighted 200 feet away, but saw no car approaching on the west track, although he could see up that track 250 feet. One of his witnesses, who was standing on the west platform waiting for a car, a place less favorable for observation because of a curve in the road, testified that he could see up the track 300 feet, and that he saw the car when it was that distance from the crossing; and another testified that the car that struck the plaintiff was 50 feet from the station when the car from which he had alighted had gone 30 feet from it.

It was the plaintiff's duty to look, after he had crossed the east track and passed the fence, before attempting to cross the west track. At this point he was within 7 feet of the west platform, and could see up the track 250 or 300 feet. The car was lighted, and there was nothing to prevent his seeing it, as his witness saw it. It could not first have come into view after he had looked. The testimony of the plaintiff's witnesses in relation to speed was that the car was running "pretty fast," "very fast," "as quick as she always goes into the station." These witnesses all agreed that the car was stopped within 150 feet of the crossing. In considering the plaintiff's testimony in the light most favorable to him, the conclusion is irresistible that he did not look, or that he saw the car and took the chance of crossing in front

of it. The case is within the rule that a person who walks in front of a moving car, which he saw or could have seen by the exercise of the reasonable care which the law requires, will be conclusively presumed to have been negligent.

That the passageway over the tracks was provided by the defendant company for the use of persons going to or from the east platform was a fact to be considered in determining the plaintiff's negligence, but it did not relieve him from the exercise of reasonable care. It was not a place where passengers alighted, nor a way leading from the place where they alighted to the station to which they were going, which they might assume would be kept clear of trains and be safe at the time. It led from the platform on the east to the street, and, while its use was a convenience, and it may be a necessity, it was not a place where passengers stood in getting on or off cars. The care required in its use was not the ordinary care required of a passenger who must cross a track between his train and the station, but the greater care of a person at a crossing over which he knows trains constantly pass.

The judgment is reversed, and judgment is now entered for the defendant.

(221 Pa. 349)

**ST. VINCENT'S ROMAN CATHOLIC CONGREGATION OF PLYMOUTH v. KINGSTON COAL CO.**

(Supreme Court of Pennsylvania. May 11, 1908.)

**1. LANDLORD AND TENANT—LEASE—RECORD—MISTAKE OF LESSEE.**

A lease for more than 21 years is within Act May 28, 1715 (1 Smith's Law, p. 94), making the recording of an instrument a substitute for feoffment with livery, thereby making good the title and assurance of lands, tenements, and hereditaments as deeds of feoffment with livery of seisin, so that a lease for 999 years so recorded vests an estate for years in the lessee, and not simply an *interesse termini*, without his entering into possession.

**2. ADVERSE POSSESSION—OUTSTANDING TERM—OUSTER.**

Where a lease for 999 years excepting and reserving the minerals with the right to mine without liability for injury to the surface was duly recorded, a person whose adverse possession of the surface began after the recording of the lease and continued for 21 years acquired title to the estate for years only, and therefore had no rights of the owner to surface support against the holder of the right to mine; the ouster of the lessee being insufficient to start limitations against the owners, in the absence of evidence that the owners had ever forfeited the lease.

**3. LANDLORD AND TENANT—POSSESSION OF TENANT.**

Until termination of the term of a lease, the tenant has the right to the exclusive possession against the landlord and all others not having a superior, legal, or equitable right.

**4. REMAINDER—LIMITATION OF ACTIONS—REVERSIONERS AND REMAINDERMEN—STARTING OF LIMITATIONS.**

Reversioners and remaindermen are not affected by the statute of limitations until the precedent estate has been determined, and their right of entry accrues.

5. LANDLORD AND TENANT — FORFEITURE OF LEASE.

A right to forfeit a lease will not be enforced in a contest between a tenant and a third person in the absence of affirmative action by the landlord.

6. WORDS AND PHRASES—"DEEDS."

The word "deed" in Act May 28, 1715 (1 Smith's Laws, p. 94), providing for the acknowledgment and recording of deeds, included not only "conveyances of lands, tenements, and hereditaments" in the strict technical senses of that phrase, but also leases exceeding 21 years and any deed intended to grant any estate for life or years, even though the latter is but a chattel interest subject to sale on execution.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1919-1923; vol. 8, p. 7830.]

Appeal from Court of Common Pleas, Luzerne County.

Bill by the St. Vincent's Roman Catholic Congregation of Plymouth against the Kingston Coal Company for an injunction. From a decree for defendant, plaintiff appeals. Affirmed.

The plaintiffs' bill avers (1) their ownership of a certain piece of land in Plymouth township, in this county, containing 4.6 acres, and known as St. Vincent's Roman Catholic Cemetery; and (2) that the defendant is operating a mine beneath it, and has threatened to remove all the underlying coal, including pillars needed for the proper support of the surface. The defendant's answer denies that the plaintiffs have any title to any of the coal under the land in question or any right to control or interfere with the mining and removal of the same or any part thereof, alleging (1) that, prior to the inception of any title which the plaintiffs may have acquired, a complete and lawful severance of the surface from the subjacent coal had been effected; and (2) that the mineral estate is now vested in the defendant, together with the right to mine and remove all the coal, including pillars, without any obligation to support the surface. The prayers of the bill are (1) for an injunction to restrain the defendant from "mining the coal, pillars, or supports" from beneath the cemetery, "or in any way endangering or disturbing the surface of the same or any part thereof"; and (2) for general relief.

The material facts are found to be as follows:

(1) On and prior to January 9, 1866, a large tract of land, embracing that afterwards used as a cemetery, was owned in fee by Henderson Gaylord, W. H. Cool, J. S. Mason, E. H. Frishmuth, and W. D. Frishmuth as tenants in common. The evidence shows a recorded title in them deduced through mesne conveyance from the commonwealth; the deed from a former owner to Gaylord having been recorded in 1831, and deeds from him to Cool, Mason, and the Frishmuths for their several undivided interests having been recorded in 1855.

(2) By a written instrument, dated January 9, 1866, and recorded March 30, 1869,

the said owners and their wives leased to one James Dooley for a term of 999 years, at a yearly rental of five cents, the surface or soil of six acres of their said land, adjoining other land of Dooley, and embracing the larger portion of the cemetery lot—all of it, in fact, except a piece at the northwesterly end of the cemetery extending about 6½ rods in depth and being about 18 rods wide (the full width of the cemetery inclosure).

This lease (to Dooley) contains the following reservation and agreement: "Excepting and reserving, however, out of the said lot, piece or parcel of ground, unto the said parties of the first part, their heirs and assigns all the coal and minerals under, in and upon the same, and also the right and privilege of mining and removing all and every part and parcel of the coal and other minerals under and upon the said lot, piece or parcel of land, and every and any part thereof, and of making and driving tunnels, passages and ways, under the surface of said lot, piece or parcel of land, for the purpose of mining and removing any and all the coal and other minerals now owned or may hereafter be acquired or owned by the parties of the first part, their heirs or assigns, on said land or any adjoining or neighboring lands, as fully and entirely as if the said parties of the first part, their heirs or assigns, remained the exclusive owners in fee and still held the exclusive possession of the said surface, right of soil of said lot hereby leased, the said parties of the first part not to transport the said coal and other minerals hereby reserved upon the surface of said lot but in all respects to be at liberty to mine and remove the same and to make and drive tunnels, passages and ways under said surface of said lot and even to remove all pillars or supports and entirely to strip the mine or mines under the said lot, without objection or hindrance and not to be liable to the ——— of the second part ——— heirs or assigns for any injury that may occur to said surface or any building now erected or that may be erected thereafter thereon by reason of mining and removing all said coal and other minerals or by reason of making or driving said tunnels, passages or ways or removing all coal, pillars or supports or entirely stripping said mine or mines; and it is further understood that the said parties of the first part their heirs or assigns may drive air shafts through the surface of said lot at any time and in any manner said parties of the first part their heirs or assigns may deem necessary in carrying on their mining operations on said lot, or on adjoining lands. But for any damages done to the said surface by said air shafts the parties of the first part their heirs or assigns are to pay for the said damages, and if the said parties cannot agree, the amount to be paid therefor shall be left to the decision of three disinterested persons one to be selected by each party and if the two cannot agree they shall choose an

umpire and the decision of the parties so chosen or of a majority of them, shall be final and conclusive upon the parties. \* \* \* It is further understood and agreed by the parties of the first part their heirs or assigns that they will leave standing two pillars of coal when mining on or under demised premises, to be each 20 by 24 feet square wherever the party of the second part shall elect within two years of the date hereof, for the purpose of supports to the surface on which buildings may be erected, or the party of the second part may designate and desire to build thereon." It does not appear that Dooley or any one claiming under him ever indicated where these two pillars should be located. Neither has it been shown that he or they ever entered into possession of the demised premises.

(3) By an instrument in writing dated September 29, 1871, and recorded January 8, 1872, Gaylord, Cool, Mason, and the Frishmuths "demised, leased, and to mine let" to the Wilkes-Barre Coal & Iron Company all the coal in, upon, and under a tract of land containing 257 acres, including within its limits the whole of the lot here in question. This coal lease grants the right to mine and remove all the coal from all the strata except the upper or "Orchard" vein (which does not underlie the cemetery lot), and also excepts the coal under two small pieces of land marked on an appended draft, "surface or right of way for railroad" (not involved in this controversy), and also excepts from its provisions certain surface land laid off for building lots on two portions of the tract marked, respectively, on said draft, "the surface reserved for building lots" and "surface reserved and sold for building lots," which latter includes the lot in question in this proceeding. This coal lease contains no provision relieving the mining company, its successors, or assigns from the obligation to support the surface, nor releasing it from damages for any injury thereto that might result from its mining operations.

(4) The cemetery lot is a part of lot No. 17, Mountain tier, Third division of certified lots in Plymouth township, and is described as follows: "Beginning at a corner of Barney street, thence north thirty-four degrees, thirty minutes west, 719 feet (along the line between certified lots Nos. 16 and 17) to a corner; thence south, forty-nine degrees, thirty-five minutes west, 297 feet, to a corner; thence south, thirty-four degrees, forty-nine minutes east, 695 feet, to a corner; thence north, forty-nine degrees, forty-five minutes east, 112 feet to a point; and thence north, fifty-six degrees, fifteen minutes east, 185 feet, to the place of beginning; containing four and six-tenths acres of land."

(5) As so described, the surface of this lot has been fenced and used as a cemetery continuously from the year 1874 until now by the rector and congregation of St. Vincent's Roman Catholic Church, and during

that period their possession of the same has been actual, hostile, adverse, continuous, visible, open, notorious, and exclusive.

(6) There is no evidence of title to this land in the plaintiffs or any of them other than by adverse possession under the statute of limitations, nor of any claim of title by them to the coal beneath the cemetery lot, nor of any entry upon, or exercise by them of any act of ownership with reference to such coal.

(7) The coal upon the Gaylord tract was opened into and mined therefrom by its owners as early as 1864, or two years before the date of the Dooley lease, and about ten years before the beginning of the plaintiffs' possession of the cemetery lot. Mining from the Gaylord tract (embracing the coal under the cemetery lot) has continued from time to time as the operations proceeded in the several veins down to the date of filing of the plaintiffs' bill. The earliest mining directly under the cemetery lot, so far as the evidence shows, appears to have been done in the Bennett vein (the second from the surface at that point) "several years" before 1881. This was what is known as first mining. A short time before this proceeding was commenced, a committee of St. Vincent's congregation were notified by the defendant's superintendent that his company contemplated proceeding with the work of removing the pillars and unmined coal left under the cemetery in the process of first mining.

(8) That such removal without the substitution of sufficient artificial support would endanger the surface is a fact so self-evident that its embodiment in a formal finding would seem to border on the absurd. Nevertheless the fact is a material one, and it is so found.

The trial judge found as a conclusion of law that the plaintiffs were entitled to the relief which they sought.

Exceptions to the adjudication were sustained by the court in banc, in an opinion by Ferris, J., which was as follows:

"The trial judge found from the evidence that a lease of surface land, including the greater part of the cemetery lot here in question, had been made in 1866 by the owners of the fee to James Dooley for the term of 999 years, and had been recorded in the proper office before the plaintiffs' possession began. It was further held that, under the provisions of this lease, the lessee was not entitled to the right of surface support. It was not shown, however, that Dooley or any one claiming under him had ever entered upon the demised premises. The judge thereupon found as matter of law (a) that, while an *interesse termini* passed to Dooley, it did not appear that an estate for years in the land had ever vested; (b) that the right of possession, therefore, remained in the owners of the fee; (c) that the plaintiffs' subsequent entry and possession was adverse, not to Dooley (since he

had not perfected his leasehold estate by entry), but to the owner of the freehold, and the title acquired under the statute was their title; and (d) that, since a severance between the surface and the subjacent mineral strata had been effected by a prior sale of the underlying coal without parting with the right to adequate surface support, the title which the plaintiffs acquired by adverse possession was the fee in the surface with the right to have it supported.

"The exceptions are based on the claim that the judge erred in holding that Dooley took a mere *interesse termini*, and never acquired (so far as the evidence shows) an estate for years. In support of this claim counsel for exceptant contends (1) that the common-law rule (that entry by the lessee is necessary to consummate an estate for years) has been modified by statute, and that the recording of a lease for a term exceeding 21 years has been made the equivalent of an entry for the purpose of consummating the relation of landlord and tenant; (2) that, therefore, when Dooley's lease was recorded he ceased to be the mere holder of an *interesse termini*, and became the tenant of an estate for years, entitled to possession even as against his landlord until his term should be ended by efflux of time or by surrender or forfeiture; (3) that entry by a stranger upon the demised premises with adverse possession for 21 years (no surrender or forfeiture of the lease being shown) could only affect the leasehold estate, and that the statute would not begin to run against the holders of the fee until right of entry accrued to the latter, which, under the evidence, has not yet occurred; and therefore (4) that the estate acquired under the statute by the plaintiffs in the portion of the cemetery lot covered by the Dooley lease was the leasehold interest which that instrument conveyed, which interest, as already stated, did not include the right of surface support. In opposition to this argument, it is claimed by the plaintiffs (1) that a lease for years is not within the statutory provision that the recording of a deed or conveyance shall be the equivalent of livery and seisin, since livery of seisin was never required to complete the conveyance of an estate less than freehold, and that, therefore, the trial judge was right in holding that, as no entry under the Dooley lease was shown, the plaintiffs' entry and possession was adverse to the only estate in the land which was shown to exist, viz., the fee in the surface with the right of support; and (2) that, even if the recording acts did apply to a leasehold so as to make recording a substitute for entry by the lessee, still the plaintiffs' possession, being shown to be adverse generally, and not specifically as against the tenant for years only, must be held to be adverse to every interest in the land, and that after 21 years it ripened into a fee simple title; and, inasmuch as the

owner of the fee had not parted with the right to surface support, that right also, as incident to the fee, was acquired by the plaintiffs under the statute of limitations.

"The exceptions thus present for consideration the following questions: (1) Did the execution of the Dooley lease in 1866 and the recording thereof in 1869 vest in the lessee an estate for years? (2) If so, when the plaintiff congregation, in 1874 entered and took possession of so much of the cemetery lot as was embraced in the lease, did the statute of limitations, as to such land, begin to run against the owners of the fee or only as against the owners of the leasehold estate?

"1. The fifth section of the act of May 28, 1715 (1 Smith's Laws, p. 95), entitled 'An act for acknowledging and recording of deeds,' provides as follows: 'Sec. 5. And be it further enacted, that all deeds and conveyances made or to be made, and proved or acknowledged, and recorded as aforesaid, which shall appear so to be, by indorsement made thereon, according to the true intent and meaning of this act, shall be of the same force and effect here, for the giving possession of seizin, and making good the title and assurance of the said lands, tenements and hereditaments, as deeds of feoffment, with livery and seizin, or deeds enrolled in any of the king's courts of record at Westminster, are or shall be in the kingdom of Great Britain,' etc. Section 6 of the act relates to the effect to be given to the words 'grant, bargain, sell,' in 'deeds to be recorded in pursuance of this act, whereby any estate of inheritance in fee simple shall hereafter be limited to the grantee and his heirs'; and contains this proviso: 'Provided always, that this act shall not extend to leases at rack-rent, or to leases not exceeding one-and-twenty years, where the actual possession goes with the lease.' Section 8 provides: 'That no deed or mortgage, or defeasible deed, in the nature of mortgages, hereafter to be made shall be good or sufficient to convey or pass any freehold or inheritance, or to grant any estate therein for life or years, unless such deed be acknowledged or proved and recorded within six months after the date thereof, where such lands lie, as hereinbefore directed for other deeds.' There would seem to be no room for doubt that in their use of the word 'deed' in this act the lawmakers of the province intended to include, as instruments to be recorded, not only 'conveyances of lands, tenements and hereditaments' (section 2) in the strict technical senses of that phrase, but also leases exceeding 21 years, and any 'deed' intended 'to grant any estate \* \* \* for life or years,' even though the latter is but a chattel interest subject to sale by a constable on an execution issued by a justice of the peace. *Bismark B. & L. Ass'n v. Bolster*, 92 Pa. 123. But whether such leases are within the purview of section 5 of the act

is not so clear. In the case last cited Mr. Justice Trunkey speaking, obiter, of a mortgage of a leasehold duly recorded, but not accompanied by possession, says (page 131): 'Possibly such mortgage is valid (as against execution creditors) under the act of 1715; the record standing for possession.' In *McKee's Lessee v. Pfout*, 3 Dall. 486, 1 L. Ed. 690, it was held, in construing section 5 of the act of 1715, that: 'In allowing to deeds recorded the same force and effect as feoffments with livery, the intention is expressly restricted to "giving possession and seisin, and making good the title and assurance of lands, tenements and hereditaments."' See, also, *Dunwoodie v. Reed*, 3 Serg. & R. 435, \*445, 446, \*454; *Lyle v. Richards*, 9 Serg. & R. 322, \*334. In *McKee's Lessee v. Pfout* it was attempted, by a narrow and technical construction of the language of section 5, to give to a recorded bargain and sale by a tenant for life the effect of a feoffment with livery of seisin; thus producing a forfeiture of the estate. Chief Justice Shippen said: 'The Legislature has at various periods, and on a variety of subjects, departed from feudal ceremonies and principles in relation to the transfer of property; but in the present instance the act of assembly meant only to give to a grant of lands a greater effect upon the estate on recording the deed than could previously have been enjoyed without livery of seisin. It never contemplated that circumstance as an instrument to work a forfeiture on the common-law doctrine of alienation by tenant for life or years.' In commenting upon and following this case, Chief Justice Gibson, in *Estate of Sarah Desilver*, 5 Rawle, \*111, 28 Am. Dec. 645, held that the object and effect of the act was not to make recording the equivalent of a feoffment with livery in all respects, but 'to make it a substitute for the ancient ceremony for the purpose only of "giving possession and seisin and making good the title and assurance of said lands," etc., evidently meaning the title which the recorded instrument was intended to convey. For example, the recording of the Dooley lease should not be held to enlarge the estate for years, intended to be granted into a freehold on the ground that the act declares that a deed when recorded shall have the effect of a "deed of feoffment with livery and seisin," but rather that it should have the same effect to give possession and vest an estate for years in the lessee as it would have if accompanied by delivery of possession to the latter. In this connection it may be noted that the words used in the act are "possession and seisin." The word "possession" would be superfluous if the legislative intent was to confine this provision to estates of freehold, since "seisin" is possession of such an estate. But when, upon turning to sections 6 and 8, it is seen that leaseholds exceeding 21 years, and also those for a shorter term when actual possession

does not go with the lease, are included in the act, it may, perhaps, be fairly claimed that a reason appears for the use of both words. At common law there might be 'possession,' but could be no 'seisin' of an estate for years. But it may possibly be argued that, as the proviso to section 6 puts leases exceeding 21 years on the same footing with those for a term of less duration where actual possession does not go with the lease (see, also, section 8 of the act of March 18, 1775 [1 Smith's Laws, p. 423]), neither could properly be held to be within section 5 of the act of 1715, for the Legislature could not have meant that recording the instrument should have the effect of giving possession where possession did not go with the lease, and, moreover, that to so hold would be contrary to the decisions which hold that the act was not intended to enlarge the estate granted. In answer to this argument it is, perhaps, sufficient to say that recording a deed or lease could not possibly be the same thing as giving actual possession of the land, and that the legislative intent was merely to make the one a substitute for the other so far as possession had been necessary to 'make good the title' to the estate intended to be granted. The main reason for the passage of the recording acts is, as stated in the preamble to the supplementary act of 1775, to prevent the evils arising from secret conveyances and incumbrances by providing for publicity in such transactions. That in this respect a short term lease with 'actual possession' differs from one where actual possession does not 'go with the lease' is obvious. We think, therefore, that, as implied by section 8 of the act of 1715, the Legislature intended that the recording of a lease for a term exceeding 21 years should make it 'good' and 'sufficient' to 'grant' an 'estate' for 'years,' and that, after such recording, actual entry by the lessee should not be necessary 'to make good the title' to such estate. It follows that the trial judge was in error in holding the contrary.

"2. It is earnestly contended by counsel for the plaintiffs that, even though the record of the Dooley lease stood for possession so as to vest in the tenant an estate for years, still, since the possession of the tenant is the possession of the landlord, an ouster of the former would be sufficient to start the statute running against the latter. We are unable to assent to this proposition. While for certain purposes the possession of the tenant is said to be the possession of the landlord (*Thompson v. Kauffelt*, 110 Pa. 209, 216, 1 Atl. 267), this is so only in a qualified sense, not dissimilar to that in which it is said that the act of an agent within the scope of his agency is the act of the principal. The tenant stands for the landlord and holds the premises for him, and strictly in subordination to him, during the

continuance of the lease. His possession is adverse to all the world except his landlord or those under whom the latter claims. It is the title of the landlord which gives to the tenant his right of possession. It is quite as true that the title of the landlord is the title of the tenant as that the possession of the tenant is the possession of the landlord. But in neither case would such a statement mean that their rights in relation to the land are identical. Each must respect the right of the other. The tenant may not deny his landlord's title, nor the landlord his tenant's right of exclusive possession. No general right of entry accrues to the landlord until the tenancy has been terminated, either by the expiration of the term of the lease or by surrender, or by such hostile action by the tenant as would justify a forfeiture. And, until such general right of entry does so accrue, the statute of limitations does not begin to run against the landlord and in favor either of a tenant claiming adversely or a stranger. *Shepley v. Lytle*, 6 Watts, 500, 506; *Newman v. Rutter*, 8 Watts, 51, 54; *Marple v. Myers*, 12 Pa. 122, 126; *Willard v. Earley*, 14 Atl. 426; *Trickett*, Law of Limitations, §§ 95, 105; *Greber v. Kleckner*, 2 Pa. 289; *French v. Fuller*, 40 Mass. 104. In *Marple v. Myers*, 12 Pa. 122, it was held to be settled law, 'both in England and Pennsylvania, that reversioners and remaindermen are not within the purview of these statutes [of limitation] until their right of entry accrues by the determination of the precedent estate, no matter how long that may endure. Thus, where there is a valid existing lease for years, the right of entry is postponed until the expiration of the term, and, though it may be forfeited by condition broken, yet, as the owner is not obliged to take advantage of the forfeiture, the continued possession of the tenant for 20 years, without any subsequent act acknowledging the tenancy, will not be counted adverse.'

"We are therefore of opinion that the plaintiff congregation acquired title by adverse possession under the statute:

"To an estate for years—that is, for the unexpired term of the Dooley lease—but without the right to require the owners of the subjacent strata to support the surface, in so much of the surface of the cemetery lot as that lease includes; the part so included being described as follows, viz.: 'Beginning at a point on Barney street (on "Welsh Hill," Plymouth township, Luzerne county, Pa.) in line of what is known as the Farrell property; thence north, thirty-four and one-half degrees west, 612 feet, to a corner; thence south, forty-nine degrees and thirty-five minutes west, about 291 feet, along the northwesterly line of land leased to James Dooley by Henderson Gaylord et al., by lease recorded in Luzerne county deed book, No. 132, page 3, to the southwesterly line of the cemetery lot; thence south, thirty-four degrees

forty-nine minutes east 588 feet, to a point in the line of what is known as the Black property; thence north, forty-nine degrees forty-five minutes east 112 feet, to a point in the line of said property; and thence from said point north fifty-six degrees fifteen minutes 185 feet to the place of beginning.'

"That the said congregation acquired title by adverse possession to an estate in fee simple in the surface of the remaining portion of the cemetery lot, together with the right to require the owners of the underlying mineral estate to furnish an adequate support to said surface, the portion of the cemetery last aforesaid being described as follows, viz.: 'Beginning at a corner where the said northwesterly line of the land leased to James Dooley as aforesaid intersects the northeasterly line of said cemetery lot as now inclosed; thence north, thirty-four and one-half degrees west 107 feet, to the northeasterly corner of the said cemetery lot as now inclosed; thence south, forty-nine degrees thirty-five minutes west 291 feet, to a corner in line of what is known as the Dwyer property; thence south, thirty-four degrees forty-nine minutes east 107 feet, to a corner of said land leased to James Dooley; and thence along the northwesterly line of said land to the place of beginning.'

"That the plaintiffs' bill should be dismissed as to the portion of the cemetery lot first above described.

"That the injunction heretofore issued should be modified as stated in the decree nisi, and made permanent as to the second described portion of the cemetery lot.

"That each party should pay the fees of its own witnesses and the costs of subpoenaing them, and one-half of the other costs in the case."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

John McCahren and M. J. Mulhall, for appellant. A. L. Williams, for appellee.

MESTREZAT, J. The facts of this case are not in dispute, and are correctly stated in the opinion of the learned trial judge. The only question raised by this appeal is whether a lease for years is within the purview of the recording acts of this state so as to vest an estate for years in the lessee without his entering into possession. The learned court below answered the question in the affirmative, and its thorough discussion of the question vindicates its conclusion.

The fee-simple title to a large tract of land including the premises in dispute was in Gaylord and others in 1866. By a written instrument dated January 9th of that year and recorded in March, 1869, the owners leased about five acres of the tract to James Dooley for a term of 999 years, excepting and reserving all the coal and minerals with the



right to mine and remove all and every part thereof without liability for any injury or damage done the surface. By a lease dated September 29, 1871, and recorded January 8, 1872, Gaylord and others demised to the predecessors in title of the defendant company all the coal in and under their land, including the lot claimed by the plaintiffs in this action. This lease grants the right to mine and remove all the coal, but does not relieve the lessee from the obligation to support the surface, nor release the lessee from damages for injury that might result to the surface from mining operations. The plaintiffs claim title by adverse possession which began in 1874, and has continued without interruption since that time to the present. The lot has been for many years, and is now used as a cemetery by the plaintiffs. The plaintiffs filed this bill to enjoin the defendant company, the owner of the coal, from mining and removing the coal in such manner or way as to affect the superincumbent surface. The plaintiffs' contention is that by the lease to Dooley there passed to him only an *interesse termini*, and not an estate for years in the land, because of his failure to enter into possession of the premises under the lease. It is therefore claimed that the possession of the premises remained in the owners of the fee, and that plaintiffs' subsequent entry and possession was adverse, not to Dooley, but to the owners of the fee, and the title acquired by adverse possession under the statute is the title of the owners. If this contention be correct and the plaintiffs' possession was adverse to the owners and not to Dooley, it follows that the defendant company whose rights to the coal accrued by the lease of 1871 which gave them no right to affect the surface by their mining operations had no authority to mine and remove the coal without leaving proper supports to sustain the surface in its natural and unbroken condition. The defendant's contention, however, was, and it was sustained by the court below, that the execution and recording of the lease to Dooley prior to the inception of the plaintiffs' title vested in the lessee not simply an *interesse termini*, but an estate for years, and that the title acquired by the plaintiffs' adverse possession under the statute of limitations was the title of Dooley, the lessee, and not that of his lessors, the owners of the fee. This conclusion of the court was rested upon its construction of the act of 1715, which makes the recording of an instrument a substitute for a feoffment with livery, thereby "making good the title and assurance of the said lands, tenements, and hereditaments as deeds of feoffment with livery and seisin." As pointed out in the opinion of the learned judge, the Dooley lease was within the intentment of the recording acts, and the effect of recording it was equivalent to entry into possession under the lease and consequently vested in the lessee an estate for years. Dooley had a leasehold estate in the

surface, and the entry by the plaintiffs in 1874, five years after the recording of his lease, was adverse and hostile to his estate. It was Dooley's possession that the plaintiffs attacked when they entered in 1874. The owners of the fee had no right at that time to the possession of the surface as against Dooley. So far as the facts disclose, the owners had not forfeited the lease, and had no right to forfeit it. They have never asserted any right to forfeit the lease, and so far as this record shows the Dooley lease was in 1874, and has since been in full force and effect.

The contention of the appellants that the ouster of the tenant, Dooley, by the plaintiffs would be sufficient to start the statute running against the owners of the land, is not tenable. It is true that the tenant cannot deny the landlord's title; but it is equally true that the landlord cannot oust the tenant and repossess himself of the premises until the tenancy has been terminated. Until that event occurs, the tenant has the right to the exclusive possession under his lease against the landlord as well as against any and all other persons who may not have a superior legal or equitable right. Reversioners and remaindermen are not affected by the statute of limitations until the precedent estate has been determined and their right of entry accrues. *Marple v. Myers*, 12 Pa. 122. This proposition is obviously correct, as it would be most inequitable and unjust to permit the statute of limitations to run against the reversioners or remaindermen until their right of possession accrued and it could be enforced by a proper action. So long as their hands are tied and they are unable to assert their right of possession, they are in no default and the law imposes upon them no penalty. It is a universal rule, with no exceptions so far as we are advised, that the statute of limitations does not begin to run against a party until his right of action accrues. Forfeitures are not favorites of the law; and, although a cause of forfeiture exists, it will not be enforced in the absence of affirmative action by the lessor in a contest between the tenant and a third party. There is nothing whatever in this record to show any cause of forfeiture of the Dooley lease, nor that the lessors ever contemplated a forfeiture of the lease and a repossession by them of the leased premises. The lessors had unquestionably the right to permit Dooley to exercise his rights under the lease notwithstanding he may not have complied with its terms. While they might have enforced a forfeiture at any time that it occurred, it was not compulsory upon them but wholly discretionary and at their pleasure; and, if they failed to exercise that right, the plaintiffs, whose only title to the premises is adverse possession, are not in a position to enforce the lessors' rights of forfeiture.

The fears of the learned counsel of the plaintiffs that the graves of the dead may be

desecrated do not appear to have any substantial foundation. The plaintiffs, and not the defendant company, instituted this action to determine the right of the defendant to remove the coal under the cemetery. The defendant, through its counsel, disavows any intention to exercise its right of withdrawing support from the surface, and thereby endangering the graves in the cemetery. By defending this action, the defendant does not necessarily declare its intention to remove all the coal under the cemetery, and thereby break and injure the surface. Its title has been attacked by the plaintiffs, and it was therefore put upon the defensive, and required to protect the title or surrender it to the plaintiffs. Neither sentiment nor any other consideration required it to submit to an attack made by a party who had no paper title to the premises, and who had record notice of the defendant's title. We have no doubt of the sincerity of the defendant company in disavowing its intention to exercise its right to mine the coal so as to affect the surface of the cemetery lot.

The assignments of error are overruled, and the decree is affirmed.

(221 Pa. 474)

**HOOD et al. v. PENNSYLVANIA SOCIETY  
TO PROTECT CHILDREN FROM  
CRUELTY.**

(Supreme Court of Pennsylvania. May 25, 1908.)

**WILLS—CONSTRUCTION—WHAT LAW GOVERNS.**

Where, at the date of the execution of a will, the courts had determined that a gift of a life estate to a daughter, and after her decease then to her children "her surviving," gave the daughter's daughter a vested remainder, the intent of the testator in making a similar bequest in a will will be supposed to have been governed by the law as construed at the date of the will, and the fact that between the date of the will and the death of the testator the courts had placed a different interpretation on such a provision in the will will not affect the rights of the beneficiaries under the will.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Bessie D. Hood and De Witt Clinton Derringer against the Pennsylvania Society to Protect Children from Cruelty. From the decree dismissing the bill, plaintiffs appeal. Affirmed.

The bill alleged that under the will of William Patterson, deceased, his daughter, Mary Jane Patterson, took only a life estate in the real estate in question, and that the interest of Mary A. Smith, the daughter of the said Mary Jane Patterson, in the premises, was in the nature of a remainder contingent upon her surviving the said Mary Jane Patterson, and that, therefore, the said Mary Jane Patterson and Mary A. Smith and her husband were not vested with an estate in fee in the premises, and that a mortgage executed by them was not operative

to convey to appellee the interest of appellants in the premises.

The following is the opinion in part of Willson, P. J., of the court below:

"It was claimed on the part of the plaintiffs that Mary Jane Patterson took only a life estate in the premises before mentioned, that said Mary A. Smith's estate in the same was in the nature of a remainder contingent upon her surviving her mother, the said Mary Jane Patterson, and that, therefore, the said Mary Jane Patterson, Orley M. Smith, and Mary Ann Smith were not vested with an estate in fee in the said premises, and that the said mortgage deed was not operative to convey to the mortgagee the interests of the plaintiffs therein. It is claimed on behalf of the defendant that at the time when the will under construction was made, as well as when the mortgage in controversy was executed, the life tenant, Mary Jane Patterson, and her daughter, Mary A. Smith, together with the husband of the latter, were together vested with the entire estate in the premises, and were, therefore, fully competent, under the law, to execute the mortgage in question, and thereby to subject the whole estate in the premises to the lien of the mortgage. Several cases have been referred to us as sustaining this proposition, viz.: *Manderson v. Lukens*, 23 Pa. 31, 62 Am. Dec. 312; *Womrath v. McCormick*, 51 Pa. 504; *Laguerne's Estate*, 15 Phila. 553; *McClure's Appeal*, 72 Pa. 414; and *Muhlenberg's Appeal*, 103 Pa. 587.

"I do not understand that on behalf of the plaintiffs any opposition is made to this position of the defendant. Whether or not that be so, the cases referred to seem to me, beyond all controversy, to sustain the defendant's point. Though the language of the wills which were under construction in the cases just cited was not in any instance identical with the language of the will now under construction, every essential element in the present case which would go to determine the nature of the estate that was taken by Mary A. Smith was covered by the cases mentioned, and, under those cases, I have no hesitation in reaching the conclusion that, at the time when the mortgage was made, the law of Pennsylvania was to the effect that Mary A. Smith held a vested estate in remainder in the premises in question, and, therefore, that she, along with her mother, Mary Jane Patterson, and her husband, were possessed of the entire estate in the property, and had full legal power to execute the mortgage and thereby subject the entire estate in the property to the lien of the mortgage. At the same time it must be admitted, and it is admitted by counsel for both the plaintiffs and the defendant, that the law of Pennsylvania upon the subject under consideration has since been differently stated, and that, if the present con-

troversy is to be determined according to the view which is now taken in our state of the nature of such an estate as was created by the will, it would be necessary to reach the conclusion that Mary A. Smith took only a contingent estate under the will, that upon her death the entire estate in fee vested in her children, the plaintiffs, and that, therefore, the estate of the plaintiffs is not bound by the mortgage. In this state of the controversy it only becomes necessary to consider whether the rights of the parties shall be determined according to the construction which the law would have given to the will at the time the will was made and the mortgage was executed, or whether such rights shall be determined according to the law as it exists at the present time.

"It is true, as a general principle, that when courts of a given jurisdiction depart from a rule of construction applied, e. g., to the language of wills, and adopt another at variance therewith, it is to be regarded as an expression of a judgment by the courts that the law as modified was always the correct view to take of a particular question, and that earlier expositions of the law were erroneous. It is, however, equally true that, where judicial decisions have given to certain language a definite construction and meaning, the intention of the testator in the use of such language can only be reached by giving to the words employed by him in his will the meaning which had been fixed by judicial determination at the time when the will was made or when it went into effect. Such a course would seem to be necessary, in order to avoid the thwarting of a testator's intentions and to prevent the doing of great wrong to those who may have acquired estates or entered into obligations upon the faith of the law being that which it had been decided to be. In the construction of every will it is incumbent upon the courts to endeavor to ascertain the intention of the testator. To do this is of more importance than to adhere to a rule of construction. In any case, how can the intention of the testator in the use of certain words be better determined than by knowing what meaning the courts have attached to such words? In the case in hand William Patterson used certain language disposing of his real estate. According to the settled construction given to such language by the courts at the time he made his will, and when he died, his daughter, Mary A. Smith, took a vested estate in remainder in the property which is now in controversy. Must we not necessarily draw the inference that he intended she should have such an estate, and, therefore, that she should have the right, along with her mother and husband, to execute such a mortgage as the defendant took? On the faith of the law as it was then interpreted the defendant presumably parted with money, to secure the return of which the

mortgage was given. The rights of the defendant may be regarded as having then been settled according to a proper interpretation to be given to the will of the testator. Under such circumstances, I deem it entirely proper to conclude that the action of the testator's widow and daughter in making the mortgage in question was strictly in accordance with the rights and estate which the testator intended to confer upon them, and that the rights of the defendant should now be determined with reference to the character of the estate which, under the law as it then existed, the testator must be regarded as having intended to confer upon his daughter, and not according to what the courts at the present time would regard as the intention of a testator under a different view as to the construction to be placed upon such language as was used in the will in question. I may add that it is somewhat indicative of the intention of the testator that in his will he charged certain annuities, and legacies 'upon the said remainder and residue of my estate herein devised to my daughter, Mary Jane and her children, in order that they may be paid out of the same.' The language just quoted apparently indicates that it was the understanding of the testator that the entire estate in the property in question would, under the provisions of his will, vest in his daughter, Mary Jane, and her children, and this view tends to corroborate the opinion already expressed by me."

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

B. F. Pepper, G. W. Pepper, and Bayard Henry, for appellants. John G. Johnson, for appellee.

PER CURIAM. It is quite true, as urged by the appellants, that when a judicial decision is rendered the law is not presumed to be changed by it, but to have been the same before as after, although previous decisions may have been to a different effect. This is the general rule, but it is not to be applied in all cases without discrimination. On the subject of interpretation of wills it meets the cardinal and controlling principle that the intention of the testator must prevail. It is undeniable that this principle had in certain classes of cases been so overlaid and hedged in by arbitrary canons of construction as to become a subordinate, instead of a dominant, rule. As was said in *Mulliken v. Earnshaw*, 209 Pa. 226, 58 Atl. 286: "The want of harmony in the cases dealing with the period to which the words 'then living,' or similar phrases, in a will, should be applied, arises mainly from the artificial canon of construction that the period intended is presumed to be the death of the testator. The canon itself grew out of the preference in the policy of the law, in all doubtful cases, for vested, rather than contingent, interests.

Like all artificial rules, it had the constant tendency to become an arbitrary fetter, instead of a mere instrument for the ascertainment of the testator's intent. The policy of the later cases in this state, if not everywhere, is to get back to the true rule of looking only to the actual intent. There is no sound reason, in the nature of things, why the actual meaning of the person using the words should not be sought in the case of a will, exactly as it is in the case of a contract."

In the present case, therefore, as in all others, the question is, what was the intention of the testator? and that is to be ascertained by what the testator understood to be the legal meaning of his language at the time he used it. It is practically conceded that at the date of the testator's will the gift of a life estate to his daughter, and after her decease then to her children "her surviving," gave the daughter's daughter a vested remainder. That, being the generally accepted meaning of the language at the time the testator used it, must, in the absence of anything to the contrary, be accepted as the expression of his actual intent. On this point we adopt what was said by the learned judge below.

Decree affirmed.

(221 Pa. 454)

HANNUM v. MEDIA, M., A. & C. ELECTRIC RY. CO. et al.

(Supreme Court of Pennsylvania. May 25, 1908.)

**1. APPEAL AND ERROR—REVERSAL—REMAND—PROCEEDINGS BELOW.**

A decree dismissing a bill in equity was reversed by the Supreme Court, with directions that the bill be reinstated and an injunction awarded, with leave to defendant to move to open the case for further testimony. *Held* that, on restoring the case in accordance with the judgment of the Supreme Court, the court below could proceed to take additional testimony and again dismiss the bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4715.]

**2. STREET RAILROADS — USE OF STREET — RIGHTS OF ABUTTING OWNERS.**

Where a street railway company used a street already occupied by an existing railway, and did not intend to construct a branch of its own on the street, an abutting property owner had no ground to complain.

**3. SAME—RIGHTS UNDER CHARTER.**

Where a street railway under its charter has a right to build branches and extensions, it has the right to use the tracks of another company for a short distance under a contract with such company to connect its main line and the proposed extension.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 127.]

Appeal from Court of Common Pleas, Delaware County.

Bill by John B. Hannum against the Media, Middletown, Aston & Chester Electric Railway Company and the Philadelphia, Morton & Swarthmore Street Railway Com-

pany. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

O. B. Dickinson, for appellant. E. A. Howell, Ellis Ames Ballard, and David Wallerstein, for appellees.

STEWART, J. In compacting the 91 assignments of error which here confront us into five questions, and very clearly and concisely stating these, the learned counsel who argued the case for appellant has saved us both time and labor which otherwise would have been unprofitably expended. We shall confine ourselves to these questions, observing the order in which they have been presented. A brief statement of facts, however, is necessary to a proper understanding of their significance. The charter route of defendant's railway extended from a point at Elwyn Station, on the Philadelphia, Wilmington & Baltimore Railroad, through the township of Middletown and Chester, to a point on the northern boundary of the city of Chester. By appropriate action taken by the stockholders and directors, and with the consent of the municipalities through which the route passed, so much of the route as led to Elwyn, from a point a short distance south of that station, was abandoned, and from that point a line leading to the borough of Media was adopted. The defendant company thereafter adopted certain extensions from its southern terminus upon and over certain of the public streets in the city of Chester; the design being to establish a connected and continuous system of street railways in said city, in conjunction with defendant's main line to Media borough. Connection between these several extensions and the main line could be made, however, only by the use of a street in the city known as "Edgmont Avenue," a necessary part of which was already occupied by the tracks of another railway. Resolutions providing for one of the extensions adopted the avenue as part of the route, notwithstanding its previous occupancy by another railway. Municipal consent was given to the extension determined upon. Two of these proposed extensions were along certain streets on which the plaintiff owned property, but the occupancy contemplated was on the farther side. The bill filed in the case set forth the company's charter and the several extensions determined upon, and, averring that irreparable injury would result to plaintiff's property from the construction of the extensions, challenged the franchise of the defendant company in this connection on several grounds, and prayed that its right to build the proposed extensions might be judicially inquired into. A preliminary injunction to preserve the status quo until final de-

termination of the case was granted. Upon hearing the bill was dismissed. An appeal followed, which resulted in a reversal of the decree. *Hannum v. Media, etc., Electric Railway Co.*, 200 Pa. 44, 49 Atl. 789.

1. In reversing the decree this court directed that the plaintiff's bill be reinstated, and an injunction awarded, with leave to the defendant to move the court below to open the case for further testimony. The decree was reversed because the defendant had not met the burden of proof that was upon it with respect to certain facts alleged in plaintiff's bill, which, if true, operated in law to defeat its claim of right to construct the proposed extensions. In allowing the case to be opened on defendant's motion, the purpose was to afford the defendant an opportunity to supplement its proofs, and establish, if it could, its right to do what it proposed. The injunction, though awarded by this court, was issued from the court below. In awarding it, the purpose was to restore the case to exactly the standing it had before the decree dismissing the bill had been entered. The additional testimony to be taken under the order allowing the case to be opened was for the consideration of the court below, and for this court, only as error was assigned to the findings and conclusions of the court below with respect to it, on appeal. In a word, the case was remitted to be proceeded with on defendant's motion just as though it had not been adjudicated. The objection that in entering the decree, from which the present appeal is taken, dismissing the plaintiff's bill, the court exceeded the authority given it under the decree of this court, has nothing to support it. The court below correctly interpreted the order made, and the case was proceeded with in exact compliance with the order. There can be no occasion for misunderstanding with respect to the costs. In reversing the former decree the order of this court was that "all costs up to the present time be paid by the defendant." We pass to the second question, which is:

2. May a railroad be lawfully constructed as a branch, when the branch is proposed to be laid along a street which for more than 2,500 feet is already occupied by an existing railway? The reference here is to the occupancy by the defendant company of part of Edgmont avenue on which the Chester Traction Company had a line of street railway. From an examination of the map furnished us, it clearly appears that the 4,000 feet on Edgmont avenue over which defendant's extension was projected, and upon which are the tracks of another company, is the nexus which links all the extensions of the defendant's road in the city of Chester with the defendant's chartered route. A break at that point, which must result if appellant's contention be sustained, would be a fatal severance to the branch lines, since it would leave them wholly discon-

nected from the chartered route, and, therefore, without legal existence. In view of the large expenditure of money made in the construction of the several extensions (they have been constructed and are now being operated), and in view of the fact that they compose so large a part of defendant's system, such a result would be little less than disastrous to the company. That is a circumstance, however, not to be considered in the determination of the present controversy, except as the general equities in the case, if there be any, make a consideration of it proper. The particular question here propounded has no application to the facts of this case. The defendant company never proposed, and, so far as we can see, never contemplated, the construction of a branch of its own on that part of Edgmont avenue which was occupied by the existing railway. Its purpose from the beginning was to subject in some way to its use so much of the line of track owned by the other company on Edgmont avenue as was necessary to link the connecting branches with the trunk road. The resolutions ordering the extensions expressly so provide. Had these resolutions been part of the original charter route, such a provision appearing in the application for the charter would have either operated to defeat the application or have rendered nugatory any charter that might have been granted thereon, for the reason that the act of assembly under which the company was chartered—Act May 14, 1889 (P. L. 211, § 1)—authorizes only the incorporation of street railway companies for constructing, maintaining, and operating street railways on streets or highways upon which no track is laid or authorized to be laid. But here we have no question as to the existence or validity of the defendant's charter. Even though the company's right to maintain the extensions were to be denied, the company's lawful existence and the right to maintain its trunk lines would not be affected thereby. This feature of the case, though without significance in this connection, may call for further consideration when we come to the discussion of the next question submitted.

3. Can a street railway company make use of the tracks of another railway to connect its chartered route with the branch otherwise disconnected? We adopt this form of the question, because more concise than that formed by appellant's counsel. It eliminates some matters which may be regarded as superfluous. The question raised does not assail the integrity of the defendant's charter. It simply challenges the right of the company to do the thing complained of under an unimpeached charter. The charter gave the company the right to make such extensions or branches as it might deem necessary to increase its business and accommodate the travel of the public. The questions submitted conceded that the company has in all respects

complied with the provisions of the act of assembly relating to extensions or branches, except in the fact complained of, the adoption of another company's line, to connect its main line with its extensions. Does the limitation imposed in connection with the charter of street railway companies—that is to say, the provision which limits their right to streets on which no track has been laid or authorized—apply as well to extensions and branches? We can see nothing in the language of the act, nor yet in the general purpose to be accomplished thereunder, that would warrant an affirmative answer to this question. The limitation in express terms is upon the right to obtain a charter. We would naturally look for any limitation upon the right of a company legally chartered to do those things which such companies are expressly authorized to do as they may deem necessary to increase its business and accommodate public travel to be none the less explicit. The section of the act which imposes the charter limitation says nothing about branches. Its reference is to companies to be formed, and it prescribes the conditions on which the charter may issue. It is the fourth section of the act that allows extensions to be made by companies acting under a sufficient charter. These extensions are allowed whenever a company may deem them necessary to increase its business to accommodate the public, and but a single limitation upon the right is imposed, viz., that no extension or branch shall be constructed upon a street upon which a track is already laid or authorized. There is such a manifest distinction between the charter limitation and that imposed with respect to extensions that the difference can be accounted for only as we understand each to apply exclusively to its own distinct subject, without relation to the other. The limitation in case of the former is that the charter may not authorize a company to construct, maintain, and operate a railway on any street already occupied by the tracks of a railway. The thing not allowed is the chartering of a company where the purpose is to construct an additional track upon a street already occupied and maintain and operate such track. The limitation upon the extension is that it shall not be constructed in any street on which a track of another company has been laid. The evident purpose in each case is to protect the property rights of already existing companies, and perhaps to save the public streets from an excessive servitude of this character which may interfere with the public use of them; but the several limitations are clearly distinguishable.

To accomplish the object in one case it was necessary to expressly disallow the incorporation of companies where the application showed a purpose to adopt a route which had been already appropriated. To accomplish it in the other case, the companies chartered were prohibited from constructing an exten-

sion or branch on a street previously occupied; and this is the only prohibition here imposed. The southern terminus of defendant's road as chartered was the northern boundary of the city of Chester. Concededly the company had a right to adopt an extension into and within the city limits, only in so doing it was prohibited by law from constructing a track upon a street where one was already in existence. If it observed this prohibition, and had municipal consent, its right was complete. But the company found the only street which admitted of convenient and direct connection with the extensions it proposed to build already occupied by the tracks of another company. The use of this street for a distance of 4,000 feet was absolutely necessary to carry out the legitimate purpose of the company. To meet this necessity, without transgressing the law which forbade the construction of a parallel line, it acquired the right from the superior company to use the latter's track for the required distance, and was thus enabled to establish a connected system. In so doing it violated no express provision of the law, did not defeat its purposes in any respect, and was clearly acting within the rights implied in the legislative grant. The grant to the company of the right to make extensions carried with it by implication everything, except what was expressly withheld, necessary to make the grant effectual. What was here withheld was the right to construct an additional track where one existed. This the company has not done or attempted to do. What it has done does not fall within the letter or spirit of the exception. The answer to this question must be a vindication of the company's right in the premises.

4 and 5. These questions relate to the effect of the abandonment by the defendant company of that part of its chartered route which led to Elwyn, and the substitution thereof of the line to Media. The court below found as a fact that the abandonment of the part of the chartered route here complained of was pursuant to authority derived from the stockholders of the company, that the consent of the townships through which the chartered route led was duly granted, and that the action of the company and the consent of the several municipalities were duly certified to the Secretary of the Commonwealth. We may add that the evidence shows acts of acquiescence and ratification on the part of the city of Chester—not here complaining—quite as conclusive. The proceedings taken to effect a variation from the chartered route being found regular, and the acquiescence of the municipalities affected being shown, it does not rest with the plaintiff to call in question the propriety or necessity of the deviation, or the sufficiency of the defendant's action in this regard. The deviation from the chartered route in this case was determined upon evidently by considerations

of public convenience. The defendant company had at least the right to the benefit of such presumption, in the absence of anything appearing to the contrary. In *Penna. Railroad Co. v. Street Railway Co.*, 176 Pa. 559, 35 Atl. 122, 36 L. R. A. 839, we held that: "The occasion for such divergence, and its extent, are questions of location, and the decision of them primarily is within the discretion of the railway company. If the variance from the charter route is greater than is necessary, or the charter route itself is open to objection, the commonwealth alone can be heard to make it in the interest of the general public." This proceeding was under Act June 19, 1871 (P. L. 1360). The act authorized no inquiry in such cases except as to the charter right to do the act complained of. Here the defendant company has shown a full legal franchise vested in itself to do what is made the subject of complaint.

The assignments of error are therefore overruled, the appeal is dismissed at the costs of appellant, and the decree is affirmed.

(221 Pa. 552)

#### COMMONWEALTH v. SMITH.

(Supreme Court of Pennsylvania. May 25, 1908.)

#### 1. CRIMINAL LAW—ADDITIONAL INSTRUCTIONS—REQUEST OF JURY.

Where, in a capital case, the jury, after having been out some time, returns and asks for additional instructions, it is error for the court to refuse to give them, though it has already given instructions which would answer the request of the jury.

#### 2. SAME—CHARACTER OF INSTRUCTIONS.

A charge in a capital case should be sufficiently explicit to enable the jury to apply the law to the facts, and it is not enough to charge on the abstract questions of law or read from the opinion in an adjudicated case, but the court should explain to the jury the law applicable to the facts in the case under consideration.

Appeal from Court of Oyer and Terminer, Philadelphia County.

George Smith was convicted of murder in the first degree, and appeals. Reversed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

George H. White and G. Edward Dickerson, for appellant. Joseph P. Rogers, Asst. Dist. Atty., and Samuel P. Rotan, Dist. Atty., for the Commonwealth.

**MESTREZAT, J.** We are of opinion that it was reversible error for the trial judge, after the jury returned and requested additional instructions, to refuse to answer the questions asked by the jury, and to give them further and specific instructions upon the law as requested. For this reason the eighth assignment of error must be sustained and the judgment be reversed.

In capital cases it is the duty of the trial judge to instruct the jury clearly and distinctly upon the law applicable to the facts

disclosed by the evidence in the case. The instructions should be full, clear, and explicit, giving to the jury all the law, so far as it relates to the facts proved, or claimed to be proved, if such facts are sustained by any evidence. 12 Cyc. 612. The charge should be sufficiently explicit to enable the jury to apply the law to the facts of the case. It is not enough for a trial judge to charge upon abstract questions of law, either in his own language or by reading from an opinion in an adjudicated case or from a text-book. The purpose of instructions given by the court is to explain fully and clearly to the jury the law applicable to the facts of the case under consideration, and, when the trial judge has not succeeded in delivering instructions on the law in such way that they will be understood by the jury, his charge is inadequate and justly open to objection by the defendant. As the very object of the instructions is to inform the jury as to the law applicable to the facts of the case, the charge falls of its purpose when the jury are ignorant of the law applicable to any material question in the case. In the absence of objection by counsel or requests for further instructions by the jury, the burden is upon him who alleges it to show that the instructions were inadequate. The charge will be deemed to be sufficient if generally it presents the law applicable to the facts of the case. It will not be open to objection if some slight or immaterial matters have been omitted if, as a whole, the charge fairly presents the law of the case.

In this state, in both civil and criminal cases, if, after retiring, the jurors disagree or are confused as to the court's instructions on the law, or if the court omit to charge on the law applicable to any part of the case, it is the uniform practice for the jury to return and ask for additional or supplemental instructions. If, after they have retired, the court discovers that its instructions are not sufficiently explicit or do not state the law applicable to some parts of the case, the trial judge may recall the jury and give them further instructions. In either case, when the jury return of their own motion or the court recalls them, it is the duty of the court to give such additional instructions on the law as the jury may request or the court may think necessary to make clear to the jury the law as to which they are in doubt. In *Cox v. Highley*, 100 Pa. 249. Trunkey, J., delivering the opinion, said (page 253): "The court was entirely right in recalling the jury to give them any instruction which, inadvertently, had been omitted." In speaking of the propriety, as well as of the necessity, for additional instructions in certain cases, Coulter, J., delivering the opinion in *Cunningham v. Patton*, 6 Pa. 355, 360, said: "Juries are brought together from the body of the county, and generally composed of individuals unused to each other's

mode of thinking, and unaccustomed to collating and recollecting testimony. They take no notes of the evidence, and, after listening to the arguments of counsel and charge of the court, often retire no doubt with rather confused recollections of the evidence, and it is not surprising that they should differ. We can perceive no well-founded objection, therefore, that the court should refresh their memories when they request it, or instruct them further at their request, in relation to the law. There would be none certainly when the jury returned into court, nor can we perceive any where the president judge, as in this case, at the request of the jury openly and fairly read his notes of evidence, and at their request instructed further as to the law." In fact, the practice of giving additional instructions to the jury upon their request is so well settled in this state that we know of no prior instance in which the request has been refused. So far as we are advised it is the universal practice in the state. It is immaterial that the court has already charged the jury upon the law of the case generally, or has given instructions which would answer the request of the jury. The very fact that the jury, after having been in consultation, have failed to comprehend the instructions given in the charge and request further instructions, is of itself sufficient to show the necessity of additional instructions. As we said above, if the jury do not understand the instructions, or are ignorant or uncertain as to the law applicable to any part of the case, the charge is inadequate and fails of its purpose, which is to advise the jury fully and clearly upon the law applicable to each and every part of the case.

The prisoner was indicted for murder, and he alleged that the killing was done in self-defense, and, further, that, if he was guilty of any crime, it was of a lesser grade than murder of the first degree. The charge was exhaustive, covering more than 12 pages of the paper book. The law of homicide was discussed at length and the distinction between the degrees of murder, between murder and manslaughter, and between voluntary and involuntary manslaughter was pointed out. The jury retired at 3:45 p. m. and discussed the case until 8 o'clock p. m., when they returned to the courtroom and requested additional instructions upon the question of premeditation. Four questions were asked the trial judge, three of which he declined to answer, observing that he had "already referred to that matter at great length in my charge." The learned judge in reply to the first question told the jury that there could not be murder of the first degree without premeditation. The other inquiries requested instructions on the question of premeditation applicable to certain facts in the case. The character of the defense made the answer to those questions of vital importance to the defendant. Whether they were ade-

quately answered in the general charge or not is of no moment in view of the fact that the jury, by request for information upon the subject, disclosed the necessity for additional instructions. Until the jury had been fully advised and understood the law upon the question of premeditation as applicable to the case, the instructions were inadequate, and it was the duty of the court, upon request of the jury, to give additional instructions. The jury had discussed the case for four hours and a half without arriving at a conclusion as to the guilt or innocence of the defendant. Presumably the questions on which they were at variance were those put to the court for instructions. The jury did not ask the court to determine any question of fact or to express its opinion upon the facts of the case. Its instructions were solicited on questions of law, which, it is apparent, were vital in the determination of the guilt or innocence of the defendant. We are clear that the court was in error in declining to answer the questions propounded by the jury, and in referring the jury to the general charge for answers to the questions.

In view of the fact that the case is remanded for another trial, the character of the questions raised by the other assignments do not make it necessary to consider those assignments. The eighth assignment, however, must be sustained.

The judgment is reversed with a *venire de novo*.

(221 Pa. 563)

MCGRAW v. HILTON et al.

(Supreme Court of Pennsylvania. May 25, 1908.)

APPEAL AND ERROR—REVIEW—FINDINGS OF FACT.

Findings of fact by a referee on conflicting evidence will not be disturbed, except for manifest error.

Appeal from Court of Common Pleas, McKean County.

Action by James H. McGraw against Robert W. Hilton and others. From an order dismissing exceptions to the referee's report, plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

T. F. Mullin, for appellant. E. R. Mayo & Son and J. E. Mullin, for appellees.

PER CURIAM. The bill in this case was by a partner for an account. His right to an account was conceded, and an account of the general business of the partnership was stated by the referee to which no exception was taken by the parties. The single matter in controversy was whether the plaintiff was entitled to an account for the profits resulting from the purchase of a tract of timber by two of his partners in their own names.

It was alleged in the bill that the timber was bought for the use of the partnership



and paid for by the use of its funds. It was denied in the answer that the partnership had any interest in the purchase and that any of its funds were used in payment. There was conflicting evidence on this subject and the findings of the referee, approved by the court, were all against the plaintiff's contention. The established rule is that findings of fact from conflicting testimony will not be disturbed except for manifest error. We review such findings only to ascertain whether there was evidence which, if believed, warranted them: *Steinmeyer v. Siebert*, 190 Pa. 471, 42 Atl. 880, 70 Am. St. Rep. 641; *Lyons v. Lyons*, 207 Pa. 13, 56 Atl. 58.

The decree is affirmed at the cost of the appellant.

(221 Pa. 550)

**POTTER v. PENNSYLVANIA R. CO.**

(Supreme Court of Pennsylvania. May 25, 1908.)

**RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.**

Where a man drove his horse in broad daylight close to a railroad track before stopping to look and listen, and the horse became frightened by an approaching train, and crossed the track in front of the train and was killed, the driver was guilty of contributory negligence, barring a recovery for his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1043-1056.]

Appeal from Court of Common Pleas, Union County.

Action by Sophia E. Potter against the Pennsylvania Railroad Company. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Geo. B. Reimensnyder and Phillip B. Linn, for appellant. Andrew A. Lelser, for appellee.

**POTTER, J.** The reason given by the learned judge of the court below, in entering judgment of compulsory nonsuit in this case fully justified him in refusing to take it off. The accident occurred at a grade crossing over a single-track railroad, in a country district, in broad daylight. The deceased was a mail carrier, upon a rural route, and, whatever may have been the precise circumstances at the time of the accident, it is clear that he drove his horse very close to the line of the railroad before stopping to look and listen, if he did make any stop. Whether the horse came to a full stop or not seems doubtful; at any rate, it was uneasy and was prancing, and as the train approached became so frightened as to be uncontrollable, and, wheeling somewhat to the left, plunged across the track in front of the train which struck the wagon, and killed the occupant. The only inference which can fairly be drawn from the action of the mail carrier in placing his horse

so near the track before stopping is that he was positively negligent. He was perfectly familiar with the crossing, as he passed over it daily in the line of his duty. The road was level and he was free to avoid all danger by stopping at a safe distance from the track. It appears from the testimony that another team was just ahead, and the driver of that wagon whipped up and succeeded in getting safely over the track in advance of the train; but the mail carrier evidently concluded at the last moment that he could not do so, and therefore attempted to stop his horse when very close to the track, intending to wait for the passage of the train. Had his horse remained quiet, he would probably have been safe; but as to this he took his own risk. He voluntarily placed himself in a position of danger. "No error in a close calculation of a chance can relieve from the charge of contributory negligence." *Brown v. Traction Co.*, 14 Pa. Super. Ct. 594. Counsel on both sides have analyzed the evidence in this case minutely, and have thoroughly argued the points involved. But the law governing the question is well settled, and we can see nothing in the evidence which would have justified the trial judge in submitting the question of contributory negligence to the jury, and he discharged a manifest duty in assuming the responsibility of pronouncing upon it himself.

There was no error in refusing to take off the nonsuit, and the judgment is affirmed.

(221 Pa. 521)

**In re KRICKBAUM'S CONTESTED ELECTION.**

(Supreme Court of Pennsylvania. May 25, 1908.)

**1. CERTIORARI—REVIEW.**

On a summary petition by certiorari in an election contest, the appellate court, in the exercise of its supervisory power, will examine the opinion of the court below to ascertain the basis of the action.

**2. ELECTIONS—CONTEST—JUDGES OF ELECTION.**

The entire vote cast in a district will not be rejected, where there was no evidence of fraud or improper counting of the votes, because a person acted as judge of the election in place of the regularly elected judge under the mistaken idea that he had a right so to do.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 47.]

**3. SAME—DISQUALIFICATION OF JUDGES OF ELECTION.**

A minority candidate will not be declared elected by throwing out the vote of a district because one or more of the judges of election were not duly sworn or duly chosen, or did not possess all the necessary qualifications.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 47, 48.]

**4. OFFICERS—"DE FACTO OFFICER."**

A "de facto officer" is one who is in possession of an office, discharging his duties under color of authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 63.]

For other definitions, see Words and Phrases, vol. 2, pp. 1845-1851.]

**5. SAME—"COLOR OF AUTHORITY."**

"Color of authority," as applied to a de facto officer, means authority derived from an election or appointment, however irregular or informal.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, p. 1262.]

Appeal from Court of Quarter Sessions, Columbia County.

In the matter of the election contest of William Krickbaum as associate judge of Columbia County. From an order declaring contestant elected, William Krickbaum appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

Fred Ikeler and James Gay Gordon, for appellant. Geo. S. Graham and Clyde Chas. Yetter, for appellee.

POTTER, J. In the opinion of this court in Independence Party Nomination, 208 Pa. 108, 57 Atl. 344, Chief Justice Mitchell points out that proceedings by certiorari on a summary petition occupy a middle ground between those in common-law actions and equity suits, and that the appellate court, in the exercise of supervisory powers in such cases, will not stop with a mere inspection of the formal proceedings, but will examine the opinion of the court below so far as may be necessary to ascertain the basis of its action. This statement of the principles and practice by which this court is governed in such cases was again cited and approved in Chester County Republican Nominations, 218 Pa. 64, 62 Atl. 258, and it was further pointed out that "where the facts appear upon the record this court will examine whether the judgment is correct upon such facts, and may for that purpose consider the opinion of the court as part of the record." See, also, Mulholland's Case, 217 Pa. 631, 66 Atl. 1105. The opinion of this court in Von Moss' Election, 219 Pa. 453, 68 Atl. 1019, is also consistent with this rule, and in that case we took into consideration the facts presented, as found in the opinion of the court below. In the present case the facts are not disputed. They are found and presented by the trial judge as the basis of his action, and it becomes our duty to examine the judgment to see if it is correct upon such facts, and for that purpose, we take them as set forth in the opinion of the trial judge as follows:

"The petition of George M. Hughes was filed in this case on the 4th day of December, 1907, to contest the election of William Krickbaum to the office of associate judge for the county of Columbia. At the general election held on the 5th day of November, 1907, in said county, an associate judge was to be elected. On the canvass of the returns by the judges, it appears that William Krickbaum received 3,048 votes and that George M. Hughes received 3,012 votes. The petition alleged that 107 votes were cast for William

Krickbaum, and that 39 votes were cast for George M. Hughes in Mifflin township at said election, and that all the votes cast at said election in Mifflin township were illegal and void, and should not be counted for either Krickbaum or Hughes in computing the election returns of Columbia county; that if the votes cast at said election in Mifflin township were not counted George M. Hughes would have received 2,973 votes, and that William Krickbaum would have received 2,936 votes; that George M. Hughes received a majority of the legal votes cast for associate judge in Columbia county at the election held November 5, 1907. The objection to the vote counted for Mifflin township is that the legally elected judge of election was not permitted to take part in holding the election and that a usurper acted as judge in holding said election."

The court below proceeds to find specifically:

"(1) That at the February election, 1907, in said district of Mifflin township, A. E. Johnson was duly elected as the judge of election, to serve for the ensuing year. (2) That at the next following election in said district, to wit, the June primary election, the said A. E. Johnson did not attend, and that thereupon one of the inspectors appointed Whitney Hess as the judge of election, in the place of Johnson, and who, after being sworn, acted as judge during said June primary election. (3) That on the morning of the general election held in said township, on the 5th day of November, 1907, before the polls were opened, the said A. E. Johnson appeared at the regularly appointed place for holding the election in said township and demanded to be sworn in as the regularly elected judge of election. (4) That the other election officers refused to administer the oath to the said A. E. Johnson, and further refused to allow him to sit upon said election board and perform the duties enjoined upon him as the regularly elected judge of the election for said district. (5) That the said A. E. Johnson persisted in demanding his right to sit as one of the said election board; but, notwithstanding his demand, Whitney Hess was sworn in as judge of election by the minority inspector, and then said Whitney Hess and other members of the board proceeded to conduct the election without Johnson and receive the votes cast at said polling place counted and made return of the same without the said Johnson participating therein. (6) That Whitney Hess acted as judge of the general election held in Mifflin township, November 5, 1907. That he was not the regularly elected judge of election to hold the November election, 1907, in said Mifflin township. That there was no vacancy in the office of judge of election in Mifflin township on the morning of November 5, 1907; A. E. Johnson, the regularly elected judge of election, being present at the time of opening the polls and demanding his right to participate in the re-

ceiving, counting, and return of the votes cast at said polling place. (7) That the election returns from Mifflin township for said election show that 107 votes were cast for William Krickbaum for associate judge and that 39 votes were cast for George M. Hughes for associate judge.

"On the part of the respondent it is contended that the votes of Mifflin township cannot be thrown out: (1) Because the action of Whitney Hess as judge was not in fraud of the rights of either candidate; neither was his appointment fraudulently obtained; nor did his action, or the action of the board in allowing him to sit, change, alter, or even render uncertain a single vote cast at the election. (2) Because Whitney Hess, holding and claiming to hold by virtue of a valid appointment at the June primary election, was acting under color of title, and was therefore, as respects third persons, the de facto judge of election, and his acts as such are binding on the contestant and respondent. On the part of the contestant it is contended that, because the election in Mifflin township was held by a judge of election who was not legally elected or legally appointed, the return of votes cast at the poll is illegal and cannot be counted."

After conceding that the irregular conduct upon the part of the election officers is not to be allowed to defeat the expressed will of the voters, unless there be fraud, or such conduct as will alter or render uncertain the result, the learned judge of the court below announced his conclusion that Whitney Hess was not de facto judge of election, acting under color of title, but that he was a mere usurper, and he therefore rejected all the votes cast in Mifflin township. How he could have reached this conclusion we do not understand. It is directly in the teeth of, and is entirely unwarranted by, his findings of fact; for he found expressly that in truth and in fact Whitney Hess was sworn in as judge of election by one of the inspectors, and that he then proceeded with the other members of the board to conduct the election and receive the votes, and counted and made return of them. So that beyond question he was actually, in fact and in deed, the judge of the election. He performed the duties of the office with apparent right, and under claim and color of an appointment, even though it be granted that he was acting under a mistaken authority. But he was in the exact sense of the term an officer de facto. Now the validity of the acts of officers of election, who are such de facto only, so far as they effect third persons and the public, is nowhere questioned. "The doctrine that whole communities of electors may be disfranchised for the time being, and a minority candidate forced into an office, because one or more of the judges of election have not been duly sworn, or were not duly chosen, or do not possess all the qualifications requisite for the office, finds no support in the

decisions of our judicial tribunals." McCrary on Elections (4th Ed.) 1897, § 251. To sustain this statement, the author cites our own case of *Baird v. Bank of Washington*, 11 Serg. & R. 411, where Justice Gibson said (page 414): "The question does not depend on whether the appointment is void or only voidable, or whether it emanated from an authority which had full power to make it, but whether the officer has come in under color of right, or in open contempt of all right whatever. *King v. Lisle*, Andr. Rep. 163, 2 Stra. 1090. This distinction runs through all the cases. \* \* \* This principle of colorable election holds not only in regard to the right of electing, but also of being elected. A person indisputably ineligible may be an officer de facto by color of election. *Knight v. Corporation of Wells*, Lutw. 156. So, even when the office was not vacant, but there was an existing officer de jure at the time. *O'Brien v. Knivian*, Cro. Jac. 552; *Harris v. Jays*, Cro. Ellz. 699."

And in *Keyser v. McKissan*, 2 Rawle, 139, the case of a county treasurer appointed by county commissioners who had failed to take the oath of office, Justice Rogers said (page 140): "The rule which governs the case is that the commissioners who appointed the treasurer were officers de facto, since they came into their office by color of title. It is a well-settled principle of law that the acts of such persons are valid when they concern the public or the rights of third persons who have an interest in the act done. *People v. Collins*, 7 Johns. (N. Y.) 549; *King v. Lisle*, Andr. Rep. 263. And this rule has been adopted to prevent a failure of justice. \* \* \* That the commissioners, who appointed the treasurer, were officers de facto, is certain, as they possessed every qualification of officers de jure, except in the one particular that they had omitted taking the oath prescribed by the Constitution. They had at least color of title. It is equally clear that the suit was not brought for their individual benefit, but for the use of the public." In *State v. Oates*, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912, we find this statement: "Within the rule that a de facto officer is one who is in possession of an office and discharging its duties under color of authority, by 'color of authority' is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer."

In the present case Hess was duly and properly appointed as judge of election at the preceding election, and both he and the other officers assumed that the appointment was good for the remainder of the year, and under this assumption he claimed and was awarded by the other election officers the right to act as judge at the election in dispute. It was a mistake, but the claim and its allowance were enough to give him color of right to the office and to prevent him from being con-

sidered as a mere usurper. Certainly the rights of the voters should not be prejudiced by any such irregularity as this. "It may be said that 'color of right' which constitutes one an officer de facto may consist in an election or appointment, or in holding over after the expiration of one's term." *Hamlin v. Kassafer*, 15 Or. 456, 15 Pac. 778, 3 Am. St. Rep. 176. The effect to be given to such irregularities is discussed in *People v. Prewett*, 124 Cal. 7, 56 Pac. 619, where it was said (pages 12, 13, of 124 Cal., page 621 of 56 Pac.): "The court below found that the persons who served as officers of the election were not sworn as required by law, and the appellants cite those provisions of the political and penal codes making it a felony to act as an election officer without having been appointed and qualified as such. But these provisions, while imposing penalties upon the person who so acts, do not declare the election void for that cause. But this has been directly decided in *Whipley v. McKune*, 12 Cal. 352 (and in other cases cited). The principle underlying those decisions is that the rights of the voters should not be prejudiced by the errors or wrongful acts of the officers of the election, unless it shall appear that a fair election and an honest count were thereby prevented."

And the general principle governing such a condition as is here presented is thus summed up in 15 Cyc. 316: "It is the duty of the court to sustain an election authorized by law if it has been so conducted as to give a free and fair expression of the popular will, and the actual result thereof is clearly ascertained; for elections should never be held void unless they are clearly illegal. In the absence of fraud, mere irregularities in the conduct of an election, where it does not appear that the result was affected either by the rejection of legal votes or the reception of illegal ones, will not justify the rejection of the whole vote of the precinct, although the circumstances may be such as to subject the officers to punishment." And in *Wheelock's Election*, 82 Pa. 297, in an opinion approved by this court, it was said: "When the application of technical rules and a strict construction of the acts of the officers, in preparing the election papers and conducting an election, would tend to defeat the will of the people and change the result of an election for an important office, they should not be applied, and all reasonable intendments should be made in favor of the legality of their proceedings."

In the present case the requirements as to time and place of holding the election were entirely fulfilled, and there is no finding that any fraudulent or wrongful vote was offered or accepted. Nor is there even a hint of any confusion or carelessness in the conduct of the election. The record and the undisputed facts show nothing irregular, except the fact that Whitney Hess acted as judge of

the election under the mistaken idea that his appointment in place of the regularly elected judge was good for the current year, instead of being good, as it was, merely for the preceding election. But this mistake did not in any way result in obstructing the complete expression of the will of the voters or the production of satisfactory evidence thereof. Under all the authorities the irregularity was not, therefore, sufficient to avoid the election, or justify the rejection of the entire poll of the votes cast in the district.

We think it is clear that the judge of the court below erred in his conclusion that Whitney Hess was not de facto an officer, and in his further conclusion that, as a consequence, all the votes cast at the election in question in Mifflin township must be rejected. The facts as set forth by him, and for the purpose of this inquiry made part of the record, show no basis for such action; and they do, on the contrary, clearly show that Whitney Hess was de facto judge of election, acting under color of title. The first assignment is sustained.

The decree of the court below is reversed, and it is adjudged and decreed that, upon the finding of facts which appear upon the record in this case, William Krickbaum received a majority of the legal votes cast for associate judge, and was elected to said office on November 5, 1907.

(221 Pa. 845)

#### HICKEY v. CALDWELL et al.

(Supreme Court of Pennsylvania. May 25, 1908.)

#### MASTER AND SERVANT—INJURY TO SERVANT— NEGLECT OF VICE PRINCIPAL.

Where the owners of a foundry delegate the absolute control thereof to a workman with power to employ and discharge the men, such workman becomes a vice principal, and for his negligence whereby another workman is injured such owners are liable.

Appeal from Court of Common Pleas, McKean County.

Action by Martin Hickey against E. R. Caldwell and R. R. Caldwell. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

John G. Johnson, W. E. Burdick, and M. L. Willis, for appellants. J. P. Mullin, for appellee.

MESTREZAT, J. The defendant partnership is engaged in the foundry and machine business in Bradford City, this state. The plaintiff was employed as a laborer in the foundry. A mold had been made for a casting weighing about 10 tons, and, while the plaintiff was assisting in pouring the molten metal into the mold, an explosion occurred which threw some of the metal on the plaintiff, resulting in serious injury to him. The molds are made of damp sand, and must be

dried and baked before they can be used with safety. On the occasion of the accident to the plaintiff, the explosion occurred by reason of the molten metal having been poured into the mold before it was properly dried. It appeared from the evidence that neither of the partners is a practical molder, or ever had any practical experience in the molding business. The firm employed one Anthony Knapp, a molder, who had supervision of the foundry, subject to the directions of E. R. Caldwell, who had general charge of the defendant's business. E. R. Caldwell had delegated to Knapp his authority within certain limits. Knapp employed and discharged men, he directed the molds to be made, and it was his duty to look after them and see that they were correctly made and in safe condition before they were used. In other words, he had general supervision over the construction and use of the molds. Some of the witnesses testified that Knapp apparently had full control of the foundry. The Caldwells, having no practical knowledge of the business, necessarily left the management of the foundry business to Knapp. The mold which exploded and caused the plaintiff's injuries was constructed by Nicholas Zims and another molder with the assistance of two helpers. They began the work on Monday or Tuesday, and finished it on the following Friday, when they put a gas fire in it to dry it. It seems from the testimony that it requires at least two days to dry the mold before it is fit or safe for use. On Saturday morning, the day after the completion of the mold, Zims examined it, and informed Knapp that "it is mud, not fit to cast." Zims told Knapp that the mold was not fit to put water in, let alone iron. He also called a helper, and by the use of a rod they showed Knapp that the mold was wet and was not in a suitable condition to receive molten metal. Knapp, however, insisted upon making the casting. He said they must cast, as they needed the space, and directed Zims to proceed with the work. Zims replied: "If we must, we will; but it is a very dangerous proposition." In attempting to make the casting, the explosion occurred by reason of the mold not having been sufficiently dried and baked. The learned trial judge submitted the case to the jury. He instructed them that it was the duty of the firm to furnish the employes, including the plaintiff, a suitable and properly dried and baked mold for the reception of the iron; that, if the defendant firm delegated to Knapp the authority to construct the mold, to determine when it was suitable to receive the metal, and the defendant exercised personally no authority over it, then Knapp would be a vice principal; and, if Knapp neglected to furnish a proper mold and his negligence in failing to do so resulted in the plaintiff's injuries, the plaintiff was entitled to recover in the case. The learned judge left to the jury to determine whether the mold furnished on the occa-

sion of the accident was in proper and suitable condition for use, and whether Knapp was a vice principal exercising the authority of the defendant in the construction of the mold. By the verdict the jury has found that the mold was not suitable, and that its construction was under the supervision of Knapp, who was at the time the vice principal of the defendant.

The assignments of error raise but a single question; and that is, whether under all the evidence in the case the plaintiff was entitled to recover. The case was clearly for the jury, and was properly submitted by the learned judge. It was unquestionably the duty of the defendants to furnish reasonably safe instrumentalities or appliances for their employes to perform the service for which they were employed. In making the casting the mold was an instrumentality or appliance with which the work was to be done by the plaintiff and the other employes. The duty to furnish this appliance rested upon the defendant. It was a personal obligation, and required the defendant to provide a suitable and reasonably safe mold. The plaintiff did not assist in making the mold, nor was it his duty to see that the mold was safe or in a fit condition for use. When he was directed by his employer to assist in making the casting, he had a right to assume that the mold was in a safe condition. He had no knowledge to the contrary. He did not know and had no reason to believe that it was wet and unfit for use. It was delivered to the plaintiff and the other employes, and they were to use it in making the casting, and they could rely on it being baked and in a suitable condition. Under the evidence in the case, the jury were fully justified in finding that Knapp was a vice principal. He had entire charge of this part of the work of the defendant firm. This was necessarily so, because the partners themselves were not practical molders nor had they any experience in the business. While one of the partners had general supervision over the entire work, yet Knapp had the authority to make the molds, to supervise the making of the castings, and to direct the employes about the work; in a word, he had the absolute control and management of the foundry and of the employes engaged in constructing the molds and in making the castings. As testified by E. R. Caldwell, one of the partners, he had general supervision over the defendant's foundry and machine business, and he delegated to Knapp his authority within certain limits; and those limits included the management and control of the foundry department of the defendant's business.

That Knapp was negligent in the performance of his duties, and that such negligence resulted in the plaintiff's injuries, there can be no doubt. This clearly appears from the plaintiff's evidence, and the defendant introduced no testimony to contradict it. On

Saturday morning, the day of the accident, the mold was wet and wholly unfit for use. Knapp was advised of this fact, and he did not then nor did he on the trial of the cause deny that the mold was in an unfit and dangerous condition when he ordered the casting to be made. Knapp insisted on making the casting, and assigned as a reason that it must be made because they needed the room. As testified by Zilms: "It was just a case of too much hurry up. If we had fired it another day and night, and waited to cast it Sunday, there would have been no trial today." With a knowledge of the unsafe and dangerous condition of the mold, it was negligence on the part of the defendant by its vice principal to direct the casting to be made; and the responsibility for the negligence of the vice principal must rest upon the defendant.

The assignments of error are overruled, and the judgment is affirmed.

(221 Pa. 870)

### MARSHALL v. FOLTZ.

(Supreme Court of Pennsylvania. May 25, 1908.)

#### ESTOPPEL—SILENCE—ACQUIESCENCE.

Where land is purchased with partnership funds, but title is taken in the name of one partner, and on his death his widow sells the property with the knowledge of the surviving partner and without any objection by him, and the purchaser improves the property, the surviving partner is thereafter estopped to deny his title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 264-275.]

Appeal from Court of Common Pleas, Fayette County.

Action by George C. Marshall against David C. Foltz. Judgment for defendant, and plaintiff appeals. Affirmed.

The following is the opinion of Umbel, J., in the court below:

"In 1872 Edmund C. Pechin purchased two pieces of land, known as the 'Bunker' and 'Allen' tracts, situate in Dunbar township, Fayette county, Pa., and for personal reasons took title in the name of Arthur W. Bliss. Some time in the 70's, the exact date of the formation of which does not appear, a partnership was formed between Arthur W. Bliss and George C. Marshall, under the firm name of Bliss & Marshall, and, with a legal interruption or two, seems to have continued for one purpose or another until the death of Mr. Bliss in August, 1903. In 1881 Bliss & Marshall purchased the Bunker and Allen tracts from Edmund C. Pechin, and paid for them out of the firm funds. As above noted, the title was standing in the name of Arthur W. Bliss, and at the time of the purchase by Bliss & Marshall no change was made in that regard, and it was allowed to continue so, subject to sales and conveyances made, until the death of Mr. Bliss. Between the date of the purchase

by Bliss & Marshall and the death of Mr. Bliss a considerable portion of said land was sold in small lots, the deed in all cases being made by Arthur W. Bliss and wife, and it would seem that most of the negotiations in that respect were conducted by Mr. Bliss. The management of the said land, so far as use and rent are concerned, seems to have been participated in jointly, and it was known generally in the community as the 'Bliss & Marshall land.' On one part of the said land the firm of Bliss & Marshall for several years operated a fire brick works, which they sold to John Palmer, and, while the deed was made by Arthur W. Bliss and wife, the mortgage for the balance of the purchase money was taken in the name of Arthur W. Bliss and George C. Marshall, mortgagees.

"There is little or no direct testimony on the point as to what disposition was made of the proceeds of the sales made in the lifetime of Mr. Bliss, yet we think, under the circumstances, the presumption is almost overwhelming that he shared them with his partner or accounted for them to the firm of Bliss & Marshall. In 1892 George C. Marshall made an assignment for the benefit of his creditors to Jos. H. Kerr. In the deed of assignment he mentions and briefly describes three separate tracts of land of which he was, or claimed to be, the owner or part owner, but makes no mention whatever of the tract in question, nor of any interest therein other than what might be inferred from the general clause after the specific description in the deed, as follows, viz: 'And also the goods, chattels, and effects, and property of every kind, real, personal, and mixed, of the said George C. Marshall.' From the record of the proceedings in re the assigned estate of George C. Marshall, at No. 2, June term, 1892, insolvent docket, it appears that considerable time elapsed after the assignment was made before anything was done toward settling the estate by the assignee, and then he moved only after a rule had been issued and served on him and the assignor to show cause why he should not be removed and a suitable person appointed in his place. February 3, 1896, more than four years after his appointment, the assignee filed his first and final account, showing a balance in his hands of \$360.50 for distribution among creditors, with claims, as proven before the auditor, amounting to \$31,610. Something over one-half of the said amount was reduced to judgments, which were compromised and satisfied of record in January, 1900. There never has been any reconveyance from the assignee to Mr. Marshall, and, so far as the record is concerned, his interest in the land in question stands just as it did immediately after the execution and delivery of the deed of assignment January 29, 1892, recorded in Deed Book 109, page 413.

"The defendant offered in evidence the rec-

ord of all the deeds executed by Arthur W. Bliss and wife to the various purchasers for lots and parts of this land, and sold before the death of Mr. Bliss, an examination of which discloses that between the date of the said assignment in January, 1892, and the date of the compromise and satisfaction of the said judgments in the early part of 1900, there were sold a number of these lots, and deeds executed, delivered, and recorded, one-half the proceeds of which sales was doubtless distributed to, received and used by Mr. Marshall, as there is no account of it in the insolvent proceedings, even of the proceeds of sales made between the date of the assignment and the date of filing the assignee's first and final account. The insolvent's one-half above referred to, as set forth in the deeds, amounted to several times as much as was reported and accounted for by the assignee for distribution. After the death of Mr. Bliss it was found that Bliss & Marshall were somewhat involved and owed considerable. Mrs. Lida Bliss, as executrix of Arthur W. Bliss, deceased, was desirous of discharging the Bliss & Marshall obligations. While she had no personal knowledge regarding the ownership of the land in question, yet after hearing Mr. Marshall's statement and claim she was willing, notwithstanding by the record her husband appeared to be the sole owner, to recognize Mr. Marshall as half owner to the extent of allowing him to share in the proceeds, or that the proceeds realized from the sale of the said land be applied to the payment of Bliss & Marshall debts, for which it was conceded Mr. Marshall was jointly liable with Mr. Bliss.

"Mrs. Bliss, as executrix aforesaid, proceeded to make sale of this land for the purpose of paying debts and apply the proceeds to obligations of Bliss & Marshall. She presented her petition to the orphans' court of Fayette county, at No. 70, September term, 1904, setting forth, regarding this land, *inter alia*, as follows, viz.: 'These two tracts of land were purchased by Arthur W. Bliss and George C. Marshall, formerly partners as Bliss & Marshall, and for convenience the title was taken in the name of Arthur W. Bliss, and had not been changed at the time of his death. They were subsequently subdivided and platted into lots, as shown by a partial plan thereof recorded in Plan Book, vol. 1, page 22, and various lots have from time to time been sold and the money divided between said partners, as will appear by sundry conveyances of record in the office of the recorder of deeds. Subject to the payments of the debts of said partnership and the adjustment of the equities between said partners, the said George C. Marshall is, therefore, entitled to the one-half of the proceeds arising from the sale of the remainder of said tracts.' Under such proceedings several parts were sold, and deeds made and recorded; the purchasers taking possession and making improvements. Disposing

of the property in this way was attended with more or less trouble, to avoid as much as possible of which, Mrs. Bliss, at No. 78, March term, 1906, and by deed dated March 27, 1906, and recorded March 28, 1906, in Deed Book 255, page 445, secured title in her own name to the whole balance, and thereafter made sales and deeds direct, accounting, however, for the proceeds to the credit of Bliss & Marshall. After the death of Mr. Bliss, Mrs. Bliss, either as executrix or in her own individual capacity, after securing title in her own name, made certain sales.

"David C. Foltz—the defendant herein—subsequently became the sole owner, and in October, 1906, began the erection of a brick works thereon, and expended a considerable sum of money in that connection. Further, soon after the sale to Foltz & McFarland in May, 1906, Mrs. Bliss had prepared and sent to Mr. Marshall a statement of receipts and expenditures in connection with these various sales, offering that he share in the proceeds and showing the balance due him. He does not appear to have made any objection to any of the sales, nor to anything else that was done, nor to have taken any account of the said notice and statement, but maintained, so far as these matters are concerned, absolute silence, and did not move in any particular until ruled in the early part of 1907 to do so under the act of 1893. All this, too, notwithstanding discussion regarding Mr. Marshall's claim to part of the title to this land was started between representatives of the Bliss estate and Mr. Marshall soon after the death of Mr. Bliss. In the face of which we think it would be idle to argue that Mr. Marshall did not have knowledge of what was being done. He is certainly competent to testify regarding matters that have occurred since the death of Mr. Bliss, and he does not say but that he was fully advised and apprised, and as a matter of fact we find and conclude that the manner of handling this land was with Mr. Marshall's knowledge and consent (implied, if not expressed).

"In their discussions and efforts to adjust their respective claims regarding this land, it seems to have been conceded that from the date of the purchase from Pechin they (Bliss & Marshall) had been joint owners and each entitled to one-half the proceeds from sales made; Mrs. Bliss insisting, however, that, in consequence of title standing in Mr. Bliss' name and he always having made the sales or conveyances, the same practice should continue, and especially so in view of what she considered Mr. Marshall's extravagant ideas as to the value of the said land, fearing that if he had to be consulted no sales could be made. The Bliss estate offered to sell its interest to Mr. Marshall for about one-third of what he indicated as his opinion of its value. The testimony shows clearly that he was fully advised in

this regard, and, as expressed by his counsel, 'It was the rock on which they split' in their efforts to compromise. Mrs. Bliss disposed of this, and in several separate parts as above set forth, for the total sum of \$10,188.75, which no one now seems to question as not having been considered at that time a good, just, fair, and ample price for it; and we find as a fact that it was a good and sufficient price.

"While a number of interesting and important legal questions were suggested and discussed on the argument of this case, no specific requests were submitted and filed, and we are of opinion that the controlling question is the following, viz.: Has Mr. Marshall's silence and conduct in this matter been of such character as to estop him and prevent judgment in his favor in this action? In *Logan v. Gardner*, 136 Pa. 588, 20 Atl. 625, 20 Am. St. Rep. 939, our present Chief Justice says: 'The doctrine of estoppel in pais has been very much extended in modern times, particularly in Pennsylvania, where equitable principles are applied in actions at law. The cases are very numerous, but it is not necessary to refer to more than a few of them. In *Woods v. Wilson*, 37 Pa. 379, the subject was discussed by Chief Justice Thompson, and it was held that silence, in ignorance of one's own right or of another's expenditures, will not estop, but that silence with knowledge is evidence from which a jury may find an estoppel. See, also, *Hill v. Epley*, 31 Pa. 331, and *Miranville v. Silverthorn*, 48 Pa. 147. These decisions rest on the ground that the circumstances were such as to raise a duty to speak, and that failure to do so is either a fraud or would work such an injury as would be equivalent to a fraud, if the party should not be estopped. On the other hand, it was held, as early as *Buchanan v. Moore*, 13 Serg. & R. 304, 15 Am. Dec. 601, and *Robinson v. Justice*, 2 Pen. & W. 19, 21 Am. Dec. 407, that positive acts of encouragement or which help to mislead, will raise an estoppel, without any fraud, and irrespective of the party's knowledge of his own rights, and, as was pointed out by Chief Justice Gibson, this result rests on a different principle—that of two innocent parties the one who occasioned the loss must bear it. See, also, *Chapman v. Chapman*, 59 Pa. 214, *Miller's Appeal*, 84 Pa. 391, and *Putnam v. Tyler*, 117 Pa. 570, 12 Atl. 43. The distinction, therefore, between the cases where acts or declarations of encouragement are necessary to create an estoppel and those where mere silence or acquiescence will be sufficient is one of principle, and each case as it arises must be assigned to one or the other class, according to its circumstances, the chief of which is knowledge or ignorance of the party's own rights and the other's actions. Encouragement is necessary where the party is ignorant; but knowledge creates the duty to speak, and, where that exists, silence is enough to estop.'

"A party who stands by and sees a bona fide purchaser making a valuable improvement upon the land in the neighborhood of which the former has resided for nearly 20 years, without giving notice of an equitable title in himself, will be estopped from subsequently asserting the same. Silence will postpone a title when one, knowing his own right, should speak out. One led by such title ignorantly and innocently to rest on his title, believing it secure, and to expend money and make improvements without timely warning, will be protected by estoppel. *Redmond v. Saving Fund & Loan Ass'n*, 194 Pa. 643, 45 Atl. 422, 75 Am. St. Rep. 714. Silence works estoppel when it has misled another to his injury. *Railroad Co. v. Dubois*, 79 U. S. 47, 20 L. Ed. 265; *Hill v. Epley*, 31 Pa. 331; *Beaupland v. McKeen*, 28 Pa. 124, 70 Am. Dec. 115. The acts of a party done in ignorance of his rights will operate as an estoppel, when others have acquired rights on the faith of them. *Newman v. Edwards*, 34 Pa. 32; *Duncan's Appeal*, 43 Pa. 67; *Miller's Appeal*, 84 Pa. 391; *Woodward v. Tudor*, \*81 Pa. 382; *Putnam v. Tyler*, 117 Pa. 570, 12 Atl. 43.

"When the acts relied on are positive in their character, or the silence so suggestive in its nature that, coupled with the fact of knowledge within the mind of him who in honesty and fair dealing ought to speak out, it becomes a fraud on the part of him who could speak, then it is sufficient to estop such person thereafter from making claim to the subject-matter regarding which such acts were performed or the silence maintained. An examination into the facts of the cases where estoppel has been grounded on silence will disclose that the silence was in relation to facts the injured party must learn through and by him who held it within his breast and failed to reveal it. If both parties have equal means of ascertaining the facts, silence upon such matters and under such circumstances cannot be held to be a fraud. In this case we are of opinion 'that the circumstances were such as to raise a duty to speak.' Mr. Marshall was in full possession of all the facts and knew what was going on. He possessed knowledge regarding this matter that could not be secured from any, howsoever extensive, examination of the record, and after the death of Mr. Bliss there seems to have been no other source from which such information could be secured than from him.

"An examination of all the deeds from the one whereby Pechin secured title to the Foltz deed does not reveal a word indicating that George C. Marshall had any interest whatsoever in the title to the said land. The only deed of record bearing on the question—the deed of assignment of Jos. H. Kerr in January, 1892—would almost warrant the presumption that he did not have any interest in the title to the land in question. We are not prepared to hold that the ex parte state-



ment in the above quotation from the petition at No. 70, March term, 1904, under the facts in this case, is sufficient to excuse Mr. Marshall for folding his hands, and sitting by in silence, and permitting all to be done that was done, without a word of objection or protest on his part. We therefore conclude that, under the circumstances, it was Mr. Marshall's duty, if not satisfied with what was being done, to speak out, not only for his own rights, but for the protection of innocent third persons, who were purchasing lots and making improvements thereon, and who could have no other source of definite information than through him. His failure in that regard, we think, brings him within the rule, as above expressed, that 'when silence is so suggestive that, coupled with the fact of knowledge within the mind of him who in honesty and fair dealing ought to speak out, it becomes a fraud on the part of him who should speak, then it is sufficient to estop.' Mr. Marshall's silence and conduct in this matter have been of such character as to estop him and prevent recovery in this action.

"Now, August 1, 1907, this matter came on to be heard and was argued, and now, August 21, 1907, upon and after due consideration, and for the reasons set forth in the foregoing opinion, it is ordered and directed that judgment be entered in favor of the defendant, with costs of suit."

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

H. L. Robinson, for appellant. D. M. Hertzog and R. M. Carroll, for appellee.

**PER CURIAM.** The judgment is affirmed, on the findings by the learned judge of the common pleas.

(221 Pa. 556)

#### In re MCCLURE'S ESTATE

##### Appeal of HALL.

(Supreme Court of Pennsylvania. May 25, 1908.)

#### WILLS—CONSTRUCTION—DEVISEES.

Testatrix devised her estate to a nephew, if living at the time of her death, and also an interest which she had in the estate of her mother, over which she had a power of appointment, if her nephew survived her. A subsequent clause provided that if her nephew did not survive her, or if he died before testatrix's estate was fully settled and before the proceeds thereof were paid over to him, then all her estate and her right to devise the interest in her mother's estate should be given and paid over to the first cousins of testatrix, named. The nephew died shortly after the death of testatrix, without having received anything under her will. *Held*, that the cousins were entitled both to the estate of the testatrix and to the interest which she had in her mother's estate.

Appeal from Orphans' Court, Union County.

In the matter of the estate of Elizabeth H. McClure. From the decree sustaining exceptions to the auditor's report, Nina M. Hall,

administrator of Humes Hall, deceased, appeals. Affirmed.

Auten, J., specially presiding, filed the following opinion:

"After making a number of specific bequests the will of Elizabeth H. McClure, deceased, provides: 'As to the rest, residue and remainder of my estate, whether real, personal or mixed, including and intended to include all moneys, rights and credits, or the proceeds thereof, shall be invested by my executrix hereinafter named for the sole use and benefit of my said daughter, Caroline H. McClure, during the term of her natural life, so that she, my said daughter, shall receive the full annual interest, proceeds or income arising therefrom, and also so much of the said principal sum as may be necessary or requisite to maintain her, my said daughter, in as comfortable a manner and style as she has been accustomed to live in during my life. And further, I do direct that my said daughter, Caroline H., shall have full power to dispose of by will, by gift, or in any other way of the one-half of such moneys, credits, or rights or such investments into which they may have been converted at the time of her death or prior thereto.' The testatrix died April 17, 1892, and her will was duly probated May 20, 1892: letters testamentary thereon being granted to her daughter, the said Caroline H. McClure, executrix therein named. At the date of her death the residuary estate of the testatrix consisted of a single item, a bond dated October 11, 1878, drawn by E. C. Humes, conditioned for the payment of \$10,850.66, upon which there was due April 17, 1892, including interest, the sum of \$11,170.76.

"Accountant contends that under the terms of the clause of the will quoted Caroline H. McClure took an absolute estate in the one-half of the residuary of the estate of Elizabeth H. McClure, deceased. The auditor, however, has found that 'Caroline H. McClure, by the terms of the will of Elizabeth H. McClure, as executrix thereof, took an estate for life in the whole of the "rest, residue, and remainder" of her mother's estate, with the right to receive so much of the said principal sum as may be necessary or requisite to maintain her in as comfortable a manner and style as she had been accustomed to live in, with the further right or power to dispose of by will, or by gift, or in any other way, the one-half of such money, credits, or rights or such investments into which they may have been converted at the time of her death or prior thereto.' In other words, as we understand the auditor, he has found that Caroline H. McClure took an estate for life in entire residuary of her mother's estate, with the power of the consumption and power of appointment over one-half of said 'rest, residue, and remainder.' In this conclusion we entirely concur, and are of opinion that the authority of Tyson's Estate.

191 Pa. 218, 43 Atl. 131, fully justifies this finding. Caroline H. McClure died October 24, 1904, testate. Her will, bearing date September 1, 1904, was duly probated October 27, 1904, and letters testamentary were granted to Hamilton B. Humes, the executor therein named, who is also the present accountant. By her will it is, *inter alia*, thus provided:

"Fifth.—I do direct that my executor hereinafter named shall sell all of my real estate at either public or private sale, either as a whole or in parts as in his judgment and discretion shall be for the best interests of my estate. In order that my said real estate shall not be hurriedly or hastily sold or offered for sale, I do hereby direct that my said executor shall not be required to close up or make an accounting upon my estate for the term of five (5) years from the time of my decease, and to this end and for this purpose I do direct that my said executor shall not be required to sell my real estate prior to a period of four (4) years and six (6) months after my decease if, in his judgment and the exercise of his discretion, it may appear for the best interests of my estate to thus postpone the final settlement thereof and for the due and proper conveyance of my real estate to the purchaser and purchasers thereof, I do hereby authorize and empower my executor to make, execute and deliver to the purchaser or purchasers of said real estate good and sufficient deed or deeds therefor in fee simple.

"Sixth.—I do direct that all of my notes, bonds, stocks, mortgages, and other evidences of money due or belonging to me be disposed of or collected by my said executor and the same converted into money by him at such time or times as he may deem for the best interest of my estate within the period above mentioned and the proceeds of the same together with the net proceeds of my real estate after the payment by my executor of all debts, expenses, charges and commissions together with all collateral inheritance and other taxes, being first deducted therefrom to be paid over to my nephew Humes Hall if he shall be living at the time of my decease subject to all of the provisions and conditions of this my last will and testament.

"Seventh.—I do give, devise and bequeath unto my nephew, Humes Hall, if he be living at the time of my decease, all of the interest in the estate of my mother, Elizabeth H. McClure, deceased; devised and bequeathed to me with power in me to dispose of the same either by will or gift, being one-half of the residuary of my said mother, Elizabeth H. McClure.

"Item.—I do further direct that in case my nephew Humes Hall shall die prior to my own decease or in case he shall die before my estate is fully settled up by my executor hereinafter named and before the proceeds of my said estate shall have been

paid over to my nephew Humes Hall, as herein provided, then and in that case I do direct that all of my estate together with all interest in and the right to devise, give or will the same arising in and through the will of my mother, Elizabeth H. McClure, deceased, which shall then remain in the custody of my executor and which has been herein bequeathed and devised to my nephew Humes Hall shall be given, devised and bequeathed and by my executors paid over to my six first cousins, namely: William P. Humes, Mira Humes, Maria Humes Roberts, Caroline Humes Gilmore, Rachel Humes Allison and Hamilton B. Humes, share and share alike, to them, their heirs and assigns forever.

"Thus it appears that Caroline H. McClure exercised the power of appointment conferred upon her under the terms of the will of Elizabeth H. McClure, deceased. The auditor has found that 'by the provisions of the will of Elizabeth H. McClure, and the exercise of the power of appointment in the will of Caroline H. McClure immediately upon the death of the latter, Humes Hall took a vested estate in all of the estate or interest in the estate of Elizabeth H. McClure, deceased, over which Caroline McClure had the power of disposition or appointment, either by will, gift, or otherwise, being the one-half of the residuary of the estate of Elizabeth H. McClure; and this estate was not divested.' To our mind this finding raises the most important point for determination, and to it the learned auditor has given careful consideration, and has cited a number of authorities to sustain his position. However, apart from the enunciation of rules of construction, precedents are of little value in contests of this kind. Mr. Justice Sharswood says in *Provenchere's Appeal*, 67 Pa. 463: 'There are no arbitrary or unbending rules in the construction of the words of a will. No two wills are in all respects alike. Where, indeed, the same precise form of expression occurs as may have been the subject of some former adjudication, unaffected by any indication of a different intention in other parts of the instrument, the courts, with a view to certainty and stability of titles, will follow the precedent. Counsel can thus be enabled to advise with confidence. Nevertheless the cardinal canon still holds good that the intention of the testator of each will separately is to be gathered from its own four corners. Hence almost every general rule has its recognized special exceptions, with exceptions to such exceptions which bring us back to the general rule again, and this may be and sometimes has been carried even further in the vain attempt to generalize and classify all the decisions upon this most difficult and doubtful subject—the ascertainment of the intention from the words of a man, who in many cases had no intention at all; the question not being present in his mind at the time the words

were used. These remarks are particularly applicable to the controversies which have arisen as to whether future legacies give present vested or contingent interests.'

In ascertaining whether or not a legacy is contingent or vested, and, if vested, whether it was subsequently divested, the cardinal rule is that the intention of the testator must govern, if legal, and that this intention must be gathered from the four corners of the will. This rule is familiar. The difficulty arises in its application. In order to give proper effect to the will of Caroline H. McClure we are to endeavor to ascertain her real intentions from the words of the instrument, and not blindly follow precedents, which at best give but a dim side light upon the question. And in trying to discover what she really means from the language she employs, it might be well to consider her will in the light of an ordinary letter or other written communication. What does she say? She directs that, in order that her real estate shall not be hurriedly or hastily sold or offered for sale, her executor shall not be required to close up or make an accounting upon her estate for the term of five years after her decease, and that to this end he shall not be required to sell her real estate prior to a period of four years and six months after her death; that he shall dispose of or collect and convert into money her notes, bonds, mortgages, etc., at such time or times as he may deem to the best interests of her estate, within the period above mentioned, and pay the proceeds of the same and the net proceeds of all her real estate over to her nephew, Humes Hall, 'if he shall be living at the time of my decease, subject to all the provisions and conditions of this my last will and testament.' She further writes that she bequeaths to her nephew, Humes Hall, that part of the estate of her mother, Elizabeth H. McClure, deceased, over which she had the power of appointment, if he be living at the time of her decease. If Humes Hall had been living at the date of the settlement of Caroline H. McClure's estate, the question we are now discussing could not have arisen. He died, however, about four months subsequent to the date of the death of Caroline H. McClure and before her estate was settled.

"In a subsequent item of the will she writes that in case Humes Hall should die prior to her own decease, or in case he should die before her estate was fully settled up by her executor, and before the proceeds of her estate were paid over to Humes Hall, then all of her estate, together with all the interest in the estate of her mother, Elizabeth H. McClure, over which she had a power of appointment, should go to her six first cousins above named. In effect she says to her executor: 'If Humes Hall shall be living when my estate shall have been settled up, he shall receive from my own estate the legacy con-

tained in clause 6 of my will and also the residuary part of my mother's estate over which I have a power of appointment, as declared in the seventh clause. You shall have five years in which to settle my estate and make an account thereof, and if Humes Hall shall not be living at the accomplishment of that event within the time prescribed he shall not be entitled to anything which I have bequeathed to him in the sixth and seventh clauses, but you shall pay the same to my six first cousins.' It seems to us that her language is plain and is susceptible of only one meaning; that it is only when we place a strained construction upon her words as the result of an effort to apply precedents we can arrive at any other conclusion. In *Wengerd's Estate*, 143 Pa. 615, 22 Atl. 863, 13 L. R. A. 360, the Supreme Court say, 'the doctrine of this state, from the time of *Corbin v. Wilson*, 2 Ashm. 178, has uniformly been that a bequest of personal property relates to the time of the testator's death, unless a contrary intent is clearly indicated in the will. "If any immediate legacy is given, without specifying a time for payment, and is given over in case the legatee dies before it becomes payable, the word 'payable' can only have reference to the death of the testator.'" Caroline H. McClure fixes a definite, determinate period at which Humes Hall shall receive her bounty, provided he be then living. This she had an absolute right to do under the power of appointment conferred by her mother. We have no right to impute to her an intention contrary to the one expressed in plain and unequivocal language. With the wisdom or unwisdom of the provisions of her will we have nothing to do. We are not permitted to make a will for her, nor to depart one iota from her plainly declared intentions. In support of his finding the auditor relies largely upon *Muller's Estate*, 19 Wkly. Notes Cas. 320, and *Wengerd's Estate*, supra. In *Muller's Estate*, however, the legacy was payable immediately upon the death of the testator, and in *Wengerd's Estate* the provision was that, 'in case of the death of any of said children of my son David before the payment to them of their said shares, then to be divided between the survivors.' That was the case of an immediate legacy being given without a specific time for payment. Both of these cases, therefore, differ materially from the one now under consideration. Caroline H. McClure has stated a fixed time for payment, to wit, when her estate shall have been fully settled.

"Stress is laid upon the fact that Caroline H. McClure had no debts and that the accountant, being one of the six first cousins named, profits in the event of this legacy not going to Humes Hall. It will be recollected, however, that Caroline H. McClure had an undivided interest, at least, in real estate, and that she, for reasons expressed in her will, specified a time within which the execu-

tor was not obliged to sell her real estate. Surely, therefore, the accountant cannot be charged with delay to the disadvantage of Humes Hall, when the death of the latter followed so soon that of Caroline H. McClure. In Raleigh's Estate, 206 Pa. 451, 55 Atl. 1119, the testator was largely indebted. His will provided that 'upon the death of my wife, my executors shall divide my entire estate into as many equal portions as I shall have children living or that should be represented by lawful heirs, and make a plain and clear statement of the division, describing the properties and numbering each lot or share, and have them of as near equal value as possible, then make the distribution,' etc. He died January 10, 1882. The debts were fully paid October 1, 1900. James Raleigh, a son, died September 26, 1896, leaving a widow and one child. The Supreme Court says: 'In the present case there was no gift of any part of the testator's estate (except legacies of \$100 a month to his widow and \$25 a month to each of his children) "until all my debts shall be paid and business settled up, or, as he puts it again, "after my business is closed up and all my debts paid." The earliest point of time, therefore, at which it could possibly be held that the legacy to James Raleigh of a distributive share in the estate could take effect would be the date of the final closing of business and payment of testator's debts. This date was October 1, 1900. But James Raleigh died September 26, 1896, long before that date. Therefore no interest in the share of the estate bequeathed to him ever became vested in him.' The language here used to fix a time for the payment of the legacy to James Raleigh is no more definite or precise than that employed by Caroline H. McClure. As said by Judge Ashman in *Shelmerdine's Estate*, 18 Pa. Dist. R. 222: 'The law favors vested interests, but the tendency of modern cases is to escape from purely technical rules of construction in furtherance of vesting, which as often as not defeat the actual intention of a testator.' It should be remembered, too, that Humes Hall was the nephew of Caroline H. McClure, and therefore the presumption that the legacy was intended to be vested applies with far less force than would one given to a child or grandchild, by a testator.

"We are of opinion that the legacies devised to Humes Hall under the seventh clause of the will of Caroline H. McClure, deceased, should go to the six first cousins, William P. Humes, Mira Humes, Maria Humes Roberts, Caroline Humes Gilmore, Rachel Humes Allison, and Hamilton B. Humes, under the subsequent 'Item' of her will, and that the same should be awarded to them in the distribution of the estate of Elizabeth H. McClure, deceased; the power to make such distribution being fully justified by the authorities cited on that point by the learned auditor. If we are wrong in our view as to the proper legatees, then the 'Item' follow-

ing the seventh clause of Caroline H. McClure's will was wholly unnecessary, as well as meaningless, and its presence can only be accounted for on the theory expressed by Mr. Justice Sharswood in *Provenchere's Appeal*, 67 Pa. 463, that it is a case where the testatrix had no intention at all. All exceptions not sustained by this opinion are dismissed.

"The report is referred back to the auditor, with direction to award distribution in accordance with this opinion."

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

John G. Johnson, William R. Follmer, and T. K. Van Dyke, for appellants. John G. Reading and Alfred Hayes, for appellees.

MESTREZAT, J. We need not determine whether Caroline McClure took an absolute estate, or a life estate with a general power of appointment, in the one-half of the residuary estate of Elizabeth H. McClure which is the subject of this controversy. If, as the court below held, Caroline H. McClure took an estate for life with the power of consumption and power of appointment over the one-half of the residue of her mother's estate, that one-half of the estate, by virtue of the exercise of the power of appointment, became vested in and was distributable to the six first cousins of Caroline H. McClure, and was properly awarded to them by the court below. The learned judge has fully vindicated his conclusions in the opinion disposing of the exceptions filed to the report of the auditor. As in the interpretation of all wills, the intention of the testator in his case must be ascertained from the entire instrument, and, when ascertained, must be carried into effect. No canons of interpretation need be invoked here to determine the intention of the testatrix. The intention of Caroline H. McClure in disposing of the interest or estate given her by her mother and over which this controversy arises is perfectly clear from the language she has used.

Elizabeth H. McClure, by her will, directed that the proceeds of the residue of her estate should be invested by her executrix for the sole use and benefit of her daughter, Caroline H. McClure, during the latter's lifetime, so that her daughter should receive the annual interest arising therefrom, and also so much of the principal as might be necessary or requisite to maintain her daughter, and then provided as follows: "And further I do direct that my said daughter, Caroline H., shall have full power to dispose of by will, by gift, or in any other way of the one-half of such moneys, credits or rights or such investments into which they may have been converted at the time of her death or prior thereto." The remaining one-half of her residuary estate she directed to be divided among her grandchildren. Caroline H. McClure was appointed executrix of her mother's estate. At the date of the death

of Elizabeth H. McClure, her residuary estate consisted of a single item, a bond conditioned for the payment of \$10,850.56. One-half of that sum is the money now in controversy.

Caroline H. McClure is dead, and by her will disposed of the estate given her by her mother. In the sixth clause of her will she directs that the proceeds of her notes, etc., after the payment of her debts, collateral inheritance and other taxes, shall "be paid over to my nephew Humes Hall if he shall be living at the time of my decease subject to all of the provisions and conditions of this my last will and testament." In the seventh clause of the will she gives to her nephew, Humes Hall, "if he be living at the time of my decease, all of the interest in the estate of my mother Elizabeth H. McClure, deceased, devised and bequeathed to me with power in me to dispose of the same either by will or gift, being the one-half of the residuary of my said mother Elizabeth H. McClure." Immediately following the seventh clause of the will, she provides—in a clause she designates "Item"—"that in case by nephew Humes Hall shall die prior to my own decease or in case he shall die before my estate is fully settled up by my executor hereinafter named and before the proceeds of my said estate shall have been paid over to my nephew Humes Hall, as herein provided, then and in that case I do direct that all of my estate together with all interest in and a right to devise, will or give the same arising in or through the will of my mother, Elizabeth H. McClure, deceased, which shall then remain in the custody of my executor and which has been herein bequeathed and devised to my nephew Humes Hall shall be given, devised and bequeathed and by my executor paid over to my six first cousins' (naming them).

In ascertaining the intention of Caroline H. McClure as to the disposition of the estate which she received from her mother, her whole will must be considered. In the sixth clause it will be observed that the proceeds of her notes, etc., go to her nephew, Humes Hall, if he be living at the time of the testatrix's decease, "subject to all of the provisions and conditions of this my last will and testament." In the following (or seventh) clause the estate she had received from her mother was given to the same nephew "if he be living at the time of my decease." Both of these clauses, however, are followed by "Item," which is subsequent to and controls both of the clauses immediately preceding it. In "Item" the testatrix changes the time of the vesting in her nephew of both her own estate and the estate she received from her mother. By clauses 6 and 7 of her will Humes Hall is to have the estate she owned in her own right and the estate she received from her mother with power of appointment, if he be living at the death of

the testatrix. By "Item," however, the estates given him immediately preceding did not vest in him if he died prior to the decease of the testatrix, or before her estate was fully settled up by the executor and the proceeds had been paid to him. Humes Hall died within a few months after Caroline H. McClure's death, without having received anything under the latter's will. This provision of the will was not simply a postponement of the payment of the proceeds of Caroline H. McClure's estate, or of the estate she had received from her mother, but it was a postponement of the vesting of both estates. In other words, in the language of the cases, the time of enjoyment by the legatee of the bequest was annexed to the gift, and not to the payment of it. Humes Hall took no interest or estate under the will of Caroline H. McClure unless he was living when the estate was "fully settled up" by the executor and the proceeds were paid over. If the executor had paid over any part of the estate to Humes Hall prior to the time it was "fully settled up," it would not have been a good payment, and the executor would have been subject to a surcharge at the instance of the six first cousins. Of this we think there can be no doubt. If the language of the will is to have its ordinary meaning, the date of the vesting of the estate in Humes Hall is left in no doubt, and any payment of any part of the estate to him prior to the date of its vesting would have been wholly unauthorized, and a devastavit for which the executor would have been responsible.

There is no merit in the suggestion or argument that "Item" does not cover or include that part of Caroline McClure's estate which she received from her mother. It includes both her own estate and the estate she received from her mother, and over which she was given a general power of appointment. In case her nephew, Humes Hall, died prior to the settlement of the estate, it is then provided in "Item" that "all of my estate together with all interest in and the right to devise, will or give the same arising in or through the will of my mother, Elizabeth H. McClure, deceased, which shall then remain in the custody of my executor and which has been herein bequeathed and devised to my nephew Humes Hall shall be given, devised and bequeathed," etc. It will thus be observed that there is no foundation whatever for the contention that this clause of the will did not dispose of the estate which Caroline H. McClure received from her mother. It does so in terms, and is clearly an exercise of the power conferred upon the testatrix by her mother.

The learned judge of the orphans' court has so fully discussed this branch of the case that nothing more need be said here. The other assignments are without merit.

The decree is affirmed.

**JOHN NUGENT & SON v. COOK.**

(Supreme Court of Rhode Island. Oct. 5, 1908.)

**APPEAL AND ERROR—BILL OF EXCEPTIONS—FAILURE TO FILE IN TIME—EFFECT.**

The bill of exceptions, not filed within the time fixed for filing bill of exceptions, transcript of evidence, etc., will, on motion, be dismissed on that ground.

Exceptions from Superior Court, Providence and Bristol Counties.

Action by John Nugent & Son against Samuel P. Cook. From the verdict, the party aggrieved brings exceptions. Cause remitted, with directions to enter judgment on verdict.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

John J. Heffernan and James H. Rickard, Jr., for plaintiff. Erwin J. France, for defendant.

**PER CURIAM.** The fact is undisputed that the time for filing bill of exceptions, transcript of evidence, etc., was September 5, 1908, and that they were not filed until September 10, 1908. Therefore the law in that respect was not complied with, and the motion to dismiss the bill of exceptions for that reason must be granted.

The other considerations brought to the attention of the court are without merit.

The bill of exceptions is dismissed, and the cause is remitted to the superior court, with direction to enter judgment upon the verdict.

(221 Pa. 538)

**COMMONWEALTH v. FISHER.**

(Supreme Court of Pennsylvania. May 25, 1908.)

**1. CRIMINAL LAW—PROCEDURE.**

The court on trial of a criminal case is not at liberty to disregard established rules of procedure, or settled rules of evidence, or the constitutional rights of the parties.

**2. WITNESSES—HUSBAND AND WIFE—CONFIDENTIAL COMMUNICATIONS.**

Where a prisoner charged with murder dictates letters to his wife, which are duly mailed to her and delivered by her to the district attorney, such letters are inadmissible in evidence, as permitting the wife to testify against her husband, in violation of his statutory rights.

Mitchell, C. J., and Potter, J., dissenting.

Appeal from Court of Oyer and Terminer, Northumberland County.

Henry Fisher was convicted of murder, and appeals. Reversed.

At the trial the district attorney offered two letters dictated by the prisoner when in jail to two other prisoners, addressed to his wife, and duly mailed to her.

Mr. J. A. Welsh: "This offer was objected to: (1) For the reason that they were not written by the defendant, and that the defendant did not know what was in the letters; that they were written by a person and mailed to his wife. (2) For the reason that the letter dated December 21, 1906, is a letter

from Fisher to his wife, and that it is a confidential and privileged communication sent to Mrs. Fisher and received by her, and confidential communications between husband and wife cannot be received in evidence at this time. (3) The letter dated January 25, 1907, is also objected to because it is a letter addressed to Mrs. Fisher, and, as we understand, was received by her, and is also a confidential and privileged communication between husband and wife. (4) The statement made to the district attorney is also objected to because it was written by Elmer Farnsworth, a prisoner in the jail, who is convicted of felony, and has been sentenced and his term has not expired, and he is therefore an incompetent witness to give testimony in any case. The witness Willvert has also been convicted of a felony, and is incompetent to give testimony in the case. \* \* \*

Mr. Shipman: "We offer the statements and the letter in evidence (1) for the purpose of showing that the defendant was upon the scene of the crime at the time it was committed as particeps criminis; (2) for the purpose of showing the instrument with which the death was caused; (3) for the purpose of showing the time of death; (4) for the purpose of showing that the murder was willful, deliberate, and premeditated; (5) for the purpose of showing a motive for the crime."

Mr. J. A. Welsh: "We renew our objections."

The Court: "(1) The act of May 23, 1887 (P. L. 158), makes competent persons under trial and conviction for offenses or crimes other than perjury or subornation of perjury. This disposes of the objections on that ground. (2) The letters to the wife may or may not have been delivered to her. Assuming that they were, she is not called upon to testify against him. The contents of the letters are not the testimony of the wife, but are the statements of the defendant himself. \* \* \* The objections are overruled, evidence admitted, and bill sealed for the defendant."

The letters were as follows:

"Sunbury, Pa., December 21, 1906.

"Mrs. Ella Fisher, Shamokin, Pa.—My Dear Wife: I just received your letter to-night. You don't need say that you don't know anything about this case for you are not as innocent, as you say you are. You know you tried your best to get the woman out of the way long ago for the little she had. It is your fault that I am here for putting my shirt and the carpet in the place you did. I am sorry I did not tell the truth right away when it happened, and then you would be here too. You are no woman, or you would not have laid around with another man the way you did in Shenandoah. You ask me to sign off but there is no signing on my part and the signing you will get is down here in jail. If you would have been any kind of

a woman you would have been down before I gave you money enough. I have been very sick and that is all I have to say.

"[Signed] Henry Fisher."

Letter of January 25, 1907, as follows:

"Sunbury, Pa., January 25, 1907.

"My Dear Wife: I now pencil this letter to let you know that I hope you will stick to me through this position that I am now held in. The shirt I had on that Sunday night I was intoxicated, I also had on to work Monday and Tuesday, but the day of the murder I did not have the shirt on for you took the shirt from my back yourself. You know I was bleeding at the nose and mouth the Sunday night I was out late under the influence of liquor. You also know it was you and I that went in the house together and found she had been murdered, so if you swear otherwise you will be convicting yourself as well as me and you know as well as I that if you send me to the death trap you would regret it as long as there is life in your body. And that knife I had, you know that Mrs. Klinger gave it to me the first Sunday we were there and also gave you a small knife. You also know that time I talked about things and turn right around and say I did not say it. You also know I have been that way for about two years and I am not accountable for many things I have said within that time. I write you these lines so as to let you know just how things stand and that I want to subpoena you as a witness on my side. You also know that some one could have went into the house and took that shirt out of the closet along with the keys the lawyers said they found there. And the blood on my trousers, that was found, I spilled on them the night I emptied the water after they washed her off. So now I hope you will stick to me as a wife should through this awful charge against me. You remember you took that shirt off the Sunday night I came home drunk for you said you would not sleep with me if I kept it on and you asked me where I was and I told you I was too drunk to find my way home, and that I fell down over the bank, in the crick, and that is the way I got the blood on the shirt, and you remember you also washed me off after I got home. And you know we also got along with the woman and never had any fights or cross words with each other. Now please come down as soon as you can, the quicker the better for both you and I. You can get in to see me at any time during the week. From your husband.

"[Signed] Henry Fisher,

"39 N. Second St., Sunbury, Pa."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. A. Welsh, John I. Welsh, and C. K. Morganroth, for appellant. D. W. Shipman, A. K. Delbler, Dist. Atty., and H. W. Cummings, for the Commonwealth.

ELKIN, J. It has been said in several of our cases that courts will not be astute to sustain technical assignments of error in homicide cases where from a consideration of the whole record it appears no substantial injustice was done defendant, and that a fair trial on the merits has been accorded him. This must not be understood to mean, however, that courts are at liberty to disregard established rules of procedure, or settled rules of evidence, or the constitutional and statutory rights of parties, in the trial of such cases. It may be, under existing conditions, and in view of our present state of society, there should be some relaxation of the old rigid rules of the common law, applicable to the trial of such cases, which grew out of an order of things at a time when the lawmaking bodies made petty offenses felonies and the common everyday practices of the people misdemeanors. Indeed, we are inclined to think there should be less insistence on technicalities and more stress put upon a course of procedure intended to develop the merits. In olden times heavy burdens were placed on the people, who required all the safeguards the court could give in the trial of criminal cases, in order that some protection should be afforded those charged with crime. Conditions have changed. The number of felonies has been reduced to the minimum. The burden in a general sense has shifted and now rests very heavily on the commonwealth, which is still practically bound by old rules intended for other purposes and growing out of different conditions. Our criminal classes at the present time are very leniently and humanely dealt with, and the wisdom of safeguarding their trials with all the refinements and technicalities of the common-law procedure may be questioned. It is well to remember that he who takes the life of another with intent to do so has offended against the laws of God and man, and a proper regard for the rights of society requires that conviction and punishment should surely follow. It is not the purpose of the law to make it easy for a person guilty of a brutal murder to escape the penalty of his crime, but, on the other hand, a person so charged must be convicted, if at all, according to the law of the land.

The fourth assignment complains that the learned trial judge erred in overruling the objection and admitting in evidence two letters written by fellow prisoners at the dictation and by the request of defendant to his wife. The admission of the letters was objected to on the ground of being confidential and privileged communications between husband and wife. It is argued that this in effect was the giving of testimony by the wife against the husband, which in our state is forbidden by statute. We have concluded that this assignment must be sustained. The letters were produced at the trial by the district attorney, representing the commonwealth, and were inclosed in envelopes postmarked at

Sunbury, where mailed, and at Shamokin, the place of delivery. These facts clearly show that the letters were placed in due course of transmission in the mails, and the presumption arises under the rule of our own cases that letters so mailed were delivered to the party addressed. It is true the evidence does not show how the district attorney got possession of the letters, but, the wife having received them, the reasonable presumption is that she gave them to the prosecuting officer, which, in point of fact, she did, as is shown by facts subsequently developed. For the purposes of the present case, it is not necessary to consider or determine whether the letters were such confidential and privileged communications as not to be admissible in evidence at all under any circumstances, but we do hold that they could not be produced by the wife and offered in evidence as coming from her because this in effect was permitting the wife to testify against her husband, which cannot be done under our statute. We see no reason why the declarations contained in the letters, if they were made to other parties, competent to testify, should not be proven by them. Because, these letters were improperly admitted in evidence, a statutory right vouchsafed to defendant was disregarded, and the fourth assignment of error must be sustained.

Judgment reversed and a venire facias de novo awarded.

**MITCHELL, C. J.** (dissenting). This judgment is being reversed upon two presumptions, one piled on top of the other without any evidence to support either. What the statute prohibits is that "neither husband nor wife shall be competent or permitted to testify against each other \* \* \* nor shall either husband or wife be competent or permitted to testify to confidential communications made by one to another." There is not a scintilla of evidence that either branch of the statute was violated in this case. The wife did not testify at all. Certain letters written by other persons in the name of the husband and addressed to the wife were offered and admitted in evidence. Whether letters dictated by a husband and written by other persons can be called confidential communications to his wife is at least an open and doubtful question. But waiving that there is no evidence that the letters ever reached the wife. It was not shown at the trial that they did reach her or even that they were mailed to her. It is true that subsequent to the trial the envelopes in which the letters were alleged to have been inclosed, were produced and appeared to have been regularly stamped and mailed. If this fact had appeared at the trial, which it did not, there would under the cases have been a presumption that they reached the wife. But the presumption would have stopped there. When the letters appeared at the trial in the hands of the com-

monwealth there was no explanation asked of the district attorney nor volunteered by him as to how he got them. The conclusion is jumped at by the further presumption that the wife gave them to the commonwealth, and that in so doing she was testifying to confidential communications. There is no evidence nor any presumption, either of fact or of law, to support such a conclusion. She might just as probably have lost them by carelessness, or by the treachery of the fellow prisoners whom the defendant trusted with them in the first place, as they testified on the stand. It is very old and very sound law that a presumption founded on a presumption is not valid. I see no good reason for making a different rule in favor of a convicted murderer. I would affirm the judgment.

**POTTER, J.**, joins in this dissent.

(221 Pa. 529)

**AMERICAN CAR & FOUNDRY CO. v. ALEXANDRIA WATER CO. et al.**

(Supreme Court of Pennsylvania. May 25, 1908.)

**1. WITNESSES—SUBPŒNA DUCES TECUM.**

Plaintiff in an action is not entitled, under a subpœna duces tecum, to have brought into court a mass of books and papers, that he may search through them to gather evidence.

**2. SAME—CONTENTS.**

A subpœna duces tecum must specify with as much precision as is possible the particular documents desired, and describe any specific book wanted.

**3. PRINCIPAL AND AGENT—PROOF OF AGENCY.**

Where a party seeks to hold the principal for the act of an agent, the burden is on him to establish the agency.

**4. SAME—EVIDENCE OF AUTHORITY—BURDEN OF PROOF.**

In an action to enforce a mechanic's lien, defendant alleged the acceptance of a note by an agent of plaintiff, a corporation. Held, that the burden was on the defendant to show that the agent had authority to accept such note as payment.

**5. MECHANIC'S LIEN—WAIVER—ACCEPTANCE OF NOTE.**

The taking of a materialman of the notes of a contractor for the amount due is not an abandonment of the right to file a lien, unless there was an agreement between the parties to that effect.

**6. JUDGMENT—ENTRY NOTWITHSTANDING VERDICT.**

Where binding instructions for plaintiff are denied and a verdict is rendered for defendant, the court may enter judgment for the plaintiff notwithstanding the verdict, under Act April 22, 1905 (P. L. 286), if direction of verdict for plaintiff would have been proper at close of the evidence.

Appeal from Court of Common Pleas, Huntingdon County.

Action by the American Car & Foundry Company against the Alexandria Water Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Before the trial W. F. Lowery, who had been served with a subpœna duces tecum, petitioned the court to be relieved from producing certain documents. The court granted the witness the relief sought. At the



trial when Mr. Lowery was on the stand the following request was made: "Mr. Bailey: Counsel for defendant is not at present making any offer. He is asking the witness who has been subpoenaed with a duces tecum and who has in obedience to that duces tecum produced in court a list of the persons, firms, and corporations with whom he has made contracts during the year 1903. Counsel requests the witness who has been subpoenaed by the defendant to allow him to see the list of persons with whom he has contracted during the year 1903, so that the witness may be properly examined by counsel for defendant. Mr. Waite: Plaintiff's counsel objects to the right of the defendant to go into the private papers and contracts, if there be contracts, of the plaintiff company, with other persons, firms, and corporations, and, if the gentleman will specify any particular contract or contracts which he desires to have produced and will show how they can become material, then it is a matter for the court to decide whether or not they shall be produced and exhibited. The Court: Objection sustained. Evidence excluded. Bill of exceptions sealed for defendant."

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and STEWART, JJ.

Thomas F. Bailey and Samuel I. Spyker, for appellants. H. H. Waite, W. H. & J. S. Woods, and C. C. Brewster, for appellee.

POTTER, J. This was a scire facias upon a mechanic's lien filed by the American Car & Foundry Company, as subcontractors, against the reservoir and waterworks and system of the Alexandria Water Company. The right to maintain the lien was sustained by this court in 215 Pa. 520, 64 Atl. 683. A trial was then had under the scire facias which resulted in a verdict for the defendant. Judgment on this verdict was reversed, because of error of the trial judge in permitting certain cross-examination of plaintiff's witness, and in rejecting evidence offered by plaintiff, and a venire facias de novo was awarded. American Car & Foundry Co. v. Water Co., 218 Pa. 542, 67 Atl. 861. The case was tried again, and the verdict was again for the defendant, subject to points of law reserved. A motion for judgment non obstante veredicto was filed by the plaintiff, and granted by the court below, and judgment was entered for plaintiff for the full amount of the claim with interest. Defendant has appealed.

There was no dispute as to the contracts, the performance of the work, and furnishing materials, nor as to the amount due the claimant. The defendant denied liability, for the alleged reason that the claimants had accepted notes of the contractors in payment of the balance due upon the account, and had, therefore, lost the right to file a mechanic's lien. It appears from the evidence that

the Alexandria Water Company contracted with William M. Powell & Co. to construct a gravity water system at Alexandria, Huntingdon county, Pa., for \$18,000. Powell & Co., in turn, contracted with the American Car & Foundry Company for the cast-iron pipe and specials necessary for the construction of the water plant, for \$12,221.20. The water pipe, etc., were furnished according to the contract, and the contractors paid on account of the contract price \$3,649.98, leaving a balance due of \$8,571.22, for which the mechanic's lien was filed. William P. Lowery was district manager for the American Car & Foundry Company, having an office at Berwick, Pa., and the contract with Powell & Co. was made by him for his company. The payments on account made by Powell & Co. were sent by them directly to the home office of the American Car & Foundry Company at St. Louis, Mo. William M. Powell testified that they remitted to the home office at St. Louis because they were directed on the invoices to do so. Lowery, who was called by defendant as witness, testified that he had power to make contracts within certain lines for his company, but that he had no authority to make collections or to receive notes, checks, or money in payment for the sales made by him, that all collections were made from the treasurer's office at St. Louis, and that all invoices were dated as from the home office where payments were to be made. There was no evidence that Lowery had any authority to receive payments either in cash or note for the company, or that he at any time received any payments on its behalf. It appears from the testimony that in December, 1903, Mr. Mandeville, a member of the firm of Powell & Co., accompanied by a lawyer, Mr. Abner Smith, visited Lowery at his office in Berwick with a view to making settlement of the claim. Mr. Smith testified that Mr. Lowery agreed to accept certain notes, but he refused to say that he agreed to accept them in satisfaction of the claim. His memory was indistinct as to that. Mr. Lowery testified that his understanding was that the notes were to be tendered for the decision of the company, and that a few days afterwards the notes were given to him, and he sent them to St. Louis for the consideration of the company at the home office. The notes were rejected by the company and returned to Lowery, who turned them over to the attorney of the company, with instructions to proceed to collect the claim. He obtained a judgment as collateral for two of them, and also gave notice and filed the lien upon which this scire facias was issued.

The entire defense rests upon Smith's testimony that the notes were accepted, and the inference which it was strongly urged should be drawn from that fact, that such acceptance was in satisfaction and payment of the indebtedness. Prior to the trial the defendant served upon Lowery a subpoena du-

ces tecum, commanding him to produce at the trial certain books and papers. It was not specific, but was couched in the most indefinite terms. Thereupon Lowery petitioned the court, setting forth that it would put the plaintiff to a tremendous amount of trouble and expense to produce all the books and papers required by the subpoena, that it would require a number of very large boxes to transport them, and that they would then be exposed to destruction, and that he was advised that the greater part of the books and papers were not and could not become material in any way to the issue to be tried, and praying that he might be relieved from compliance with the subpoena. The court granted the prayer of the petition, and confined the production of books and papers to such only as might be shown to be material in the case. This action of the court is made the subject of the first assignment of error. The learned judge was entirely right in his conclusion. The same reasonable certainty in describing what is required should be observed in a subpoena duces tecum as is held necessary in the case of applications for orders to produce books and papers. In *Cowles v. Cowles*, 2 Pen. & W. 139, it was held that, where an order for the production of books and papers under the act of February 27, 1798, is asked for, the papers must be described with reasonable certainty. In *Wills v. Kane*, 2 Grant, Cas. 47, Justice Woodward said (page 54): "The affidavit of notice must describe the books and papers with reasonable certainty—must allege that they are, or at least that the affiant verily believes them to be, in the possession or power of the party—and that they contain evidence pertinent to the issue." Anything in the nature of a mere fishing expedition is not to be encouraged. Where the plaintiff will swear that some specific book contains material or important evidence, and sufficiently describes and identifies what he wants, it is proper that he should have it produced. But this does not entitle him to have brought in a mass of books and papers in order that he may search them through to gather evidence. In 23 Am. & Eng. Ency. of Law (2d Ed.) 179, it is said: "The courts uniformly decline to grant an application for production and inspection where it is merely for the purpose of a fishing examination, as where it is made to discover whether or not there is evidence contained in the documents which will be useful to the applicant, or for the purpose of determining whether he has a cause of action, or a defense, or in anticipation of a defense, or to gratify curiosity." And the fair and proper rule upon the subject is also set forth in 3 Wigmore on Evidence (1904) § 2200, where it is said: "A peculiarity of the subpoena duces tecum is that in the nature of things it must specify with as much precision as is fair and feasible the particular documents desired, because the witness

ought not to be required to bring what is not needed, and he cannot know what is needed unless he is informed beforehand." And in a note to above the following cases are cited: *Carson v. Hawley*, 82 Minn. 204, 84 N. W. 746: Demand for all books and papers for a business during three months held insufficient. *Ex parte Brown*, 72 Mo. 83, 93, 37 Am. Rep. 426: There must be a "reasonably accurate description of the papers wanted," and a showing that it is material in a pending cause. Here a call for all telegrams between half a dozen persons within 15 months past was held too broad. *United States v. Babcock*, 3 Dill. 566, 570, Fed. Cas. No. 14,484: "The papers are required to be stated or specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him and to have the papers on the trial, so that they can be used if the court shall then determine that they are competent and relative evidence." An order to produce all papers concerning the matter in dispute is not sufficiently specific. The papers and documents to be produced should be described with reasonable precision. An inspection of the subpoena in this case shows that the court below was fully justified in refusing to compel obedience to what was asked for. The first assignment of error is, therefore, dismissed.

For the same reason, the second assignment of error is overruled. It was unreasonable to ask for a blanket list of persons and firms with whom contracts had been made during the year. In the absence of all particularity in specifying what was wanted, and without any showing of materiality, the court was right in sustaining the objection to the demand for a general list of contracts with other persons.

With regard to the authority of the agent, Mr. Lowery, to accept the notes in full payment of the claim, this court said, when this case was here before (218 Pa. 542, 87 Atl. 861) that the evidence offered upon the former trial was too meager to enable us in reviewing the case to determine what the general powers of the agent were, and the case was sent back to enable defendant, if possible, to produce more satisfactory evidence in that respect. But the correctness of the judgment which has now been entered in the court below must, of course, be tested by the evidence offered upon the last trial. The trial judge held it was insufficient to establish authority in the district manager to accept the notes of the contractors in full settlement of the account, and our review of the testimony leads us to the same conclusion. The burden of proof was upon the defendant. "A party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the agent acted. The burden of proof lies on him to

establish the agency and the extent of it." *Hays v. Lynn*, 7 Watts, 524, 525; *Moore's Ex'rs v. Patterson*, 28 Pa. 505, 512; *American Underwriters' Ass'n v. George*, 97 Pa. 238, 241; *Relief Ass'n v. Post*, 122 Pa. 579, 597, 15 Atl. 885, 2 L. R. A. 44, 9 Am. St. Rep. 147; *Smith v. Iron & Steel Co.*, 208 Pa. 462, 466, 57 Atl. 953. In the present case the district agent, Mr. Lowery, who was called by the defendant to establish his authority to receive the notes in payment, not only denied positively that he had taken them in payment, but denied that he had authority to so receive the notes, and denied, further, that he had any authority to receive payments even in cash. There was no other evidence of his authority, and it appeared from the evidence that the contractors, Powell & Co., had notice, from the invoices of the material sent to them, that payments must be made to the treasurer of the plaintiff company at St. Louis. And, in pursuance of such notice, they did forward the cash payments made by them on account directly to St. Louis, and they paid no money to Mr. Lowery. At the trial the defendant put Mr. Lowery on the stand for the purpose of proving the scope of his authority, and this opened the door to the plaintiff on cross-examination to show precisely the limits of that authority. We see no merit in the third assignment of error.

As a general principle, the taking of the notes of the contractors for the amount due to the materialmen would not of itself effect a relinquishment of the right to file a lien. This was decided in *Kinsley v. Buchanan*, 5 Watts, 118, where it was said (page 119): "Additional securities are in their nature cumulative; nor where the parties have not expressly or impliedly so stipulated is there any reason why the one should be a relinquishment of the other. Accordingly it has been determined in one of the cases cited that acceptance of a bond is not an abandonment of a mechanic's lien. The case is in point and rules the present." To the same effect are *Jones v. Shawhan*, 4 W. & S. 257; *Odd Fellows' Hall v. Masser*, 24 Pa. 507, 64 Am. Dec. 675; *Shaw v. Church*, 39 Pa. 226; *Noar v. Gill*, 111 Pa. 488, 4 Atl. 552. Nothing less than the agreement of the parties that it shall do so will have the effect of waiving the right to file a lien. "If the note is taken as a payment of the debt, the lien is waived. It is not, however, to be presumed that a note taken by a person entitled to a lien was taken as payment, but it must be shown that such was the case." 27 Cyc. 272. In the present case, if there had been evidence of authority on the part of Lowery to receive payment of the account in the shape of notes, then the testimony of the witness Smith would have been sufficient to take the case to the jury on the question of fact as to whether or not the notes were so accepted in payment, and with the intention of releasing

the right to lien. But, in the absence of any evidence of such authority on the part of Lowery, there is nothing in the record to show that the defendant company ever parted with the right to enforce its lien.

The fact that one of the points reserved was a request by the plaintiff for binding instructions brings the case directly within the terms of the act of April 22, 1905 (P. L. 286), which applies expressly where such a point requesting binding instructions has been reserved or declined. Under all the evidence, as we have seen, a binding direction in favor of the plaintiff would have been proper at the close of the trial. The court below, therefore, very properly entered judgment non obstante veredicto for the plaintiff.

The assignments of error are all overruled, and the judgment is affirmed.

(21 Pa. 573)

**PEFFER et al. v. PENNSYLVANIA WATER CO.**

(Supreme Court of Pennsylvania. May 25, 1908.)

**1. WATERS AND WATER COURSES—WATER COMPANIES—IMPURE WATER.**

Plaintiff filed a bill against a water company, alleging that the water furnished by it was impure and was the cause of typhoid fever, and the evidence showed that the water was polluted, containing bacteria and bacilli. Held, that a decree directing the company to provide a sufficient supply of pure water and to file a statement within the time specified, showing what it proposed to do in order to comply with Act April 23, 1874 (P. L. 73), Act June 2, 1887 (P. L. 310), and Act May 16, 1889 (P. L. 226), regulating public water supply, was properly rendered.

**2. SAME.**

A public water supply company is not required to furnish chemically pure water, but it is sufficient if the water be reasonably pure and wholesome.

**3. SAME—PURE WATER—"ORDINARILY PURE AND WHOLESOME WATER."**

"Ordinarily pure and wholesome water" means water reasonably clean and free from bacteria or other contamination, rendering it unfit for domestic use and dangerous to individuals.

Appeal from Court of Common Pleas, Allegheny County.

Bill by E. Z. Peffer and others against the Pennsylvania Water Company. Decree for plaintiffs, and defendant appeals. Affirmed.

Miller, P. J., specially presiding in the court below, filed the following opinion:

"The bill, by three citizens of the borough of Wilkinsburg, alleges that the defendant company is not furnishing reasonably pure and wholesome water to them and to defendant's consumers, as it is required to do by virtue of its incorporation.

**"Findings of Fact.**

"(1) The Pennsylvania Water Company, defendant, was chartered in 1887, under the provisions of the act of 1874 (P. L. 73), for the purpose of supplying water to the in-

habitants of the then township of Sterrett, in the county of Allegheny. By various mergers and consolidations, on May 28, 1902, a number of other water companies were included under the name of the defendant company. As such it is now authorized by charter to supply water to the public in the Thirty-Seventh and Forty-First Wards of the city of Pittsburg, in the boroughs of Wilkinsburg, Edgewood, Swissvale, North Braddock, East Pittsburg, Turtle Creek, Wilmerding, and Pitcairn, and in the townships of Penn, Wilkins, Braddock, North Versailles, and Patton.

"(2) The source of supply of the water furnished by the defendant company is the Allegheny river, which is the most available to furnish an adequate quantity to supply the needs of the defendant company and those of the inhabitants in the districts so supplied. This river is also the source of supply for the public municipalities of the cities of Pittsburg and Allegheny, taken from the river in the near vicinity of defendant's intake pipes.

"(3) The pumping station of the defendant company is located in Penn township, on the south side of the Allegheny river, at Nadine Station, on the Allegheny Valley Railway, a short distance east of the Pittsburg city line. From the time of its incorporation to 1897 the defendant company furnished unfiltered river water to its patrons.

"(4) In the year 1896 it constructed, and put in operation in the year 1897, a crib in the Allegheny river, which was constructed primarily as follows: A large structure was built, 32 feet wide, 308 feet long, and 5 feet deep, made of 2"x6" and 2"x8" planks, placed edgewise and flatwise, respectively, and separated by intervals of about 2 inches, so as to form a thick wooden grating, setting or forming a rectangular crib or box with an open bottom. A suitable excavation was dredged in the bed of the river to the depth of about 10 feet. This excavation is located on the northerly side of the river, about 300 feet from the north shore and about 600 feet from the south shore. The bed of the Allegheny river in this locality for a depth of at least 30 feet is composed of sand and gravel. The crib was sunk to the bottom of the excavation. The surrounding excavation was then filled, and the crib covered to a depth of about 1 foot with coarse gravel 2 inches in size. The balance of the excavation was covered with sand and fine gravel, such as had passed through a 1½-inch screen to a depth of about 4 feet, until the excavation was filled even with the ordinary surface of the bed of the river. The depth of the water over the crib ranges ordinarily from 8 to 10 feet. From the hollow chamber constituting the interior of the crib a 24-inch pipe line was constructed across the river, buried under the bed thereof, to the defendant company's pumping station at Nadine. Beginning with the year 1897, the defendant company furnished to its patrons water drawn from the in-

terior of the crib above described, and which is referred to in the testimony as crib No. 1. The water so furnished was pumped to the defendant's reservoir in Penn township, and thence distributed by mains. The gravel bed in which said crib is sunk or located is highly permeable and filled with water, partly ground water and partly river water, which percolates through said cribs; the water furnished from the crib by the defendant company partly permeating through said gravel beds from the bottom and sides of the crib, and partly river water permeating the bed of sand and gravel covering the top of the crib.

"(5) In 1901, owing to the growth of the territory which the company supplied, and anticipating additional demands of the Turtle Creek valley, the company constructed and placed in operation in the year 1902 two additional cribs in the bed of the Allegheny river, lying to the north or upstream from crib No. 1, and which are referred to in the testimony as cribs Nos. 2 and 3. These were constructed substantially in the same manner as the former, except that the interstices between the timbers on top of the cribs were constructed 1 inch wide. These are 48 feet wide, 480 feet long, and 5 feet deep. They were sunk in the excavations which had been prepared for them, parallel with each other and 10 feet apart. These excavations and the tops of the cribs were covered to a depth of about 12 inches with large stone and gravel 2 inches or more in size, and the whole covered to a depth of about 5 feet with sand and gravel which had passed through a 1-inch mesh. A main line of cast iron pipe, ranging from 24 inches to 42 inches in diameter, is laid in the 10-foot space excavated between cribs Nos. 2 and 3, with short branches extending at intervals into the interior of both of said cribs. This main line of 42-inch pipe, so contained in the trench subsequently filled, crosses the river to the defendant's pumping station at Nadine. The river bed in which these latter cribs are located is of the same character as that described surrounding crib No. 1, and the water flowing from the interior thereof is of the same general character as that in No. 1. This water is a great improvement over the raw, unfiltered river water, yet it is at times muddy, turbid, and odorous, and is not free from impurities detrimental to comfort and injurious to health. The condition of these cribs and pipes and the covering over them can only be ascertained by soundings and by divers. They are hard to repair and keep in order, difficult of examination, and, in the light of modern development, they are unique and antiquated.

"(6) During part of the winter of 1905, 1906, and the spring and early summer of 1906, down to the month of June, 1906, the 42-inch main leading from cribs Nos. 2 and 3, crossing the Allegheny river to the pumping station, had become displaced at one joint and open on the lower side about 4 in-

ches. Through this opening unfiltered water so entered the pipe, and then to the reservoir and mains of the defendant. In the year 1904 the manhole cover near the pumping house was twice carried away by ice, on each occasion allowing raw water to get into the pipes. In the summer of 1906 a manhole cover near crib No. 1 became broken and displaced, allowing raw water to enter the mains. With reasonable promptness these defects were remedied. During their existence the purity of the water was more seriously affected. It was more turbid and contained a higher percentage of bacteria and coli. Holes or excavations have also been found on the surface of these cribs, which has impaired their efficiency.

"(7) For the purpose of increasing the capacity of these cribs a process of scouring or changing the surface of the river bed covering the cribs is in practice. This is done by means of a heavy iron rake, weighing 400 pounds, 3 feet long, having seven teeth, each 15 inches long and an inch in diameter. These teeth contain each three holes three-sixteenths of an inch in diameter, two in front and one in the bottom. The cross-bar of the rake, which is hollow, is connected with a 2-inch hose, through which water is forced with a pressure of 125 pounds per square inch. This rake, so equipped, with the water forced through the ends thereof, is dragged over the surface of the crib to stir up the silt or covering. It is moved by hand; the rope to which it is attached being wound by windlass connected with barges. The hose action and water pressure is furnished from a boiler and pump in a boat moved along the line of the barges from south to north. Cribs Nos. 2 and 3 are thus scoured together, while No. 1 is separate. The rake is moved over the same surface three times in succession before a new area is worked. In 1905 this work began in May and ended in November. In 1906 it began in May and ended in December, and was continued except as interfered with by the state of the weather or the stage of the river. Approximately the same time was occupied in the year prior thereto. While this process of raking or scouring is going on the cribs are in constant use. Water is continually taken therefrom, and pumped into the reservoir, and distributed through the defendant's company's mains. The disturbance of the surface of the cribs and the destruction of the silt formation thereon permits a large increased volume of raw river water to pass into the interior of the crib, with less hindrance and consequently less efficient filtering. It is during and immediately after these periods of scouring that the deleterious character of the water is more apparent and more easily ascertainable.

"(8) The watershed draining into the Allegheny river at this point covers about 12,000 square miles. It extends east as far as Johnstown, on the Conemaugh river, and

north beyond Oil City, on the Allegheny river, and includes a large number of towns and a thickly populated district. A short distance above these cribs the sewage from the Allegheny county workhouse and the Allegheny city poor farm empties into the Allegheny river, with a volume of 188 gallons per minute; at Oakmont,  $2\frac{1}{2}$  miles above, 107 gallons of sewage per minute; at Verona, still nearer the defendant's cribs, with sewage of 220 gallons per minute. Taking into consideration the extent of the watershed, the territory draining into the Allegheny river, the sewage from towns, villages, cities, and public institutions, and the presence of bacteria and coli in the analysis of the raw Allegheny river water, compels the finding as a fact that at the place in question, to wit, the cribs of the defendant company, the Allegheny river is a highly polluted stream.

"(9) In 1905 and 1906 typhoid fever, which was prevalent since 1902 in the borough of Wilkesburg, became an epidemic. It also prevailed to a great extent in the Thirty-Seventh Ward, Pittsburg, and in Swissvale borough, supplied by the defendant company; the percentage of cases and the death rate being higher per thousand capita in Wilkesburg than anywhere else in the United States. These typhoid cases were generally distributed throughout the two boroughs and the ward above referred to.

"(10) While modern scientific opinion is that typhoid fever may be caused and spread by vegetables, milk, infection, etc., a careful consideration of the large mass of expert testimony given by the witnesses on both sides in this case justifies the finding as a fact that impure, polluted water, containing bacteria and the colon bacilli, is a prevailing cause of this pestilence.

"(11) From the great number of bacterial analyses made by the various experts for both the plaintiffs and the defendant, it appears that bacteria in large numbers exist in the raw Allegheny river water, averaging many thousand per cubic centimeter. It also appears that the quantity of bacteria found in this water after it passes through the filter cribs of the defendant company is very materially reduced when the cribs, pipes, and coverings were in perfect condition, and when the scouring process was not going on. These analyses also show the presence of colon bacilli in proportionately large quantities in the raw Allegheny river water. Their presence is very materially reduced after the water has passed through the filter cribs when they were properly used, in proper repair, and the scouring process was not in operation; but both bacteria and the colon bacilli in dangerous quantities are found in defendant's water after it has passed from the filter cribs.

"(12) From all the testimony, taking into account the source and character of supply, the effect and amount of contamination and pollution, the presence of bacteria and coli,

its turbidity and odor, the prevalence of typhoid fever, the method of increasing the supply while lessening the efficiency of the filter process, the accidents which have occurred since the cribs have been in operation, and the inability of the defendant company to continuously examine and repair these cribs, the fact is found that the water furnished by the defendant company is not reasonably pure and wholesome, and that without a change and improvement of its present filtration processes it cannot furnish reasonably pure and wholesome water.

"(13) To construct a new slow sand filtration plant on the bank of the Allegheny river of sufficient capacity to supply the present requirements of the defendant would require an expenditure of possibly \$750,000, the abandonment of the present cribs, and an increased cost for operating expenses. A fair capitalization charge for interest, depreciation, etc., would be 8 per cent. on the cost of the new construction. The defendant company uses at present about 8,000,000 gallons of water per day. The Pennsylvania Railroad Company now being no longer a customer, necessarily the defendant company would have to increase its charges; otherwise, it would not be able to secure a fair return for such an increased investment. This, however, is subject to modification, for the reason that \$750,000 of common stock is outstanding for which no money has been paid, and the franchises of the company are of large value, neither of which are taken into account in the foregoing estimate.

"(14) If the defendant company constructed an additional crib or cribs, of the character of those described as cribs Nos. 2 and 3, so as to be able to have not only the larger filter surface, but to be able to cease the use of one or more while the necessary scouring or repairing process is going on, keeping the others in proper condition, maintaining at the same time efficient supervision over the cribs and pipes in use, the water so distributed to its customers would be far less objectionable, dangerous, impure, and unwholesome. This construction of an additional crib or cribs is comparatively of small cost as compared with the construction of an entire new slow sand modern filtration plant, or a new mechanical filtration plant.

#### "Conclusions of Law.

"(1) The fact having been found that the water complained of, as furnished by the defendant, is not reasonably pure and wholesome, it follows that the plaintiffs' bill must be sustained.

"(2) An interlocutory decree will be entered, directing it to secure and provide a sufficient supply of pure and wholesome water, and further directing that it shall within three months from the date of decree file a statement of the steps it has taken and proposes to make in compliance with the requirements to furnish reasonably pure and

wholesome water, upon the submission of which the plaintiffs may file a reply or answer, as they may deem advisable. It will further be decreed that this case be retained for such further proceedings as may be necessary to insure its performance, and to enable the court to exercise the jurisdiction conferred by the act of assembly under which this action is brought, with liberty on the part of either of the parties to apply to court for further orders and decrees as may be necessary and just.

"(3) Defendant to pay the costs.

#### "Opinion.

"A careful consideration of the voluminous testimony, covering about 1,100 typewritten pages, given by a large number of witnesses, including physicians, chemists, engineers, and eminent filtration experts from many sections of this country, has compelled the conclusion reached as to the character of the water furnished by the defendant company, and requires compliance with the interlocutory decree to be made. It is not necessary at this stage of the proceeding to enter into an extended discussion of the case. It may be taken as settled at the outstart that chemically pure water is not the standard. The definition of the water required, that it shall be ordinarily and reasonably pure and wholesome, controls in the cases of *Brymer v. Butler Water Company*, 172 Pa. 489, 33 Atl. 707, *Brace Brothers v. Pennsylvania Water Company*, 7 Pa. Dist. R. 71, and *Hinkson et al. v. New Chester Water Company*, 8 Del. Co. R. 417. Ordinarily pure and wholesome water necessarily means such as is reasonably clean from dirt, discoloration, and odor, reasonably free from bacteria and coli, or any other infection or contamination which renders the water unfit for domestic use and unsafe and dangerous to individuals. Modern investigation and scientific attainments demonstrate that water from polluted sources can by proper filtration be made reasonably safe and pure, and therefore the standard of purity as fixed by the well-recognized authorities must be secured.

"It is not for the court at this time to define what the defendant company shall do in the way of construction of new plants or improvement of the present one. It is estimated in the findings of fact that most objectionable features connected with the present filter cribs is their inaccessibility, the danger of accident from causes not easily ascertained or repaired, and the method taken of increasing the supply by destroying the efficiency of the filtration process, and use of water at the same time. This might be overcome by the construction of additional cribs, putting out of use those that are undergoing the process of disturbance in scouring, and might be aided by more continuous investigation, through divers, of their constant condition. It might be that, with the decrease in the demand from the defendant

company by reason of the withdrawal of the Pennsylvania Railroad Company's supply, the same results can be obtained from the present cribs if the foregoing objections are avoided. These are, however, mere suggestions arising out of the testimony. Undoubtedly these cribs have done meritorious work in the past. At the time they were constructed nothing like them was known to exist. They were in advance of the times then, and the company may be able by the same means to improve the character of the supply now.

"The circumstances do not warrant harsh or oppressive burdens to be laid upon defendant at once. It can improve the character of its water supply; but in requiring this to be done regard will be had to the fact that it is entitled to fair consideration, and that those who are interested in it are entitled to fair return from their investment. It is for this reason that ample time will be given in which to formulate plans for its improvements and submit the same to the court, and ample time will be given for the purpose of putting the same into effect.

"Decree.

"And now, September 28, 1907, this cause having been heard by the court on evidence offered by the respective parties, and argument of counsel, and the findings of fact, conclusions of law, and opinion of the court filed, and exceptions thereto, it is ordered, adjudged, and decreed as follows: That the Pennsylvania Water Company, the defendant, having refused and neglected to furnish the plaintiffs and its patrons with a sufficient supply of reasonably pure and wholesome water, the defendant company secure and provide, and at all times hereafter furnish to, the plaintiffs and its other patrons, either by change of its source of supply, by proper filtration, or by some other proper method, a sufficient supply of water, so free from sewage and organic matter, turbidity, and odor as to make said water reasonably pure and wholesome. Within three months from the date if this decree the defendant shall file in this cause a statement of the steps it has taken and which it proposes to take in further compliance with the provisions of this decree, and of the acts of April 29, 1874 (P. L. 73), June 2, 1887 (P. L. 310, No. 199), and May 16, 1889 (P. L. 228, No. 232), and that upon filing the said statement the plaintiffs may file in this cause such statement, suggestion, or answer as they may deem advisable. That this case be retained in court for such further proceedings as from time to time may be necessary and proper to insure the performance of this decree, and to enable the court to exercise the jurisdiction conferred by the said act of April 29, 1874, and with the liberty on the part of either party at any time to apply to the court for such orders and further decrees as may from time to time be necessary and just.

"The costs in this case to be paid by the defendant."

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

G. E. Gordon, Geo. W. Herriott, and A. W. Duff, for appellant. R. A. Balph and J. A. Langfitt, for appellees.

PER CURIAM. The decree entered in this case is affirmed, on the opinion of Judge Miller.

(221 Pa. 611)

### WEIR v. HAVERFORD ELECTRIC LIGHT CO.

(Supreme Court of Pennsylvania. June 2, 1908.)

#### 1. ELECTRICITY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

Though an electric light company is held to the highest degree of care to avoid injury to persons lawfully near its wires, such persons are not relieved from the consequences of their own contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 10.]

#### 2. SAME—EVIDENCE.

In an action against an electric light company to recover for the death of plaintiff's husband by contact with a live wire, evidence held to show decedent guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 11.]

#### 3. NEGLIGENCE—COMPARATIVE NEGLIGENCE.

Any negligence on the part of plaintiff contributing to his injury is a bar to recovery; the doctrine of comparative neglect not being recognized in the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 162.]

#### 4. TRIAL—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

In an action against an electric light company to recover for the death of plaintiff's husband caused by contact with a live wire, where there is no evidence that the defendant maintained a common nuisance or was guilty of wanton negligence, it is error to refer to the negligence of decedent as "light," and that of defendant as "heavy."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Lizzie C. Weir against the Haverford Electric Light Company to recover for the death of plaintiff's husband. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Charles Biddle, for appellant. A. S. L. Shields, and Sandberg & Heymann, for appellee.

FELL, J. The testimony on which the plaintiff relied to establish negligence on the part of the defendant was this: The defendant, in order to furnish electricity for lighting a dwelling house in a rural district, ex-

tended two wires from the top of a pole 30 feet high to a transformer which was fastened to the side of a tankhouse that was on the top of the dwelling. The pole was on the bank of a country road nearest the dwelling, and the wires were 120 feet in length, and were suspended 30 feet from the ground over private property. They were from 4 to 6 inches apart and 7 feet above the roof of the dwelling, and 8 inches from the wall of the tankhouse to which they were fastened. The wires were coated with rubber, over which there was a canvas cover that had become weather-worn and frayed, and in places hung in shreds from the wire. The rubber coating was unbroken except at one place at a bend in the wire near the transformer, where it was worn or broken off, and an inch of the wire was bare. How long this inch of wire had been bare was not shown. The defendant employed no one whose special duty it was to inspect the wires, but it was the duty of the linemen, who read the meters monthly and installed meters and transformers and made ordinary repairs, to observe the wires and to repair or report any defects. The canvas on these wires had been frayed and hanging in shreds for three months before the accident. The bare wire could be safely handled by a person standing on a dry board or box, and had been handled with bare hands by the plaintiff's witness. To touch it while standing on metal or a wet surface was exceedingly dangerous, and would probably cause death.

The plaintiff's husband, James Weir, was a journeyman painter, and with two other men, McAfee, a journeyman, and Keegan, a foreman in charge of the work, was engaged in painting the outside wood and brickwork of the dwelling. They first worked on the top of the tankhouse, and while there they observed the wires below, and one of them remarked that "it looked like a rag show." Before they went on the roof of the dwelling house, Keegan told Weir "to be careful of the wires, that he did not know the danger." When they came up a ladder to this roof to work, Weir read the name of the maker and the capacity of the transformer, and remarked: "It isn't the Watts that would fix you. It is the electricity that is in it." What then took place is thus described by the plaintiff's only witness to the occurrence: "Then he went on painting. Mr. Weir was coming down the end of the weather boarding along the mansard roof. Mr. Keegan went to work in the corner, and reached his part off the stepladder. Mr. Weir was painting from the bottom up on the brickwork. He got up to the bottom of the transformer. Mr. Keegan told him to wait for the stepladder, that he could reach it off the stepladder over the transformer where there would be no danger. The consequence was he reached between the wires, and was struck at the point connecting the wires with the transformer." When shocked, he fell

from the roof of the dwelling to the roof of a porch below, and from there to the ground. Whether his death was caused by the shock or the fall, which broke his neck, was unknown. This was the case made out by the plaintiff's witnesses, and there was nothing in the testimony produced by the defendant that added strength to it or presented it in a different light. Its witnesses corroborated those of the plaintiff, and showed that additional and more specific warnings had been given by Keegan to Weir. The only defect that made the wire dangerous was that it was bare for the space of an inch. The rest of it from the pole to the transformer was safe, although the outer canvas cover was worn and frayed. The bare spot was 30 feet above the ground, 7 feet above the roof of the building over which the wire passed, and at a bend near the transformer. This was a place where no one was likely to go except on rare occasions, and the wire was in a position where no one could run against it or touch it accidentally in ignorance of its presence.

Because of the danger of electricity, companies furnishing it are held to the very highest degree of care practicable to avoid injury to any one who may be lawfully in proximity to their wires. *Fitzgerald v. Edison Electric Illuminating Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; *Daltry v. Media Electric Light, etc., Co.*, 208 Pa. 403, 57 Atl. 833; *Alexander v. Nanticoke Light Co.*, 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475. The rule in regard to the degree of care that will be exacted was clearly announced and rigidly applied in these cases, but their facts, as indicating negligence or fixing its degree, have but slight resemblance to the facts in this case. In the first of them improperly insulated wires were stretched eight or ten inches over the roof of a building and were in such a position that the person injured was required to move them in order to continue his work. In the second a heavily charged and unused wire was allowed to hang within a few inches of the ground, close to a driveway near its entrance from a public road to a lawn where children were accustomed to play. In the third the proprietor of a store was injured by taking hold of an ordinary incandescent light bulb suspended by a cord, and using it in the way it was intended to be used. In that case it was held that, while the electric company was not an insurer, a presumption of negligence arose and the burden of explanation was upon it, and it was said in the opinion by our Brother Brown: "Against patent dangers or against those as to which he may have been warned, the user of electricity must of course guard himself, and, if he dallies with them, taking hold, by way of illustration, of an appliance emitting sparks or handling an uninsulated wire after having been warned not to do so, he voluntarily places himself in peril, and cannot recover if



injured." These cases establish a high standard of duty for electric companies, but they do not relieve a plaintiff from the consequence of his own neglect, nor impose on a defendant liability for an accident that was not in reason to be foreseen and guarded against. But, if we assume that there was sufficient evidence of the defendant's negligence to require the submission of that question to the jury, we find no warrant for submitting the question of wanton negligence and the maintenance of a common nuisance, nor for the instruction that, notwithstanding the negligence of the deceased, there could be a recovery if there was an inequality in the degrees of negligence; that on his part being ordinary or "light" negligence, and that on the part of the defendant wanton or "heavy" negligence. There was no evidence of wanton negligence, of an intention to injure, or of a reckless disregard of the safety of others. The full extent of the defendant's default was that the rubber covering was off an inch of wire that was securely fastened to the side of a private house seven feet above any place from which it could be reached. Of this defect no one had actual or constructive notice. No one knew whether it had been off an hour or a year. The defendant's agents had not looked to see. If it was negligent, this was the full measure of its neglect.

The doctrine of comparative negligence has not been recognized in our state. Any negligence on the part of a plaintiff that contributes to, and is the proximate cause of, his injury, defeats his action. There can be no balancing or matching of degrees of negligence. This has been held so rigidly that in *Monongahela City v. Fischer*, 111 Pa. 9, 2 Atl. 87, 56 Am. Rep. 241, *Oil City Fuel Supply Co. v. Boundy*, 122 Pa. 449, 15 Atl. 865, and *Mattimore v. Erie City*, 144 Pa. 14, 22 Atl. 817, the judgments were reversed because of the use of the word "material" to qualify the degree of the plaintiff's negligence. *Railway Co. v. Boudroun*, 92 Pa. 475, 37 Am. Rep. 707, and *Railway Co. v. Rosenzweig*, 113 Pa. 519, 6 Atl. 545, are not in point, and have no relation to the question. In the first a passenger riding on the rear platform of a crowded street car was struck by the pole of a horse car following, and it was held that under the circumstances he was not negligent, and that, although his position on the platform made the accident possible, it was a condition and not the cause of his injury. It was said in the opinion, quoting from *Creed v. Railroad Co.*, 86 Pa. 139, 27 Am. Rep. 693: "The test for contributory negligence is found in the affirmative of the question: Does that negligence contribute in any degree to the production of the injury complained of? If it does, there can be no recovery. If it does not, it is not to be considered." In the second it was held that the mistake of the plaintiff in getting on the wrong train did not relieve the rail-

road company from liability for injuries occasioned by the wrongful act of the conductor in putting him off in the dark at a place where there was a network of tracks and switches on which trains and engines were moving. The plaintiff's duty to exercise care for his safety after he had been put off was fully recognized, and the instruction was given that any negligence on his part after he had been ejected would defeat his right to recover.

We are of opinion that the negligence of the deceased was so clearly established by the plaintiff's witnesses that a nonsuit should have been entered or a verdict directed for the defendant. He knew the wires were charged with electricity, and that they were dangerous. He may not have observed the break in the rubber cover which was before his eyes, nor comprehended its significance, but he was twice warned of the danger, and directed not to attempt to paint above the wires while standing on the roof. Notwithstanding these warnings, he persisted in doing the work in the most dangerous manner, and deliberately placed his arm between the wires, which were six inches apart, and attempted to paint the wall above and eight inches back of them. This was simply trifling with a danger of which he was conscious. His death, as in the case of the plaintiff's husband in *Wood v. Diamond Electric Co.*, 185 Pa. 529, 39 Atl. 1111, who touched a screen which he had been told was charged with electricity from a defectively insulated wire, "was the result of his own voluntary and deliberate act."

The judgment is reversed, and judgment is now entered for the defendant.

(231 Pa. 539)

#### SNYDER v. CORN EXCH. NAT. BANK.

(Supreme Court of Pennsylvania. June 2, 1908.)

#### 1. BILLS AND NOTES—CHECKS PAYABLE TO BEARER—"FICTITIOUS PERSON."

Where the drawer of a check intended to use the name of payee, and did use it, as that of a person who should never receive the check nor have any right to it, such payee, though an existing person, was a fictitious one, within the negotiable instruments act of May 16, 1901 (P. L. 194), making a check payable to bearer, if payable to the order of a fictitious or non-existing person, and such fact is known to the person making it so payable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 49.]

#### 2. BANKS AND BANKING—DEPOSITS—PAYMENT—ON FORGED INDORSEMENT.

The liability of a bank to its depositor for payment of a check on a forged indorsement, does not protect a depositor who is in fault, as in intrusting a check to one he has reason to suppose would make a fraudulent use of it, or in so carelessly filling up a check that it may readily be altered, or in issuing a check to a fictitious person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, §§ 438-462.]

**3. SAME—WRONGFUL PAYMENT.**

That checks drawn by an agent on his principal's account were delivered in connection with gambling or wagering transactions is unavailing in an action against the bank, where there was no notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, §§ 396-405.]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by George E. Snyder, individually, and trading as Harrison, Snyder & Son, against the Corn Exchange National Bank to recover the amount of checks alleged to have been wrongfully paid by the bank. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William S. Divine and George S. Graham, for appellant. John Cromwell Bell and H. Gordon McCouch, for appellee.

BROWN, J. In determining whether the rule for judgment for want of a sufficient affidavit of defense was properly discharged by the court below, the following material averments in plaintiff's statement must be first considered: George E. Snyder, the plaintiff, trading and doing business as a broker in the city of Philadelphia under the name of Harrison, Snyder & Son, was a depositor with the Corn Exchange National Bank, the defendant. He had in his employ a clerk named Edwin S. Greenfield, who was authorized to draw checks in his name against his deposit in the said bank for the special purposes stated in written power of attorney, lodged with the bank. His power of attorney was as follows:

"Know all men by these presents, that we, Harrison, Snyder & Son, do make, constitute, and appoint Edwin S. Greenfield our true and lawful attorney for us and in our name. (1) To draw checks against our account in the Corn Exchange National Bank. (2) To indorse notes, checks, drafts, or bills of exchange which may require indorsement for deposit as cash or for collection in said bank. (3) To indorse any paper we may offer said bank, for discount. (4) To accept all drafts or bills of exchange which may be drawn upon. (5) To make substitution in collateral loans, and to do all lawful acts requisite for effecting these premises; hereby ratifying and confirming all that the said attorney shall do herein by virtue of these presents: In witness whereof, we have hereunto set our hand and seal, this 19th day of February, in the year of our Lord, one thousand nine hundred and two (1902). Harrison, Snyder & Son.

"Signed, sealed, and delivered in the presence of C. Meyer, Jr."

Against plaintiff's deposit with the defendant Greenfield, as attorney aforesaid, drew four checks payable to the order of Charles

Niemann, amounting in the aggregate to \$18,387.50. The first, for \$6,000, was drawn on April 18, 1906; the second, for \$1,800, on April 27, 1906; the third, for \$2,587.50, on May 1, 1906; and the fourth, for \$8,000, on May 8, 1906. These checks were paid by the bank and charged to the account of the plaintiff. They purported to have been indorsed by the said Charles Niemann, but the indorsements of his name were forgeries, and were never authorized by him or the plaintiff. The said checks purported to have been indorsed in blank by said forged indorsements to the firm of R. M. Miner & Co., a copartnership, purporting to carry on a stock and grain brokerage business, based upon actual purchases, sales, and deliveries, but actually conducting a gambling establishment, popularly known as a "bucket shop." The said four checks were deposited by the said R. M. Miner & Co., with the Real Estate Title Insurance & Trust Company of Philadelphia, which acted as a bank of deposit for the said R. M. Miner & Co. The said trust company indorsed three of the said checks, guaranteeing the previous indorsements to certain banks in the city of Philadelphia for collection, through which they were collected. The fourth check was also indorsed by the said trust company, but without guaranteeing the previous indorsements. The defendant, the Corn Exchange National Bank, relying upon the guaranty by the Real Estate Title Insurance & Trust Company of the indorsements upon the three checks, and upon its indorsement of the fourth, paid each of said checks to it through its collecting agents. Upon the averments that the indorsements purporting to be those of Charles Niemann were forgeries, that the Real Estate Title Insurance & Trust Company collected the proceeds of the checks with actual knowledge of the character of the business of the firm of R. M. Miner & Co., that the defendant had constructive notice of the business of said firm, and that the said checks were not given in due course of business, the plaintiff claims to recover from the appellee the amounts it paid on them.

Turning to the affidavit of defense, we find the following averred by the defendant: The plaintiff had in his employ as his confidential clerk and manager Edwin S. Greenfield, to whom he largely intrusted the conduct and management of his business, particularly that portion of it relating to the finances, and the said clerk or manager had by virtue of the power of attorney of February 19, 1902, drawn many checks upon the defendant, amounting in the aggregate to many thousand dollars, which checks had been paid by the defendant on presentation, and no payment had ever been questioned by the plaintiff. Greenfield, after having drawn to the order of Niemann the four checks set forth in plaintiff's statement, delivered them to R. M. Miner & Co., in the regular course of business in payment of accounts due to the said firm,

R. M. Miner & Co., after indorsing the said checks, deposited them with the Real Estate Title Insurance & Trust Company in the regular course of business, and the same were paid to the said trust company through the agencies set forth in plaintiff's statement. At the time each of the checks was drawn by Greenfield, there were no business transactions pending between the plaintiff and Charles Niemann, and there were not due to him the amounts of said checks or any other sum or sums of money whatever. When Greenfield drew the said checks and forthwith delivered them to R. M. Miner & Co., he intended to cheat and defraud the plaintiff to the extent of \$18,887.50 by having the checks paid to the said firm. He intended to write, and actually did write, the name of the said Charles Niemann on the back of the said checks in order to induce R. M. Miner & Co., and all others to whom they might be presented, to accept them as if they had been issued by the plaintiff to the said Charles Niemann in the regular course of business, and had been indorsed by him, the payee named in them. When Greenfield, as attorney for the plaintiff, drew the checks to the order of Niemann, he well knew that the latter had no right to them, or any of them, and it was never intended by Greenfield that Niemann should receive them or the proceeds thereof. Niemann was not a real bona fide payee, but was in legal contemplation a fictitious person, a fact well known to Greenfield at the time the checks were drawn. Said checks thereupon became payable to bearer, and the defendant is in no manner affected by the forged indorsements of Niemann's name thereon. Neither R. M. Miner & Co., the said Real Estate Title Insurance & Trust Company, nor its collecting agents had any notice or knowledge of any kind of the fraud of Greenfield until long after the checks had been paid by the defendant in due course in the regular order of business, and the said trust company had no knowledge of the character of the business of R. M. Miner & Co., as set forth in plaintiff's statement, if such was the fact, and that the checks represented gambling transactions. It is to be noted that, though the averment in plaintiff's statement is that Greenfield was authorized to draw checks "for the special purposes" stated in the power of attorney, no special purposes are therein named. His authority to draw checks was a general and unlimited one, and, upon the presentation of any check drawn by him as attorney for the appellant, the bank was under no duty to ascertain the purpose for which it had been drawn. It was as safe in paying any check drawn by him as attorney for the plaintiff as it would have been if the check had been drawn by the plaintiff himself. By conferring this general power upon Greenfield, the appellant made it possible for him to abuse it, and, having been abused by him, the principal now asks that another, the bank which innocently paid the

checks, and not he, shall bear the consequences of the fraud of the agent whom he trusted. This result cannot follow unless in the face of the facts as set forth in the affidavit of defense, which for the present we must assume to be true, the appellee paid the checks and charged them to the appellant's account in disregard of a duty which it owed him.

Greenfield had admittedly been authorized to draw checks payable to bearer. A check so drawn and delivered by him to any one could have been indorsed by the holder to another, and the payment of it by the bank to the indorsee could not have been questioned by the appellant. If, instead of drawing the four checks to the order of Niemann, he had made them payable to bearer and gone to the bank and drawn the money himself, the appellant could not have repudiated the bank's payment to him; or, if having made them payable to bearer he had delivered them to R. M. Miner & Co., and they had been indorsed by that firm to the Real Estate Title Insurance & Trust Company, and collected by it through the agencies set forth in plaintiff's statement, it would have been idle for the appellant to challenge the payments by the appellee in the face of his power of attorney clothing his clerk with unlimited power in drawing checks in his name and lodged by himself with the bank as its authority to pay any checks drawn by virtue of it. Greenfield was responsible to his employer for the abuse of the power conferred upon him, and the employer's concern was that it should not be abused; but it was never any concern of the bank why, or for what purpose, any check had been drawn by the clerk under the broad power given him by the employer. Its sole duty was to pay without question whenever a check so drawn was presented by the party to whom Greenfield intended it to be paid, and his intention every time he drew a check became, as to the bank upon which it was drawn, the intention of the man who had empowered him to draw it.

By our negotiable instruments act of May 16, 1901 (P. L. 194), a check is payable to bearer "when it is payable to the order of a fictitious or nonexistent person, and such fact was known to the person making it so payable." The averment in the affidavit of defense is that Niemann was not a real, bona fide payee, but was in legal contemplation a fictitious person, such fact having been well known to Greenfield at the time he drew the checks; that Niemann had no right to them, or any of them, and it never was intended by Greenfield that he should receive them or their proceeds. Niemann may have been an existing person, but he could have been, and was, a fictitious one within the meaning of the act of assembly if Greenfield intended to use his name, and did use it, as that of a person who should never receive the checks nor have any right to them. The intent of the drawer of the check in inserting the name of a payee is the sole test of whether the

payee is a fictitious person, and the intent of the drawer of these checks as attorney for the appellant must, as just stated, be regarded as against the bank upon which they were drawn as the intent of the appellant himself. A fictitious person within the contemplation of the act of 1901 is not merely a nonexistent one; for, if so, the word "nonexisting" would have been sufficient without more. It is clear, then, that, when the Legislature declared that a check payable to a "fictitious or nonexistent person" is to be regarded as payable to bearer, it meant a fictitious person to be one who, though named as payee in a check, has no right to it, or the proceeds of it, because the drawer of it so intended, and it therefore matters not whether the name of the payee used by him be that of one living or dead, or of one who never existed.

In *Bank of England v. Vagliano*, L. R. Appeal Cases (1891) 107, the English bills of exchange act of 1882, after which our act of 1901 was modeled, was construed, and, in answering the contention that the word "fictitious" was only applicable to a creature of imagination, having no legal existence, Lord Herschell said: "If so, there was no necessity for the introduction of the word 'fictitious' in the enactment. The word 'nonexistent' would have sufficed. \* \* \* Where, then, the payee named is so named by way of pretense only without the intention that he shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word 'fictitious' is exclusively used to qualify that which has no real existence." Lord Morris, following, said: "I entirely agree in the conclusion arrived at by my noble and learned friend, Lord Herschell, viz., that, whenever the name inserted as that of the payee is inserted without any intention that payment shall only be made in conformity therewith, the payee becomes a fictitious person within the meaning of the Bills of Exchange Act, 1882, § 7, subsec. 3, and that the bill may be treated by a legal holder as payable to bearer; and, having had the advantage of reading the noble and learned lord's judgment in print, I concur in the reasoning by which that conclusion is arrived at." In this Lord Watson concurred, saying: "I think that the language of the subsection taken in its ordinary significance imports that a bill may be treated as payable to bearer in all cases where the person designated as payee on the face of it is either nonexistent, or, being in existence, has not, and never was intended to have, any right to its contents."

In *Phillips v. Mercantile National Bank of New York*, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, a case singularly similar to the one now before us, the New York Court of Appeals, in construing the word "fictitious" in a statute of that state containing the same provision as ours, attached to it the same meaning as is given to it in *Vagliano v. Bank of England*. Bart-

lett, the cashier of the National Bank of Sumter, S. C., had authority from it to draw checks or drafts upon the Mercantile National Bank of New York, with which it had an account. He drew checks upon that bank, making them payable to the order of existing persons, but without their knowledge, and then indorsed the checks in their names to a firm of stockbrokers in New York, who collected them from the Mercantile National Bank. The receiver of the Sumter bank brought suit against that bank to recover back the amounts which it had paid on Bartlett's checks, on the ground that the indorsements of the names of the payees were forgeries. It was held that there could be no recovery because the checks had been made payable to fictitious persons, even though the names adopted were those of known and existing ones, and were therefore to be regarded as having been made payable to bearer and intended for delivery to the stockbrokers in New York. This having been the intent of Bartlett, who had authority from his bank to draw the checks, his intent was said to have been, so far as the New York bank was concerned, the intent of his bank, and that whatever he did in drawing and delivering the checks was to be regarded as its act. In the course of its opinion the court said: "Whether indorsing the check in the name of the payee therein was a forgery in the legal sense or not is not the important question. In a general sense, of course, the cashier did forge the payee's name, but that fact did not affect the title or rights of the defendant. *Coggill v. American Exchange Bank*, 1 N. Y. 113, 49 Am. Dec. 310. In the case cited a bill was drawn upon the plaintiff to the order of one Truman Billings, and was discounted at a bank. The drawer had indorsed it with the name of the payee, Truman Billings, a person who in fact had no interest in the bill. It was held that the defendant in the case, who had accepted and paid the bill, held it by a good title. *Bronson, J.*, said: 'As the payee had no interest and it was not intended he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity, and it is fully settled that when a man draws and puts into circulation a bill, which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer. In legal effect, though not in form, the bill is payable to bearer.' The case of *Shipman v. Bank of the State of New York*, 126 N. Y. 313, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821, \* \* \* was a case wholly other than was made out here. It was stated in the *Shipman* Case that the maker's intention is the controlling consideration, which determines the character of the paper, and that the statutory rule which gives to paper drawn payable to the order of a fictitious person, and negotiated by the maker, the same validity as paper payable to bearer,

applies only when such paper is put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The principle of that decision is quite applicable to the case at bar. Though Bartlett selected, for the execution of his dishonest purposes, the names of persons who were dealers with his bank, it was, in legal effect, as though he had selected any names at random. The difference is that by the methods resorted to he averted suspicion on the part of the directors or other officers of his bank. The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon them. The transaction was one solely for the fraudulent purpose of appropriating his bank's moneys by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter bank would have had no claim upon the defendant. \* \* \* The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name. Where, as in this case, the intent of the act was, by the use of the names of some known persons, to throw directors and officers off their guard, such a use of names was merely an instrumentality or a means which the cashier adopted, in the execution of his purpose to defraud the bank, in an apparently legitimate exercise of his authority. The cashier, through his office, and the powers confided to him for exercise, was enabled to perpetrate a fraud upon his bank, which a greater vigilance of its officers might have earlier discovered, if it might not have prevented. If his position and the confidence reposed in him were such as to enable him to escape detection for the while, then the consequences of his fraudulent acts should fall upon the bank, whose directors, by their misplaced confidence, and gift of powers, made them possible, and not upon others, who themselves acting innocently and in good faith were warranted in believing the transaction to have been one coming within the cashier's powers. It may be quite true that the cashier was not the agent of the bank to commit a forgery or any other fraud of such a nature, but he was authorized to draw or check upon the bank's funds. If he abused his authority and robbed his bank, it must suffer the loss. The distinction between such a case and the many other cases which the plaintiff's counsel cites from is in the fact that it was within the scope of this cashier's powers to bind the bank by his

checks. In transmitting them, made out and indorsed as they were, the bank was so far concluded by his acts as to be estopped from now denying their validity."

If the checks drawn by Greenfield to the order of Niemann as a fictitious person had been drawn by Snyder himself with the same intent as Greenfield's, and he had indorsed Niemann's name on them and handed them to R. M. Miner & Co., it would not be pretended that he would have any claim against the appellee. And yet this is the real situation; for, when Snyder lodged with the bank his power of attorney to Greenfield, he in effect said to it: "Any check drawn upon you by Greenfield as my attorney and issued by him is to be paid by you as having been drawn and issued by me." If this is not sufficient to protect the bank from liability for what the appellant now charges were its mispayments out of his funds, it is not easy to conceive what would be. The guaranty of the previous indorsements on the checks by the Real Estate Title Insurance & Trust Company was a guaranty of the indorsement of R. M. Miner & Co., for it was the only one upon the checks in legal contemplation when they were deposited with the trust company. When the checks were delivered to R. M. Miner & Co., they were, as shown, payable to bearer, and nothing, therefore, need be said on the contention of the appellant as to the liability of the trust company to the appellee upon the guaranty of the indorsements on the checks, unless it be to repeat what we have said through our Brother Fell in recognizing the liability of a bank to its depositor for payment of a check on a forged indorsement: "The rule applies where a check has been lost or stolen and the payee's name has afterwards been forged; but it does not protect a depositor who is in fault, as in intrusting a check to one who he has reason to suppose will make a fraudulent use of it, or in so carelessly filling up a check that it may readily be altered, or in issuing a check to a fictitious person. It is confined to cases in which the depositor has done nothing to increase the risk of the bank." *Land Title & Trust Company v. Northwestern National Bank*, 196 Pa. 230, 46 Atl. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717. The allegation that the checks were delivered to R. M. Miner & Co. in connection with gambling or wagering transactions is unavailing, in view of the averments in the affidavit of defense. *Bank v. Arnold*, 187 Pa. 356, 40 Atl. 794.

The assignment of error is overruled, and the order of the court discharging the rule for judgment is affirmed.

**DIOCESE OF TRENTON v. TOMAN.**

(Court of Chancery of New Jersey. Aug. 13, 1908.)

**1. COSTS—PERSONS ENTITLED—BOTH PARTIES SUCCESSFUL IN PART.**

Independent of statute, and under Chancery Act (P. L. 1902, p. 538) § 84, providing that costs in the Court of Chancery shall be discretionary, except where otherwise directed by law, etc., where complainant and defendant are each successful on one or more substantial issues, neither is entitled to costs as against the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 272.]

**2. SAME—AMOUNT—COUNSEL FEES—DISCRETION OF COURT.**

Under Chancery Act (P. L. 1902, p. 540) § 91, making it lawful to include in complainant's costs a counsel fee, fixed by the Chancellor, the allowance of a counsel fee is in the discretion of the Chancellor, where costs are given against defendant; but, where complainant does not recover costs, he cannot obtain the allowance of a counsel fee.

On application for costs and counsel fee. Denied.

For former opinion, see 70 Atl. 606.

**WALKER, V. C.** The bill in this case was filed to restrain the defendants from propelling automobiles through a certain alleyway onto a lot to which the way is appurtenant, and thence onto another lot of the defendants lying beyond and to which the way is not appurtenant, and also to restrain them from such use of the alleyway, because it is alleged that an automobile is not a carriage (the way being reserved as a carriageway), and that the propulsion of the automobiles through the alleyway constitutes a nuisance. The complainant has prevailed in the first contention, and the defendant in the last two contentions. The decree is now to be settled, and the complainant asks for costs and counsel fee against the defendants.

The cases are numerous in this state, both at law and in equity, that, where each party succeeds in part, neither is entitled to costs against the other. 2 Ann. Dig. N. J. p. 2744, § 36. The test, I take it, is that if the complainant succeeds on one or more substantial issues, and the defendant likewise succeeds on one or more substantial issues, neither is entitled to costs as against the other; and such has been the result in this case. Besides, the chancery act provides (P. L. 1902, p. 538, § 84) that costs in this court shall be discretionary, except where it is otherwise directed by law. There is no act making an award of costs compulsory upon the court in such a case as this one. The chancery act (P. L. 1902, p. 540, § 91) also provides that it shall be lawful to include in the complainant's costs, to be collected as part thereof, a counsel fee to be fixed by the Chancellor on final decree. This is something that may or may not be done, in the discretion of the Chancellor, in cases where costs are given against a defendant; but where the com-

plainant does not recover costs he cannot have a counsel fee awarded.

The result is that the decree for injunction in favor of the complainant and against the defendants, to the extent indicated in the opinion already filed, will be advised, but without costs to either party as against the other.

**In re NEWARK SCHOOL BOARD.**

(Supreme Court of New Jersey. Dec. 30, 1907.)

**1. CERTIORARI—GROUNDS—ADEQUACY OF OTHER REMEDY.**

Where the real interest of the applicants for certiorari to review the proceedings under which a school board of a city was appointed by the mayor thereof is their individual interest as members of the board of education to retain their offices, the reason must be cogent to induce the court to exercise its discretion in their favor.

**2. QUO WARRANTO—GROUNDS—EXERCISE OF PUBLIC OFFICE.**

The remedy of the present board of education of a city, seeking to retain their offices as against a new board appointed by the mayor, is by quo warranto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 10.]

**3. SCHOOLS AND SCHOOL DISTRICTS—STATUTES—LOCAL APPOINTIVE BOARD OF ESTIMATE—EFFECT.**

The school law of 1903 (P. L. p. 5), is not unconstitutional, because it creates a local appointive board of estimate, with power to fix the amount to be raised by taxation.

**4. SAME—PUBLIC SCHOOLS—ESTABLISHMENT—CONSTITUTIONAL LIMITATIONS.**

The Constitution, requiring the Legislature to provide for the instruction of children between the ages of 5 and 18 years, does not limit the power of the Legislature over free public schools; and a school law providing for the education of children between the ages of 5 and 20 years is not invalid.

**5. STATUTES—REFERENDUM ELECTIONS—USE OF VOTING MACHINES—EFFECT.**

The Legislature, in adopting the device of a referendum for the adoption of provisions of the school law, may provide for the use of voting machines at the election provided for, though the provision for voting machines at elections of school officers may be invalid.

**6. CERTIORARI—DEFENSE.**

After a referendum election authorized by the school law for the adoption of the provisions thereof has been held by the use of voting machines, the validity of the method of voting adopted cannot be attacked by certiorari to review the proceedings under which a school board was appointed, to the detriment of the public interests.

Application for a rule to show cause why a writ of certiorari should not be issued to review the proceedings under which the Newark school board, of nine members, was appointed by the mayor to supersede a larger active body. Denied.

Argued before SWAYZE, J.

Chandler W. Riker, for the rule. Francis Child, Jr., James Nugent, and Herbert Boggs, opposed.

SWAYZE, J. I think the case is like that of McFall v. Dover, 70 N. J. Law, 518, 57

Atl. 136, and *Magner v. Bayonne* (N. J. Sup.) 64 Atl. 993, and I am not willing to say that a writ of certiorari could not issue in a proper case. It is obvious, however, that the real interest of the applicants is not their interest as taxpayers and citizens in good government of the city, but their individual interest as members of the present board of education to retain their offices. As such they have a remedy by quo warranto, and do not need the writ now asked for. Their application ought, therefore, to be scanned carefully, and the reasons for it ought to be cogent, to induce the court to exercise its discretion in their favor.

The reasons do not seem to me such as would be likely to lead to the setting aside of the proceedings sought to be reviewed.

The objection that the school law is unconstitutional, because it creates an appointive board of estimate, with power to fix the amount to be raised by taxation, rests on a misapprehension of the opinion in *Township of Bernards v. Allen*, 61 N. J. Law, 228, 39 Atl. 716. The objection there was, not that the board was appointive, but that it was appointed by the Governor, a power quite beyond the control of people of the township, who had to pay the taxes.

Chief Justice Depue in his opinion expressly stated that for local purposes the local authorities are the representatives of the people, and the objection which he found to be fatal to the act then under review was that it did not purport to confer the power of taxation on local municipal bodies. He did not intimate that, if the power had been conferred on a local body, it would have made any difference whether that local body was appointive or elective. What it was important to secure was local control of the local taxing authority. It was of comparatively minor importance whether that local control was direct, as in the case of an elective body, or indirect, as in the case of an appointive body.

At the time of that decision the legislation of 1891, creating an appointive board of street and water commissioners in first-class cities, with extensive powers, was still recent, and must have been in the mind of the judge; but there is no intimation that the powers conferred upon that board were beyond the constitutional right of the Legislature.

The school law of 1902 (P. L. p. 69) contained a like provision for a board of school estimate; but, although the constitutionality of that act was thoroughly debated in the courts, there was no suggestion that this particular feature was obnoxious to a constitutional provision.

The objection that the school law provides for the education of children between the ages of 5 and 20 years, while the Constitution requires the Legislature to provide for the instruction of children between 5 and 18 only, does not appeal to me with any force. There is nothing in the Constitution

to forbid the Legislature from providing for better school facilities than the Constitution itself requires. The school fund is devoted to the support of public free schools for the equal benefit of all the people of this state, but it is not limited to children between 5 and 18 years of age. The question seems to me to have been settled by *Rutgers College v. Morgan*, 70 N. J. Law, 460, 57 Atl. 250.

Further reflection has convinced me that the objection arising out of the use of voting machines is also without force. No doubt voting machines were not in contemplation of the framers of the Constitution, and there are expressions in that instrument which might be held to be inconsistent with the use of voting machines; but the question here involved is the validity of a referendum. Such a device in a matter of ordinary legislation, aside from the creation of a state debt or the amendment of the Constitution itself, was as much outside the contemplation of the framers as a voting machine, and I see no reason why the Legislature, in adopting the new extraconstitutional device of a referendum, may not surround it with such conditions as the Legislature deems best. When the school law of 1902 was framed, the act providing for voting machines had been on the statute books for more than a year, and the referendum was necessarily such a referendum as existing statutes permitted. Even if the act of 1902 providing for voting machines were unconstitutional, so far as concerns voting for officers, it might still be effective for the purposes of a referendum, just as the act of 1887 (P. L. p. 149) giving women the right to vote at school meetings, although not effective as to the choice of officers, was held to be effective, as to the right to vote for appropriations. *Landis v. Ashworth*, 57 N. J. Law, 509-513, 31 Atl. 1017. The court must always strive to sustain the constitutionality of an act of the Legislature.

If this were not so, this application comes too late. The election has been held, and it would be detrimental to the public interest to have the validity of the method of voting adopted by so many voters challenged at this late day.

I have also examined the other reasons, which were not elaborated at the oral argument, but find in them nothing which leads me to think I ought to allow this writ.

I therefore decline to allow it.

(221 Pa. 630)

OTT et al. v. SEWARD.

(Supreme Court of Pennsylvania. June 2, 1908.)

BILLS AND NOTES—ACCOMMODATION INDORSER—EVIDENCE.

In an action against an indorser of a note, the latter cannot show as a defense that a person representing the maker had told him that the plaintiffs had requested his indorsement as an accommodation, where there is no evidence that defendant was requested by plaintiffs themselves to become an accommodation indorser,

and there is nothing to show that the person making the statement was acting for plaintiffs.

Appeal from Court of Common Pleas, Blair County.

Action by David Ott and George Ellenberger, trading as David Ott & Co., against O. L. Seward. Judgment for plaintiffs, and defendant appeals. Affirmed.

One of the notes was in the following form:  
"\$4,000. September 29, 1906.

"Two months after date, we promise.....  
to pay to the order of J. T. Flourney.....  
Four Thousand..... Dollars  
at Union National Bank.....  
without defalcation for value received.

"Island Park Association,  
"Per J. O. Rauch, President.

"Attest:

"Jno. T. Flourney, Secretary."

Indorsements:

"J. T. Flourney.

"O. L. Seward.

"C. A. Hargraves.

"J. O. Rauch.

"David Ott & Co."

Argued before MITCHELL, O. J., and FELL, BROWN, POTTER, and STEWART, JJ.

Thomas H. Greevy and E. G. Brotherlin, for appellant. R. A. Henderson and Charles C. Greer, for appellees.

BROWN, J. This is an appeal from one of two judgments against appellant as an indorser on two promissory notes of the Island Park Association held by the appellees. The defense set up in each suit was that the appellant was a mere accommodation indorser for the holders of the notes. Under facts which were undisputed the trial judge instructed the jury that the defense was unavailing and directed verdicts for the plaintiffs, upon which judgments were subsequently entered. By agreement of counsel the disposition of this appeal is to be regarded as disposing of the other; the facts in each case being identical.

No material fact upon which the appellees rely is disputed, and the defense that the appellant was a mere accommodation indorser for them, to enable them to raise money on the notes is absolutely barren of merit. Professional zeal hardly excuses the attempt to make it. Some time in March, 1906, the appellees, lumber dealers, agreed to furnish lumber to the Island Park Association for the construction of a hotel and other buildings upon their grounds in Somerset county. J. O. Rauch, J. T. Flourney, and O. L. Seward, the appellant, were three of its directors, and, respectively, its president, secretary, and treasurer. Before furnishing any lumber to the association the appellees took from these three men in their individual capacity an agreement, under seal, dated March 27, 1906, in which they obligated themselves, "jointly

and severally, to pay the said David Ott & Co., the full amount of the purchase price of said lumber, approximating \$4,000, within four months after the date hereof, in the event the said amount is not paid in full by the said Island Park Association." Later on the association asked for more lumber, and, the appellees having asked for additional protection, the same obligors, on April 27, 1906, executed another agreement, obligating themselves, jointly and severally, to pay the appellees, within four months from that date, the full amount of the purchase price of the mill work, lumber, and building supplies furnished by them to the association. When it was pressed by the appellees for the payment of their bill, C. A. Hargraves, its general manager, told them the only way they could be helped would be by a note. The appellees agreed to accept it, if assured that it would be taken care of when due. In pursuance of this, two notes of the association were given to them, each dated September 29, 1906, one for \$4,000, payable two months after date, and the other for \$5,000, payable in one month. Each note was made payable to the order of J. T. Flourney and by him indorsed. Following his indorsement were those of Seward, Hargraves, and Rauch. The notes, having been indorsed by the appellees, were discounted by a bank and the proceeds placed to their credit. They were not paid at maturity, and, after protest and due notice thereof to the prior indorsers, were taken up by the appellees. This suit against Seward followed.

The only attempt made by the appellant to show that he had become an indorser for the accommodation of the appellees was his testimony as to what took place between him and Hargraves when the latter procured his indorsement. Whatever may have taken place between them at that time could not have affected the appellees, unless apprised of it, or Hargraves was acting for them, and not for the association. He was not acting for the appellees, and there was no offer to show that what was alleged to have taken place between him and Seward was ever communicated to them. The court ought, therefore, to have sustained the objection made to the offer to prove by Seward that when he indorsed the note he did so because Hargraves told him the appellees had requested his indorsement as an accommodation to them to enable them to get money out of bank. Though the offer was improperly admitted, nothing was proved under it to help the appellant; for Hargraves was not called to testify that what he is alleged to have told Seward was true. Each of the appellees testified that it was not. They knew absolutely nothing as to how the indorsement was procured. They only knew that the notes were brought to them by the general manager of the association after they had pressed him for payment, bearing the absolute indorsements of responsible men, and these the very men



who, by their agreement of April 27, 1906, had assumed the payment of the bill if the association should not pay it. They were not merely guarantors, but absolute sureties, to the appellees. If, instead of suing Seward on his indorsement, they had sued him on his obligation to pay their whole bill, nothing shown in this suit would have availed him as a defense. The situation as to this feature of the case is summed up in a sentence in the charge of the court: "When the note was brought back to them, and they had no knowledge of his restrictive indorsement, that he put any restrictions about it, they had a perfect right to take it, because they were only getting their due, and Mr. Seward was not increasing his legal liability, because he was already legally liable to pay this particular debt, and in that view of it I do not see that Mr. Seward has any defense." But, without regard to the liability assumed by the appellant on the agreement of April 27, 1906, there is nothing to show that he was requested by the appellees to become an accommodation indorser for them, or that he was ever accepted as such by them.

The assignments of error are all overruled, and the judgment is affirmed.

(221 Pa. 626)

# LENAHAN v. PITSTON COAL MINING CO.

(Supreme Court of Pennsylvania. June 2, 1908.)

## 1. MASTER AND SERVANT—INJURY TO SERVANT—CONDUCT OF TRIAL.

In an action for personal injuries, the introduction into the case by plaintiff, whether by testimony or statements of counsel, by offers of proof, or by questions to witness or jury under pretense of disclosing interest or bias, of the fact that defendant was insured in an employers' liability company, was ground for reversal.

## 2. WITNESSES—CROSS-EXAMINATION—BIAS.

Where defendant in an action for personal injuries calls his own attorney to discredit one of plaintiff's witnesses, and the attorney testifies that he is the attorney for defendant, he may be asked on cross-examination whether he is not also the attorney for an employers' liability company which insured the defendant.

## 3. SAME.

A party may show by cross-examination that an adverse witness has an interest direct or collateral in the result of the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1192-1197.]

Appeal from Court of Common Pleas, Luzerne County.

Action by Margaret Lenahan against the Pittston Coal Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 218 Pa. 311, 67 Atl. 642, 12 L. R. A. (N. S.) 461.

At the trial Lawrence B. Jones, one of the counsel for the defendant, was called to discredit a witness for plaintiff. In his examination in chief he testified that he was an attorney for the defendant. On cross-exam-

ination he was asked this question: "Q. You represent a surety company? Defendant's Counsel: State what you propose to prove. Plaintiff's Counsel: It is not usual on cross-examination to make an offer of testimony. We have a right to ask questions of this witness, and, if they are improper, they are ruled out. Defendant's Counsel: I know the object of this testimony, and think it is entirely fair that an offer be made. The Court: It is only on direct examination that offers are made. You have the right to object to any question. Defendant's Counsel: I object to the question as not cross-examination, immaterial, and irrelevant. The Court: I will take the testimony. (Objection overruled, exception noted, bill sealed for the defendant.) Q. You represent a surety company which has this defendant coal company insured against accidents of this kind? A. What do you mean by representing? Q. As counsel—as agent or counsel? A. I am not agent for this company. Q. As counsel? A. I was employed by a casualty company to appear as counsel for the defendant in this case, is that what you mean? Q. What casualty company is that? Defendant's Counsel: Objected to as immaterial and irrelevant. The Court: We will take it. (Objection overruled, exception noted for the defendant, bill sealed.) A. The Pennsylvania Casualty Company of Scranton. Q. And that company has this defendant, the Pittston Coal Mining Company, insured against accidents such as befell young Munley? Defendant's Counsel: We object. A. I think so. Defendant's Counsel: We object, and ask that a juror be withdrawn. It is an improper remark by counsel in presence of this jury."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

Benjamin R. Jones and Lawrence B. Jones, for appellant. Edward A. Lynch, Thos. F. Farrell, and Joseph H. Finn, for appellee.

FELL, J. This action was by a parent to recover for the death of a minor son who was killed at the defendant's colliery. The testimony of the witness for the plaintiff at the trial was admittedly in conflict with his testimony at the coroner's inquest and with statements made by him at other times. Because of the defective memory of the witness or his desire not to expose himself to a prosecution for perjury based on his admissions, the defense was unable on cross-examination to prove by him that he had made certain statements in regard to the accident that were in conflict with his testimony at the trial. To discredit the witness by proof of conflicting statements, one of the defendant's attorneys engaged in the trial was called by it. He testified that he was attorney for the defendant, that he had attended the inquest and taken notes of the testimony of the witnesses, and he stated what the plaintiff's witness had testified to before the coroner and

what he had told him at other times. On cross-examination of this witness he was asked whether he represented as attorney a company that had insured the defendant against loss from accidents to its employes. The allowance of this question and other questions of the same import is the error alleged in the assignments. The fact that the defendant in an action for personal injuries is insured in an employers' liability company has not the slightest bearing on the issue. It is an irrelevant fact prejudicial to the defendant, and its introduction by the plaintiff, whether by testimony offered by him, by statements of this counsel, by offers of proofs or by questions asked witnesses or jurors under the pretense of disclosing interest or bias, is ground for reversal. *Walsh v. Wilkes-Barre*, 215 Pa. 226, 84 Atl. 407; *Hollis v. Glass Co.*, 220 Pa. 49, 69 Atl. 55. The rulings of these cases will be strictly adhered to and rigidly enforced, and no evasion or circumvention of them by indirection will be tolerated. But, in applying them, regard must be had to the undoubted right of the plaintiff to cross-examine a witness for the defendant to show his interest or bias. It is always the right of a party against whom a witness is called to show by cross-examination that he has an interest direct or collateral in the result of the trial, or that he has a relation to the party from which bias would naturally arise. Such an examination goes to the credibility of the witness. *Ott v. Houghton*, 30 Pa. 451; *Batdorff v. Bank*, 61 Pa. 179. The right is not to be denied or abridged because incidentally facts may be developed that are irrelevant to the issue and prejudicial to the other party. This chance the party takes when he calls the witness.

The defendant's witness in his examination in chief had testified that he was attorney for it. This was but a partial disclosure of facts that might create a bias, and it was competent for the plaintiff to show the full extent of the witness' relation to the parties in interest in defending the action. The defendant opened the door for this inquiry, and, as long as it was conducted in good faith for a legitimate purpose, the plaintiff was within his rights.

The judgment is affirmed.

(221 Pa. 634)

JAMES et al. v. PENN TANNING CO.

(Supreme Court of Pennsylvania. June 2, 1908.)

SPECIFIC PERFORMANCE—CONTRACT—INDEFINITENESS.

A writing relating to the sale of bark or timber where no parties are mentioned in the writing as to be bound thereby, and no time is stated for the beginning and ending of the contract, and there is no particular tract of land described from which the timber is to be taken, nor is the amount of bark to be delivered fixed, is insufficient to show that the minds of the

parties met, so that the memorandum is unenforceable as a contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 61-68.]

Appeal from Court of Common Pleas, Warren County.

Action by H. J. James and T. S. James, trading as James Bros., now for use of James Bros. Lumber Company, against the Penn Tanning Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

The writing or memorandum in controversy was in the following form:

"H J James of James Bros was here on Jay 21, '95 I told him that we would pay 5.75 pr 2200 lbs for Bark Loaded on P & W Jo Jo Jnct fr 1895 Peeling Somewhere about 3000 to 4000 Cord that we would pay them 4.00 pr Cord & the timber from a Cord of Bark Bark Del Same Place or 4.50 & the timber from a Cord of Bark delivered on the T V R R and take no timber than what is on the Crawford Lands and that we would not peel until 4 years from now when we could commence peeling at the rate of 3000 to 4000 Cords pr year. All Deliveries of bark to be in the Summer option with us peel Sooner than four years the James Bros are to take this proposition into Consideration.

"Agred upon 3-29-95."

The following is the charge of Lindsey, P. J., in the court below:

"This action is brought by the plaintiffs, H. J. James and T. S. James, former partners doing business as James Bros., now for the use of James Bros. Lumber Company, a corporation organized under the laws of Pennsylvania, against the Penn Tanning Company, for the purpose of recovering alleged damages for what the plaintiffs claim is a breach of contract, and also to recover a balance which the plaintiffs claim to be due them for hemlock bark which the plaintiffs delivered to the defendant. The alleged contract on the part of the plaintiffs—that is, the terms of the alleged contract—was first talked about on January 21, 1895, according to the evidence of the plaintiffs. It was either on that date or January 22d, and Mr. H. J. James states that he went to Sheffield and in the office of the Penn Tanning Company he had a talk with Mr. Jerry Crary, the president of the Penn Tanning Company. Mr. James states that their talk and negotiations resulted in coming to terms in relation to the plaintiffs delivering a certain quantity of bark to the defendant, and the price was agreed upon. Mr. James stated, for which Mr. Crary, as president of the Penn Tanning Company, was to cut and peel the bark on a quantity of timber which was then standing and growing upon lands called the Crawford lands. And according to the terms, which Mr. James stated was agreed upon between himself and Mr. Crary, Mr. Crary was to pay \$4 per cord in cash for the bark which Mr. James was to deliver at a station called Jo Jo on the P.

& W. R. R., and was to credit the plaintiff with \$1.50 per cord on the timber which was to be delivered from the Crawford property to the plaintiffs, and he was to pay \$4.50 per cord for bark delivered on the T. & V. R. R., and credit \$1.50 on the timber to be delivered from the Crawford property. Now, Mr. James states that Mr. Crary made a memorandum of this understanding between them, that it was talked over, but Mr. James states that he did not want to agree to it positively until he had consulted his partner. He went home and consulted his partner, and claims that he and his partner came back on March 29, 1895, and that they had further talk about it, and that a copy was made, Mr. James stated, of the memorandum which Mr. Crary had made, which copy is produced in evidence in this case. Now, it is alleged on the part of the plaintiffs that the negotiation there had constituted an agreement between the plaintiffs and defendant in relation to this bark and timber, and in accordance with the terms of the memorandum which has been given in evidence. We say to you, gentlemen of the jury, that Mr. Crary, as president of the Penn Tanning Company, did not have authority in our opinion to bind the Penn Tanning Company in a contract for the property mentioned in this memorandum and property in question here.

"It is claimed, also, on the part of the plaintiffs that if this contract was not binding between the parties because of a lack of authority on the part of the president, Mr. Crary, to make such a contract, without the consent or direction of the board of directors of the Penn Tanning Company, that it was ratified afterwards. And they have introduced testimony which they claim is sufficient to show a ratification on the part of the defendant corporation. We feel bound to say to you that, in our judgment, the evidence is not sufficient to show a ratification, and is not sufficient in our judgment to submit to the jury of the ratification. And, without now entering into the evidence to point out the lack of testimony, we so instruct you. And we say to you that there was no valid contract in our judgment made between the parties there which would entitle the plaintiffs to recover damages; and the plaintiffs have not shown evidence sufficient to submit to the jury of a ratification of any contract.

"But the evidence shows that the plaintiffs have delivered a large quantity of bark which the defendant company has had the benefit of and the use of, and in our opinion the defendant is bound to pay for the amount of bark, if the defendant has not already done so, and to pay for it according to the price named in this memorandum. We think that the question was talked over between the plaintiffs, the two brothers—James Bros.—and Mr. Crary, the president of the Penn Tanning Company, and these prices named in the memorandum were settled upon as the prices; whether or not it was a contract

made between them in view of the fact that the matter was not put in writing in accordance with what some of the evidence shows—I think Mr. James himself testified that it was to be put in writing—Irrrespective of that we think that the prices were settled upon in such a way that the Penn Tanning Company ought to pay for the bark received and which the defendant received the benefit of, in accordance with these prices.

"The plaintiffs claim in their statement of claim a balance of \$4,321.07 due them on the amount of bark which they have delivered to the defendant. And we say to you on this branch of the case the plaintiffs are entitled to recover. This amount is not disputed by the defendant. There is no dispute in the testimony relating to this part of the plaintiffs' claim, and therefore the plaintiffs will be entitled to your verdict for that amount, with interest from the date of bringing of this suit. The interest has been figured and added to the amount which I gave you, and it amounts to \$4,969.15, and the clerk will take your verdict for that amount."

Verdict and judgment for plaintiffs for \$4,969.13, for the amount of bark actually delivered. Plaintiffs appealed.

Argued before FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Alex. Simpson, Jr., H. E. Fish, D. I. Ball, and J. E. Mullin, for appellant. John G. Johnson, C. H. McCauley, and Hinckley, Rice & Alexander, for appellees.

ELKIN, J. This is an action of assumpsit to recover for the breach of an alleged contract for the sale or exchange of hemlock timber and bark. The defendant corporation is extensively engaged in the operation of tanneries, and the legal plaintiffs were, and the use plaintiff is, engaged in the lumber business. The tanning company needed bark and the lumber people wanted to sell bark, and perhaps purchase timber. This was the situation of the parties at the time negotiations began about the subject-matter of this controversy. Crary was the president of the Penn Tanning Company, and had the general management of its business at the time the alleged contract was entered into. In the first clause of the amended statement of claim it is averred that the defendant on or about March 29, 1895, entered into an agreement with the James Bros., whereby defendant agreed to cut, fell, and peel the hemlock trees upon what was known as the Crawford lands, containing about 4,700 acres, and to exchange the timber and logs taken therefrom suitable for sawing for hemlock bark to be delivered by the James Bros., at the price, and upon the conditions agreed upon between the parties as to amounts and deliveries. At the trial the burden was on the plaintiff, first, to establish a valid contract, then to prove performance, or proffer

to perform, and still further to show refusal on the part of defendant to perform amounting to a breach. The plaintiff undertook to meet the burden resting on it by offering in evidence a memorandum made by Crary on January 21, 1895, upon which were indorsed in the handwriting of James these words: "Agred upon 3-29-95." The memorandum was not signed by Crary, or James, nor did it contain any mention of the Penn Tanning Company, nor did it purport to be at the time of making an executed contract on the part of any one. It is not pretended that any officer authorized to do so had at any time formally executed the alleged contract in the name of the Penn Tanning Company, or, indeed, that any person, either as an officer of the corporation or as an individual, had executed the memorandum of agreement by signing his name. The memorandum, the very foundation upon which the right to recover depends, and without which there can be no recovery in this case, does not contain the name of the defendant corporation, was not executed by any officer of the tanning company, either with or without authority as and for its corporate act and deed, or indeed in any other manner, nor was anything done up to the time when it is asserted there was an acceptance to show on its face that the tanning company was in any manner connected with it, unless such connection should be inferred from the fact that it had to do with hemlock bark and trees. It is apparent the memorandum was very hastily drawn. Its meaning is, to say the least, doubtful, and, if there are mutual covenants, against whom are they to be enforced? This cannot be determined from the writing. What do they mean? This is uncertain. How much bark was to be delivered on one side, and how many trees or how much timber on the other, is not stated, nor in our opinion can these material matters be determined with any legal certainty from the instrument relied on, considered in its parts or as a whole. After careful consideration, we have concluded the memorandum is too vague, indefinite, and uncertain in its terms to be specifically enforced, and that an action for an alleged breach cannot be sustained. In our opinion there is no escape from this conclusion, and for the following reasons: First. No parties are mentioned in the agreement upon which it is to be binding. No individual, firm, partnership, or corporation signed the agreement, nor does the memorandum itself, or the evidence produced at the trial, show that it was ever authorized to be executed. It never was finally executed by any one. The memorandum begins with a declaration that a Mr. James was here on a certain date, and that the writer had said to him: "I told him that we would pay" certain prices. Who "I" was and who is meant by "we" is not explained in the writing, nor does anything appear on its face which in

any manner explains what parties are to be bound thereby, and certainly not the slightest reference is made to the appellee company. Second. No time is mentioned for the beginning or ending of the alleged contract, and nothing definite is provided as to the length of time during which the sale or exchange of hemlock timber for bark is to continue, unless, as is suggested, the duration of the contract is to be determined by the number of cords of bark produced, but the measurement of time by the cord is unknown to the calendar, and is too indefinite in law to determine the legal rights of parties under the facts of the present case. Third. The subject-matter of the alleged agreement is indefinite and uncertain as to amounts and areas. There is no definite area of land described from which timber is to be taken, nor is there any fixed amount of bark to be delivered for purposes of exchange. If the transaction amounted in contemplation of law to a sale of standing timber, not for immediate severance, then, under the rule of all our cases, it would be real estate, and a bare reference to the Crawford lands would be insufficient in point of description to make a valid contract under the statute of frauds, but independently of this consideration it cannot be that a reference in the memorandum which says to "take no timber than what is on the Crawford lands" can be construed as a binding covenant to cut, fell, and peel the hemlock timber on several thousand acres of land. The provision that no timber was to be included in the exchanges than such as should be taken from the Crawford lands does not mean that all the timber from all the Crawford lands must be so exchanged. What the parties evidently intended, and what was subsequently done, was that timber cut from the Crawford lands from time to time was exchanged for bark delivered at various times as suited the purpose and convenience of the parties. The slight reference to the Crawford lands in the memorandum of agreement falls far short of an express covenant to sell or exchange all the trees on all of the tracts of land. Fourth. The memorandum does not show that the minds of the parties ever came together on any specific thing, and certainly it cannot be pretended that the Penn Tanning Company by any corporate action authorized such an agreement in writing to be entered into. Indeed, the memorandum on its face, the subsequent correspondence between the parties, and the proven facts clearly show that the parties intended a formal contract to be executed at a later date, which was never done. The memorandum relied on is lacking in almost all of the essential elements of a contract. It was not intended as an executed agreement, as clearly appears from letters which passed between the parties in November and December, 1896, and in January, 1897, showing that almost two years after making the

alleged agreement upon which appellant relies to recover, both parties had the understanding, and so declared in writing, that the contract had never been executed. This no doubt explains why the memorandum was so vague, indefinite, and uncertain. It was intended as the basis upon which to make a formal contract in which the amount of bark to be furnished, and the extent of lands to be included, and other material matters, should be expressly stipulated. This was never done, and the understanding between the parties, whatever it was, can only legally be determined by the vague and indefinite writing set up in this case, and perhaps to some extent by what the parties did under it, but, in any event, the memorandum itself, or the acts of the parties under it, would not justify a court in holding as a matter of law that the appellee had covenanted to sell or exchange all the hemlock timber on all the Crawford lands, or that it had agreed to accept an unlimited and indeterminate supply of bark from appellant, indefinite as to time of delivery and without reference to whether it was to be furnished from timber then owned by appellant or to include all that might be subsequently acquired. The letter of the lumber company addressed to the tanning company, dated August 4, 1897, and the answer of the tanning company of the same date, would seem to conclusively show that both parties understood their arrangement, whatever it was, only to apply to bark owned by the lumber company, and did not apply to such as might be purchased from other parties by appellant. From all these facts and circumstances, it seems perfectly clear that the parties never did finally execute a definite contract, nor was anything ever done to fix the amount of bark to be furnished on one side and timber on the other, nor was it ever determined to what exact areas the proposed agreement should apply, but, in the absence of an express contract, the parties, taking the memorandum as a basis as to prices and deliveries, proceeded to make exchanges of timber and bark for a period of years, expecting no doubt at some time to execute a contract fixing amounts and defining areas, which was never done, and the courts cannot do for them what they have failed to do for themselves.

From what has been hereinbefore said, it is clear that the judgment of the court below must be affirmed, and we do not deem it necessary to discuss the other assignments of error. But this must not be understood to mean that we disagree with the conclusion reached by the learned trial judge in the consideration of this case on other points. Independently of the question whether the president of the corporation could bind it under the facts of this case, or whether the alleged contract was subsequently ratified by the corporation, we hold that the memorandum of agreement is too vague, in-

definite, and uncertain to be enforced against the appellee company to the extent of compelling the sale or exchange of all the trees on all the tracts of land mentioned in the statement of claim, and, since there was no obligation to sell or exchange all the trees or timber on all the lands, under the facts of this case, there was no breach for which damages can be recovered.

Judgment affirmed.

(221 Pa. 615)

## CRIDLAND v. CROW.

(Supreme Court of Pennsylvania. June 2, 1908.)

### 1. DAMAGES—PERSONAL INJURIES—EVIDENCE.

Where, in an action to recover damages for an assault, plaintiff and her sister, testify to a continuous condition of injury, a physician may testify as to the condition of plaintiff six months after the assault, and that he then treated her for the condition to which she testified on the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 483.]

### 2. TRIAL—REMARKS OF JUDGE.

In an action for an assault, it is reversible error for the court to refer to the hysterical outbreak of plaintiff in the courtroom at a time when she was not on the witness stand, as an exhibition to aid the jury in determining whether plaintiff's excitable temperament was not in a measure the cause of the trouble resulting in the assault.

### 3. SAME—DEMEANOR OF WITNESS.

Where a witness shows bias or feeling on the stand, it may be commented on by the court as affecting her credibility; but the demeanor of a witness while not upon the stand is no part of the evidence.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Ella Cridland against Alexander Crow, Jr., sheriff, to recover for an assault alleged to have been committed by a deputy sheriff in executing a writ of possession. Judgment for defendant, and plaintiff appeals. Reversed.

At the trial the plaintiff and his sister testified as to a continuous condition of injury to plaintiff's hand and arm, extending many months after the assault. The assault took place in November, 1899. Dr. F. S. Angeny, called by the plaintiff, was asked this question: "Q. For what did you treat Miss Cridland at that time in May, 1900? (Objected to.) Mr. Newlin: I offer to show that in May, 1900, the witness began attending the plaintiff for the condition of her hand and arm, which she told him was brought about in the way she has detailed to this jury, and to show the condition has been a continuous condition of her hand and arm. (Objected to, unless there is some connection between the time of her injury and the time she was treated by Dr. Angeny.) Mr. Newlin: I offer to show that this physician treated her for the condition which she has described in this trial. (Objected to. Objection sustained.)"

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

James W. M. Newlin, for appellant. Joseph Hill Brinton, for appellee.

POTTER, J. In the first assignment of error in this case counsel for appellant complains of the exclusion by the trial judge of certain testimony of a physician. The offer was to show the condition of plaintiff's hand and arm when the witness began attending her in May, 1900, six months after the injuries were alleged to have been inflicted, and that he then treated her for the condition which she described on the trial. Plaintiff had testified as to the injury to her hand and arm inflicted by the deputy sheriff, and that the witness, Dr. Angeny, whose testimony was offered, had treated her for it within a month after the occurrence, and that the effects of the injury had continued up to the time of the trial, and that she still suffered from it. She was corroborated in this statement by the testimony of her sister. If the evidence of the plaintiff and her sister was believed, it was sufficient to show a continuous condition of injury lasting until long after May, 1900, and the testimony of Dr. Angeny should therefore have been admitted. If plaintiff was injured, as she claimed, by the use of unnecessary and excessive force by the deputy sheriff, she had the right to show the extent and character of the injury, and the evidence of the doctor might have been of material value in this respect to the plaintiff. The trial judge would, of course, have cautioned the jury in his charge that they must be satisfied from the evidence that the injured condition of plaintiff when she was treated by Dr. Angeny was connected with and resulted from the injury inflicted in the previous November by the deputy sheriff. But, subject to this caution and control by the court, we think the testimony offered should have been admitted.

The second assignment of error relates to the comment of the trial judge upon the actions of the plaintiff and her sister while in the courtroom, but not while they were upon the witness stand. In his charge to the jury he used this language, of which complaint is made: "The conduct you saw displayed here in the courtroom by the plaintiff and her sister may throw some light on the subject. Their attitude toward the doctor when a witness upon the stand, and their ungoverned and hysterical conduct when his testimony did not please them—this exhibition may aid you in determining whether or not the story of Scarlett, Moore, and the policeman is true, and whether this excitable temperament was not in a measure the cause of the trouble." The record does not show just what the occurrence was to which the court referred; but it appears, from the statements of counsel, to have been a violent and hysterical outbreak of some kind, which created an unpleas-

ant impression. In thus commenting upon the conduct of the witnesses when they were not upon the stand, we think the trial judge went too far. He was not justified in asking the jury to compare their conduct in the courtroom with what it was said to have been at the time of the alleged assault. The circumstances were entirely different, and as to the latter the facts were directly in dispute. The suggestion of the court put into the case a question of excitable temperament on the part of the plaintiff, and invited the jury to conjecture as to effect of that at the former occasion, instead of confining them to the evidence. Plaintiff charged her excitability in part to the effect of the injury in question; and yet the jury were asked to regard her excitable temperament at the time of the trial, and were permitted to infer from that her condition several years before. Great latitude is properly given to the trial judge in commenting upon the evidence; but it is going too far to comment upon the conduct of a witness while not upon the stand. If a witness shows bias, feeling, or partiality upon the stand, it may very properly be commented upon by the court as affecting credibility. But the demeanor or conduct of the witness while not upon the stand is no part of the evidence in the case. It is easily conceivable that various unusual circumstances may arise during the course of a trial, and that under the stress of excitement personal peculiarities may lead to the doing of things in a courtroom of which no notice should be taken in the orderly administration of justice. The jury should not be instructed to consider, in arriving at a verdict, anything but the law and the evidence in the case.

The first and second assignments of error are sustained, and the judgment is reversed, with a venire facias de novo.

(221 Pa. 822)

# SCHRAGER v. COOL.

(Supreme Court of Pennsylvania. June 2, 1908.)

## 1. TRUSTS—RESULTING TRUSTS—EVIDENCE TO ESTABLISH—PAROL EVIDENCE.

Facts which, if admitted, would give rise to an implied or resulting trust, may be proved orally.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 130-132.]

## 2. SAME—BREACH OF CONTRACT OF AGENCY OR EMPLOYMENT.

A trust will spring from the fraud practiced where one employed to negotiate for another takes advantage of the opportunity to obtain a conveyance to himself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 152.]

## 3. SAME.

Where an agent to buy land uses only his own money to complete the purchase, the transaction will be regarded as a loan to the principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 152.]

#### 4. SAME—STATUTE OF FRAUDS.

Where an agent to purchase land took title in his own name, and thereafter sold the land at a profit, an action by the principal for such profit is not for land, and does not involve title to land, and the agent cannot avail himself of the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 141.]

Appeal from Court of Common Pleas, Luzerne County.

Assumpsit by Leon Schragger against James Cool to recover a balance alleged to be due from him as plaintiff's agent. Judgment for plaintiff, and defendant appeals. Affirmed.

The court charged in part as follows:

"Now, summing it all up down to this point, gentlemen of the jury, if you believe the testimony of the plaintiff assisted by the corroborations which you believe it has received from other credible testimony in the case, you may find that substantially the contract averred in the declaration has been proven, namely, an agreement by the defendant to buy for the plaintiff these properties, borrow the necessary money, and take in compensation the sum of \$150, with interest and expenses.

"Now, on the question of law. There is what we call the statute of frauds, of which you have heard. It is a statute which provides, in substance, so far as it bears upon this case, that contracts in relation to land must be in writing; that written title to lands, or written ownership of lands, cannot be affected or defeated, as a general legal proposition under this statute, by verbal testimony, by anything short of a writing. That statute has not been specifically mentioned in the argument here; but, as we are requested to give you certain binding instructions upon the legal aspects of the case, it is proper for me to say that the statute of frauds, the statute to which I refer, is no bar to the plaintiff's recovery in this action, if you find the contract as he has asserted it to be.

"The suit is not for land. It does not involve land, but it is for the profits made by the sale of land, derived from the sale of land which the defendant undertook, if you so find, to buy and to dispose of, and the defendant cannot avail himself of the statute of frauds, if you believe the plaintiff, for two reasons: In the first place, if you believe that the \$4,800, paid to the association in New York for this property, was derived, \$100 from money advanced by the plaintiff, although subsequently the balance was returned, \$81, and that \$4,700 of it was advanced or put into the transaction by the defendant under the contract or arrangement asserted by the plaintiff, there would probably be in law what is denominated a resulting trust; that is, the assignment of this sheriff's deed to the defendant would not make him the real owner, but only make him the trustee of the legal title for the

plaintiff, charged, however, as between the parties, with the amount of his advances. That is a well-recognized legal proposition to protect both parties, the defendant in his advances and the plaintiff in his real ownership of the property.

"Again, independent of any resulting trust and independent of any technical relation between the parties of trustee and cestui que trust, and whether the transaction constituted the plaintiff the technical legal or equitable owner or not, if you believe the advancing of the money by the defendant was part of an arrangement between the parties to do what was done for the benefit of the plaintiff, allowing the defendant compensation \$150, and interest, and expenses, then the plaintiff, notwithstanding the statute of frauds, might be entitled to a verdict."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

George H. Troutman, George J. Llewellyn, and T. J. Chase, for appellant. T. R. Martin and Rush Truscott, for appellee.

FELL, J. The assignments of error to be considered relate to the effect of the statute of frauds on the contract on which a recovery was allowed. The facts as established by the verdict are as follows: The plaintiff employed the defendant, a real estate agent, to purchase land for him and to obtain a loan to be secured on it and used in part payment of the purchase price. The defendant was to be repaid all expenses incurred by him in attending to the business and a commission for his services. The defendant, in violation of his duty, purchased the land in his own name, but made the first payment, when the contract was signed, with money received from the plaintiff for that purpose. When the plaintiff learned that the defendant was named as purchaser in the contract, he was led to acquiesce because of the defendant's assurance that he would advance the balance of the purchase money, and that, if he held the title, the expense of preparing and recording a mortgage would be saved. The land was sold through the agency of the defendant at a profit, and during the negotiations for its sale the plaintiff was always treated as the owner and consulted at every step. The defendant refused to pay the balance of the purchase price received by him after deducting his expenses, commissions, and advances, but tendered the plaintiff a part thereof in settlement.

Facts which, if admitted, would give rise to an implied or resulting trust, may be proved orally; otherwise, the exception of those trusts from the statute of frauds would be inoperative; A trust will spring from the fraud practiced where one employed to negotiate for another takes advantage of the opportunity to obtain a conveyance to himself. Whether in this case the acquiescence of the plaintiff in the taking of title by the

defendant left him anything to rely upon except an unwritten promise to hold the land for him need not be considered, for a trust also arose from the payment of the purchase money, which could be established by parol evidence. Where an agent to buy land uses his own money to complete the purchase, the transaction will be regarded as a loan to the principal. Nor does the fact that he pays in full out of his own funds necessarily exclude the operation of the principle. *Notes to Dyer v. Dyer*, 1 Leading Cases in Equity, \*203.

The verdict should be sustained also on the ground taken by the learned judge in submitting the case to the jury, that the action was not for land, and did not involve the title to land, but was for profits made by the sale of land, which were in the hands of the defendant. If he was an agent, the statute of frauds would not prevent a recovery under *Benjamin v. Zell*, 100 Pa. 33; *Everhart's Appeal*, 106 Pa. 349; *Howell v. Kelly*, 149 Pa. 473, 24 Atl. 224.

The judgment is affirmed.

(221 Pa. 588)

#### MCNEELY CO. v. BANK OF NORTH AMERICA.

(Supreme Court of Pennsylvania. June 2, 1908.)

##### 1. BANKS AND BANKING—DEPOSITS—DUTY OF DEPOSITOR TO NOTIFY BANK OF FORGERY.

It is the duty of a depositor in a bank, on discovering that it has paid and charged to his account either a check bearing his forged signature as drawer or his check on the forged indorsement of the payee, to promptly notify it of the forgery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 443.]

##### 2. SAME—PAYMENT ON FORGED CHECKS—LIABILITY OF BANK TO DEPOSITOR.

No payment by a bank on a forged signature of a depositor as drawer of a check or on a forged indorsement of his payee can affect him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, §§ 439-441.]

##### 3. SAME—FAILURE OF DEPOSITOR TO NOTIFY BANK OF FORGERIES—EFFECT.

A depositor, failing to promptly notify a bank of its discovery of forgeries, cannot recover of the bank irrespective of whether the bank could have protected itself had it been promptly notified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 443.]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by the McNeely Company against the Bank of North America to recover the amount of checks alleged to have been wrongfully paid by the bank. From an order dismissing exceptions to the report of the referee, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

G. W. Pepper and B. F. Pepper, for appellant. Alex. Simpson, Jr., for appellee.

BROWN, J. McNeely Company, a corporation, was a depositor with the appellee, the Bank of North America, and had in its employ one Charles S. Reber, who between April 20, 1897, and February 24, 1903, forged the names of payees on 90 checks issued by it. Some of these checks were paid directly to him by the appellee, and others he deposited to the credit of his account with certain banks and bankers, who collected them through the clearing house. Each of said checks was charged to plaintiff's account with the defendant, and the amount thereof entered as a charge against its deposit in its bank book when the same was settled. On each settlement the balance was struck and entered, after deducting the amount of the checks paid on the forged indorsements. During the period of these forgeries the bank book of the appellant was settled 76 times, and all checks that had been paid by the bank, including those bearing the forged indorsements, were regularly returned to the appellant at each settlement of its bank book. Reber continued in its employ until April 1, 1903. Some of his forgeries were discovered on or about January 1, 1904, and within two or three weeks thereafter a very large number of the 90 forged indorsements were discovered. The twenty-fourth finding of fact of the referee is: "No notice was given by the plaintiff to the defendant of the forgeries or any of them until April 11, 1904. As stated in finding No. 10, the bank book was settled three times, viz., on February 1, 1904, February 28, 1904, and March 31, 1904, after the discovery of the forgeries and before notice was given thereof on April 11, 1904. During the same period, Robert K. McNeely, who was a director of the bank, attended directors' meetings weekly from January 4, 1904, to April 11, 1904, a total of 14 meetings, but gave no notice to the bank concerning the forged indorsements or complaining of their payment." Robert K. McNeely, referred to in the foregoing finding, was a director of the company and its secretary and treasurer, having charge of its offices and the examination of its trial balances. Reber was able to conceal his forgeries from his employer by a complicated and ingenious system, which need not be here described, for the referee has found that the appellant was not negligent in failing to discover them sooner, though they extended through a period of nearly six years. The reasons for this finding are unimportant, if the legal conclusion of the referee and court was correct, that the appellant so delayed giving notice to the bank of the forgeries, after it had discovered them, that it cannot recover the amount paid and charged to its account on any of the forged indorsements. The fact that Reber had forged some of the indorsements was, as stated, discovered about January 1, 1904, and within two or three weeks thereafter it was known to the appellant that a very large number of the 90



forgeries had been committed; but no notice of this was given to the bank until nearly three months afterwards. The duty of a depositor in a bank, upon discovering that it has paid and charged to his account either a check bearing his forged signature as drawer or his check on the forged indorsement of the payee, is to promptly notify it of the forgery. This notification is not only a duty, but it is what a depositor will instinctively do on discovering, upon the return of his bank book with canceled checks charged to his account, that there are among them some which he never signed or which were not paid to the payees named in them. This duty is not questioned by the learned counsel for the appellant. Their contention is that, for the disregard of it, a depositor is not to be barred from recovering from the bank what it may have paid on his forged signatures or on the forged indorsements of payees named in checks drawn by him, unless, by his failure to promptly notify it of the forgeries, it has lost rights over against other parties, and the burden is upon it to prove such loss. Authorities are not wanting to support this, but the referee and court below did not follow them. Relying upon others, they held that the plaintiff, by reason of its failure to promptly notify the bank of its discovery of the forgeries, could not recover, even though the bank had offered no evidence that it could have protected itself and the plaintiff had not shown that it could not if prompt notice had been given.

The relation between a bank and its depositor is a contractual one. Its undertaking with its depositor is to pay his checks, if he has sufficient funds with it for that purpose, and it assumes all the risk as against him of a mispayment in paying and charging to his account a check which he has not signed or one which he has signed bearing a forged indorsement of the payee. To his account it may not charge such a check. If it does, the depositor can recover from it the amount so charged. No payment by a bank on a forged signature of a depositor as drawer of a check or on a forged indorsement of his payee can affect him. His right is to get back from the bank whatever he has deposited with it, less what has been properly paid out on his orders. The responsibility of the bank to the depositor is absolute, and it can retain no money deposited with it by him to reimburse it for any mispayment it has made out of such deposit; but it can recover from a forger responsible for the mispayment, or from those who, by their indorsement of a check, have vouched for previous indorsements or the genuineness of the signature of the alleged drawer. The right of a bank to recover from a forger, or from those to whom it may have paid a check bearing the forged signature of one of its depositors, or a forged indorsement, is its only remedy for the fraud practiced upon it by the forgery. The depositor's money is not affected by it, and,

when he is the first to discover it, it is not reasonable that he should not be required to give prompt notice of it to the bank, if he intends to hold his depository liable for the mispayment, and this without regard to what may or may not result from a prompt effort to recover from the party or parties who may be liable to the bank for the mispayment. The depositor can gain nothing by withholding knowledge of the forgery, but the bank, if kept in ignorance of it after his discovery of it, may lose everything. As soon as a bank learns that it has paid a check on a forged signature of a depositor, or on a forged indorsement on his check, it is its duty to promptly restore to the depositor's account what was improperly taken from it, and its right at the same time is to proceed against those who wrongfully got the money. This right is to proceed immediately, and to the promptness with which a bank is able to exercise its recovery is often due. When a depositor withholds from his bank his knowledge of the forgery, he withholds from it this right to proceed promptly for its own protection. It may or may not be able to recover from the forger by promptly proceeding against him, but its right is to try by so proceeding; and, when one of its depositors discovers that it has innocently sustained a loss, he ought, not only in all good conscience, but as a legal duty, to notify it at once of its mistake; for by withholding from it what he has discovered he can, as just stated, gain nothing, but it may lose all. A forger may be insolvent or beyond the reach of civil or criminal process, but, by prompt proceedings against him, others may become interested in him and come to his assistance, who after delay may not do so. This incident to a bank's right to promptly proceed against a forger is not to be overlooked. Whenever a depositor knowingly withholds from it knowledge without which it cannot so proceed in an effort to protect itself, he ought to be regarded, when he comes to enforce alleged rights against it, as having withheld from it a substantial right, without regard to what might or might not have resulted from a prompt exercise of that right. When an indorser on a promissory note defends on the ground that prompt notice was not given him of its nonpayment, the holder will not be heard in reply that, if notice of the nonpayment had been promptly given, it would not have helped the indorser, because he could have recovered nothing from the maker of the note or prior indorsers. The right of the indorser on a note is to prompt notice of its nonpayment, that he may have an opportunity of proceeding promptly against the maker or prior indorsers, without regard to what may result from his efforts, and, if this right is not given him, his liability is at an end. "The insolvency of the maker of a note, though known to the indorser, ought not to discharge the holder from giving notice. There are various degrees of insolvency, and it rarely

happens that a man is totally insolvent. So that there is a chance of getting something by an application to the debtor. Besides, if a man has nothing of his own, he may have friends, who, to relieve him from pressure, will do something for him. The indorser, therefore, has a chance of securing himself, at least in part. The only reason that can be assigned for insolvency taking away the necessity of notice is that notice could be of no use to the indorser; but it is almost impossible to prove that it might not have been of use. Therefore it is necessary." *Barton v. Baker*, 1 Serg. & R. 334, 7 Am. Dec. 620. Why should a different rule apply to a bank, which never knowingly pays on a forgery, but, in cases like the one now before us, is always an innocent victim?

Delay by a depositor in giving notice to a bank means not only its enforced delay in proceeding against those liable to it, but means loss of evidence as well; and, if the rule for which appellant contends should prevail, a bank might be deprived of the opportunity of showing that prompt proceeding on its part would have resulted in its recovering for its loss. And, again, in a suit brought by a depositor against a bank to recover the amount which it may have improperly paid on a forgery, the issue is the forgery. This issue ought not to be complicated with another, and a speculative one, as to whether anything might have been recovered from the forger, if prompt notice had been given to the bank of the forgery. The only reasonable and logical rule is the one adopted by the referee and the court below. Our own cases are in harmony with it, and it is approved by high authority. A different one would be putting a premium upon the laches of a depositor, and give to a dishonest one opportunity to help a forger to escape.

In *Rick v. Kelly* and *Rick v. Fisher*, 30 Pa. 527, the plaintiffs below purchased from the defendants notes bearing the genuine signature of George Fox, as maker, but the forged indorsements of the payee. In reversing the judgments in favor of the plaintiffs and announcing the general rule that notice of a forgery within a reasonable time after discovery is necessary for the maintenance of an action for the recovery of the money paid for such notes, it was said by Porter, J.: "The notes in this suit contained a genuine name. For aught that appears, timely application to that party might have saved the debt, for others thought proper to obtain judgments and sell his property. At some stage of the business the plaintiffs obtained knowledge of the forgery, for they brought the actions and put the fact on record. Why not inform the defendant of his risk, and give him a chance of escape by a direct blow at the maker? What justice could there be in permitting a holder to hold on until the very close of the period of limitation, and then to spring a suit on the seller, when the genuine parties are dead and their estates gone?" In *Myers v. Southwest-*

*ern National Bank*, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672, in a suit to recover what had been paid by the bank on the forged signature of the plaintiff to checks, judgment on a verdict directed for the defendant was sustained, because the plaintiff had not promptly notified it of the forgeries after he was held to have had notice of them, and we said: "It was not the bank's fault that the first forgeries were not promptly discovered and notice thereof given. If the plaintiff's duty to the bank had been performed at the proper time, the fact would have appeared that the bank had charged plaintiff, on his bank book, with the payment of two items (\$300 and \$200) for which no vouchers appeared among the checks handed to him by his clerk. These vouchers, the two forged checks, had been abstracted and destroyed by the latter. No objection having been made at the time of the first settlement, the bank had a right to assume that everything was correct, including the two checks purporting to be signed by him. His silence was tantamount to a declaration to that effect, and, in afterwards honoring checks signed by the same person, the bank had a right to consider the fact that the signatures had been at least tacitly recognized by the plaintiff as genuine. While the plaintiff was not chargeable with the knowledge of his clerk that the latter had committed the forgery, he was clearly responsible for the acts and omissions of his clerk in the course of the duties with which he was intrusted, viz., to receive the checks from the bank, take them to his employer's office, compare the amounts thereof with the amounts in the bank book and check book, etc. In view of the uncontradicted evidence as to the foregoing facts it cannot be doubted that, as between the bank and the plaintiff, the latter alone should be held responsible for the consequences resulting from the failure to examine the checks in question, and approve or reject them within a reasonable time. In contemplation of law the delivery of the checks to plaintiff's clerk was a delivery by the bank to the plaintiff himself, as the basis on which its credits were claimed. The bank was therefore entitled to have them examined, and, if rejected, returned within a reasonable time. That was not done, and because of plaintiff's failure to perform his duty in that regard he should not be permitted to recover. Any other rule would be inconsistent, not only with general and long-established custom, but also with well-settled principles of law on the subject. *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 107, 6 Sup. Ct. 657, 29 L. Ed. 811; *United Security, etc., Co. v. Central Nat. Bank*, 185 Pa. 586, 40 Atl. 97."

A very learned referee in *United Security Life Insurance & Trust Company of Pennsylvania v. Central National Bank of Philadelphia*, 185 Pa. 586, 40 Atl. 97, in his report, confirmed by the court, held that the plaintiff was not entitled to recover from the defend-

ant the amounts paid and charged to its account on forged indorsements, because it had not promptly notified the defendant of the forgeries after it had what the referee held to be constructive notice of them. The judgment was reversed solely on the ground that the referee had erred in finding that the plaintiff had had constructive notice of the forgeries on March 27, 1894, and judgment was directed to be entered for it, because, when it actually discovered the forgeries on May 17, 1894, it gave immediate notice to the defendant. What the referee said and what was not held to be error was: "The referee is of opinion that it is not necessary for the defendant to make effective the defense based upon the want of diligence of the plaintiff in giving notice of the forgery to show with certainty that had notice been given at an earlier day a fund belonging to Williams (the forger) was in existence which could have been attached and held. When it is once shown that the plaintiff failed to give prompt notice of the discovery of the forgery, the plaintiff's right of action is gone. The law assumes, and does not find it necessary to conduct an inquiry to verify the assumption, that, had the notice been given promptly, the Central Bank might have taken steps to protect itself as against Williams." A sentence from the opinion in *Iron City National Bank v. Ft. Pitt National Bank*, 159 Pa. 46, 28 Atl. 195, 23 L. R. A. 615, is pointed to by counsel for the appellant as an expression from this court sustaining their contention. In that case the present Chief Justice did say that all a bank which has paid a forged check of one of its depositors "need do in any case is to give notice promptly according to the circumstances and the usage of the business, and, unless the position of the party receiving the money has been altered for the worse in the meantime, it would seem that the date of notice is not material." This must be read with reference to the facts in that case. As to those in the present one, it is not applicable. There the Fort Pitt National Bank, the defendant, which received the money on the forged check, had paid it out on the check of its depositor, to whose credit it had been placed, and all that we meant to say was that if the bank had not paid it out, and could still have protected itself by withholding it, the date of the notice of the forgery would not have been material.

The rule followed by the learned referee and court below is the only reasonable, logical, and proper one in this class of cases. It is approved by the Supreme Court of the United States in *Leather Manufacturers' Nat. Bank v. Morgan et al.*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811, where it is said by Harlan, J.: "If the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or

other form of proceeding, to compel restitution. It is not necessary that it should be made to appear, by evidence, that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed or subsequently property sufficient to meet the demands of the bank. \* \* \* As the right to seek and compel restoration and payments from the person committing the forgeries was in itself a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectively, exercising it. *Continental Bank v. Nat. Bank of the Commonwealth*, 50 N. Y. 583; *Voorhis v. Olmstead*, 66 N. Y. 113, 118; *Knights v. Wiffen*, L. R. 5 Q. B. 660; *Casco Bank v. Keene*, 53 Maine, 103; *Fall River Bank v. Buffinton*, 97 Mass. 498."

Other questions raised by the appellant need not be considered in view of the correct conclusion of the court below that its delay in giving the appellee notice of the forgeries bars its right to recover.

The assignments of error are all overruled, and the judgment is affirmed.

(221 Pa. 642)

#### LA BELLE COKE CO. v. SMITH.

(Supreme Court of Pennsylvania. June 2, 1908.)

#### 1. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—CERTAINTY.

Specific performance cannot be had of a bond for title, which does not set forth the purchase price, nor the terms of payment, nor indicate what the purchaser is to perform.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 61-64.]

#### 2. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—NATURE AND GROUNDS OF PROTECTION.

The purchaser of an equitable title takes it subject to the equities against it in the hands of his vendor. It is only the purchaser of a title perfect on its face for a valuable consideration who takes it discharged from every equity of which he had no notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 592.]

#### 3. SAME.

A purchaser of a portion of land from the equitable owner, pending a controversy between the equitable owner and the legal owner as to the boundary line, is bound by the boundary line fixed by a compromise deed.

Appeal from Court of Common Pleas, Fayette County.

Ejectment by the La Belle Coke Company against Jeremiah Smith for coal underlying land. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the opinion of Umbel, J. in the court below:

"In the early part of the nineteenth cen-

tury John Crawford owned several hundred acres of land situate on the Monongahela river, in Luzerne township, Fayette county, Pa., including the coal, title to which is now in dispute in this case, and on February 18, 1830, he executed a bond to his son, William W. Crawford, in the sum of \$6,000, conditioned that he should within one year execute to him, his heirs and assigns, a good and sufficient deed in fee simple for 200 acres of the said land, more or less, bounded by the courses and distances as surveyed by Joseph Crawford, Jr., with certain unimportant reservations, which bond was recorded January 6, 1838, and the coal in question was included within the boundaries of the land referred to in said bond. The conditions of the bond as to the making of the deed within one year and the conveyance of the identical land called for in the bond were not complied with, nor is there any evidence that the said William W. Crawford, the obligee in the bond, took any legal steps toward enforcing his rights under it, nor was deed made to him for any part of the 200 acres until 1840. Recorded with the bond is an ex parte affidavit, dated January 1, 1836, of Joseph Crawford, Jr., referred to in the bond as the engineer who made the survey, setting forth: (1) The courses and distances of the survey, seemingly so far as material to the controversy between the parties, as follows: 'Beginning at a stone near the spring run, 70 perches from a stone in the division line between William Crawford, brother of John Crawford, and John Crawford, S. 75° W. 51 perches, to a stone; thence S. 18¼° E. 94.5 perches, to a sugar tree; thence S. 72° W. 35 perches, to a W. O. on top of the river hill; thence same course to the river,'—which includes the coal in question within the aforesaid 200 acres, more or less. (2) That he believed the said survey is the one alluded to in the said bond of February, 1830. (3) That John Crawford told deponent that the land contained within the above-mentioned lines was exclusively for his son, William W. Crawford, making mention at the same time that there was one field more in the survey that he originally intended to give William, but on reflection he thought William was entitled to in consideration of some debts he (William) had paid for John's son-in-law. (4) That John Crawford repeatedly told deponent that William W. Crawford was to have the land above mentioned one or two years after the bond alluded to was executed. (5) William W. Crawford called upon deponent to make the survey, which survey deponent made in the presence of John Crawford, the father, the plot of which survey deponent gave into the possession of his father, Joseph Crawford. At that time John Crawford told deponent he had agreed to give William W., his son, a deed according with the second survey, excepting a portion of the river hill. There is also recorded with the said bond another ex parte affidavit,

dated January 1, 1836, of John Bower, who says the bond was drawn up by him, that it was voluntarily executed by said John Crawford, and that deponent's recollection is that it was prior to the last marriage of said John Crawford. These two affidavits, while of small material consequence in the adjustment of the matter in dispute, show conclusively that there was then, and evidently for some time had been, a controversy between John Crawford and his son, William W. Crawford, regarding what should be included in the conveyance, affecting particularly the lines as bearing on the part of the said 200 acres over and in the vicinity of the coal in question.

"By deed dated December 30, 1837 (two years after the date of the above affidavit), William W. Crawford and wife conveyed to Henry Turner the following described land: 'A certain lot of ground situate near the Monongahela river, in the county aforesaid, bounded as follows: Beginning at a sugar tree near the coal bank belonging to Joseph Davis, and running S. 17° W. 200 feet, in front along the said river, and extending back 300 feet between the parallel lines bearing N. 73° E., and also the coal under the ground between said parallel lines continuing in the same course as far back as the said William W. Crawford's land extends,' which by legal conveyance, etc., in due time became vested in the defendant. By deed dated April 3, 1841, William W. Crawford and wife conveyed to Gideon John a part of the said premises fronting 12.85 perches on the river and extending back 12.85 perches between parallel lines bearing N. 73° E., forming a square containing 165 perches, 'also the coal lying under the surface of the ground embraced between the two parallel lines aforesaid continued in the same course, viz., N. 73° E., as far back as said William W. Crawford's land extends,' which by due and legal conveyance became vested in the defendant. Other conveyances were made by said William W. Crawford of coal lots or tracts near and adjoining the Turner and John lots aforesaid, bounded on the north and south by lines parallel to the longest lines of said Turner and John lots, and in each deed there is included 'also the coal under the ground back of said lot embraced between the above-described parallel lines continued in the same course as far back as said William W. Crawford's land extends.' The indefiniteness of the extent of the coal conveyed in each instance, and the failure to locate the real line, conclusively establish that such line was uncertain, and not fixed, and that it was doubtless the occasion of controversy between said John and William W. Crawford. Further evidence of controversy between them is the action of ejectment instituted by John Crawford against William W. Crawford, Henry Turner, and others, at No. 49, June term, 1838, for the 200 acres referred to in the above-mentioned

bond, which action was compromised and settled after December, 1839.

"In the limited time we have been able to devote to the consideration of this case, we have not discovered any authority holding or indicating that, on failure or refusal of John Crawford to carry out the condition of the said bond, the obligee, William W. Crawford, could enforce specific performance and compel conveyance to him of the said 200 acres. If the obligor failed or refused to convey, etc., the obligee's remedy would be to sue on the bond, in view of which we seriously question whether such title vested in the obligee in the bond under the provisions thereof as would enable him to make conveyance of title to the Turner and other lots, or any part of the said 200 acres, without other and further action on the part of the obligor, except subject to the existing equities between John and his son, William W. Suppose the obligor for some reason had refused absolutely to convey all or any part of said 200 acres, as the action of ejectment at No. 49, June term, 1838, indicates he contemplated; would not the obligee have been limited to recovery on the bond, and the obligor could not have been held liable beyond the penalty thereof? Suppose, further, that the obligor had elected not to convey, and proceeded forthwith to the obligee and advised him accordingly, and thereupon paid, or in good faith offered to pay, him the \$6,000 penalty provided in the bond; would it be contended that such action on the part of the obligor did not free and clear him, and operate to satisfy the said bond, and at the same time wipe out every possible interest and claim that the obligee had or could have in the said 200 acres, and every part thereof, under the said bond? We strongly incline to the conviction that these considerations would have to be decided in favor of the obligor. *Streep v. Williams*, 48 Pa. 450; *Mathews v. Sharp*, 99 Pa. 560; *Clements v. Railroad Co.*, 132 Pa. 445, 19 Atl. 274, 276. The purchaser (Turner and others) of an equitable title, or of a title inchoate or defective on its face, takes it subject to all the countervailing equities to which it was subject in the hands of the person (William W. Crawford) from whom he purchases. He cannot claim to be placed in a better position than such person. It is only the purchaser of a title perfect on its face, for a valuable consideration, who takes it discharged from every equity or claim of which he had no notice. *Chew v. Barnet*, 11 Serg. & R. 389; *Chew v. Parker*, 3 Rawle, 283; *Reed v. Dickey*, 2 Watts, 459; *Kramer v. Arthurs*, 7 Pa. 165.

"The agreement between John Crawford and William W. Crawford, dated July 24, 1840, by which their differences were adjusted, provides as follows, viz.: 'Whereas, there had been some dispute between us in relation to the land for which John Crawford was bound to make a title to his son, Wil-

liam W. Crawford, and in order to settle all further dispute and controversy on the subject, and to fix a proper line between us, it is hereby now agreed by John Crawford, of Fayette county, Pa., of the one part, and his son, William W. Crawford, of the other part, that the said John Crawford shall make a good and sufficient deed in fee simple for 190 acres of the tract of land on which they both now reside, to be run off as follows, so as to include the part on which said William now resides, viz.: Beginning at the Monongahela river, at the corner between William Crawford and brother of said John Crawford; thence by the courses and distances of the patent up the river to the coal bank of Henry Turner, so as to include the same; thence up the river hill to the top; thence along down the river on the top of the hill to a point from which, by running a straight line across to the line between said John Crawford and his brother, William Crawford, so as to include in the whole 190 acres; thence by the line between said John and his brother William to the corner on the river, the place of beginning. The said William W. Crawford to have the privilege of running back under the land of said John Crawford from the coal bank of Henry Turner, reserving also sales already made to Turner and others as to mining by the said William W. Crawford. Said John Crawford to make said deed and survey on or before the 1st day of October next, with notice to the said William W. Crawford; said survey to be made by the county surveyor or John I. Dorsey.' The deed made in pursuance of the said agreement is dated September 22, 1840, and contains a description of the said 190 acres by courses and distances, and also the provisions quoted last above in the agreement of compromise regarding the privilege of William W. Crawford running back under the land of John Crawford, etc. It will be observed that the Turner deed was made before, and the John deed after, September 22, 1840; but one of the other deeds offered in evidence, dated previous to September 22, 1840, recites such matter as indicates that William W. Crawford sold to John before the last-named date.

"Referring to the courses and distances set forth in the affidavit of Joseph Crawford, Jr., recorded with the above-mentioned bond, and the courses and distances set forth in the deed of September 22, 1840, and comparing plots offered in evidence that were made in pursuance thereof, it clearly appeared that the coal in question was not included in the conveyance of September 22, 1840, and that the said rear property line of William W. Crawford was the western end of the coal in dispute. If conveyances had been made by John Crawford to William W. Crawford as provided in said bond of February 18, 1830, the said rear property line would have been about 120 perches from the front line of the river. The surface tracts conveyed by

William W. Crawford to Henry Turner and others extends back from the river only from about 12 to 18 perches, and the coal intended to be conveyed would extend, according to the claim of the defendant, considerably beyond what was under the surface lots. It was, in addition to what was under the surface lots, a narrow strip, from 200 to 300 feet wide, extending back from the rear line of the surface lots to the rear or eastern property line of John Crawford, noted in the above-mentioned affidavit of Joseph Crawford, Jr., as 70 perches in length, between a stone near the spring run and a stone in the division between John Crawford and his brother William, a distance of from 102 to 107 perches from the rear line of the surface lots. According to the agreement of compromise of July 24, 1840, and the deed made in pursuance thereof, it was definitely ascertained, determined, and established for the first time, so far as appears from the evidence, that the said property line of William W. Crawford at the point in question was only 37.7 perches from the river, instead of about 120 perches, which would extend defendant's coal back beyond the rear line of the surface lots from 19 to 24 perches, instead of from 102 to 107.

"The established facts satisfy us beyond a doubt that the said rear line was a bone of contention between John Crawford and William W. Crawford for years, and was not definitely determined until the execution of the agreement of compromise in July, 1840, and the deed made in pursuance thereof in September of the same year, and we believe and conclude such condition was the occasion of the indefinite description and uncertain extent of the said coal, being described as 'the coal under the ground between said parallel lines continued in the same course as far back as the said William W. Crawford's land extends,' and William W. Crawford having at most only a defeasible equitable title, the sales were made and the deeds accepted by Henry Turner and others with the understanding that the rear line of their coal was to be the line finally determined and agreed upon as the rear property line of William W. Crawford; else why would the deeds not have expressed clearly that they were to extend to a certain, fixed, definite line, which could easily have been done if defendant's contention be correct, but which could not be done in any other way, manner, or language than that used if the rear line of William W. Crawford was undetermined and the extent of his land uncertain, as it was at the time the Turner and Searight deeds and Gideon John's contract were made? We think this conclusion is warranted by the principle stated by our Supreme Court in *Meigs v. Lewis*, 164 Pa. 597, 30 Atl. 505, cited by defendant, which holds that 'in construing a deed it is proper, and sometimes necessary, to consider the circumstances under which it is made, for the purpose of ascertaining the intention

of the parties,' which is abundantly sustained by a long line of decisions. In the same case, quoting from *Lacy v. Green*, 84 Pa. 514, we find: 'When the meaning of an agreement is doubtful, its terms are to be considered in the light thrown on them by proved or admitted illustrative facts. The situation in which the parties stand, the necessities for which they would naturally provide, the conveniences they would probably seek to secure, and the circumstances and relations of the property, in regard to which they have negotiated, are all elements in the interpretation of an ambiguous contract.'

"It is earnestly insisted on the part of the defendant that the provision in the agreement of compromise and the deed from John Crawford to William W. Crawford in 1840, as follows, viz., 'The said William W. Crawford to have the privilege of running back under the land of the said John Crawford from the coal bank of Henry Turner, reserving also the sales also made to Turner and others as to the mining by the said William W. Crawford,' amounts to a conveyance of the title from John Crawford to the vendees of William W. Crawford for the coal between the rear line of William W. Crawford as established by the deed of September 22d and the eastern line of John Crawford, which is the coal in dispute, which contention we cannot approve, as it is lacking in the requisite formalities necessary and incident to a legal conveyance. What is the meaning of the expression, 'The said William W. Crawford to have the privilege of running back under the land of the said John Crawford from the coal bank of Henry Turner?' Adopting the contention of the defendant, barring conveyance, that it was intended to extend to William W. Crawford and his grantees the right to mine and remove the coal in question, as well as the coal in rear of other lots, it develops a condition at once unreasonable, if not absurd, in limiting the privilege to 'the coal bank of Henry Turner,' as there were several other lots conveyed by William W. Crawford adjoining and fronting on the river for a distance of about one-third of a mile, and defendant's exhibits show that there were several other banks, yet, under the above, all the coal back of what was established to be the rear line of the land of William W. Crawford would have to be brought out the Turner bank. We cannot conclude otherwise than that it was intended to be a personal privilege extended to William W. Crawford 'of running back under the land of the said John Crawford from the coal bank of Henry Turner.' For what purpose is not expressed, but doubtless for the purpose of taking out coal conveniently located, if an arrangement should be effected along the line between the said William W. Crawford and Henry Turner for the use of the latter's bank, and, in our opinion, it has no connection or reference whatever to any previous conveyance made by William W. Crawford, which

conclusion we think is warranted by the clause next following the above quoted, viz.: 'Reserving, also, the sales already made to Turner and others as to mining by the said William W. Crawford.'

"If the clause quoted first above had been intended to refer to the Turner and other conveyances, it could easily have been so expressed in language clear and ambiguous, and the second clause last above quoted 'reserving also,' etc., referring to the Turner and other lots, indicates to our mind that the first clause does not have any reference to the Turner and other lots. It is undoubtedly true, if John Crawford had made conveyance to William W. Crawford in such way as to have given title to William W. Crawford to the line claimed by defendant as the rear line of William W. Crawford's land, such conveyance would have inured to the benefit of the defendant and its predecessors in title, and he would now be entitled to the property. But such uncertain and indefinite statement as relied on by the defendant, quoted above, cannot, in our opinion, be the basis for claim to title to real estate under the circumstances of this case. The language quoted above in one way almost warrants the conclusion that John Crawford, instead of ratifying and confirming the sales to Henry Turner and others by William W. Crawford, meant to repudiate such action and reserve to himself the right of making such conveyances as above indicated in 'reserving, also, the sales already made to Turner and others as to mining by the said William W. Crawford,' which can hardly be taken to mean a ratification, but is rather in the nature of a reservation, which in law is said to be 'an express withholding of certain rights, the surrender of which would otherwise follow or might be inferred from one's act.' Applying the principles set forth in *Rock Island Ry. Co. v. Rio Grande R. R. Co.*, 143 U. S. 596, 12 Sup. Ct. 479, 36 L. Ed. 277, to the effect that the meaning of a reservation must be determined in every case by the particular facts of the case, such as the character of the conveyance, the nature and situation of the property conveyed, and of the property reserved or excepted, and the purpose thereof, to the facts here, inclined us to doubt that the intention of the conveyance in question was to ratify and confirm the titles from John Crawford to the grantees in 'the sales already made to Turner and others' by William W. Crawford. But grant that it is confirmatory in character, what does it confirm? 'The sales already made to Turner and others.' What were the 'sales already made to Turner and others'? Certain surface lots and coal under them, and under the ground in rear of them, extending 'as far back as the said William W. Crawford's land extends.'

"We now come to the most important question, viz.: How far does William W. Crawford's land extend, or how far did it extend

at the time of the execution of such deeds? That is not fixed or certain, but is in controversy, uncertain, indefinite, and the uncertainty attending it was current rumor in the community at the time of 'the sales made to Turner and others,' and it cannot be determined until their differences are adjusted, which is done in July, 1840. True, in view of the deed of September 22, 1840, we question the necessity of any confirmation of the Turner and other deeds, and, if confirmed, it was doubtless occasioned by the fact of the previous and existing controversy attending when these deeds or the sales were made, and was done at the suggestion and request of William W. Crawford or Turner and others, so as to free the matter from other or further question; and such confirmation did not apply beyond the line 37.7 perches from the river. Inasmuch, then, as the land of William W. Crawford does not, and never did, by any title other than a defeasible one, extend back to the line 120 perches from the river, claimed by the defendant as the rear line of the said coal lots, no conveyance of his could give title beyond his rear line, as definitely determined to be 37.7 perches from the river; and, taking all the records and giving to each its fullest force, we cannot discover such facts and conditions as warrant us in holding that the title to the coal in dispute ever passed from John Crawford, down the line of conveyances, etc., claimed by the defendant, but we do find and conclude that the due and legal title to the coal in dispute did pass from John Crawford, down the line claimed by the plaintiff, and is now fully and completely vested in the La Belle Coke Company."

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

H. L. Robinson and R. W. Dawson, for appellant. Geo. D. Howell, for appellee.

POTTER, J. This was an issue in ejectment, framed to try the ownership of the coal underlying a tract of land in Luzerne township, Fayette county, Pa. The trial judge directed a verdict for the plaintiff, subject to a point of law reserved, and subsequently discharged a rule for judgment non obstante veredicto and entered judgment upon the verdict. The question raised by this appeal involves the proper construction of a title bond or agreement of John Crawford, dated February 18, 1830, in which he agreed to convey about 200 acres of land to William W. Crawford. And as no deed was executed by John Crawford within the time stated in the bond, and as a controversy arose between John Crawford, the father, and William W. Crawford, his son, with regard to just how much or what was to be conveyed under the bond, and this controversy the parties attempted and intended to settle by a compromise agreement dated July 24, 1840, it



became necessary also to construe the terms of that compromise agreement.

The point in dispute was as to the limits of the coal tract—whether it ceased at the brow of the river hill, or extended back of and beyond that line. During the continuance of the controversy in December, 1837, William W. Crawford sold a portion of the ground, and, being uncertain as to the definite location of his line, in a deed to Henry Turner he conveyed as far back “as the said William W. Crawford’s land extends.” From this it is plain that he intended to convey to the limit of his own title, wherever that might be. As the trial judge says: “William W. Crawford having at most only a defeasible equitable title, his sales were made and the deeds were accepted by Turner and others, with the understanding that the rear line of their coal was to be the line finally determined and agreed upon as the real property line of W. W. Crawford.” The court below was of the opinion that, under the bond for a deed given by John Crawford, specific performance could not have been enforced. We coincide with this view. The bond does not set forth the purchase price, nor the terms of payment; nor is there anything upon the surface of the paper to indicate what the purchaser was to perform. This in itself is enough to prevent specific performance. We are satisfied that the trial judge was right in his conclusion that any conveyance which might have been made by William W. Crawford must have been subject to the equities between him and his father, John Crawford.

Nor are we able to find anything in the record to sustain the position, which appellant’s counsel seem to have assumed, that William W. Crawford was in actual possession of the coal now in dispute. The contrary would seem to be true, for when the dispute was finally settled, in the compromise agreement of 1840 between the two Crawfords, it was determined that the title of William W. Crawford did not extend beyond the line along the brow of the river hill. In that settlement John Crawford agreed to make a deed “to William for 190 acres of the tract on which they both now reside, to be run off as follows, so as to include the part on which said William now resides.” We do not understand that any of the coal now in dispute was included in the 190 acres above referred to, and from the plots offered in evidence it seems that the rear property line of W. W. Crawford is the western line of the coal in dispute. In the compromise agreement, and in the deed made in pursuance of it, there was a provision extending to William W. Crawford the privilege of running back under the land of the said John Crawford; but this the trial judge construed as being only a personal privilege to William, and not as a conveyance of the title to the coal. The language is not clear, but we cannot say that the court below was wrong in holding that the purpose was to permit William W. Craw-

ford to take out such coal as he might need for his own use.

Counsel for appellant have contended with much force that the proper construction of the original bond for title, and the language of the compromise agreement, and the various deeds offered in evidence, was sufficient to establish title to the coal in controversy in the defendant. We are satisfied, however, from our examination of the record, that we would not be justified in reaching a conclusion in this respect different from that reached by the trial judge. We can add nothing to his detailed discussion of the various papers offered in evidence, and their meaning and effect, as conveying the title from John Crawford. It would be fruitless for us to add to or repeat what has been well said, in this connection, in the opinion of the court below in entering judgment for the plaintiff. We coincide with the final conclusion that the legal title to the coal in dispute did pass from John Crawford down the line, as claimed by the plaintiff, La Belle Coke Company.

The judgment is affirmed.

(222 Pa. 20)

ESHLEMAN v. UNION STOCKYARDS CO.  
(Supreme Court of Pennsylvania. June 2, 1908.)

1. ANIMALS—CONTAGIOUS AND INFECTIOUS DISEASES—RULES OF BUREAU OF ANIMAL INDUSTRY—EFFECT IN STATES.

Rules of the Bureau of Animal Industry of the Department of Agriculture, organized by Act Cong. May 29, 1884, c. 60, 23 Stat. 31 (U. S. Comp. St. 1901, p. 299), known as the “Animal Industry Act,” for the suppression of contagious diseases among domestic animals, have not, apart from the action of a state, any binding force upon the state.

2. SAME—LIABILITIES FOR COMMUNICATION OF DISEASE.

The keeping of an animal having an infectious disease is not per se culpable, and will not give a right of action for damages sustained in consequence of the disease being communicated to other animals, unless the owner of the diseased animal knew that it was diseased and was guilty of some negligence in the manner of keeping it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Animals, §§ 83, 84.]

3. SAME—STOCKYARDS COMPANY—DUTY—DISEASED ANIMALS.

In an action against a stockyards company for the death of cattle from Texas fever, alleged to have been communicated to them by ticks which had dropped in pens of the stockyards from other cattle theretofore confined therein, plaintiff is bound to show, not only that the cattle alleged to have dropped the ticks were placed in the pens, but that they contaminated the same and that the stockyards company did not disinfect the pens and again put them in proper condition.

4. SAME—PRESUMPTIONS AND BURDEN OF PROOF.

In an action against a stockyards company for the death of cattle from Texas fever, alleged to have been communicated to them by ticks which had dropped in pens of the stockyards from other cattle theretofore confined therein, it will be presumed that the stockyards company performed its duty, and, where there is



no evidence to the contrary, recovery cannot be had against it.

**5. NEGLIGENCE—PROXIMATE CAUSE.**

A person guilty of negligence is liable for the damage sustained by any one injured by the wrongful act, but is responsible only to him to whom the wrong is done, and not to those who suffer the remote consequences of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 73.]

**6. ANIMALS—CONTAGIOUS AND INFECTIOUS DISEASES—COMMUNICATION OF—PERSONS ENTITLED TO SUE.**

A purchaser of cattle subsequent to the communication to them of a disease has no right of action for the negligence to which the disease is due.

Appeal from Court of Common Pleas, Lancaster County.

Trespass to recover damages for the death of cattle from Texas fever, by Samuel Eshleman against the Union Stockyards Company. From an order refusing to take off a non-suit plaintiff appeals. Affirmed.

Landis, P. J., filed the following opinion in the trial court:

"This action for damages by the plaintiff rests upon the basis that the defendant company permitted cattle with Texas ticks upon them to be placed in its yards, and thereby Texas fever was communicated to cattle which he subsequently purchased, with the results that some of them died. The stockyards and cattle pens—which are owned by the Pennsylvania Railroad Company, but are leased by it to the defendant company—are located along the line of the Pennsylvania Railroad, adjacent to the city of Lancaster. These yards are used by shippers and wholesale dealers in cattle, and the plaintiff has been accustomed for some time to buy his stock there. Martin H. Flickinger was one of these wholesale dealers who did business at these yards, and certain pens, numbered Nos. 59 and 31, were generally used for his cattle and were known as his pens. On Saturday evening, June 21, 1904, two car loads of cattle, containing 44 head, from St. Louis, came to the stockyards. They were billed to Philadelphia, and were marked, 'Off at Lancaster to feed and water.' They had been purchased for slaughter purposes. These cattle were taken from the cars and placed in the rear of these so-called Flickinger pens, where they remained overnight. On the following morning (Sunday) they were moved to the lower part of the yards, to what is called the 'willow' pen. Flickinger, receiving notice of their arrival at the stockyards, came to Lancaster on Monday morning and directed the superintendent of the yard to ship the cattle to their destination. Upon seeing them he said: 'I see they are tick cattle. \* \* \* Take caution with them. They are not lawful to handle, unless you clean the pens right, and do the right thing.' They were taken from the willow pen, placed in cars, and shipped to Reading, where they were killed at the Reading abattoir. There was no evidence of any

mark upon the cars which brought them to Lancaster; but it was testified that the manifest showed that they were Southern cattle, and it was proven that there were ticks upon them. After they were unloaded at Lancaster, fat cattle of F. C. Musser were placed in the same cars and shipped to New York.

"On August 3, 1904, Flickinger sold to the plaintiff 13 head of butcher cattle. He had purchased them from S. B. Hedgen & Co., of Pittsburg, on August 1st. On August 10, 1904, he sold to the plaintiff a second lot of 10 or 11 cattle, and August 17th a third lot of 9 head. All of these cattle were apparently placed with his consent in, and were sold out of, pens Nos. 59 and 31. The second lot was bought from a man by the name of Hoover, who also deals at the yards, and were taken from Hoover's pens and placed in Flickinger's pens, and the third lot was bought from Musser. Flickinger stated that, while he did not examine the cattle particularly for ticks, they seemed to him, at the time he sold them, to be clean and healthy; and Musser says that the cattle he sold to Flickinger were apparently healthy cattle. The cattle were bought by Eshleman in the morning, taken out and weighed, and put back into the Flickinger pens until afternoon or evening, and then driven away by Eshleman. Eshleman kept the first lot about two weeks in pasture. He then sold eight of them to Daniel S. Leib, but only delivered seven. The one he retained died a few days after. Six of those thus sold to Leib died, and were replaced with four other cattle, and Eshleman promised to replace the other two. Of the second lot all died. Some had been sold outright by Eshleman to other parties and paid for; but three had been contracted to Martin Doster, and four to a Mr. Hummer. Of the third lot two died, one of which was contracted to John Ruhle. It was shown that there were Texas ticks upon all the cattle that died.

"The evidence showed that Texas or Southern cattle have at times upon them a parasite which is called a 'tick.' To the Southern cattle it is harmless. Being brought north by Southern cattle, after it is in this country, it falls from the animals to the ground and lays its eggs in grass or other material. The eggs are hatched out, the young ticks crawl onto the domestic cattle, and these cattle become infected by the tick biting them. The original tick, after it lays its eggs, dies, and no harm can result from it; but it is the progeny of the dead tick that causes the infection and produces Texas fever in the domestic cattle. For the hatching of the eggs and for the process of incubation of the disease about 30 days is the minimum time. One witness said that it takes 28 or 30 days until the young tick is able to crawl on the animal, and in about 10 days thereafter symptoms of the disease appear. Although the plaintiff's statement al-

leges that the defendant 'carelessly and negligently, and without having first properly disinfected and cleaned said pens, lanes, and alleys, caused and permitted other cattle not infected with said germ, parasite, or tick \* \* \* to be driven through the aforesaid lanes and alleys and to be confined in the same pens in which the said infected cattle had been confined,' there was no proof presented that the pens, lanes, and alleys had not been disinfected, nor was there any evidence that they had not been cleaned. There was no proof that any ticks were found by any one in these pens, Nos. 59 and 31, or upon any cattle while in the pens. The inference is made that because, on June 21st and 22d the cattle of Flickinger, which had ticks upon them, were overnight in the rear of these two pens, and were afterwards driven through the yard to the willow pen, and thence to the cars, therefore, the plaintiff's cattle, placed in the same pens from August 3d to 17th, or driven through the yard, became infected, by reason of which some of them died. These were the facts upon which the plaintiff insists that the defendant company is liable for the loss sustained.

"But two questions seem to be involved in this case: The first is whether there was any carelessness or negligence proved against the defendant company; and the second is whether, even this be so, the plaintiff is in a situation to recover damages from the defendant company. There was no evidence presented that the cattle which were purchased by Flickinger at St. Louis in June, 1904, were Texas cattle. All that was elucidated upon that subject was that in the manifest they were marked as Southern cattle. They may or may not have come from an infected district. The principle, therefore, which has been held by some courts and denied by others, that judicial notice will be taken of the fact that Texas cattle have some contagious or infectious disease communicable to native cattle, cannot be invoked. There is no presumption in this case against the defendant.

"The cattle were consigned to Philadelphia, but were to be left off at Lancaster to feed. This was done of the evening of Saturday, June 21st. The railroad company, under Act Cong. March 3, 1873, c. 252, § 1, 17 Stat. 594, was not permitted to confine in its cars cattle carried or transported from one state to another for a longer period than 28 consecutive hours, without unloading the same for rest, water, and feeding for a period of at least 5 consecutive hours, unless prevented by storm or other accidental causes. The unloading of the cattle, therefore, at Lancaster, for the purpose of watering and feeding them, was proper, and no liability attaches on that account.

"There is no statute in Pennsylvania relating to Texas fever as such, though there are laws preventing the sale of diseased cattle, and the 'State Live Stock Sanitary Board' is

authorized to prohibit their importation and to make and enforce rules and regulations in relation to contagious or infectious diseases as may from time to time be required. There is no evidence that any rules have been adopted which affect this controversy. There has been no act of Congress presented that imposes liability, though certain rules of the United States Bureau of Animal Industry were offered and admitted in this case. These rules were supposed to have been authorized by Act Cong. May 20, 1884, c. 60, 23 Stat. 31 (U. S. Comp. St. 1901, p. 299), known as the 'Animal Industry Act.' By the first section of that act the Commissioner of Agriculture was directed to organize in his department a Bureau of Animal Industry, to appoint a chief thereof, who should be a competent veterinary surgeon and whose duty it should be to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also to inquire into and report the causes of contagious, infectious, and communicable diseases among them, and the means for the prevention and cure of the same, and to collect such information on these subjects as should be valuable to the agricultural and commercial interests of the country; and by section 3 (23 Stat. 32 [U. S. Comp. St. 1901, p. 300]) it was made the duty of the Commissioner to prepare such rules and regulations as he might deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each state and territory, and invite said authorities to co-operate in the execution and enforcement of the act, and whenever the plans and methods of the Commissioner should be accepted by any state or territory in which pleuro-pneumonia or other contagious, infectious, or communicable disease is declared to exist, or such state or territory should have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods should be accepted by the Commissioner, and whenever the Governor of a state or other properly constituted authorities signify their readiness to co-operate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of this act, the Commissioner was authorized to expend as much of the money appropriated by the act as might be necessary in such investigations, and in such disinfection and quarantine measures as might be necessary to prevent the spread of the disease from one state or territory into another.

"If any authority exists in the Commissioner to make rules and regulations, it is under section 3, above recited; but it has been held by the United States Supreme Court, in *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108 (Mr. Justice Harlan delivering the opinion of the court), that 'Congress did not assume to declare that the "rules and

regulations" which that department might adopt as necessary "for the speedy and effectual suppression and extirpation of said diseases" should have in themselves, or apart from the action of a state, any binding force upon the states. They were to be certified to the executive authority of each state, and the co-operation of such authorities in executing the act of Congress invited. If the authorities of any state adopted the plans and methods devised by the department, or if the state authorities adopted measures of their own which the department approved, then the money appropriated by Congress could be used in conducting the required investigations, and in such disinfection and quarantine measures as might be necessary to prevent the spread of the diseases in question from one state or territory into another. Congress did not intend to override the powers of the states to care for the safety of the property of their people by such legislation as they deemed appropriate. It did not undertake to invest any officer or agent of the department with authority to go into a state and without its assent take charge of the work of suppressing or extirpating contagious, infectious, or communicable diseases there prevailing and which endangered the health of domestic animals.' In *Mullen v. Western Union Beef Company*, 9 Colo. App. 497, 49 Pac. 425, the plaintiff introduces in evidence an order, called 'Regulations Concerning Cattle Transportation,' issued by the Secretary of Agriculture, and it was held, by the Court of Appeals of Colorado, that such regulations were ineffectual in any state which did not co-operate with the Secretary in their enforcement, and in the absence of such co-operation, were outside of his authority. Upon the same general question is the case of *Illinois Central Railroad Company v. McKendree*, 203 U. S. 514, 27 Sup. Ct. 153, 51 L. Ed. 298, which was decided by the Supreme Court of the United States on December 17, 1906. These regulations should not have been admitted upon the trial, and they will, therefore, not be considered in arriving at our conclusion upon this rule.

"There being, therefore, an absence of statutory authority to sustain the plaintiff's cause of action, if recovery can be had, it must be by force of the common law. The rule of the common law is that knowledge is indispensably necessary to a recovery, and that negligence must be proven. The keeping of an animal having an infectious disease is not per se culpable. The right of any one to use his own property as he pleases for all purposes to which such property is usually applied is unlimited and unqualified, up to the point where the particular use becomes a nuisance. Hence the keeping of animals having an infectious disease on one's own property, although the adjoining premises have upon them other animals which are likely to be infected by the disease, is not unlawful; nor will it give the owner of the

adjoining premises a cause of action for damages sustained in consequence of the disease being so communicated to his animals, unless the person owning the diseased animals knows the fact that they are diseased and is guilty of some negligence in the manner of keeping them. *Fisher v. Clark*, 41 Barb. (N. Y.) 329; *Mill v. N. Y. & H. R. R. Company*, 41 N. Y. 619. Even the keeping of diseased animals on the defendant's uninclosed lands, to which other animals are in the habit of coming, and where it is no trespass for them to come, is not an act of negligence, if the owner of the healthy animal is duly warned of his danger. *Walker v. Herron*, 22 Tex. 55; 1 *Thompson on Negligence*, § 917. Except where the owner knows that it is probable that the animals may intrude on an adjoining inclosure, or the statute law forbids a man keeping his diseased cattle in his own pasture, he will not be liable for injury to cattle in an adjoining pasture, unless negligent in the manner of keeping his own. *Cyc.* p. 332; 22 *Am. & Eng. Ency. of Law*, p. 380; *Herrick v. Gary*, 65 Ill. 101. Nothing can be better settled than that, if one do a lawful act upon his own premises, he cannot be held responsible for injurious consequences that result from it, unless it was so done as to constitute actionable negligence. *Rockwood v. Wilson*, 65 Mass. 221.

"In this case the railroad company had a right to transport these cattle, even though there were ticks upon them. The sixth section of the act of Congress of May 29, 1884 (23 Stat. 32), enacts: 'That no railroad company within the United States, or the owners or masters of any steam or other vessel or boat, shall receive for transportation or transport from one state or territory to another, or from one state into the District of Columbia, or from the District into any state, any live stock affected with any contagious, infectious or communicable disease, and especially the disease known as pleuro-pneumonia, nor shall any person, company or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious or communicable disease, nor shall any person, company or corporation drive on foot or transport in private conveyance from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, any live stock, knowing them to be infected with any contagious, infectious or communicable disease, and especially the disease known as pleuro-pneumonia: Provided, that the so-called splenic or Texas fever shall not be considered a contagious, infectious or communicable disease within the meanings of sections four, five, six and seven of this act as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.' As the proof in this case

showed that these cattle were for slaughter, and were put off in the yards of the defendant to be fed and watered, they did not fall within the act of 1884, and were not to be considered as affected with any contagious, infectious, or communicable diseases, even though the tick was on them as stated.

"Did, then, the evidence show negligence on the part of the defendant company? Outside of cases in which a positive obligation is cast upon a carrier to perform safely a special exercise, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and if he has not the plaintiff must prove it. *The Nitro-Glycerine Case*, 82 U. S. 524, 21 L. Ed. 206. The duty of a railroad company, in regard to the transportation of freight and passengers and the carrying on of a stockyard in order to facilitate its business, is twofold; the latter being independent and distinct from the former. The business of a stockyard corporation, except in the character of the property which is the subject of bailment, corresponds in many respects with the business of warehousemen. *Delaware, Lackawanna & Western Railroad Company v. Central Stockyard Co.*, 45 N. J. Eq. 50, 17 Atl. 148, 6 L. R. A. 855. A warehouseman is liable only for negligence in preserving the property deposited with him. *McCarty v. N. Y. & Erie R. R. Co.*, 30 Pa. 247. Their responsibility as warehousemen is but for ordinary neglect. *Shenk v. Philadelphia Steam Propeller Co.*, 60 Pa. 109, 100 Am. Dec. 541; *Tower v. Grocers' Supply & Storage Co.*, 159 Pa. 106, 28 Atl. 229. Stockyards are not public markets. 26 Am. & Eng. Ency. of Law, p. 1074. It therefore seems to us that the plaintiff was bound to show, not only that the cattle were placed in the rear end of Flickinger's pens overnight on June 21st and 22d but that they contaminated the pens, and the defendant company did not, as set forth in the plaintiff's statement, disinfect and put them in proper condition again. It is presumed that it did its duty, and there is no evidence to the contrary. In addition, it was not shown that the cattle which Flickinger sold to Eshleman on August 3d, 10th, and 17th received their infection from these pens; non constat that they might not have derived the ticks from some other cause. Without any definite proof upon the subject, we are asked to infer, first, that the ticks from Flickinger's cattle were dropped into the pens or driveways on June 21st and 22d; and, secondly, that those ticks produced another brood, which got upon the cattle sold to Eshleman in the following August. Thus we have an inference upon an inference in order to sustain this action, and no conclusive inference at that.

"The next point is, as we have said—conceding, for the purpose of the discussion, the question of negligence—whether the plaintiff

is in position to maintain the action. The cattle that died, when placed in these pens, belonged to Flickinger. This is conceded. They were sold out of the pens to, and were taken away by, Eshleman. The mere fact that they were taken to the scales and weighed, and then brought back and allowed to remain until Eshleman thought fit to remove them an hour or two later cannot in any wise affect the principles which govern the case. It is true that the general rule of the law is that whoever does an illegal act is answerable for all the consequences which ensue, in the ordinary and natural course of events, though those consequences be brought about by intervening agents, provided such agents were set in motion by the primary wrongdoer, or provided those acts causing the damage were the necessary or legal and natural consequences of the wrongful act. *Filer v. Smith*, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603; *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377. Thus, to put falsely labeled poison upon the market, to be used by any one who may need the articles named in the label, is negligence, rendering the defendant liable to any person injured, whether the immediate vendee or not. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455. Or, as in a case where the defendants were engaged in selling meats, and sold plaintiff's brother a roll of spiced bacon, and he took it to the plaintiff's house, where he boarded, and plaintiff's wife cooked it for breakfast, and the bacon was in fact spoiled and unfit for food, and made plaintiff sick, on the assumption that the defendant knew that the meat was purchased for consumption was negligent in selling it, it was held that there was a good cause of action. *Craft v. Parker, Webb & Co.*, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139. See, also, 26 Am. & Eng. Ency. of Law, pp. 461, 462. But, on the other hand, it is decided that answerable negligence exists only where the party whose negligence occasions the loss owes a duty arising from contract or otherwise to the person sustaining the loss. *Kahl v. Love*, 37 N. J. Law, 5. Therefore, in *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, it was held that, if an explosion is caused by a defect in the manufacture of a boiler, the manufacturer is not liable, in the absence of proof that such defect was known to him, or was discovered upon examination or by application of known tests; and in *Curtin v. Somerset*, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220, that, in order that a person who has been injured by an accident may hold another responsible therefor upon the ground of negligence, there must be a causal connection between the negligence and the hurt, and such causal connection must be uninterrupted by the interposition between the negligence and the hurt of any independent human agency. In this case, a contractor for the erection of a hotel building, who used improper material in its

construction and in other respects departed from the specifications embodied in his contract, so that the building, when completed, was structurally weak and unsafe, was determined not to be liable to a guest of the hotel for an injury caused to him by such defective construction, but occurring after the owner had taken possession. To the same effect are *Fitzmaurice v. Fabian*, 147 Pa. 199, 23 Atl. 444, and *First Presbyterian Congregation v. Smith*, 163 Pa. 561, 30 Atl. 279, 26 L. R. A. 504, 43 Am. St. Rep. 808.

"It seems to us to be clear that there may be, in some instances, a recovery without regard to privity of contract. In all actions of negligence, he who is guilty of the wrong is liable for the damage sustained by any one injured by the wrongful act. He is responsible, however, to him to whom the wrong is done, and not to those who suffer the remote consequences of it. If, while in the possession of either real or personal property, an injury is done to that property, the right of action is alone in the then owner, and not in any successor in the title. The recent case of *Moore v. City of Lancaster*, 212 Pa. 642, 62 Atl. 100, 2 L. R. A. (N. S.) 819, determines this principle. Following, then, the same to its logical conclusion, the plaintiff would have no cause of action if the wrong was occasioned while the property was owned by Flickinger. It must be recollected that it is not contended that the infection was communicated from the defendant's pens to the cattle that were placed therein, and by that means conveyed to other cattle belonging to the plaintiff. The evidence is that the disease was conveyed to cattle owned by Flickinger, but which Eshleman subsequently bought. If Eshleman obtained the cattle from Flickinger contaminated—and no evidence to the contrary appears, for they were in the pens as Flickinger's cattle for the purposes of sale—he took them in the condition in which they then were, and no right of action for negligence would pass through Flickinger to him. No case similar to this one has been cited to nor found by us, and there is no principle that we know of which permits a stretching of the law to the extent which the plaintiff here endeavors to maintain. We are of the opinion that the judgment of nonsuit was properly entered, and we now refuse to take it off.

"Rule discharged."

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

D. McMullen and John E. Malone, for appellant. W. U. Hensel and Coyle & Keller, for appellee.

PER CURIAM. We are of opinion that the testimony offered at the trial did not establish the plaintiff's right to recover, and that a nonsuit was properly entered for reasons stated in the opinion of the learned trial judge.

The judgment is affirmed.

(22 Pa. 43)

**CITY OF ERIE v. ERIE TRACTION CO.**  
(Supreme Court of Pennsylvania. June 2, 1908.)

**1. STREET RAILROADS—REGULATION AND OPERATION—POWER TO REGULATE—MUNICIPAL REGULATION.**

Apart from any constitutional authority, municipalities can impose reasonable regulations upon street railway companies in the "operation" of their lines; and it does not follow that because Const. art. 17, § 9, forbidding the construction of a street railway without the consent of the local authorities, deals only with the "construction," that municipalities are limited in the exercise of municipal functions to their "construction."

**2. SAME—ACQUISITION OF RIGHTS IN STREETS—CONSENT OF MUNICIPALITY.**

A grant to a street railway company to operate its own lines on streets, subject to conditions and regulations, does not carry with it the right of the company obtaining such franchise to permit other companies to use its tracks without municipal consent and against municipal protest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 127.]

**3. SAME.**

A street railway company which has lost the municipal consent to the use of streets it once had by failure to perform the conditions imposed cannot, without municipal consent, secure the right to operate its cars by contract for the joint use of the tracks of another street railway company.

Appeal from Court of Common Pleas, Erie County.

Bill for injunction by the city of Erie against the Erie Traction Company. Decree for complainant, and defendant appeals. Affirmed.

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

T. A. Lamb and E. S. Templeton, for appellant. John B. Brooks, Chas. P. Hewes, and Paul Benson, for appellee.

ELKIN, J. This is a bill in equity to restrain the respondent traction company from operating cars upon its own lines, or upon the lines of any other street railway company, in the city of Erie, and praying that it be required to take up and remove its tracks from certain streets therein designated. The learned court below, after full hearing and careful consideration, granted the prayer of the bill and entered a decree requiring the respondent to take up and remove its tracks in said city, and enjoined it from using the tracks of the Erie Electric Motor Company for the purpose of securing an entrance to the city.

The facts upon which the bill was sustained and the decree entered were briefly as follows: The Erie Transit Company several years ago obtained municipal consent to lay its tracks on certain streets in the city of Erie, upon the conditions and subject to the regulations provided by ordinance. One of the precedent conditions of the grant was that the transit company shall deposit with the city treasurer the sum of \$5,000 as a guaranty that the line or lines upon the

streets named in the ordinance should be built within the time specified, and failure to complete the lines within the time worked a forfeiture of the franchise and all rights thereunder, in which event said sum required to be deposited reverted to the city as liquidated damages. The ordinance contained many other conditions, and provided for regulation in the operation of the line when complete. The transit company became involved financially, and upon judgments obtained against it executions were issued, and all the rights, privileges, franchises, and property of said company were sold to persons who subsequently organized the respondent traction company, which became the successor of the former insolvent transit company. The learned court below, sitting as a chancellor, has found all the material facts upon which the rights of the companies depend concisely and paragraphically, as required by the rules of court, and as a conclusion of law, based upon the facts so found, held that the respondent traction company, by its manifest and continued violations of the conditions upon which municipal consent was obtained, forfeited all rights under the ordinance, and is now occupying the streets of the city without lawful authority. The learned counsel for appellant does not seriously contend that there is any reversible error in the findings of fact or conclusions of law on this branch of the case. It is urged, however, with much force and ability that, even conceding the correctness of the conclusions reached by the chancellor, there is nothing in the situation to prevent the respondent traction company from entering into a contract with the Electric Motor Company, another street railway whose tracks are laid on certain streets in said city, with municipal consent not questioned, by means of which the cars of the respondent company are permitted to be run over the tracks of the motor company. It is argued that, inasmuch as the motor company had a valid ordinance to operate its cars on the streets of the city, it could enter into contractual relations with another street railway company not having municipal consent to use its tracks for the operation of the cars of the railway company. In other words, that two railway companies have the right to enter into a contract for the joint use of the tracks of one without municipal consent, and this is the question pressed here. The argument is based on section 9, art. 17, Const., which provides that "no street passenger railway shall be constructed within the limits of any city, borough or district, without the consent of its local authorities." It is contended that the inhibition of the Constitution is aimed at the construction, and not the operation, of a street railway; and, if the question here depended solely upon this constitutional requirement, we are inclined to think there would be some force in this position. A Constitution only deals with general conditions, and in no proper sense should

questions of detail be included in the organic law. No doubt the intention of the framers of the Constitution was only to announce the general principle that street railways should not be constructed within cities or boroughs without municipal consent. This was intended as a safeguard to the rights of municipalities against the encroachment of companies organized to construct street railways in the first instance, and it is a very wise provision, because it would be intolerable for municipalities to be invaded by a public service corporation of this character, so closely connected with the everyday life of their people, without having anything to say about it. It may be the purpose of the Constitution was to protect municipalities from such invasion in the construction of lines of street railway, leaving all question of detail as to the operation of the lines when constructed to the municipalities to deal with. However, it does not follow that, because the Constitution only deals with the construction of street railways, municipalities are limited in the exercise of municipal functions to their construction. Indeed, the regulation of the operation of street railways is more important to the municipality day by day than their construction. Apart from any constitutional authority, and independent of any such limitations and requirements, municipalities have the power to impose reasonable regulations upon street railway companies in the operation of their lines under ordinance. It seems to necessarily follow that a grant to a street railway company to operate its own lines on certain streets and subject to certain conditions and regulations does not carry with it the right of the company obtaining such franchise to permit other companies to come into the city and use its tracks without municipal consent and against municipal protest. We agree that as between the companies themselves, so far as the private rights of the corporations may be involved, there is no reason why a contractual relation should not exist for the use, enjoyment, and occupation of the property of either corporation by the other. A very different question arises when the rights of the municipalities are involved. No matter what contracts may be made by corporations as between themselves, and as only private corporate rights may be concerned, no such contract is binding upon a municipality without its consent. The respondent company needs one thing more to entitle it to the use of the streets in the city of Erie, and that is municipal consent. It had municipal consent once, lost it by failure to perform the conditions imposed, and it cannot now secure by indirection what it lost by nonperformance of precedent and subsequent conditions.

The question here concerns the use of the streets of the city of Erie, and it has the right to raise the question in this proceeding.

Decree affirmed, at the cost of appellant.

(222 Pa. 8)

**WIRSING v. SMITH.**

(Supreme Court of Pennsylvania. June 2, 1908.)

**1. ASSAULT AND BATTERY—CIVIL LIABILITY—ACTION—EVIDENCE—RELEVANCY—COLLATERAL MATTERS.**

In an action for an aggravated assault by shooting plaintiff, who had eloped with and married defendant's daughter, evidence of letters, written between members of the families of defendant and plaintiff, but not to or by either of them, for the purpose of showing that defendant was led to believe that it was the plan to get control of his money, and as one step to show his condition of mind when the shooting occurred, to mitigate punitive damages, was properly excluded as relating to irrelevant collateral matters not connected with the parties to the action.

**2. WITNESSES—CROSS-EXAMINATION—SCOPE.**

Where, in an action for an aggravated assault, defendant offered in evidence, for the purpose of mitigating punitive damages, the record of his conviction for a criminal offense growing out of the same acts, and testified that he was serving a term in prison as a result of such conviction, it was not reversible error to permit plaintiff to cross-examine defendant as to whether, when sentence was imposed, the court had not stated that, if the case for damages was settled within the term, a portion of the sentence, not exceeding one-half, would be remitted.

**3. DAMAGES—PUNITIVE DAMAGES—CONVICTION OF CRIMINAL OFFENSE—EFFECT.**

Punitive damages may be recovered, notwithstanding there has been a conviction of a criminal offense growing out of the same acts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 202.]

**4. SAME—MATTER OF MITIGATION.**

In an action for damages, the record, showing a conviction for a criminal offense growing out of the same acts and sentence, may be considered in mitigation of exemplary damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 202.]

**5. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—SUFFICIENCY.**

An assignment of error that "the court erred in omitting in its general charge to instruct the jury as requested by defendant by his counsel as follows," setting out an offer of evidence by defendant and the duty of the jury to disregard it, except as restricted by the court, is not in proper form, and will not be considered.

**6. NEW TRIAL—DISCRETION OF COURT.**

Whether a new trial should be granted is, as a rule, within the sound discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 9, 10.]

**7. APPEAL AND ERROR—REVIEW—DISCRETION OF LOWER COURT—NEW TRIAL.**

The grant or refusal of a new trial will not be reversed, except for gross abuse of the trial court's discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3860.]

**8. NEW TRIAL—CONDITIONS ON GRANTING OR REFUSING NEW TRIAL—DISCRETION OF COURT.**

It was not an abuse of discretion, in an action for damages for an aggravated assault wherein a verdict for \$45,000 had been returned, to direct that a new trial be granted unless plaintiff within ten days should stipulate to accept in full satisfaction \$35,000, to be paid or secured within 30 days after filing of such stipulation, and if such stipulation should be filed, and payment of such amount should

not be made or secured within the 30 days, then judgment to be entered on the verdict as rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 324-329.]

**9. SAME.**

The court may impose terms upon either or both of the parties as conditions of the grant or refusal of a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 321-323.]

**10. APPEAL AND ERROR—ASSIGNMENT OF ERROR—SUFFICIENCY.**

An assignment of error that "the court erred in charging the jury as follows, special attention being directed to those portions of the charge inclosed in brackets," and then quoting the whole charge, is not in proper form.

**11. SAME—DISCRETION OF LOWER COURT—NEW TRIAL—EXCESSIVE VERDICT.**

Where defendant maliciously and brutally assaulted and shot plaintiff, with the evident intention to take life, and the murderous attack permanently disabled him, the Supreme Court cannot say that a verdict of \$45,000 was so excessive as to make the denial of a new trial on that ground an abuse of the trial court's discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3873.]

Appeal from Court of Common Pleas, Fayette County.

Trespass for an aggravated assault and battery by William S. Wirsing against James R. Smith. Judgment for plaintiff for \$45,000, and defendant appeals. **Affirmed.**

At the trial it appeared that plaintiff, while under age, ran away with defendant's daughter, about 18 years old, and married her. The couple returned to the house of the plaintiff's father. While there they received a letter from defendant expressing his forgiveness, and inviting them to dine on a day stated. The court in its charge described the assault as follows:

"In acceptance of this invitation the young man and his wife drove to Smithfield upon the day named, reaching there about 9:30 in the morning. After hitching the horse in the alley below the defendant's house, they approached the front door. Just then the defendant called out, 'Is that Bill Wirsing?' The plaintiff was on the portico. The defendant called out again, 'Is that you, Bill Wirsing?' and the plaintiff stepped out about two steps. Mrs. Smith, the defendant's wife, was just inside the door and called to her daughter, Martha, who had come to the door when the plaintiff and his wife had stepped up on the portico, to come inside. As the plaintiff stepped back the two steps he speaks of, he saw the defendant bringing his rifle around out of an upstairs window. The plaintiff jumped back just as the defendant fired; the shot taking effect in the third finger of the right hand, severing it, or almost severing it. After the shot was fired, the plaintiff told his wife that the best thing they could do was to stand there until the defendant started downstairs, and then try to escape up the street. They heard the defendant start across the room upstairs, and



when he got to the head of the stairs they started to run up the street. The defendant came out of the house and fired the second shot, which missed. The plaintiff says he fell just as that shot was fired, and it failed to take effect. A third shot was fired, which took effect in the right arm of the plaintiff, and then a fourth, which missed. The plaintiff continued running, and by an alley reached Grim's butcher shop and asked to be concealed, disclosing his condition—that he had been shot. He remained there until his wife came, and he was then taken to a hotel across the way, where his wounds were dressed, and whence he was removed to the hospital at this place. The plaintiff's statement of the transaction is corroborated by his wife. Other witnesses, attracted by the first shot, saw the defendant fire the three shots from the outside, in the street. They say that his aim was deliberate, and that between the shots he advanced up the street, returning to his house after the three shots were fired. \* \* \*

"The defendant does not deny that the encounter that resulted in the plaintiff's injury took place substantially as the plaintiff alleges, nor is it denied that he is entitled to fair compensation for his injuries, as the jury may determine them to be. But it is claimed in his behalf that the circumstances are such as to prevent the imposition of exemplary or punitive damages; that for a month prior to this trouble the defendant had given himself up to the excessive indulgence in liquor, drinking from a quart to three pints per day, and that the marriage of his daughter, without his knowledge and consent, brought him great trouble and anxiety, and, in his condition, resulted in great nervous tension: that, after learning that his daughter and Mr. Wirsing had left home, he and Mr. Sackett went to Cumberland in the hope of intercepting them, and that while on that trip Mr. Sackett said the defendant drank several times while they were in Connelville, and that during the trip his principal talk was about his daughter, crying and making considerable fuss and talk, as the witness expressed it. On June 5th the defendant was in Dr. Altman's office, and the doctor says he was strongly under the influence of liquor, and that while he, the doctor, did not examine his physical condition, he prescribed for him for excessive drinking. The defendant related to the doctor the story of his daughter's elopement. On the day of the shooting, after hearing of it, Mr. Sackett went to the defendant's house and saw him for a few minutes, and found him lying on the bed and pretty stupid. The defendant says that when he wrote the letter to his daughter, inviting her and her husband and others to dinner, he meant what he said; that when Wirsing and his wife arrived he was upstairs, reading a newspaper; that he had been drinking, having taken a heavy drink 15 minutes before; that when Wirsing

drove past the sight of him made him so mad that he lost control of himself and his head began to roar, which was the last he remembered until his boy took the gun from him in the street; and that he knew nothing of what he did that day until his wife, the next morning, told him what had occurred."

At the trial the defendant made the following offer:

"Mr. Hertzog: As a beginning of the course of conduct between the plaintiff and defendant, which continued in various ways up until the time that the shooting occurred, I propose to show by this witness that four or five years ago a sister of the plaintiff wrote a letter to the brother of the plaintiff's wife, in which she stated that the reason that their father, H. C. Wirsing, had purchased the farm from Mr. Smith, was that he wanted his daughter, who was writing the letter, to marry Joe, a son of the defendant, and his son Will to marry Malinda, a daughter of the defendant, and one of them could live on that farm, and Mr. Smith was able to buy the best property they could want in town for the others to live on, and it made no difference how much their 'pap,' meaning Smith, would oppose the marriage, they could arrange it to have them married, anyhow; that they could run away to Cumberland and get married. This was followed by another letter in a short time, in answer to the first letter, and repeating, in substance, matters that she had suggested in the first, and that these letters were burned by Smith and his wife at the time they were received. This for the purpose of introducing the matters between the two families, leading him to believe that it was the plan of the father of those children to try to get them married to get control of his money, and is offered as one step in the general evidence to follow on up to the time the shooting occurred, to show the condition of mind Smith was in when the shots were fired, for the purpose of mitigating the punitive damages, the children at the time being 11 or 12 years of age.

"Mr. Crow: The plaintiff objects to the testimony as being incompetent and irrelevant, for the reason that it doesn't connect William Wirsing with the transaction.

"The Court: Objection sustained and exception.

"Mr. Crow: 'Q. Mr. Smith, I will ask you if, at the time you were sentenced, the court didn't make you the proposition that if you would settle with this young man—'

"Mr. Hertzog: We object. We want you to make that offer privately.

"Mr. Crow: The plaintiff offers to ask the defendant, if, at the time the sentence was imposed upon him, the court did not state that if, within the term, the case for damages was settled, a portion of the sentence, not exceeding one-half, would be remitted.

"Mr. Hertzog: The offer is objected to as incompetent and irrelevant, for the following reasons: First, the proposition so made by



the court did not include in it any amount at which the case for damages should be settled; second, that it is incompetent and irrelevant, generally; and, third, the offer made was in the line of various attempts that had been made towards a settlement of the case between the parties, which had failed, and is, therefore, not competent evidence to be introduced here, being in the nature of a compromise offer.

"The Court: Objection overruled and exception."

Defendant presented these points:

"Punitive damages cannot be recovered in this action, for the reason that the defendant has been sentenced to a long term of imprisonment by the court of quarter sessions of this county for the same act as that upon which this suit is based, and which term of imprisonment he is now serving. Answer: Refused.

"The plaintiff is only entitled to recover such amount in this action as will compensate him for the injury and loss sustained by him by reason of defendant's conduct, and the jury cannot add an additional amount by way of punishment for the public crime committed by him. Answer: Refused."

Certain assignments of error are as follows:

"(5) The court erred in omitting in its general charge to instruct the jury as requested by defendant by his counsel as follows: Mr. Hertzog: The offer made on the part of the defendant of the record of the cases in the quarter session of the peace of Fayette county against the defendant was restricted in the offer to the one purpose of the mitigation of punitive damages, and for this reason the counsel in his argument had no right to use it as he did—to claim that that offer, in effect, proved that the defendant committed this act willfully and maliciously, and that it therefore destroyed the effect of the defendant's testimony as a witness in that regard. And it is further the duty of the court to so instruct the jury as to withdraw from them in its general charge the right to use this offer for any other purpose than that to which it was restricted in the offer itself, and the defendant objects to its use for any other purpose.

"(6) The court erred in overruling the motion to set aside the verdict as unreasonable and excessive; such action and refusal to grant the motion being a misuse and abuse of the court's discretionary power in passing upon an application for a new trial.

"(7) It was an abuse of discretion, and therefore error, on the part of the court below to not sustain defendant's motion for a new trial upon the first reason assigned in support thereof, which motion and reason are as follows: 'The defendant, by his counsel, respectfully moves the court for a new trial, and assigns in support thereof the following reasons: (1) The verdict is excessive

and unreasonable under all the evidence in the case.'

"(8) The court erred in making the following final order, to wit: 'November, 1907, this matter came on to be heard, and was argued by counsel as on a rule to show cause why a new trial should not be granted. And now, December 2, 1907, after consideration, it is ordered that a new trial be granted in this case, unless plaintiff within 10 days file a stipulation that he will accept in full satisfaction of his claim the sum of \$35,000, to be paid, or security approved by the court to pay the same to be given, within 30 days after notice of the filing of said stipulation to defendant or his counsel. If said stipulation is filed, and payment of said amount, with interest from the date of the verdict and costs, is not made or secured as aforesaid within 30 days, then judgment is to be entered on the verdict, as rendered upon payment of the jury fee.' No payment was made or secured, and judgment was entered on the verdict.

"(9) The court erred in charging the jury as follows, especial attention being directed to those portions of the charge inclosed in brackets, quoting the whole charge."

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

J. A. Langfitt, D. M. Hertzog, and Smith & Brownfield, for appellant. W. E. Crow, for appellee.

ELKIN, J. The first and second assignments of error, as we view the case, are without merit. The first is based upon the refusal of the court to admit the introduction of testimony relating to collateral matters, not connected with the parties to the action, nor had it any relevancy to the issue, and it was properly excluded. As to the second it may be observed that the defendant had offered in evidence the record of his conviction for a criminal offense growing out of the shooting, and followed this up by going on the stand for the purpose of showing that at the time of the trial of the present case he was serving out the term for which he had been sentenced, and this in mitigation of punitive damages. Under these circumstances no harm was done, nor was it reversible error to permit the plaintiff, on cross-examination, to develop all the facts shown by the record or by the testimony of defendant at the time sentence was imposed.

The third and fourth assignments relate to the right of plaintiff, under the facts of the case, to recover punitive damages. It is contended that because defendant had been convicted of a criminal offense growing out of the same acts, and was serving a term of imprisonment for his crime, punitive damages should not be allowed in the civil action. The answer is: Apart from the views of text-writers on this question, of which there are many reaching different conclusions, and

independently of the rule established by courts in other jurisdictions, and in this there is no uniformity, it is settled law in Pennsylvania that punitive damages may be recovered if the facts warrant their imposition, and this even in a case where there has been a conviction of a criminal offense. *Porter v. Seiler*, 23 Pa. 424, 62 Am. Dec. 341; *Cornelius v. Hambay*, 150 Pa. 359, 24 Atl. 515; *Rhodes v. Rodgers*, 151 Pa. 634, 24 Atl. 1044; *Mathels v. Mazet*, 164 Pa. 580, 30 Atl. 434. In such cases the rule is that the record showing conviction and sentence may be offered in evidence, and considered by the jury, in mitigation of exemplary damages; and this was done in the present case.

The fifth assignment is not in proper form, does not show anything before this court to review, and will not be considered.

The sixth and seventh assignments complain of the refusal of the court below to grant a new trial on the ground that the verdict was unreasonable and excessive. As a rule, whether a new trial be granted or refused is a matter within the sound discretion of the court, and certainly is not sufficient ground of reversible error, unless for gross abuse; and this does not appear in the case at bar.

Nor are we convinced that the conditional order of the court below, after trial and verdict, complained of in the eighth assignment, would justify a reversal of the judgment entered in the present case. The learned trial judge evidently followed the rule of our own cases in this respect in a well-meaning effort to have the matters in dispute between the parties finally determined. In *Fleming v. Dixon*, 194 Pa. 67, 44 Atl. 1064, our Brother Brown, in passing upon a conditional order made by the court below and not accepted by defendant, said: "The relief tendered was refused. The order of court providing for it was made for the benefit of the defendant now complaining of it, and we overrule his second assignment of error." In *Stauffer v. Reading*, 206 Pa. 479, 55 Atl. 1072, the present Chief Justice, in reviewing the discretionary power of courts in granting or refusing new trials, among other things, said: "Hence it is well settled that the court may impose terms upon either or both of the parties as conditions of the grant or refusal, and the latitude allowed to the discretion of the court to this end is very great." It is clear, therefore, that the learned court below was well within the rule of our own cases in this respect, and certainly should not be convicted of error for doing what this court has said he had the right to do in the proper exercise of his judicial discretion.

The error suggested in the ninth and last specification cannot be considered, because the assignment is not in proper form and does not bring before this court anything for consideration. The circumstances under which defendant maliciously and brutally

assaulted plaintiff, with the evident intention to take life, and the murderous attack having seriously and permanently disabled him, justified the court in submitting the question of punitive damages to the jury, which was done in a careful charge defining the application of the rule. It may be that the jury took into consideration the aggravated, unwarranted, and felonious character of the shooting in rendering their verdict; but this they had the right to do, and it is not for us to say that there was reversible error on the sole ground of the verdict being excessive, for if there ever was a case in which a jury was justified in returning a large verdict, not only as compensation for the injury done, but as a punishment to the offender, this would seem to be the one.

Judgment affirmed.

(222 Pa. 40)

SULLIVAN v. HANOVER CORDAGE CO.

(Supreme Court of Pennsylvania. June 2, 1908.)

1. MASTER AND SERVANT—INJURY TO MINOR—CONTRIBUTORY NEGLIGENCE.

Under Act May 2, 1905 (P. L. 352), providing that no minor under 16 years of age shall be permitted to clean or oil machinery while in motion, a boy under the statutory age is not chargeable with contributory negligence while employed in such an occupation, whether the attempt is made when the machine is in motion for the purpose of operating the same, or whether it is in motion for the purpose of cleaning it.

2. SAME—QUESTION FOR JURY.

Whether machinery when oiled by a boy under 16 years of age was in dangerous motion, or whether the motion consisted simply in partial revolutions to facilitate the cleaning, is a question of fact for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1100.]

Appeal from Court of Common Pleas, York County.

Action by Paul T. Sullivan, by his next friend, Noah Sullivan, and Noah Sullivan, against the Hanover Cordage Company. Judgment for plaintiff, and defendant appeals. Affirmed.

At the trial it appeared that plaintiff, when a little over 15 years of age, was employed by the defendant in its cordage works. On July 20, 1905, while engaged in cleaning a machine, his hand became caught in the machine and was crushed. The evidence showed that the machine was not in regular operation at the time, but that it had been put in operation to facilitate the cleaning.

The court charged in part as follows:

"This act of assembly which I read to you, which is the law, the act of May 2, 1905 (P. L. 352), does not make it unlawful for parties operating this kind of work or machinery to employ a minor under sixteen years of age, but it does make it unlawful to permit him to clean or oil machinery while in motion, or to operate or otherwise have the care or custody of any elevator or lift. The other act of assembly of 1901 makes it unlawful

to employ such a minor under 16 years of age without an affidavit being filed in the office provided for in the act of assembly, and goes further than this last act of assembly. We instruct the jury that this is an important point in the case. Did they know when they employed this boy he was under 16 years of age? Did they know when they put him in charge of this machine that he was under 16 years of age, and did they know how he was instructed to clean this cylinder when the belt was on and the machine moving? Were they aware of the fact that it was being done in this way, and did they order him or place him in control of that machine, or allow him to operate it, knowing he was under 16 years of age? If they did, then, even if he was negligent in this matter and his negligence contributed to this injury, if he allowed Trone to turn on too much power when he should have turned on but little, or if he cleaned the machine when it was going too fast, why then, the defendant company cannot take advantage of it. They cannot take advantage of the concurrent negligence. The Supreme Court have decided the defendant cannot make a defense of this character when they have violated the law in the matters here at issue in the case."

Verdict and judgment for Paul T. Sullivan for \$3,000 and for Noah Sullivan for \$1,000.

Argued before FELL, BROWN, POTTER, ELKIN and STEWART, JJ.

Henry C. Niles, C. J. Delone, and George S. Schmidt, for appellant. Chas. A. Hawkins, C. E. Ehrehart, and J. S. Black, for appellees.

ELKIN, J. In *Lenahan v. Pittston Coal Mining Company*, 218 Pa. 311, 67 Atl. 642, 12 L. R. A. (N. S.) 461, 120 Am. St. Rep. 885, it was held that a boy under the statutory age employed to perform the dangerous kind of work prohibited by the statute is not chargeable with contributory negligence or with having assumed the risks of employment in such occupation. In *Stehle, by His Next Friend, v. Jaeger Automatic Machine Company*, 220 Pa. 617, 69 Atl. 1116, further consideration was given to the application of the rule under the act of May 2, 1905 (P. L. 352). In this case it became necessary to pass upon the requirements of section 4 of that act, which provides that no minor under 16 years of age shall be permitted to clean or oil machinery while in motion. Following the rule of the *Lenahan Case*, it was again held that an employer who violated the law by engaging a boy under the statutory age to perform the dangerous kind of work prohibited by the statute did so at his own risk; and, in an action of trespass for personal injuries sustained by the boy while so employed, the master cannot set up as a defense either the assumption of risk or the contributory negligence of the boy servant. It is con-

tended, however, in the present case, that the rule of these cases does not apply, because the machine, which the boy was attempting to clean at the time he was injured, was not in motion within the meaning of the statute.

It is argued with much force that the prohibition of the statute is directed against an attempt to clean a dangerous machine while it is in motion in the usual method of operation. In a sense this may be true, but it is the kind of motion, not the purpose, the statute guards against. It does not matter whether the attempt to clean is made when the machine is in motion for the purpose of operation, or whether it is in motion for the purpose of cleaning, if, in point of fact, the motion is of the same dangerous character in both instances. What the statute intended to prohibit was the employment of a boy of immature judgment, without experience and lacking in discretion to perform such dangerous work. We agree that if the machine at the time of the cleaning was not in dangerous motion, such as was usual in its operation, and if the motion, or revolution, at the time of the cleaning, was not dangerous, but simply consisted in partial revolutions made from time to time in order to facilitate the cleaning, the prohibition of the statute would very properly be held inapplicable. On the other hand, if the machine was propelled in the usual manner, and by the same force or power, while being cleaned as was usual when in operation, and if the motion or revolutions were of the same dangerous character, differing only in degree, the court would not be warranted in holding as a matter of law that the prohibition of the statute did not apply. Under such circumstances, it would at least be for the jury to determine whether at the time of the injury the machine was in dangerous motion. All of these questions were submitted to the jury by the learned trial judge in such manner as to enable them to justly determine the rights of the parties to the controversy, and in our opinion appellant has no just cause to complain.

Assignments of error overruled, and judgment affirmed.

(222 Pa. 35)

#### SECHLER v. ESHLEMAN.

(Supreme Court of Pennsylvania. June 2, 1908.)

#### 1. WILLS — CONSTRUCTION — NATURE OF ESTATE.

Testator devised certain property to his brother for life, and, after his death, to the four daughters of his brother, each for life, and, after the death of each niece, "unto her children and their heirs and assigns forever." Held, to create an estate tail in each niece, which becomes a fee simple under Act April 27, 1855 (P. L. 328).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1369.]

## 2. SAME — "CHILDREN" — "HEIRS OF THE BODY."

The word "children" is ordinarily a word of purchase, and not a word of limitation, and is synonymous with "heirs of the body."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1080.

For other definitions, see Words and Phrases, vol. 2, pp. 1126-1140; vol. 8, p. 7601; vol. 4, pp. 3267-3271.]

Appeal from Court of Common Pleas, Lancaster County.

Action by Emille M. E. Sechler against Joseph Eshleman. Judgment for plaintiffs, and defendant appeals. Affirmed.

The following is the opinion of Hassler, J., of the court below:

"This is an action to recover the price agreed upon for certain real estate in Martic township, known as the 'Bernard Short Farm,' containing 171 acres, more or less. The facts necessary for a proper disposition of the case have been agreed upon in the form of a case stated. The plaintiffs' right to recover depends upon whether they and their sister, now deceased, had an absolute title in fee simple to the real estate in question under the will of Robert A. Evans, deceased, who died on August 28, 1889. The will is dated May 17, 1889, and the item of it under which they take their title is as follows: 'Sixteenth. I give and devise the following farms and plantations: My farm or tract of land called Pen Hill, situated in Fulton township, Lancaster county, containing one hundred and fifteen acres, be the same more or less, with the appurtenances; also my farm in Martic township, Lancaster county, known as the Bernard Short farm, containing one hundred and seventy-one acres, be the same more or less, with appurtenances; also my farm in West Drumore township, Lancaster county, known as my Rodgers farm, containing two hundred and thirty-five acres, be the same more or less, with the appurtenances, unto my brother, John James Evans, for and during the term of his natural life, but he shall not cut and use more of the timber growing on said farms than what is necessary to keep the fences thereon in good order and repair, and from and immediately after his decease, I give and devise the same unto my nieces, Emily Evans, Helena Evans, Marietta Evans and Elizabeth Evans, children of my said brother, John James Evans, that is, to each one, the undivided one-fourth part thereof for and during the term of her natural life; and from and immediately after the decease of said Emily Evans, I give and devise the undivided one-fourth part of said three farms given to her for life unto her children and their heirs and assigns forever; and from and immediately after the decease of said Helena Evans, I give and devise the undivided one-fourth part of said three farms given to her for life unto her children and their heirs and assigns forever; and from and immediately after the decease of said Marietta Evans, I

give and devise the undivided one-fourth part of said three farms given to her for life unto her children and their heirs and assigns forever; and from and immediately after the decease of said Elizabeth Evans, I give and devise the undivided one-fourth part of said three farms given to her for life unto her children and their heirs and assigns forever. The devises hereinbefore made to the children of said Emily, Helena, Marietta and Elizabeth Evans, shall embrace and include the issue of any of such deceased child or children, and such issue taking such part or portion thereof as his, her or their deceased parent or parents would have had taken had he, she or they been living.' John J. Evans died on January 26, 1890. At the time of the death of Robert A. Evans the four nieces mentioned in the will were unmarried, and all were living when John J. Evans died. Marietta Evans, one of the nieces, died unmarried on November 13, 1895, leaving a will, dated May 10, 1893, which was duly probated, in which she bequeathed her estate in the land which is the subject of this controversy to her three sisters, who, with the husband of the one married sister, are the plaintiffs in this case. None of the four nieces mentioned in the will ever had any children.

"The question, as we have stated, for us to pass upon, is whether the plaintiffs take an estate in fee simple or fee tail, which under the act of 1855 (P. L. p. 328) is converted into a fee simple, under the will of Robert A. Evans, or only a life estate. If the former, they are entitled to recover; but, if they only take a life estate, the judgment must be for the defendant, for then they cannot convey an estate in the land in fee simple as they have agreed to do. We are of the opinion that this case is governed by the rule in Shelley's Case, which is as follows: 'When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance the estate is limited, either mediately or immediately, to his heirs in fee, or in tail, always in such cases "the heirs" are words of limitation of the estate, and not words of purchase.' It is held in a number of cases that 'heirs of the body' are also words of limitation, and not words of purchase under this rule, and that the estate taken by the ancestor when these words are used is an estate in fee tail. *Curtis v. Longstreth*, 44 Pa. 297; *Allen v. Henderson*, 49 Pa. 333; *Bassett v. Hawk*, 118 Pa. 94, 11 Atl. 802; *Reimer v. Reimer*, 192 Pa. 571, 44 Atl. 316, 77 Am. St. Rep. 833. The word 'children' is ordinarily a word of purchase, and not a word of limitation, yet, when it is used to signify a whole line of descendants of the first taker as an equivalent of 'heirs of the body,' it creates an estate tail under the rule. This has been decided in a number of quite recent cases.

"In *Pifer v. Locke*, 205 Pa. 616, 55 Atl.

790, the testator devised a house and lot to his daughter 'for and during her natural life, and at her death, I devise and bequeath the same unto her children or issue in fee simple.' Held, that she took a fee simple. In the opinion of the court it is said: 'We concede that generally the words "child" and "children" prima facie are words of purchase, and not of limitation. See the many cases cited in Guthrie's Appeal, 37 Pa. 9. But if the remainder, even where these words are used, is to go to the general or lineal heirs as pointed out by law, they are synonymous with "heirs of the body," and, by analogy to the rule in Shelley's Case, the estate for life in the first taker is enlarged into a fee or into an estate tail by implication. Here the devise at the daughter's death is to her children or issue in fee simple, precisely as if he had said to my daughter and the heirs of her body, the very ones the law pointed out as the general or lineal heirs of the first taker.' In *Simpson v. Reed*, 205 Pa. 53, 54 Atl. 499, the words of the will are: 'I give to my daughter, Martha Bell Simpson, the equal, undivided one-fifth part or share of all my real estate for life only; remainder after her death to her child or children in fee.' etc. Held, that she took an estate in fee tail general, which the act of April 27, 1855 (P. L. 328), resolved into a fee simple. In the opinion Justice Dean says: 'Did the testator here use the words "child" or "children" in the sense of heirs of the body or issue? Prima facie they are words of purchase, and not of limitation, and the devisee took but a life estate (Guthrie's Appeal, 37 Pa. 9, and the many cases therein cited); but is the remainder to go to the general or lineal heirs of the first taker as the law determines? Of course, the estate of the first taker must be a freehold estate for life or for years. It is then to go to her child or children in fee, the lineal heirs of the first taker whom the law identifies. "Any form of words sufficient to show that the remainder is to go to those whom the law points out as the general or lineal heirs of the first taker will enlarge the estate in fee or estate tail by implication." \* \* \*

A long list of those cases in which the words "child" and "children" have been held to be words of limitation by analogy to the rule in Shelley's Case is given by Agnew, J., in *Yarnall's Appeal*, 70 Pa. 335. \* \* \* The word "child," since the daughter had no child at the time, was not a designatio personæ, but comprehended a class, and the daughter took an estate tail. *Jones v. Davies*, 4 Barn. & Adolph, 43.' In *McKee v. McKinley*, 38 Pa. 92, the words of the will were: 'To my daughter \* \* \* during her lifetime \* \* \* after her death to her children, if any surviving, or issue of such children, and in case of no children or issue

of children, then to return to my relatives or lawful heirs.' In referring to this case in *Simpson v. Reed*, 205 Pa. 53, 54 Atl. 499, Justice Dean says: 'It was held that the devise was to the daughter for life and then to her children in fee, and, in default of these, to testator's heirs; that this was only another way of devising to the plaintiff for life, with the remainder to her heirs, or to the plaintiff and her heirs; that the roundabout way the testator takes to say "heirs" does not affect the substance. It appears that at the date of the will the daughter was single, and did not contemplate marriage. She having no children, and no particular ones being in the mind of the testator, for he could not know what children or how many would be the issue, we think he intended the "issue" to take in lineal descent. Therefore the daughter took an estate in fee tail general, which the statute of 1855 resolves into a fee simple.'

"With the law as laid down in these cases before us, it is not a matter of much difficulty to construe the will under which the plaintiffs have their title. A freehold estate is given to them. A remainder of each undivided fourth of the estate is given, on the death of each one of the four nieces, to 'her children and their heirs and assigns forever,' without a bequest over in case of such niece's failure to have children. Each share is to go to the lineal heirs, as pointed out by law, on the death of each niece, and the word 'children' is synonymous with 'heirs of the body.' The word 'children' is not a designatio personæ as none of the nieces had any children and all were unmarried at the time of testator's death. The use of the words 'children and their heirs and assigns forever,' therefore, was only another way of devising the undivided part of the land to each niece and the heirs of her body; and the roundabout way which the testator takes to say 'heirs' does not affect the substance. The estate which the plaintiffs and the deceased sister took under the will, according to the rule in Shelley's Case, is a title in fee tail general, which is resolved into a title in fee simple by the act of 1855. They are, therefore, able to convey such title to the defendant as they agreed to convey, and entitled to recover the purchase money which the defendant agreed to pay. We therefore enter judgment for the plaintiffs for the sum of \$4,000."

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

J. R. Kinzer, for appellant. W. U. Hensel, for appellees.

PER CURIAM. The judgment is affirmed on the opinion of the learned judge of the common pleas.

**WASHINGTON v. RHODE ISLAND CO.**

(Supreme Court of Rhode Island. Oct. 12, 1908.)

**1. STREET RAILROADS—INJURIES TO PERSONS NEAR TRACK—NEGLIGENCE—RES IPSA LOQUITUR.**

A trolley pole, which had come off the trolley wire and which had been banging the cross-wires for some time, became disconnected from the spring and fell on a driver of a vehicle in the street, injuring him. *Held* that, under the doctrine of "*res ipsa loquitur*," the company had the burden of explaining its failure to stop the car forthwith, or to control the pole by the rope, and on its failure to sustain such burden a recovery was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 227, 228.]

**2. DAMAGES—PERSONAL INJURIES—EXCESSIVE DAMAGES.**

Where a person earning \$10 a week was struck by a falling trolley pole, causing him to lose about 10 weeks from his work, to suffer severely for several days, and to incur medical expenses of from \$60 to \$80, a verdict for \$1,300 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 359-371.]

Exceptions from Superior Court, Providence and Bristol Counties.

Action by Walter R. Washington against the Rhode Island Company. There was a verdict for plaintiff, and defendant brings exceptions. Overruled, and cause remitted, with directions for judgment on the verdict.

This is an action for personal injuries. Plaintiff was driving a vehicle down a street. A train of cars belonging to defendant was proceeding down the street behind him. As the train overtook and was passing him, the trolley pole, which had come off the trolley wire and which had been banging against the cross-wires for some time, became disconnected from the spring, when opposite plaintiff, and fell on his neck, shoulders, and back, injuring him. Plaintiff at the time of the accident earned \$10 a week as a driver for a stable keeper. He lost about 10 weeks from his work and incurred medical expenses of from \$60 to \$80. He suffered severe pain for a day or two, or a week, after the accident. He recovered a verdict for \$1,300.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

John W. Hogan, for plaintiff. Joseph O. Sweeney and Clifford Whipple, for defendant.

**PER CURIAM.** The case presented is one in which *res ipsa loquitur*, thereby casting upon the defendant the burden of explaining its freedom from negligence in the accident. The explanation offered is that the conductor in charge of the car did nothing to prevent damage, after notice that the trolley had left the wire, except to give a signal (one bell) to the motorman to stop the car at the foot of College Hill. As it appears that, in order to save the trolley pole from doing damage

after leaving the trolley wire, it was necessary to stop the car forthwith or to control the pole by the rope attached to it and provided for that purpose, and as no excuse was offered by the defendant for not making an attempt to do either, it has failed to sustain the burden imposed upon it.

The verdict is supported by the law and the evidence. Considering the medical as well as the other testimony, we do not regard the damages awarded as excessive.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

(29 R. I. 202)

**WILCOX v. RHODE ISLAND CO.**

(Supreme Court of Rhode Island. Oct. 19, 1908.)

**1. APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT—VERDICT—INSUFFICIENCY OF EVIDENCE.**

Where the evidence is conflicting, and the trial court has overruled a motion for new trial on the ground of insufficiency of evidence, its ruling will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3049.]

**2. NEW TRIAL—GROUNDS—VERDICT—CONFLICTING EVIDENCE.**

The rule that an appellate court will not reverse on conflicting evidence has no application to the granting of new trials by the lower courts, and they should grant a new trial whenever it appears that the verdict fails to do substantial justice to the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 144, 145.]

**3. CARRIERS—PASSENGERS—PERSONAL INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE.**

In trespass for assault and battery by employes of a carrier upon one about to take passage on its car, evidence *held* to sustain a verdict for plaintiff.

**4. DAMAGES—EXCESSIVE DAMAGES—PERSONAL INJURIES.**

In an action against a carrier for injuries caused by an assault of employes, resulting in contusions and bruises on the knee joint, which caused plaintiff's knee to be permanently stiff, a verdict for \$2,000 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 377.]

Exceptions from Superior Court, Providence and Bristol Counties.

Trespass for assault and battery by Eleanor F. Wilcox against the Rhode Island Company. Verdict for plaintiff. Defendant's motion for a new trial was denied, and defendant excepts. Exceptions overruled, and cause remitted, with directions to enter judgment on the verdict.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

James A. Williams, for plaintiff. Joseph C. Sweeney and Alonzo R. Williams, for defendant.

**DUBOIS, J.** This is an action of trespass for assault and battery, brought by the plain-

tiff to recover damages for injuries inflicted upon her July 25, 1904, in the town of Warwick, by a car conductor in the employ of the defendant. The case was tried before Mr. Justice Brown and a jury in the superior court in Providence county, and a verdict was rendered for the plaintiff for \$2,000 damages. The case is now before this court upon the defendant's exception to the ruling of said justice denying the defendant's motion for a new trial upon the grounds that the verdict was against the evidence and the weight thereof and that the damages awarded by said verdict were excessive.

It is claimed by the appellant that on the day in question she and her mother, together with her son, a boy about nine years of age, were about to become passengers upon one of the defendant's cars at Oakland Beach for the purpose of riding to Providence, and that after her mother and son had boarded the car, and while she was in the act of boarding the same, together with a small "Esquimaux Shepherd" dog, for which she had a proper pass, and which she held by an old soft clothesline wound around her hand, and had reached the rear platform, the conductor, without warning, grabbed the dog and threw it bodily from the car, which caused her to turn, and then pushed her from the car to the station platform, upon which she fell violently upon her right knee, which was thereby rendered permanently lame. The plaintiff's story of the assault is corroborated by her mother and son, and her statement of the injuries sustained is confirmed by Dr. George D. Hersey, who testified that he examined her within a week of the alleged assault, and found contusions and bruises on the knee joint, and that he treated her during August, September, and October, 1904, and that after that he has seen her at intervals when she has been at his office, and that she has a stiff knee, which is a permanent injury.

The story of the plaintiff and her witnesses is denied by the conductor; but the motorman and baggage master of the defendant, and the messenger of Adams Express Company, who were in or about the car, merely deny seeing anything of the kind. William D. F. Aldrich, Jr., the motorman, testified in relation to the matter as follows: "Q. 25. On that morning in question did you know of any person receiving injury on your car by being thrown off the car? A. I didn't know anything about it; no, sir. Q. 26. On that morning in question was there any complaint made in your presence, or that you knew of? A. No, sir; there was not." Edward Russell, the baggage master, testified concerning the same as follows: "Q. 4. Do you remember the occurrence of Mrs. Wilcox, the plaintiff in this case, her mother, an elderly lady and a dog, boarding your car at Oakland Beach? A. Well, I remember at Oakland Beach we stopped there, and there was a trunk on the platform belonging to

Mrs. Wilcox, and I put the trunk aboard the car, and got out and looked out of the door, and there was a lady standing on the platform and a dog—a shepherd dog—and I got out of the baggage room door and goes back to get the dog to bring it up in front in the baggage department, and she said— Q. 5. When you had put the trunk aboard, and had gone back to get the dog, where was the lady—where was she? A. The lady and the dog was on the platform of the station. Q. 6. Of the station? A. The station; yes. Q. 7. How near the car? A. Well, I should say eight or ten inches from the car." And Frank Tucker, the express messenger, in relation to the same, gave the following testimony: "Q. 18. Did you know anything about any injury that day? A. No, sir."

In support of its contention that the court below erred in denying its motion for a new trial upon the ground that the verdict was against the evidence, the defendant argues as follows: "This case is one which, from the extraordinary character of the plaintiff's testimony, and from the overwhelming evidence of the defendant in contradiction of all the claims of the plaintiff, the defendant maintained, and still maintains, is one of pure out-and-out fraud, and therefore seeks to be relieved from paying any such verdict as rendered. The appearance of the plaintiff and her family upon the stand, the manner of giving their testimony, coupled with the unbelievable testimony itself, show, without any question, that it is a case without any semblance of merit. It is not the intention of the defendant to write an extended brief from the fact that the case is so peculiar that the fraud can only be detected by a careful reading of the testimony. It would be useless to attempt to set forth separately the contradictions contained therein, as that would include the recital of the whole transcript. Gruff, impulsive, high-tempered, the plaintiff is convincingly capable of anything."

The position assumed by the defendant and other litigants, coming before this court on similar exceptions, convinces us that it may be well to state definitely the rules governing trial courts and appellate courts in regard to granting new trials upon the ground that the evidence is insufficient to support the verdict. The rules governing the respective courts are wholly different. The distinction is clearly pointed out in the case of *Dewey v. Chicago, etc., R. R. Co.*, 31 Iowa, 373, cited in *Clark v. Great Northern Ry. Co.* (1905) 37 Wash. 537, 79 Pac. 1108, 2 Am. & Eng. Ann. Cas. 760, where the following language is used: "We therefore avail ourselves of this occasion to correct what we understand to be a very general misapprehension on the part of district and circuit judges in respect to the rule as to new trials in the nisi prius courts. This court has repeatedly declared the rule for itself (and such is the rule in most appellate tribunals), that where the evidence is conflicting, and the nisi prius

court has overruled a motion for a new trial grounded upon the insufficiency of the evidence, we will not interfere; and this because, first, the jury have found the verdict and given credit to the witnesses on the one side of the conflict; second, the judge, who also heard the testimony from the mouths of the witnesses, and weighed the same in the balance of his more cultured and accurate legal judgment, has, by overruling the motion, given his approval and indorsement to the verdict; and, third, this court can never have the benefit of observing the conduct and deportment of the witnesses while testifying, nor even the peculiarity of their expressions, but generally only the substance of their testimony, and often in the language of the attorneys interested in the cause. A mention of these considerations upon which the rule for the appellate courts is (in part) founded, is sufficient to show that the rule ought not and does not have any application whatever to the nisi prius courts. Those courts ought to independently exercise their power to grant new trials, and, with entire freedom from the rule which controls appellate tribunals, they ought to grant new trials whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice to the parties in the case. Whenever it appears that the jury have, from any cause, failed to respond truly to the real merits of the controversy, they have failed to do their duty, and the verdict ought to be set aside and a new trial granted." See, also, *Gorman v. Hand Brewing Co.*, 28 R. I. 183, 186, 66 Atl. 209.

There is nothing so peculiar about this case as to take it out of the general rule applicable to appellate tribunals, above stated. The story of the plaintiff and her eyewitnesses, while remarkable, is not impossible, and its probability and credibility were subject to the scrutiny of the trial judge and jury, and they have seen fit to credit it. There is nothing to show that the jury were governed by any improper motives, or that the judge erred in the performance of his duty. Nothing has been suggested to us in argument that was not urged upon judge and jury in the court below, including, probably, even the expressions above quoted, "Gruff, impulsive, high-tempered, the plaintiff is convincingly capable of anything," which are meaningless to us, because a mere reading of the transcript of testimony fails to disclose such characteristics. We cannot hope to know as much about the witnesses as the trial court.

In view of the permanent character of the plaintiff's injury, the damages cannot be deemed excessive.

The defendant's exceptions are therefore overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

## O'MALLEY v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Oct. 19, 1908.)

## 1. APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT—EXPERT MEDICAL TESTIMONY.

In an action for personal injuries, as to the extent and cause of which the medical experts testifying for each party disagree, it is for the jury to pass upon the weight of the medical testimony, as well as the other evidence, and their finding thereon warranted by evidence, will not be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

## 2. DAMAGES—EXCESSIVE DAMAGES—PERSONAL INJURIES.

In an action by a woman for personal injuries, if her injuries caused a retroversion of the uterus, which rendered a major surgical operation necessary to effect a cure, a verdict for \$4,156 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 366, 376.]

## 3. APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT—VERDICT—DENIAL OF NEW TRIAL—EXCESSIVE DAMAGES.

As a general rule, a verdict will not be disturbed, on the ground of excessive damages, where a motion for a new trial on that ground was denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3945.]

Exceptions from Superior Court, Providence and Bristol Counties.

Action by Marguerite O'Malley, by her next friend, against the Rhode Island Company. Verdict for plaintiff. Defendant's motion for a new trial was denied, and defendant excepts. Exceptions overruled, and cause remitted with directions to enter judgment on the verdict.

Plaintiff was injured in a collision of defendant's cars while a passenger, and recovered a verdict for \$4,156.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

John W. Hogan, for plaintiff. Joseph O. Sweeney, for defendant.

PER CURIAM. The only question submitted to us relates to the amount of damages awarded by the jury. The medical experts for the defendant do not agree with those of the plaintiff as to the seriousness, permanence, or cause of the plaintiff's disabilities. It was the duty of the jury to pass upon the weight of the medical, as well as that of the other, evidence, and they have done so, evidently preferring that for the plaintiff. If the retroversion of the plaintiff's uterus was caused by the collision of the defendant's cars, and if that condition cannot be cured without a major surgical operation (and there is sufficient evidence to warrant such a finding), we cannot say that the damages awarded are excessive.

Furthermore, as the defendant's motion for a new trial because damages are excessive was denied by the trial judge, who heard the



case, the correctness of the verdict is approved and indorsed by him, and the general rule in such cases is that such a verdict, so approved, will not be disturbed. *Wilcox v. Rhode Island Company*, 29 R. I. —, 70 Atl. 913.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

(75 N. H. 13)

**KINGSBURY et al. v. BAZELEY et al.**  
(Supreme Court of New Hampshire. Cheshire.  
June 2, 1908.)

**1. WILLS—PAYMENT OF LEGACIES—INTEREST.**

Ordinarily, in the absence of any provision in the will as to the time of payment, pecuniary legacies are payable at the end of a year from the death of testator, without interest; but, if not then paid, they bear interest thereafter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1847-1865.]

**2. TAXATION—INHERITANCE TAXES—CHARGES AGAINST ESTATE—INTENTION OF TESTATOR.**

Whether inheritance taxes are a charge against the estate, or are to be deducted from the several legacies, depends on the intention of the testator, who may provide by the will how such charges shall be treated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1712.]

**3. SAME.**

A clause in a will giving pecuniary legacies to certain individuals for their own benefit and to certain other individuals for charitable purposes, which directs the executors to pay inheritance taxes on legacies to individuals, so that the legatees may be benefited to the full amount of their legacies, does not cover a legacy to individuals for charitable purposes, and both they and the beneficiaries of the charity are excluded from the payment of such taxes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1712.]

**4. SAME—CHARITIES—NATURE OF GIFTS.**

Gifts for charitable purposes, though gifts for the benefit of individuals, are not gifts to individuals, within an instruction in a will directing payment of inheritance taxes on legacies to individuals.

**5. SAME—STATUTES.**

Under Laws 1905, p. 433, c. 40, § 5, requiring an executor holding property subject to an inheritance tax under the act to deduct the tax therefrom, or collect it from the legatees, etc., an inheritance tax imposed on property distributed through the courts of New Hampshire is to be deducted from the legacy, and is not a part of the expenses of administration; and a testator, who makes no provision for the payment of such a tax from his estate, intends the benefit to be received by the beneficiary, less the tax.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1710.]

**6. WILLS—CONSTRUCTION—PRESUMPTIONS.**

A testator is presumed to have made his will, having in view the law of his domicile.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 947, 948.]

**7. TAXATION—INHERITANCE TAXES—PAYMENT.**

In a testamentary gift of specific personal property located in a sister state, the amount demanded by such state as the price of the transfer of the title is naturally a charge

against the legacy, because, under the law, the testator cannot transfer by will the entire title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1710.]

**8. DESCENT AND DISTRIBUTION—WHAT LAW GOVERNS.**

Whether distribution is effected by the state of the domicile of decedent or by that of the locus of the property, the law of distribution is that of the state of the domicile.

**9. WILLS—CONSTRUCTION—AMOUNT OF PECUNIARY LEGACY—INTENTION OF TESTATOR.**

In a gift of a pecuniary legacy of a fixed amount, the apparent intent is to benefit the legatee to such amount; and where the will is administered by the law of a jurisdiction imposing no inheritance tax, the purpose to transmit the full amount to the legatee is clear.

**10. TAXATION—INHERITANCE TAXES—VALIDITY.**

The ground on which the collection of an inheritance tax by the state of the locus of the property, when different from that of testator's domicile, is sustainable, is the jurisdiction over the property which is given by its situs; and the tax is merely a charge on the particular property, and not on pecuniary legacies given by the will.

**11. WILLS—CONSTRUCTION—WHAT LAW GOVERNS.**

The law of a sister state cannot extend beyond the jurisdiction thereof, and where the rights to property under a will depend on a foreign law the rights are determined in accordance with that law, but where rights depend on the law of the forum the foreign law is immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 947, 948.]

**12. EXECUTORS AND ADMINISTRATORS—FOREIGN WILLS—DISTRIBUTION OF ESTATE.**

While, in giving effect to a foreign will, courts are governed by the law of the domicile of the testator, the estate within the control of the court is administered according to the law of the forum, and such estate embraces all property originally within the state and brought into it by the executor, and whatever sum the executor pays to bring the property within the state reduces the amount within the control of the court.

**13. TAXATION—INHERITANCE TAXES—PAYMENT.**

In the absence of a direction, express or implied, in a will, or of a statute on the subject, a pro rata distribution among all the pecuniary legacies of sums paid as foreign death duties cannot be made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1710.]

**14. SAME.**

A clause in a will, directing an executor to pay inheritance taxes due on any legacy given to an individual, implies a recognition of the possibility of such taxes, and as to legatees other than individuals a purpose that duties legally chargeable on such legacies shall be borne by them; but as foreign duties are not due on the legacy given by the will, but are a deduction from the property used in carrying out the purpose of the will, the clause is insufficient to require the court to administer the law of the sister states in which property may have been found and inheritance taxes paid.

Transferred from Superior Court, Cheshire County; Chamberlain, Judge.

Bill in equity by Frederic H. Kingsbury and another, executors of Julia Beatrice Thayer, deceased, against Margaret Chapin Bazeley and another, for the construction of the will of the deceased and advice as to

the duty of the executors. Transferred from the superior court. Case discharged.

The seventh clause of the will is as follows: "In memory of my sister, Jennie Evelyn Ball, I give and bequeath to my niece, Margaret Chapin Bazeley, and to Mrs. Louis Derr, of Brookline, Massachusetts, the sum of one hundred thousand dollars, to be used by them or the survivor of them, or their successors, for the purpose of establishing and maintaining a summer home for poor children and their mothers, or for poor children alone, or for working girls, as in their judgment may be best calculated to promote the welfare of such children, mothers, or working girls."

The eighty-second clause of the will is as follows: "I give the following directions to my executors: In case my estate should prove insufficient for the payment of all the pecuniary legacies and bequests herein given, I direct them to apply my estate first to the payment in full of the legacies given to my relations, second to the payment of the legacies given to other individuals, and third to the payment of legacies and devises to institutions and corporations in such proportions as the residue divided pro rata shall suffice for, and this direction is to apply as well to all those legacies given in trust; it being my wish that individuals should be fully paid and that all institutions and corporations named herein should be paid pro rata from my estate in case of an insufficiency. And I further direct that my executors pay from my estate any and all inheritance and succession taxes that may become due upon any legacies given by this will to individuals, so that said legatees may be benefited to the full amount of their respective legacies."

Mrs. Louis Derr, named in the seventh clause of the will, declined to act, and Richard D. Ware was duly appointed in her place. Other clauses of the will contain pecuniary and specific gifts to individuals for their own benefit and in trust for certain persons named, some of whom were related to the testatrix, and to various institutions or corporations for charitable purposes.

Charles H. Hersey, for plaintiffs. Richard D. Ware, pro se and for Margaret Chapin Bazeley. John E. Allen, for town of Winchester. Cain & Benton, for Keene Humane Society.

PARSONS, C. J. The questions submitted are: (1) From what time and at what rate is interest payable upon the pecuniary legacies given by the will? (2) Whether any inheritance or succession taxes payable upon the bequest made by the seventh clause of the will are a charge against the estate or the legacy? (3) Whether such taxes imposed upon property by other states should be charged as an expense of administration, or deducted pro rata from all legacies, as to

which such taxes are not expressly by the will charged upon the estate?

Ordinarily, in the absence of any provision in the will as to the time of payment, pecuniary legacies are payable at the end of the year from the death of the testator, without interest; but, if not then paid, they bear interest after the expiration of the year. *Loring v. Woodward*, 41 N. H. 391, 393; *Rice v. Society*, 56 N. H. 191; *Tilton v. Society*, 60 N. H. 377, 384, 49 Am. Rep. 321. Upon grounds apparently satisfactory to all parties the superior court ruled that interest on the gift contained in the seventh clause should be limited to the income on certain securities. No exception was taken to this ruling, and no question was transferred for consideration. It is not found that the remaining pecuniary legacies are affected in any way by the same facts, or by a like situation to that which appears to be considered sufficient to authorize the ruling as to this legacy. No other reason appearing for excluding them from the ordinary rule, interest is payable upon them after the expiration of one year after the testator's death, at the legal rate. Pub. St. 1901, c. 203, § 1.

Whether inheritance or succession taxes are a charge against the estate, or are to be deducted from the several legacies, is a question of intention, which the will makes clear as to all legacies to individuals by the concluding sentence of the eighty-second clause: "And I further direct that my executors pay from my estate any and all inheritance and succession taxes that may become due upon any legacies given by this will to individuals, so that said legatees may be benefited to the full amount of their respective legacies." This language has no reference to the legacy given by the seventh clause to Margaret Chapin Bazeley and Mrs. Louis Derr, for the purpose of establishing and maintaining a summer home for poor children and their mothers, for it was not the testatrix's intent that the individuals named as trustees to administer the fund bequeathed by this legacy should be benefited by any part of the fund; consequently the reason given for the payment of the legacy tax upon gifts to individuals, that the "legatees may be benefited to the full amount of their respective legacies," can have no application. In a sense, all the gifts for charitable purposes are gifts for the benefit of individuals; but such gifts are "for the benefit of an indefinite number of persons," and not for particular individuals. Such gifts are not gifts to the individuals, but to the class. The trustees named in the seventh clause are not within the language of the eighty-second, because the gift is not for their benefit. The individuals for whose benefit the gift is made are also excluded, because the gift is not for individuals, but for a class.

The remaining question, whether succession or inheritance taxes paid in another jurisdiction to get possession of the property

for administration by the courts of the state of the testator's domicile are a charge against the estate as expenses of administration, or deductible pro rata from the various legacies, is one of greater difficulty. It seems to be an entirely new question. No case is cited in which it has been considered. None has been found in which the precise question has been raised, though it is understood that, in reliance upon the language of the court in considering questions more or less analogous, it is ruled in New York that such taxes are to be deducted from the legacy, and in Massachusetts that they should not be. In *re Swift's Estate*, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709; *Hooper v. Shaw*, 176 Mass. 190, 57 N. E. 361; *Leg. & Succ. Tax Mass.* (1906) 7, 8. But, since it was perfectly competent for the testatrix to provide by will how these charges should be treated, the question must be one of intention. The varying nature of the property, its situation, the character of the gift (whether specific or otherwise), and other evidentiary matters competent upon the ascertainment of the expressed intention, may justify different conclusions from almost identical language. From the nature of the question, no rule can be laid down which will solve all cases.

The inheritance tax imposed upon property distributed through the courts of this state is deducted from the legacy, and is not a part of the expenses of administration. *Laws 1905*, p. 433, c. 40, § 5. A testator is presumed to have made his will, having in view the law of his domicile. *Mann v. Carter*, 74 N. H. 345, 350, 68 Atl. 130; *Harris v. Ingalls*, 74 N. H. 339, 345, 68 Atl. 34. Hence a testator, who makes no provision for the payment of such taxes from his estate, must have intended the actual benefit to be received by the subject of his bounty to be as much less than the sum named in his will as he is presumed to have known the state would take for itself in executing his expressed wish for the transmission of his property. In a gift of specific personal property located in a foreign state, the amount demanded by such state as the price of the transfer of the title may naturally be a charge against the subject of the legacy, not because of the testator's presumed familiarity with the law of the jurisdiction, but because under that law he has not the power to transfer by will the entire title. The intention apparent from the words of the will is effectuated as near as may be by the transfer of all of the title the testator was capable of transmitting—the title charged with the duty. Whether the distribution is effected by the state of the domicile, or by that of the locus of the property, the law of the distribution is that of the state of the domicile. *Mann v. Carter*, 74 N. H. 345, 349, 351, 68 Atl. 130. A statutory requirement that, unless otherwise provided by the will, foreign death duties should be treated as ex-

penses of administration, would as efficiently provide for their payment out of the general estate as an express direction of the will. Similarly a statute of this state, providing that in the distribution of the estate of a decedent here the same effect should be given to the laws of a foreign state imposing inheritance or succession taxes upon property of the decedent found therein as would be given if the distribution were made under the laws of the state imposing the tax, would also determine the question. In the absence of statutory provisions on the subject, the question seems to be: What force, if any, can be given the foreign law in the distribution under New Hampshire law? This must be the sole question, unless there can be drawn from the terms of the will, expressly or by implication, evidence sufficient to justify a conclusion as to the testator's intention.

In a gift of a pecuniary legacy of a certain amount, the apparent intention is to benefit the legatee to the full amount named. If such will is to be administered by the law of a jurisdiction imposing no inheritance tax, or none upon the class to which the legatee belongs, the purpose to transmit the full amount to such legatee would seem clear, when the will is read in the light of the law by which it is to be given effect. The conclusion that a less sum was intended, because at the time of the testator's death some portion of his property happened to be within a jurisdiction imposing a tax upon such a transfer, seems strained and illogical. The sole ground upon which the collection of such tax by the state of the locus of the property, when different from that of the testator's domicile, can be sustained is the jurisdiction over the property which is given by its situs. *Gardiner v. Carter*, 74 N. H. 507, 69 Atl. 939; *Callahan v. Woodbridge*, 171 Mass. 595, 597, 51 N. E. 176. To hold that the effect of the foreign law is to reduce the legacy given by the will construed in accordance with the law of the testator's domicile is to permit the foreign law to regulate the testamentary capacity of a citizen of this state. But the foreign law cannot extend beyond the jurisdiction which created it. If the rights in controversy depend upon the foreign law, those rights are determined in accordance with that law. *MacDonald v. Railway*, 71 N. H. 448, 52 Atl. 982, 59 L. R. A. 448, 93 Am. St. Rep. 550. But when the right involved depends, not upon the foreign law, but upon that of the forum, the foreign law is immaterial and incompetent upon the question at issue. "It is obvious that the state has no jurisdiction over a right of succession which accrues under the law of the foreign state. That is something in which this state has no interest and with which it is not concerned." In *re Bronson*, 150 N. Y. 1, 8, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632.

As the foreign tax depends upon the ju-

jurisdiction over the property, and is not sustainable as a regulation of the exercise of testamentary power by the citizen of another state, it follows that the tax is merely a charge upon the particular property, and not upon pecuniary legacies given by the will. That the foreign state may regulate the amount of the imposition made by it, or determine whether it will make any at all, by the character of the legacies given by the will, is immaterial. Having jurisdiction over the property, it is for such state alone to determine upon what basis it will exact payment. While in giving effect to a foreign will courts are governed by the law of the testator's domicile, it has never been held that in the administration of an estate the courts of the testator's domicile would be governed by the law of the situs of personal property. The estate within the control of the court is to be administered according to the law of the state. The property to be administered embraces all that was originally within the state, or that the executor has been able to find elsewhere and bring here. Whatever sums the executor may be obliged to pay to bring the property within the state merely reduce the amount within the control of the court.

No ground can be found, in the absence of a direction, either express or implied in the will, for a pro rata distribution among all the pecuniary legacies of the sums paid as foreign death duties. On account of some legacies a charge may be made in some states and not in others. A deduction from a legacy on account of a tax imposed on others in a particular jurisdiction would not be supported by any basis of reason. The only method which could be followed would be the division of the legacies into as many classes as were made by the laws of all the states in which property was found, and a division of the sums paid pro rata among each class. This would plainly be an administration of the estate according to laws which have no force here, and which cannot, in the absence of legislative authority for such course, properly be followed. The executors have in hand, if they are ready to settle, so much property. The will, construed by the law of this state, directs how the distribution shall be made. The fact that the executors have less than they would have had, except for the demands of jurisdictions to which they were obliged to go to get the property and bring it here for distribution, cannot alter the law of the state or the terms of the will. In the absence of evidence from which a contrary direction can be implied from the will, the amount deducted by other states before permitting the transfer of property within their limits to the executor for distribution here (*Greves v. Shaw*, 173 Mass. 205, 209, 53 N. E. 372) is not property within this state for distribution. The executors are chargeable only for what has come to their hands—the property less the duties paid. If they

charge themselves with the full value of the property, a practical method of accounting would permit them to discharge themselves by accounting for the foreign duties paid as expenses of administration.

In the present case there are no facts showing an intention to charge the pecuniary legacies with foreign duties for the benefit of the residuary legatees. "There is a class of cases, where the residuary bequest, by reason of the special circumstances of the case, has been construed as a particular legacy, not liable to fail, except ratably with the other legacies, on account of any unexpected deficiency of the estate, or to be augmented by the unforeseen failure of the other legacies." 2 Red. Wills, 447; *Dyose v. Dyose*, 1 P. Wms. 305. There is nothing in the present case tending to show that the residuary bequest was intended as anything except the ordinary disposal of a residuum which might be left, while the first part of the eighty-second clause establishes that the testatrix considered the possibility that the residuary legatees would receive nothing. In the latter part of the same clause the testatrix directs her executors to pay any and all inheritance and succession taxes that may become due upon any legacies given to individuals. This implies a recognition of the possibility of such taxes, and, as to legatees other than individuals, a purpose that the duties legally chargeable upon such legacies should be borne by them; but as the foreign duties are not due upon the legacies given by the will, but are a deduction from property which may be used in carrying out the purpose of the will, the language is insufficient to require the court to administer the law of all the states in which property may have been found and taxes paid.

Case discharged.

YOUNG, J., did not sit. The other Justices concurred.

(74 N. J. E. 538)

TINGLEY v. INTERNATIONAL DYNELECTRON CO. et al.

(Court of Chancery of New Jersey. Sept. 25, 1908.)

# 1. CHATTEL MORTGAGES—DESTRUCTION—NEW MORTGAGE.

Where an original chattel mortgage on the property in controversy, containing no defect in the paper itself or its execution, but only in its proof for record, was destroyed, and a new mortgage executed and accepted by the mortgagee, without objection, subsequent to a sale of the property by the mortgagor and a remortgage thereof by the purchaser, such original mortgage could not be resuscitated and enforced as a prior lien on the property against such purchaser and its mortgagee without proof that the latter sale and mortgage was voluntary or taken with notice of the existence of the first mortgage.

# 2. SAME—AFFIDAVIT.

Where a chattel mortgage given to P. did not describe him as a trustee, and the consideration was obtained through a sale of the

mortgagor's notes, secured by the mortgage, and was in fact furnished by B., an affidavit attached to the mortgage in which P. verified that he was the trustee and beneficiary in the mortgage, and that the consideration was \$5,000 paid to the mortgagor, could only be construed to mean that the consideration was paid by P. himself, either personally or as trustee, and was therefore false.

### 3. SAME—EFFECT.

Where a mortgagee's affidavit attached to a chattel mortgage on personal property was false, the landlord's claim for rent of the building in which the property was located was entitled to priority of payment from the proceeds of the sale of the property, though the mortgage was made prior to the accrual of the claim for rent.

Suit by Stephen L. Tingley against the International Dynelectron Company and others. Judgment for defendant International Dynelectron Company as against complainant, Tingley, and judgment against such company and in favor of defendant Crosselmire.

Frank Bradner, for complainant. G. L. Titus, for defendant Crosselmire. E. C. Harris, for defendant Purcell, trustee. Herbert Boggs, for defendant Dynelectron Co.

EMERY, V. C. The complainant, Tingley, as assignee of a chattel mortgage given by a company called the International Dynelectron Company, of Washington, D. C., to one Kenyon, his assignor, seeks to establish this mortgage as a lien prior to a sale of the chattels made by the mortgagor to another company, the Dynelectron Company of Arizona, and also as prior to a mortgage subsequently given by the vendee to the defendant Purcell, as trustee for five note holders, also made defendants. The bill also asserted priority over claim of defendant Crosselmire for rent due from the vendee, the Dynelectron Company; but at the hearing this claim of priority was abandoned by complainant. Pending the suit, the mortgaged chattels have been sold by a receiver and the proceeds of sale deposited in court, and the present dispute is on the disposition of the money.

In the bill the claim of priority is based on an agreement alleged to have been made by the International Company with Kenyon on November 2, 1905, for the advance by him to the company of \$3,500, to be secured by a chattel mortgage on the goods in question, and it is also alleged that as part of the agreement the chattel mortgage to be given was also to secure the advances already made and thereafter to be made to the company by the directors, of whom Kenyon was one. It is further alleged that on November 8, 1905, the board authorized the execution of the chattel mortgage by the president on behalf of the company, and that Kenyon advanced the \$3,500, and the other directors made other advances, but that for some reasons unknown to complainant the mortgage was not actually executed until May 9, 1906, at which time the total advances by Kenyon and the

other directors are alleged to have been \$23,560.28. The sale of the chattels to the Arizona company took place in April, 1906, prior to the execution of its mortgage to Purcell on May 7, 1906. The latter mortgage was recorded on this date, while complainant's mortgage was not recorded until June 20, 1906. Complainant's priority, by its bill, is based on an alleged equitable lien on the chattels, arising by virtue of the agreement to mortgage, on the faith of which the advances of \$3,500 by Kenyon was subsequently made, and the charge that the subsequent purchase and mortgage were with knowledge of this lien. Complainant's own proofs showed, however, that a mortgage and a note to Kenyon for \$3,500 was actually executed by the International Company on November 8, 1905, and that on that day the note and mortgage were delivered to Kenyon, and the \$3,500 paid by him to the company, at Providence, R. I., the principal office of the company.

The mortgage was not recorded, and the only explanation made is by Tingley, who says that the reason was that it was not properly proved, and that the register of Essex county, where the goods were located, refused to record it for that reason. The time when this attempt to record the mortgage was first made appears only by a minute of the meeting of the directors of the company on May 9, 1906, at which the president of the company, James H. Reid, reported that there was something wrong in the form of proof in the mortgage given to the company by Kenyon on November 8, 1905, which prevented its being recorded. The minute further shows that the attorney of the company was authorized to correct the mortgage and make the necessary additions, and that, having done so, the mortgage was presented to the board, who authorized the president (Reid) and the secretary (Tingley, the complainant) to execute the mortgage and deliver it to Kenyon. This correction, made and thus authorized, was not in fact the correction of the mere proof of the mortgage, but was the actual execution of a new mortgage, and, as appears by Tingley's evidence, part of the first mortgage was used, and the balance of the mortgage rewritten, and the mortgage executed as a new paper. And on the proof it is this new mortgage, delivered to Kenyon, and recorded, actually executed, and afterwards assigned to Tingley, which is sought to be enforced. The case made by the bill was one to declare effective, against the purchaser and those claiming under it, a mortgage executed subsequent to the transfer of chattels, but pursuant to an agreement made before the transfer and of which the purchaser had notice. The case on the proofs shows that a mortgage was actually executed and delivered at the time agreed on and before the sale, passing the legal as well as equitable title to the goods, and that this mortgage, subsequent to the sale and

apparently for no defect in the paper itself or in its execution, but only in its proofs for record, was destroyed, and a new mortgage executed and accepted by the mortgagee, apparently without objection. And this destruction of the old mortgage and execution of the new mortgage in its place was not only made without the inducement, or even knowledge, of the purchaser, but with the knowledge of the complainant, who, as secretary of the company, was present and participated. On the proofs, therefore, a mortgage to secure the \$3,500 was actually executed and delivered to Kenyon, according to the agreement, duly passing in form the legal as well as equitable title to the goods, and this mortgage after the transfer to the Arizona company and its mortgage to Purcell was destroyed without any participation or knowledge on their part.

It is clear, I think, that the substantial case made by the bill, the enforcement against a purchaser with notice of an equitable agreement existing at the time of the sale, not only has not been made out, but has been disproved, by showing that the agreement sought to be enforced was actually carried out, and that at the time of the sale Kenyon had in his possession the mortgage, giving expressly the lien on the chattels, which the complainant seeks to declare to be subject to an implied equitable lien by virtue of the agreement. The maxim, "*Expressum facit cessare tacitum*," applies to this agreement for lien to secure a loan, and the substantial equitable question on the proofs is whether, as against the purchaser and its mortgagee, the new mortgage by the International Company after the sale, being the only mortgage now relied on by complainant, can be established as a prior lien. The acceptance of the new security in place of the original one by Kenyon was voluntary on his part, and confirmed by his assignee, Tingley, who took part in the substitution; and, as it was not in any manner attributable to the defendants, there would seem to be no equitable basis for re-establishing the mortgage of November, 1905. Reid, the president of the International Company, who executed the new mortgage, had previously executed the bill of sale on behalf of this company to the Arizona company, and knew of its claim to the property included in the new mortgage. It appears by Tingley's evidence that the destruction of the old mortgage and the execution of the new one was made with the advice of counsel, but whether with or without considering its effect does not appear. No claim of mistake is made, either in the bill or at the hearing, and as any mistake either of law or fact which occurred was due to the negligence of the parties themselves, and in no sense attributable to defendants, the right to relief against it, by re-establishing the destroyed mortgage, admits of question. Certainly it cannot be re-established, except upon proof that the trans-

fer to the Arizona company and its mortgage to Purcell were either voluntary or taken with notice of the existence of the first mortgage. 2 Pom. Eq. Juris. §§ 776, 871. Nor could the mortgage of November 8, 1905, if it had not been destroyed, have been declared a prior lien, in the absence of similar proof of notice of such equitable lien. This notice the complainant has failed to make out upon the proofs. The transfer was made upon a consideration agreed on, which has been fully paid and performed by the purchaser, and it is now impossible to restore the status existing at the time of the purchase; and the purchase was made, as I also find upon the proofs, without notice of the alleged lien. The mortgagee, Purcell, and the note holders for whom he is trustee, are also bona fide purchasers for full value without notice, and so far as complainant's claim as assignee under the second mortgage to Kenyon is concerned there is no equity either to declare it a lien or to give complainant any equitable standing under the original mortgage of November, 1905. Before taking the mortgage from the Arizona company, searches of the records were made for chattel mortgages, and none being found, and the money being subsequently advanced under this mortgage to pay debts of the International Company assumed by the purchaser on the transfer, the notice of the alleged lien should be clearly proved. Such notice, as against Bergstrom, the holder of \$1,500 of the notes, is sought to be established by the evidence of Tingley himself, and to some extent by Reid, the president of the company. Their testimony on this subject is not only outweighed by the evidence in contradiction, but, under the circumstances disclosed in the case, should be considered with extreme caution on this point of notice. As against the five other defendants, parties as holders of the notes secured by the mortgage, there is no evidence whatever of notice of any lien at the time of their respective advances of money for the notes.

I will advise decree that complainant has failed to establish a right to any of the funds in court.

The second question arises on the claim of defendant Crosselmire for rent claimed to be due from the Dynelectron Company to November, 1906, besides the expenses of distress warrants issued for the collection of the same. It was objected that the rent was not payable by the company after July 1, 1906. But on full examination of the circumstances connected with the retention of the property in the rented premises during litigation against the company in the Tansey litigation, to which the Arizona company was a party, and the orders of the court made respecting the custody and removal of the property, I conclude that rental is fairly chargeable up to the time of the sale of the property under the order of the court, and that, so far as relates to the amount claimed, must

be allowed. As to the rent, however, becoming due after the mortgage given by the Dynelectron Company, the question of its priority over that mortgage depends on the validity of the affidavit to the mortgage, which is attacked as not complying with the statute.

The chattel mortgage, dated April 19, 1906, is given by the Dynelectron Company of Arizona to "Theodore M. Purcell," not describing him, however, as trustee, and conveys the absolute title to the chattels in question, with general warranty of title, and with the following statement: "This conveyance is made on condition, however, that the said Dynelectron Company is indebted in the sum of five thousand dollars (\$5,000) represented by ten notes of five hundred dollars (\$500) each, bearing even date herewith and payable on or before six months from date hereof, and bearing interest at the rate of six (6) per cent. per annum; said notes being numbered from one to ten, respectively. Now, if the said Dynelectron Company shall well and truly pay or cause to be paid said notes, principal and interest, then these presents shall be void," etc. The affidavit attached to the mortgage is as follows: "State of New York, County of New York—ss. Theodore M. Purcell, being duly sworn, says he is the trustee and beneficiary in the foregoing mortgage; that the consideration for said mortgage is the sum of five thousand (\$5,000) dollars paid to the said Dynelectron Company. [Signed] Theodore M. Purcell." Sworn to, etc.

The mortgage was in fact intended to be given to Purcell as trustee for the holders of the notes referred to in the mortgage, and it was intended that the notes should be given to persons advancing money on them. The ten notes of \$500 each were payable "to the order of Theodore M. Purcell or bearer," and were declared to be secured by the chattel mortgage. The firm of Bergstrom & Co., one of whose members was president of the company, had agreed to advance \$5,000 to the company on the security of this mortgage, reimbursing themselves from the moneys received on placing the notes; and \$2,000 was advanced by Bergstrom & Co. to the company the day after the mortgage was authorized (April 17, 1904), and the day before its execution, about \$2,000 more within five days of the execution, \$550 within a month, and the residue within two months. The persons, other than Mr. Bergstrom himself, who received notes, paid Bergstrom & Co. and received the notes from them for their money advanced to purchase them after the recording of the mortgage. Mr. Bergstrom himself received three notes on the execution of the mortgage. On this state of facts relating to the consideration of the mortgage and the actual advance of money thereon, it would seem to be beyond question that the statement of Purcell in the affidavit "that the consideration for said mortgage is the sum of five thousand dollars paid to the said Dyne-

lectron Company" was not a true statement of the status and consideration of the mortgage at the time of recording it, which is the time when it must be true. In the absence of any statement by Purcell in the mortgage that he was trustee, and in the absence of any statement, either in the mortgage or the affidavit, as to how or for whom he was trustee, the affidavit that the consideration of the mortgage was for \$5,000 paid to the company could only be taken to mean paid by Purcell himself, either personally or as trustee; and manifestly this was not a correct statement of the facts relating to the mortgage. The mortgage was undoubtedly an honest mortgage, and, as between the company and the holders of the notes secured by it, the mortgage is valid; but as against the landlord, a creditor of the company, for the failure of the affidavit to state truly the substantial facts relating to the consideration as they existed at the time of recording it the mortgage must be declared invalid.

The company itself, which appears and defends this suit, sets up no defense to the mortgage, and after the payment to the defendant Crosselmire of the amount due him for rent the balance of the money in court should be paid to the holders of the notes; the payments being pro rata, if not sufficient to pay in full.

(74 N. J. E. 394)

#### CAFFREY v. CAFFREY.

(Court of Errors and Appeals of New Jersey  
Sept. 28, 1908.)

#### DIVORCE—DESERTION—EVIDENCE.

On the facts of this case, as recited in the opinion, the petitioner is entitled to a final decree of divorce on the ground of willful, continued, and obstinate desertion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17. Divorce. §§ 448, 447.]

(Syllabus by the Court.)

#### Appeal from Chancery Court.

Action by Alice C. Caffrey against Lewis W. Caffrey. Judgment for defendant, and plaintiff appeals. Reversed.

Carrow & Kraft, for appellant.

TRENCHARD, J. This is an appeal from a decree of the Court of Chancery dismissing the appellant's petition for divorce.

The parties resided in Camden and were married in that city January 8, 1902. On the night of the marriage, shortly after the ceremony, and at the home of the wife's parents, the defendant told the petitioner, in the presence of her mother, that "he was not fit to be a married man and was going to his home," and also that he was being attended by Dr. L— and "would be better after awhile." The defendant then went to his home, and the petitioner remained with her parents. The defendant called upon the petitioner two or three nights following their

marriage, and then remained away about three weeks, when he called and said he would "take her to housekeeping in June." On this last-mentioned visit he told his wife that "he had been to Mr. Hilton, the minister who married us, and asked him to tear up our marriage certificate," and, when she asked him "what he did that for," he said "that he was afraid of Miss F—— M——." He never, after the night of the marriage, referred to his physical condition, nor gave that as an excuse for not living with his wife. He never visited the petitioner again, and never contributed to her support, although he resided in the same neighborhood.

In February, 1902, after frequently asking her husband to provide a home for her and to support her, the wife brought a suit for alimony. The parties next met, as a consequence of that suit, at the office of the solicitors of the petitioner. At this interview the husband promised to go housekeeping with his wife in June, 1902, whereupon the suit for alimony was abandoned. In June, 1902, the wife, having heard nothing from her husband, went with her mother to his place of business in Camden to remind him of his promise. She asked him to carry out his promise to take her to housekeeping, and he replied that he could not then, but would later on. Whereupon the wife said to him: "You will go back on your word." And he replied: "No; I won't. I will go right down to Squire Schmitz's with you." Thereupon he took his wife to Squire Schmitz's office, where he signed a paper writing as follows:

"This agreement made this tenth day of June, A. D. 1902, between Lewis Caffrey and his wife Alice Caffrey both of the City and County of Camden and State of New Jersey, I Lewis Caffrey give to my wife Alice Caffrey the Privilege to go and come whenever she likes in male and female company at Day or night. As I have not the time to go with her, and she has the right to live with her parents until I am ready to go to housekeeping or go with my wife parents to live and when I go to live with her parents I hereby agree to pay one half of the expenses of the keeping of the house. That is in a few months time it is my intention to live with her as I cannot at present.

"I Alice Caffrey agrees to extend the time from a few months to the month November 1902 but it is agreed that she will not go and live with his mother.

"Lewis W. Caffrey.

"Signed, sealed and delivered in the presence of Philip Schmitz."

Within two weeks after making this so-called agreement, the husband, without the knowledge or consent of his wife, went "out West," where he remained about one year, during which time he had no communication with his wife and furnished her no support. In the summer of 1903 the husband returned to the neighborhood of Camden, where his wife and her father and her moth-

er saw him on the streets of Philadelphia and Camden two or three times, in company with Miss F—— M——, and on such occasions the defendant avoided them by crossing the street or going up a side street. On one occasion his wife, in the presence of her mother, went up to him and tried to engage him in conversation, when he said, "I don't know you." On April 6, 1906, the wife filed the petition for divorce in this cause on the ground of desertion. The matter was referred to a special master, who advised a decree dissolving the marriage between the parties. The learned Chancellor, without filing an opinion, by decree dated December 31, 1907, dismissed the petition, and from such decree the petitioner appeals to this court.

That the husband has never lived with his wife, and has never supported her, although often requested so to do, clearly appears from the depositions; and this, too, without any fault upon the part of the wife. Such voluntary separation of the husband from the wife, for the prescribed time, without the latter's consent, without justification, and with the intention of not returning, is desertion upon the part of the husband. *Sergeant v. Sergeant*, 33 N. J. Eq. 204.

As bearing upon the consent of the wife, and the intention of the husband, the so-called agreement of June 10, 1902, requires consideration. Without reference to the fact that it was not signed by the wife, or its other informalities, it is certain that the agreement did not give to either spouse, as against the other, the right to continue the separation. *Miller v. Miller*, 1 N. J. Eq. 391; *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302, 24 Atl. 926. Consequently the only question is whether it indicates or gives rise to a change in the mental attitude of either party, showing consent to separation, instead of protest, on the part of the wife, and obstinate persistence on the part of the husband.

The answer to this question depends, not alone upon the language of the paper writing, but upon a consideration of all the circumstances of the case as disclosed by the evidence. From these we incline to think that, in extending the time for going to housekeeping from June 10, 1902, until the next following November, the wife was but yielding to the necessities of the case, still recognizing, as the law recognized, the continuance of marital obligations, both for herself and her husband. We think it equally clear that the husband was fully aware of this state of mind of his wife, and remained separated from her, not because he believed she assented to such separation, but because his resolution never to cohabit with his wife was unaltered. Such a state of facts constitutes willful, continued, and obstinate desertion. *Power v. Power*, 66 N. J. Eq. 320, 58 Atl. 192, 105 Am. St. Rep. 653; 1 Bish. Mar. & Div. (6th Ed.) § 805b.

This conclusion as to the state of mind of the parties we incline to think is compelled



by the undisputed facts. The husband appears to have been infatuated with another woman, and immediately after the marriage ceremony was performed showed his determination, always adhered to, not to cohabit with his wife. He was the owner of a house in Camden, but refused to go to housekeeping there or elsewhere, or to in any manner live with or support his wife. When she began her suit for support, he agreed to provide a home for her, in order, undoubtedly, to get rid of the suit. When the suit was discontinued upon such promise, he utterly failed to keep his agreement. When the wife again sought to make him fulfill his promise, he proposed, as we think, for the purpose of quieting her, to sign the paper writing under discussion. That his conduct was fraudulent from the beginning is shown by the fact that within two weeks after this last interview with his wife, without her knowledge or consent, he rented his house in Camden and absconded, remaining in the West for a year, and never thereafter communicated with her or made any provision for her support.

We incline to think that the wife, in yielding, under these circumstances, to her husband by granting the extension of time for going to housekeeping, did not consent to a separation, even for the limited time named in the writing of June 10, 1902; but, however that may be, the utmost effect that can be given to her acquiescence is to regard it as a consent to separation until the month of November, 1902. So considered, there rested upon the husband the undoubted duty to return to her and to provide a home for her at that time. In that duty the husband failed. He had fled, and his whereabouts remained unknown until the following summer. Such conduct, taken in connection with his failure to seek his wife upon his return to Camden in the summer of 1903, and his studied efforts to avoid her and her parents, rendered his conduct willful, continued, and obstinate desertion for the statutory period prior to the filing of the petition.

The decree of the court below should be reversed, with costs, and the record forthwith remitted to the Court of Chancery, to the end that a final decree for a divorce from the bond of matrimony may be made in that court.

#### PRUDENTIAL INS. CO OF AMERICA v. MORRIS et al.

(Court of Chancery of New Jersey. Oct. 1, 1908.)

#### 1. INSURANCE—LIFE INSURANCE—BENEFICIARIES—HUSBAND AND WIFE.

A man obtained a life policy, payable to C., described as his wife, if she survived him; otherwise, to his representatives. At the time he cohabited with C. In the neighborhood in which they resided they were reputed to be husband and wife, but at the time he had a law-

ful wife, whom he had deserted. *Held*, that C. was entitled to the insurance money.

#### 2. EVIDENCE — PAROL EVIDENCE — VARYING TERMS OF WRITTEN INSTRUMENTS.

Where the lawful wife and a woman who had cohabited with insured both claimed the money on a policy, which designated the woman as beneficiary and which described her as wife, parol evidence of the circumstances in which the parties lived and surrounding them when the policy was issued was admissible.

#### 3. SAME.

Parol evidence is admissible to explain a written instrument and to show the circumstances under which it was executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2066-2084.]

Bill of Interpleader by the Prudential Insurance Company of America against Carrie V. Morris and Ellen Elizabeth Morris, individually and as administratrix of Hugh E. Morris, deceased. Decree in favor of Carrie V. Morris.

Joseph H. Lecour, for Ellen E. Morris.  
Sylvester J. Smith and Robert A. Stots, for Carrie V. Morris.

HOWELL, V. C. On April 19, 1878, Hugh E. Morris married Ellen E. Morris, and lived with her until March 19, 1901, when he appears to have deserted her at Poughkeepsie, N. Y. In May, 1904, he first met the woman with whom he afterwards lived, whose name was then Carrie V. Rittenhouse. She went to live with him in 1904, and they lived together in various places in this state as husband and wife. She was known as Mrs. Morris, and they were reputed to be husband and wife by the people of the neighborhood in which they resided. While they were so living together, and on September 7, 1907, he made application to the Prudential Insurance Company for a policy of insurance on his life. After examination he was accepted, and the policy was issued to him, dated September 24, 1907, for \$1,000. On October 14, 1907, he died, leaving the policy of insurance in full force. The policy by its terms was made payable to Carrie V. Morris, beneficiary, wife of the insured, if the beneficiary survived the insured; otherwise, to the executors, administrators, or assigns of the insured. After the death of the insured, Carrie V. Morris filed proofs of death with the company; and, both Ellen E. Morris and Carrie V. Morris being claimants for the fund, the insurance company filed a bill of interpleader and paid the money into court; and the case now comes before the court on this interpleader between the two women—the one claiming to be the wife, and as such entitled to the fund, and the other claiming the fund because she was named in the policy as his beneficiary.

At the time the application was made for the policy, and at the time the policy was issued, Morris was living with Carrie V. Morris at Netcong, in this state. They were known to the people with whom they boarded and to the people with whom they were acquainted as husband and wife. She is de-

scribed in the application, a copy of which is indorsed on the policy, as his wife, and after the policy was issued it was delivered to Carrie V. Morris by him. She held it until his death, and then submitted proofs of death to the company, which issued the policy. I am of opinion that the woman with whom the insured was living at the time the policy was taken out, and who was then known as Carrie V. Morris, is entitled to the money. She was named specifically as the beneficiary. She was living with him as his wife, and was known among the people with whom they lived as such. The case is a parallel to the case of *Overbeck v. Overbeck*, 155 Pa. 5, 25 Atl. 646. In this case, as in that, it is certain that the insured did not intend that the proceeds of the policy should go to his lawful wife. On the contrary, he designated the woman with whom he was living as the beneficiary, and the money must be awarded to her.

Objection was made on behalf of the lawful wife against the introduction of any parol testimony tending to show the circumstances in which the parties lived and by which they were surrounded at the time of the issuing of the policy. Parol evidence is always admissible, not to contradict, but to explain, a written instrument; and it is always admissible for the purpose of showing the circumstances under which the instrument was executed or given life. It was only to that extent that evidence was admitted in this case.

The decree will be in favor of Carrie V. Morris. Under the circumstances, I do not think it proper to award costs against either party.

(76 N. J. L. 327)

**BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY et al. v. LEE.**

(Supreme Court of New Jersey. Sept. 5, 1908.)

**1. OFFICERS—"TERM OF OFFICE."**

The words "term of office" may indicate the statutory period for which an officer is elected; but the words may also mean a period shorter than that for which the particular officer was elected, as his "term of office" may be terminated before the expiration of the statutory period by impeachment, resignation, or death.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 8, pp. 6920-6921.]

**2. CLERKS OF COURTS—SALARY—FEES—STATUTES—APPLICATION—"TERM OF OFFICE."**

P. L. 1906, p. 78, placing all county clerks on a salary, and requiring payment of all fees, costs, and perquisites, etc., into the county treasury, declares (section 5 [page 78]) that it shall take effect, so far as respects such offices, at the expiration of the terms of the present officers; and Const. art. 7, § 2, par. 6, provides that county clerks shall be elected and hold office for five years. *Held*, that the "term of office," in section 5, was restricted to the term during which the then present clerk was entitled to receive compensation, so that, respondent's predecessor having died in office after the act took effect, but before the expiration of his term, respondent, on being appointed to fill the vacancy, began a new term, and was therefore entitled to a salary only.

Mandamus, on relation of the board of chosen freeholders of Atlantic county and another, against Edward S. Lee. On demurrer to alternative writ. Overruled, with judgment for relators.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Enoch A. Higbee and H. R. Coulomb, for relators. Bourgeois & Sooy, for respondent.

REED, J. This is a demurrer to an alternative writ of mandamus. The writ commands Edward S. Lee, the present clerk of Atlantic county, to collect for the sole use of the board of chosen freeholders of Atlantic county, as public moneys belonging to the said board, all fees, costs, perquisites, etc., which the said Lee may receive for any official act or service rendered by him as said county clerk.

The command of the writ is based upon the assumption that the official conduct of Mr. Lee toward the relators is controlled by the provisions of the act of 1906 (P. L. p. 78), the purpose of which act is to put all county clerks upon a salary, and to impose a duty upon such officers to keep an account of all fees and perquisites received by them, to make a statement thereof monthly to the county collector, and to pay over the same to that officer by monthly payments. The demurrer challenges the right of the collector to receive such money, upon the ground that the act of 1906 is not yet operative so far as respects the official conduct of Mr. Lee. This position of the demurrant is grounded upon the language of section 5 of the act of 1906. The clause of section 5 invoked by the demurrant is as follows: "This act shall take effect so far as respects said officers at the expiration of the terms of office of the present surrogates, registers of deeds and mortgages, county clerks and sheriffs respectively." The question propounded by this insistence is whether the term of office of the clerk of Atlantic county in office on March 30, 1906—the date of the approval of the statute—has expired.

The facts are these: Lewis P. Scott was elected to the office of county clerk of Atlantic county at the general election held in November, 1905. He died in November, 1907. Edward S. Lee, the present incumbent, was appointed by Gov. Stokes on December 6, 1907, to fill the vacancy caused by the death of Mr. Scott. Mr. Lee claims that, notwithstanding the death of Mr. Scott, his term of office did not expire until December, 1910. This claim is based upon the language of article 7, § 2, par. 6, of our Constitution, the language of which is: "The clerks and surrogates of counties shall be elected by the people of their respective counties, at the annual election for members of the General Assembly, and shall hold their offices for five years." Inasmuch as Mr. Scott was elected, and by the Constitution was to hold

his office, for five years, it is argued that the words "expiration of term of office" meant the expiration of the five years following Scott's election.

The words "term of office" may in a sense be used to indicate the statutory period for which an officer is elected. We speak of the term of office of the President of the United States and the term of office of the Governor of the state, meaning that the first was four years and the latter three years; but the words "term of office" may also mean a period much shorter than that for which the particular officer was elected. His term of office may be terminated before the expiration of the statutory period for which he was elected by impeachment, or resignation, or death of the particular officer. The happening of these contingencies is an implied limitation upon the right of the elected officer to continue in office for the period for which he would otherwise be entitled to hold. When such a contingency occurs, the officer's term expires, there is a vacancy, and upon the appointment or election to fill the vacant office the term of another officer begins. To assert that a term of office of an impeached or deceased officer continues is to assert that there may be two terms of office running together, although the office can be filled but by a single person. The purpose of the fifth section of the act of 1906 is manifest. It was to preserve to those officers who were then in office those perquisites which, when they accepted the office, they had a right to expect would remain as compensation for their official services for the period for which they were elected or appointed. The force of the section was to limit the operation of the act to those officers who should thereafter accept an election or appointment, with the knowledge of the change in the method of official compensation.

The construction of the act insisted upon by the demurrant would be to preserve the right to all the perquisites to any officer, whether in office at the date of the approval of the act, or whether since elected or appointed during the five years for which Mr. Scott was elected. Had the proviso provided that the act should take effect at the expiration of the term for which the then present clerk was elected, there might be a question as to the meaning of the proviso; but, in view of the purpose of the legislation, there seems to be no question that the words "term of office" meant the term during which the then present clerk was entitled to receive compensation for his services. When Mr. Scott died, it terminated his official life, and the period of his official life was his term of office. When Mr. Lee was appointed, he began a new term—not as a legatee of Mr. Scott, but by a distinct appointment to a vacant office.

There should be a judgment for the relators.

# CITY OF HOBOKEN v. HOBOKEN & M. R. CO. et al

(Court of Chancery of New Jersey. Aug. 30, 1907.)

## 1. INJUNCTION—STREETS—REMEDY IMPROPER.

Equity will not enjoin railroad companies from excavating under land claimed by complainant city to constitute parts of streets, where it appears that as to one of the tracts the work is finished, that ejectment involving it is pending, and that the city was restrained from interfering with the work, and as to the other tract the travel is not seriously obstructed, the work is partly completed, and to stop it would endanger the whole place; the improvement constituting a great public work, sanctioned by two states.

## 2. COURTS—EQUITY—JURISDICTION.

The Supreme Court having taken jurisdiction of certain subject-matter in ejectment, the Court of Chancery cannot seize jurisdiction, or attempt to deprive the Supreme Court of it, or interfere in any way with the ordinary process of common-law courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1230.]

Bill by the city of Hoboken against the Hoboken & Manhattan Railroad Company and another for an injunction. Order discharging order to show cause advised.

James F. Minturn, for the motion. Charles L. Corbin, opposed.

HOWELL, V. C. The bill in this case is filed by the city of Hoboken against the Hoboken & Manhattan Railroad Company, hereafter called the "tunnel company," and the Jersey City, Hoboken & Paterson Street Railroad Company, to restrain them from interfering with what it claims to be two public streets, Ferry street and Hudson Place. The tunnel company has made an excavation for its terminal which is north of and adjacent to the Lackawanna Railroad Station in Hoboken, several hundred feet long and six railroad tracks in width, diagonally to the general plan of the acknowledged public streets of Hoboken at that point. At the westerly end the tunnel, or its approaches, run under the surface of a triangular piece of land which is claimed by the city to be a portion of Ferry street. At the easterly end the terminal station is being constructed under the surface of another triangular piece of land lying under Hudson Place, which is also claimed to be a public highway.

The bill sets out at considerable length and with much minuteness its title to those two triangular pieces of land as public streets and highways, claiming that the tunnel company and the street railway company have trespassed thereupon and have made excavations therein without the consent of the city, and it prays that the defendants may be enjoined from committing any further waste or destruction in said public places, and from trespassing upon Ferry street and Hudson Place without the permit of the city, and requiring the companies to remove their fences, buildings, and all other structures placed

by them upon the streets. I understand the city claims the public use in Ferry street and Hudson Place by a dedication and acceptance; the dedication consisting of the throwing open of the strips of land to the public, and the acceptance consisting of long-continued public use of those strips as public highways. The dedication is not admitted by the defendants, but, on the contrary, is strenuously denied. They claim that those strips of land belonged and now belong to the Hoboken Land & Improvement Company, as did the Hoboken ferry, and that the land was merely an entrance from admitted public streets to the ferry and was really a part of the ferry itself. This claim was made so late as May 29, 1896, when the Hoboken Land & Improvement Company granted to the Hoboken Ferry Company a right of way over Hudson Place. It appears that at one time the high-water mark of the Hudson river was inshore of these two triangular pieces of property; that the land was filled out by the Hoboken Land & Improvement Company, which claims as owner; and that in 1885 the Hoboken Land & Improvement Company obtained a grant from the riparian commissioners, representing the state, for all the land injury to which is now claimed. The present defendants obtained their rights under this grant, according to the bill, in 1887. The bill attacks this grant collaterally, and declares the whole scheme of conveyance by the riparian commissioners to the Hoboken Land & Improvement Company to be and to have been always void.

It further appears that the work which the bill complains of was begun many months ago, and has been pushed as rapidly as circumstances would permit, and that as to the portion of the land complained about which lies within the supposed boundaries of Ferry street the defendants have entirely finished their underground construction, and are actually in possession of the land both above and under the surface of the triangular strip at that point. As to the Hudson Place triangle it appears that the defendants found it necessary to excavate to a depth of 22 feet at that point, and in order to do so they took up the stone pavement and substituted a planking, which does not appear to interfere with the public travel. In fact, it is alleged on the part of the defendants that this Hudson Place strip is now and for many years has been entirely and completely occupied by the street railway company as a terminal, and that it is covered with the tracks of the company. Sufficient facts appear on the face of the papers to show that the situation there could not be restored without destroying the construction already made, and interfering for a considerable time with public travel, and subjecting the public to considerable danger of accidents. So far as the Ferry street end is concerned, it appears that so early as 1905 the work had begun there, and that the street commissioner of the complainant

forbade the further excavation at that point, and that shortly after this interdiction the tunnel company brought suit in this court to restrain the city of Hoboken from interfering with their work. An injunction was granted by Vice Chancellor Pitney after a full consideration of the case, which is reported under the name of *Hoboken & Manhattan Railroad v. City of Hoboken* (N. J. Ch.) 64 Atl. 641. It appears, therefore, that the mischief which this bill is intended to reach has already been done, and that to undo it and restore the situation would require a mandatory injunction. It further appears that in the year 1900 the city of Hoboken brought an action of ejectment to recover possession of the Ferry street triangle, which action is pending in the Supreme Court of this state and has been continued from time to time by agreement of both parties.

But, if the court should find that the lands in question are public highways under the control of the city of Hoboken, the defendants claim that by virtue of the twenty-third section of the general railroad law (P. L. 1903, p. 645) they are authorized to make their underground construction under streets, and longitudinally under streets, without seeking or obtaining the permission of the municipality having control thereof, except when it is necessary to alter the position of a public sewer or water pipe. This proposition is denied by the complainant, which argues that it never could have been intended by the Legislature to authorize the longitudinal occupation of any portion of a public highway, even below the surface. It must be seen at a glance that to grant the writ prayed for at this stage of the proceedings would be to practically decide the whole case on preliminary affidavits. An injunction to stop the work at Ferry street, so called, would not stop it. It has already been accomplished. Besides, at that point the Supreme Court has taken jurisdiction of the real controversy, the title to the land or the right to possession thereof, and it would be impossible for this court to seize jurisdiction, or to attempt to deprive the Supreme Court of it, or in any way to interfere with the ordinary process of the common-law courts.

At Hudson Place the situation is much the same, excepting that no action of ejectment is pending in favor of the city against the defendants touching the title or possession of the strip which they are occupying at that point; and it may well be, as was suggested by the defendants' counsel on the argument, that the proper way to test the city's right there would be by a common-law action. In Hudson Place the excavation is already made. The underground walls and supports are being constructed. The street and the work are both protected by a planking at the street level, which does not appear to interfere with the free use of the street. In fact the public use of the street there is more or less subject to the right of the street railway to

use the point in question as a stopping place for its cars. To stop work there would leave the excavation covered with planking for months and until in the regular course a final hearing could be had. Besides which, the affidavits on the part of the defendants show that, if the work is stopped at that point, the waters of the Hudson river would shortly fill the excavation and render the whole place dangerous.

The proposition on the part of the complainant is that this court shall interfere by its writ of injunction to stop the progress of a great public work, which no one will deny will be of the greatest possible benefit to the complainant in this suit, a work which the exigencies of business and transportation have made necessary, a work the performance of which is sanctioned by the Legislature of two sovereign states. To do so this court would on a preliminary motion be obliged to decide the difficult questions of the dedication and acceptance relating to Ferry street and Hudson Place, the validity or invalidity of the riparian grant in an action in which the state is not represented, to override the view of the situation taken by Vice Chancellor Pitney in the former suit, and to hold for the plaintiff, under the general railroad law, a proposition which seems to me to be quite plain authority for the use of a public highway in the manner in which the defendants are using Ferry street and Hudson Place. And when we consider that the work in the so-called Ferry street is finished, and that travel is not seriously obstructed in Hudson Place, and that an action of ejectment is already pending in the courts of law to settle the Ferry street controversy, it will be seen that this court would go to a great length in stopping the important public work in which the defendants are engaged.

I will advise an order discharging the pending order to show cause.

(74 N. J. E. 596)

#### HALSTEAD v. HALSTEAD.

(Court of Chancery of New Jersey. Sept. 25, 1908.)

#### 1. HUSBAND AND WIFE—SEPARATION AGREEMENT—REVOCATION—SUIT FOR DIVORCE.

A separation agreement between husband and wife is not abrogated by the institution by the wife of a suit for divorce.

#### 2. SAME — ENFORCEMENT — JURISDICTION OF COURTS.

A separation agreement between a husband and wife is enforceable only in equity to the extent that it is just.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1046.]

#### 3. SAME.

While the law does not favor separation between husband and wife, it favors a settlement outside of court of all matters in dispute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1046.]

#### 4. SAME — RECOVERY ON SEPARATION AGREEMENT.

A wife, under a separation agreement, which binds her husband to pay to her a week-

ly sum in full of claims for support and alimony, and which binds her not to demand any other payment, cannot, on obtaining an order for temporary alimony in a suit by her for divorce, recover on the agreement; but she may recover thereon until such order is obtained.

Suit by Rachel Halstead against David Henry Halstead. Final hearing on bill, answer, and proofs in open court. Decree for complainant advised.

Ralph W. Skinner, for complainant. Archibald C. Hart, for defendant.

GARRISON, V. C. The parties to this suit are husband and wife, and the bill is filed for the purpose of obtaining a decree against the defendant for money alleged to be due to the complainant by virtue of an agreement between the parties. The agreement in question is dated June 21, 1904, and is to be read in connection with a previous agreement between the parties. Taken together, these agreements provide for the parties living separate, and that the defendant should pay to the complainant the sum of \$7 a week in full of all claims for the support, maintenance, and clothing of herself and children; she upon her part agreeing to receive and take the same in full satisfaction for her support and maintenance and all alimony whatever, and that she "shall not, nor will at any time or times hereafter, ask or demand of or from the party of the first part [the defendant here] any payment or allowance other than the payment or allowance last herein above provided for. \* \* \*"

The defendant made payments under this agreement up to and including the 31st of October, 1904, and one subsequent payment of \$7 in November of that year. On the 7th of March, 1905, the complainant commenced an action for divorce against the defendant on the ground of desertion and adultery, and on the 20th day of November, 1905, on the motion of her solicitor, an order was made in the divorce suit that the defendant pay to her, for the support and maintenance of herself and children, pending the determination of said suit for divorce, the sum of \$5 per week from the date of said order to the date of taking proofs. The present demand of the complainant is for the sum of \$7 per week from the 31st of October, 1904, with a credit of \$7 for one payment made in November, up to the 20th day of November, 1905, and for the sum of \$2 per week from the last-mentioned date to the date of the filing of the bill or the date of the final decree, as the court might determine this question. This sum of \$2 is the difference between the \$7 provided for in the agreement and the \$5 provided for in the order for alimony pendente lite in the divorce suit.

The defendant contends, first, that the institution of the suit for divorce abrogated the written engagement or agreement between the parties. It is the law of this case that it does not. A demurrer was filed to the bill,

and Chancellor Magie, in an opinion filed in this suit on the 19th of July, 1907, in overruling the demurrer, held that "the institution and continuance of that suit [the divorce suit] is not a bar to a bill to enforce the agreement for support." That this decision of the Chancellor is supported by authorities will appear from the following: 21 Cyc. 1598, par. 9; *Buttler v. Buttler* (N. J. Ch.) 65 Atl. 485, 487 (Garrison, V. C.; 1906). Engagements of this character between husband and wife must be enforced in a court of equity, because at law, the parties being incapable of contracting, a court of law does not recognize their engagements as legal, and they must therefore come into equity to enforce them. A court of equity enforces them when and to the extent that it finds that the engagement was equitable and just. The general principle and the authorities will be found cited in *Buttler v. Buttler*, supra.

I can see no reason why this agreement should not be enforced up to and including the date when the order in the divorce suit was obtained awarding the wife temporary alimony. I do not think it should be enforced against the husband during the time that the order for temporary alimony is operative. While the law does not favor separation between husband and wife, it does favor a settlement out of court and without resort to litigation of all matters in dispute. The attitude that the court takes towards agreements of this nature is well expressed in the case of *Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. Rep. 453.

The parties to this suit, after they separated, entered into the agreements in question. One purpose of those agreements undoubtedly was to provide a proper sum for the wife's support, and oblige the husband to pay the same, and permit him to rest in security from other importunity or demand. She engages in the agreements that she will not ask or demand of or from him any payment or allowance other than the one provided therein. By applying for temporary alimony she departed from the letter and spirit of the written engagement between herself and her husband. Instead of relying upon the written engagement and the remedies available to her to enforce the same, she applied to a court to fix such sum as in its discretion was proper and enforce the same by different and other remedies. I do not think it equitable to permit her to have the benefits of this other demand, and, in addition, to retain in its virility the obligation of the defendant under the written engagements. Having, with respect to the very subject-matter, made an agreement, which, as I have pointed out heretofore, the law favors parties doing, she should either have abided by that agreement, or, if she departs from it, must suffer whatever the consequences of her departure are. That she did depart from it is unquestioned. The consequences are

that during the time that she was receiving the results of her other demand she cannot enforce this agreement against her husband. Whether she can, or not, after the final decree in the divorce suit, if that either awards her alimony or she does not apply for or secure the same, I do not determine, because it is not before me. What I do determine here is that she is entitled to the full amount under this agreement up to the time that the order for temporary alimony became operative, but that after that time she may not enforce this agreement during the operation of the order for temporary alimony.

Since the complainant had not paid what I find he should have paid, I think it proper to award costs, if, in any event, the matter was debatable and rested in discretion.

I will advise a decree in accordance with these conclusions.

(74 N. J. E. 668)

# BASSETT v. UNITED STATES CAST IRON PIPE & FOUNDRY CO.

(Court of Chancery of New Jersey. Sept. 11, 1908.)

## 1. CORPORATIONS—RESERVATION OF PROFITS AS WORKING CAPITAL—STATUTES.

Under Corporation Act 1896 (P. L. p. 293) § 47, giving the corporation capacity to confer on the directors the power to fix the amount to be reserved as working capital, and the amendatory act of 1901 (P. L. p. 246, § 2), conferring such power on the stockholders unless otherwise provided in the certificate of incorporation or in a by-law, it is primarily the function of the stockholders to fix the amount to be reserved, over the capital stock paid in, as working capital; and the incorporators in the certificate of incorporation and the stockholders in the by-laws may confer power on the directors to fix the amount of the working capital.

## 2. SAME—DIVIDENDS—PREFERRED STOCK.

The charter of a corporation provided that preferred stock should be entitled to an annual dividend in preference to the payment of dividends on the common stock, and authorized the directors to alter the by-laws and to fix the amount to be reserved as working capital. The directors reserved annually sums for additional working capital, which were not used as actual working capital, but were invested in securities. *Held*, that such sums did not become actual working capital, but remained under the control of the directors, who might use the same for the payment of a dividend on the preferred stock.

## 3. SAME.

Corporation Act 1896 (P. L. p. 293) § 47, as amended in 1901 (P. L. p. 246, § 2), authorizes the stockholders, unless otherwise provided in the certificate of incorporation or by-laws, to fix the amount to be reserved as working capital. The charter of a corporation provided that the preferred stock should be entitled to an annual dividend out of any surplus net profits, and authorized the directors to amend the by-laws and to fix the amount to be reserved as working capital. The directors annually reserved sums for additional working capital, which were invested in securities, and not used as actual working capital. *Held* that, though such sums be considered as actual working capital, the directors could appropriate a part thereof for a dividend on the preferred stock.

## 4. SAME.

Where the charter of a corporation provided that preferred stock should be entitled to an

annual dividend, and authorized the directors to fix the amount to be reserved as working capital, and where the by-laws authorized the directors to amend the by-laws and fix the amount of the working capital, an amended by-law, permitting them to fix and from time to time increase or diminish the amount of working capital, did not add to the powers of the directors to appropriate sums reserved as working capital for the payment of dividends on preferred stock.

5. SAME.

Corporation Act 1896 (P. L. p. 293) § 47, as amended in 1901 (P. L. p. 246, § 2), confers on stockholders the power, unless otherwise provided in the certificate of incorporation, to fix the amount to be reserved as a working capital. The charter of a corporation provided that preferred stock should be entitled to annual dividends out of any surplus net profits, when declared by the directors, in preference to any dividend on the common stock, and declared that the common stock should be subject to the rights of the preferred stockholders. The directors reserved annually sums for additional working capital, not used as actual working capital, but invested in securities. Subsequently the directors voted to use a part of such sums for the payment of dividends on the preferred stock. *Held*, that the reduction of the working capital did not belong to the common stockholders, but might be used for the payment of such dividends.

6. SAME.

The charter and stock certificates of a corporation, which provide that preferred stock "shall be entitled out of any and all surplus net profits," when declared by the directors, to dividends, authorize the directors to use any surplus profits arising from the operation of the corporation's business, whenever made, to pay dividends on preferred stock, no matter when they shall have been declared, and such dividends for any fiscal year need not be declared out of the profits of that year.

Suit by Frank Bassett against the United States Cast Iron Pipe & Foundry Company. Heard on motion for preliminary injunction, on bill and demurrer. Bill dismissed.

The bill in this case is filed to restrain the defendant corporation from paying a dividend which it has declared in favor of its preferred shareholders. The dividend is at the rate of 1½ per cent., and is for the last quarter of the fiscal year ending May 31, 1908. It is payable on September 1, 1908. It requires in cash \$218,750 to satisfy the dividend so declared. The balance sheet taken from the company's books as of May 31, 1908 (the last day of the last quarter of the fiscal year), showed to the credit of profit and loss applicable to dividends only \$16,024.45. On July 2, 1908, the board of directors by a formal resolution transferred \$209,896.64 from an account known as "Reserve for Additional Working Capital" to the credit of "Profit and Loss," increasing that credit to \$225,921.09, out of which the dividend in question would be paid. The complainant, who is a large holder of the common stock, objects to this course of procedure, and seeks to enjoin the payment of the dividend, upon the ground that the directors are endeavoring to make the payment out of moneys which had been reserved by the company in preceding years for a working capital, and in which the common stockholders alone have a pro-

prietary interest; in other words, that the directors are about to pay to the preferred stockholders a dividend out of moneys which belong to the common stockholders. The facts are these:

The defendant corporation was organized on March 3, 1899, under the general corporation law of 1896. It has an authorized capital of \$30,000,000, divided equally between common and preferred shares. Only \$25,000,000 of this stock has been issued, and this is equally divided between preferred and common shares. The fundamental agreement between the shareholders touching the relative rights and duties of the two classes of stock is found in the following extracts from the charter and by-laws.

Charter, par. 4: "The preferred stock shall be entitled, out of any and all surplus net profits, whenever declared by the board of directors, to noncumulative dividends at a rate not to exceed 7 per cent. per annum for the fiscal year beginning on the 1st day of June, 1899, and for each and every other fiscal year thereafter, payable in preference and priority to any payment of any dividend on the common stock for such fiscal year. In the event of the dissolution of the corporation the holders of the preferred stock shall be entitled to receive par value of their preferred shares out of the surplus funds of the corporation remaining after the payment of its debts, before any payment shall be made therefrom to the holders of the common stock. The common stock shall be subject to the prior rights of the holders of the preferred stock as herein declared. If, after providing for the payment of full dividends for any fiscal year on the preferred stock, there shall remain any surplus net profits for such year, any of such net profits of such year, and of any other fiscal year, after the full dividends shall have been paid on the preferred stock, shall be applicable to such dividends upon the common stock as from time to time shall be declared by the board of directors, and out of any such surplus net profits after the closing of any fiscal year the board of directors may pay dividends upon the common stock of the corporation for such fiscal year, but not until the dividends upon the preferred stock for such fiscal year shall have been actually paid or provided for and set apart."

Charter, par. 7: "The board of directors shall have the power, without the assent or vote of the stockholders, to make, alter, amend, and rescind the by-laws of the corporation; to fix the amount to be reserved as the working capital," etc.

The bill states that after the organization of the corporation by-laws were adopted by the stockholders, by which it was provided that the directors should have the power, without the assent or vote of the stockholders, to make, alter, amend, and rescind the by-laws of the corporation, and to fix the

amount of the working capital, and that in 1906 the by-laws in this last particular were amended by the directors, so as to permit them "to fix and from time to time increase, diminish, and vary the amount of working capital of the corporation in their absolute judgment and discretion," which amendment was never acted upon by the stockholders, excepting at the annual meeting of the stockholders in 1907 there was passed a general ratification of all of the acts of the directors during the preceding year.

By-laws, art. 12: "The directors of the corporation, after reserving over and above its capital stock paid in as a working capital such sum, if any, as shall have been fixed by the directors, shall, either annually, semi-annually, or quarterly, as in the discretion of the directors may seem best, declare a dividend or dividends on the preferred stock of the corporation; provided, however, that the aggregate amount of dividends so declared in any fiscal year shall not exceed the sum of 7 per cent. on the preferred stock of the corporation."

When the company was organized there was provided, in addition to the capital invested, a working capital of \$1,720,000. From time to time, as the operations of the company went on, dividends were declared to the preferred stockholders, and large sums were set apart to the credit of an account known as "Reserve for Additional Working Capital," until the amount to the credit of that account was the sum of \$2,459,896.64. The following table shows the amount of dividends paid to the preferred stockholders and the amounts added to the reserve for working capital for each year since 1900:

Year	Dividends.	Reservations.
1900 .....	\$656,250 00	\$289,826 85
1902 .....	250,000 00	546,717 69
1903 .....	500,000 00	728,724 29
1904 .....	500,000 00	732,169 77
1905 .....	875,000 00	.....
1906 .....	875,000 00	162,458 04
1907 .....	875,000 00	.....
1908 .....	875,000 00	.....
	<u>\$5,406,250 00</u>	<u>\$2,459,896 64</u>

The amount reserved for additional working capital is in cash and quickly convertible assets. On July 2, 1908, the board of directors passed a resolution, which, after reciting that the company had since its organization opened upon its books an account known as "Reserve for Additional Working Capital," and has set aside out of net earnings and placed to the credit of that account \$2,459,896.64, and has used that fund as additional working capital in the business of the company, and that under the present conditions the company did not need, over and above its original working capital, an additional working capital in excess of \$2,250,000, resolved that such additional working capital should be diminished by withdrawing therefrom the sum of \$209,896.64, and that the same should be credited to the profit and loss

account, and that the treasurer should make such entries upon the books of the company as should carry out the purpose and intent of the resolution. In this way the fund was provided out of which the dividend declared to the preferred shareholders could be paid.

John R. Hardin, for complainant. Richard V. Lindabury, for defendant.

HOWELL, V. C. (after stating the facts as above). The difficulties arising out of the above state of facts are principally those of interpretation. We must ascertain the nature and character of the fund known as "Reserve for Additional Working Capital," and we must understand the relation which the statutory provisions bear to the engagements that the shareholders have entered into among themselves, in the company's charter and by-laws, in order to determine the character of this fund. Primarily it is a function of the stockholders to fix the amount to be reserved, over and above the capital stock paid in, as a working capital. Corporation Act 1896 (P. L. p. 293) § 47, as amended in 1901 (P. L. p. 246, § 2). The act of 1896 gave the corporation capacity to confer this power upon the directors. The act of 1901 confers the power on the stockholders, unless otherwise provided in the original or amended certificate of incorporation, or in a by-law adopted by at least a majority of the stockholders. While there are some important differences between section 47 of the act of 1896 and section 2 of the act of 1901, above referred to (Stevens v. U. S. Steel Corp. 68 N. J. Eq. 373, 59 Atl. 905), yet for the purposes of the case in hand they are not of consequence, because in this case the incorporators in the original certificate of incorporation and the stockholders in the by-laws conferred the power to fix the amount of the working capital upon the directors. The directors as early as 1900 opened an account in the company's books of the character known among professional accountants as a representative account, which they denominated "Reserve for Additional Working Capital," to which they appropriated large sums of money in the years 1900, 1902, 1903, 1904, and 1906. These appropriations aggregated the sum of \$2,459,896.64. This fund seems never to have been used as actual working capital; that is, it was never invested in book accounts, plant, machinery, fixtures, or materials. It was always invested in securities, which were quickly convertible into cash, and, as far as the case shows, bore no relation whatever to those activities in which the company was engaged and for the prosecution of which it was formed.

The complainant does not complain of this action on the part of the directors. I take it that he accords to the directors, under the charter and by-laws, the right to pile up this "reserve" in their discretion; but, having once appropriated the money to that account, he denies their right to reduce the amount of



such reserve, unless the whole sum so withdrawn shall be given to the common stockholders. He contends that, when the fund is once created, it cannot be disturbed, except by vote of the common stockholders, and that its appropriation to working capital perforce changes its character and function to such an extent as to withdraw it wholly from the reach of the preferred shareholders. Concerning this contention two remarks may be made: (1) This fund never became actual working capital. It was never actually employed in the business in which the company was engaged. It has always remained in cash or securities. It has always been a mere creature of bookkeeping, and, although as a matter of account merely, it was set apart and tagged with a new name, its physical condition and character were never changed. When it was returned to profit and loss account by the resolution of July 2, 1908, the return was effected by the treasurer by a mere bookkeeping entry, as the resolution directed. It was what the directors called it when they opened the special account—a reserve—which might be used as actual working capital in case it should be needed for that purpose. In order to so use it, it would require the further action of the directors to take the amount so found to be necessary from this account by solemn resolution, and by like resolution to exchange it for machinery or materials. The resolution which declares that the fund had been used as a working capital does not state the facts. (2) This fund was once "Surplus Net Profits," else it could not have been dealt with as the directors did deal with it. It was originally a fund which was applicable to dividends, and during the five years above mentioned could legally have been applied to pay full 7 per cent. dividends to the preferred stockholders. I fail to see how its character as "Surplus Net Profits" can be changed by calling it "Reserve for Additional Working Capital" and doing nothing more about it. If the fund is of this nature and character, then it is under the full control of the directors, and may be used by them for the payment of the dividend in question. They may diminish it for lawful purpose, and in a lawful manner in their discretion. They may open other accounts with other names on their books, and appropriate the whole or any part of it thereto; but, whatever they do about it, so long as it is not actually paid out, it must remain in fact "Surplus Net Profits." Mere bookkeeping entries cannot affect it.

The fourth paragraph of the charter provides that the preferred stockholders may be paid dividends "out of any and all surplus net profits." If the view above expressed is correct, then the present board of directors have express warrant in the charter for paying the dividend in question out of this reserve fund. An almost conclusive argument in favor of the defendants' position lies in

the fact that there yet remains in the account denominated "Reserve for Additional Working Capital" \$2,250,000, which is invested in quickly convertible securities, and which the corporation management declare is sufficient for the company's purposes, but which has not yet been actually employed in the operation of the company's business. I understand from the case that the original working capital of \$1,720,000 was actually invested in the purchase of materials or plant, or invested in book accounts, and that it has been and is treated as actual working capital. It is quite manifest that there is a wide difference between that original actual working capital invested in property necessary for the company's business, and the reserve of \$2,250,000 which is merely held as an investment of the surplus moneys belonging to the corporation.

But, if the fund is of the character insisted upon by the complainant, viz., actual working capital, yet, in my opinion, the directors have been given full control of it by the charter and by-laws. The charter (paragraph 7) confers upon the board of directors the power, without the assent or vote of the stockholders, to fix the amount to be reserved for the working capital. The by-laws use the same expression. The complainant argues that this authority, as well as the like authority in the statute (P. L. 1901, p. 246, § 2, amending section 47 of the act of 1896) goes only to the extent of permitting the directors to establish by resolution an amount to which additions made be made from time to time by virtue of the same authority, but that the fund, once built up, may not be diminished, except by the consent of the common shareholders. The statute contemplates annual dividends. It likewise contemplates, at the time these annual dividends are declared, that the body to which the function may be committed by the charter or by-laws—either the directors or the stockholders—shall ascertain whether any additional working capital may be needed in the company's business, and, if so, to provide it out of the profits of the business, and so annually to fix the amount which may be so needed. Manifestly this amount may vary. It may be large one year and small the next. In the case of a corporation which had issued common stock only there could be no question. In such a case the directors or stockholders, as the case might be, would reduce the working capital and divide the reduction as a dividend among the stockholders. The words of the statute are no different in the case of a corporation which has issued preferred stock, and the rule must be analogous. The trend of judicial thought on this point will be found in Vice Chancellor Stevenson's opinion in *Stevens v. U. S. Steel Corp.*, 68 N. J. Eq. 382, 59 Atl. 905.

I do not think that any important change was made in the power of the directors by the amendment to the by-laws in 1906, where-

by specific authority was given to them, to increase, diminish, and vary the amount of the working capital; neither do I find, in the statute or the documents in the case, any direction to refer the question to the stockholders. But, says the complainant, although the working capital may be reduced by the directors, the reduction belongs to the common stockholders, and must be divided among them, to the exclusion of the preferred stockholders. I find no appropriation of this kind in the statute, nor in the charter or by-laws of the company. In my opinion, any amount taken from actual working capital, or from "Reserve for Additional Working Capital," is at once restored to the character that it originally bore. It was either "surplus," or "net profits," or "surplus net profits," when it was first dealt with by the directors, and probably appeared on the books in the profit and loss account as a surplus. It is now dealt with again. The bookkeeping process is reversed by an entry made by the treasurer, and this should restore the former situation. As a matter of bookkeeping its place would be in the profit and loss account, or in some other special account in which it would show as a surplus; and it would be applicable to the payment of any and all dividends that the board of directors might lawfully declare.

It is claimed on the part of the complainant that the preferred stock dividends for any fiscal year must be declared and paid out of the profits made by the company during that same fiscal year; that is to say, that profits made during the fiscal year ending in 1904 cannot be paid out in dividends to the preferred stockholders which might be declared during the fiscal year ending in 1905 or 1906. This position is entirely at variance with the charter and the stock certificate, both of which provide that the preferred stock shall be entitled, "out of any and all surplus net profits," whenever declared by the board of directors, to noncumulative dividends, etc. I think that this means that the directors may use any surplus profits arising from the operation of the company's business, whenever made, to pay lawfully declared dividends on the preferred stock, no matter when they shall have been so lawfully declared. The case of *Elkins v. C. & A. R. R. Co.*, 36 N. J. Eq. 233, does not apply, because of the difference in the wording of the charter.

I therefore conclude that the bill of complaint is without equity, and, unless the complainant can amend in such manner as to avoid the objections now presented, it must be dismissed.

(74 N. J. E. 593)

BLESSING v. SMITH et al.

(Court of Chancery of New Jersey. Sept. 25, 1908.)

1. GAMING — "GAMBLING TRANSACTIONS" — SPECULATIVE TRANSACTIONS.

Transactions between a customer and a stockbroker, which involve payments by the cus-

tomers for margins on orders for buying and selling stocks, pursuant to an understanding that no stock shall be delivered to the customer, but that settlements of differences of profits and losses shall be made, are "gambling transactions."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 25.]

For other definitions, see Words and Phrases, vol. 4, p. 3036.]

2. SAME—ACTIONS FOR MONEY LOST IN GAMING—TIME TO SUE.

A suit by a customer against a stockbroker for an accounting of gambling transactions in the purchase of stock on margin and for a decree for the amount due, brought nearly a year after the payments for margins, if brought by virtue of Gaming Act (Gen. St. 1895, p. 1606) § 5, authorizing a suit for money lost, is barred by lapse of time; and if brought by virtue of section 2, authorizing the recovery of money deposited on the event of any wager, the limitation may apply by construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 91, 92.]

3. EQUITY—JURISDICTION—ADEQUACY OF REMEDY AT LAW.

A bill by a customer against a stockbroker for an accounting of a gambling transaction, alleging that the customer turned over to the broker specified sums in such transactions, shows an adequate remedy at law under the statute to recover the sums paid, and equity does not obtain jurisdiction merely because the customer is willing to permit the broker to recoup for any losses with respect to stocks actually purchased by him on the customer's account.

4. GAMING — GAMBLING TRANSACTIONS — ACTION—NATURE AND FORM.

Where a bill, in a suit by a customer against a broker for an accounting of gambling transactions, sets forth the date and amount of each payment made by the customer to the broker in the transactions, so that the customer, if entitled to recover, is entitled to a return of the sums paid, equity does not have jurisdiction on the theory that a discovery is necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 84.]

Suit by Harry B. Blessing against William B. Smith and others. Heard on demurrer to bill. Sustained.

The bill in this case, which by stipulation is to be treated as filed on the 28th of April, 1908, charges that the defendants were stockbrokers, and that the complainant, between the 11th of April and the 21st of May, 1907, paid the defendants, in four several amounts, a total of \$3,250, which said moneys, it is alleged, were paid by the complainant to the defendants as margin and as additional margin on complainant's account with the said defendants; that he gave orders to the defendants for the buying and selling of certain stocks; that the defendants have furnished to the complainant certain paper writings purporting to show the names of the persons from whom the stocks were bought and to whom the stocks were sold on his account, but the complainant charges that the writings do not sufficiently identify the said persons; that the defendants did not execute the orders given by the complainant, and did not in a number of instances buy and sell

the stocks as directed; "that it was never intended or agreed by and between your orator and the defendants that the stocks bought by the defendants on behalf of your orator should be actually delivered to your orator, or that your orator should ever actually pay therefor; and that as a matter of fact no stocks were ever actually delivered to your orator, nor did your orator ever actually pay therefor to the defendants, but that the arrangement between your orator and the defendants was that at the settlement a balance should be struck, based on the profits or losses, as the case might be, or, in other words, simply and solely a settlement of difference, each transaction by your orator with the defendants being had on a marginal basis, and the difference between the buying and selling price being charged against your orator or placed to his credit, as the case might be." The bill then prays for an accounting, and that the defendants may set forth each purchase and sale made by them on behalf of the complainant, with the names and dates in full and the prices, and that the amount due from the defendants to the complainant may be ascertained and decreed. The demurrer specifies a number of causes which I do not think it necessary to detail.

Wenner & Ostrom, for complainant. Wm. P. Martin, for defendants.

GARRISON, V. C. (after stating the facts as above). It is entirely clear, under the law of this state, that the transactions pleaded in the bill were gambling transactions. *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308 (Ct. of Err., 1884); *Sharp v. Stalker*, 63 N. J. Eq. 596, 52 Atl. 1120 (Stevens, V. C., 1902); *Van Pelt v. Schauble*, 68 N. J. Law, 638, 54 Atl. 437 (Ct. of Err., 1903); *Thompson v. Williamson*, 67 N. J. Eq. 212, 58 Atl. 602 (Emery, V. C., 1905); *Myers v. Fridenberg*, 70 N. J. Eq. 3, 62 Atl. 532 (Magle, Ch., 1905). In the brief of the complainant he "concedes that his bill of complaint as drawn sets up an action which comes within the act to prevent gaming." The situation is closely analogous to that dealt with in the case of *Myers v. Fridenberg*, supra. If the action is by virtue of the fifth section of the act (Gen. St. 1895, p. 1806), it is barred by lapse of time; if by virtue of the second section, the limitation by construction may apply thereto also, and the action similarly be barred. In any event, there seems to be a complete and adequate remedy at law, and no necessity for the intervention of a court of equity.

The gravamen of the complainant's bill is that he turned over \$3,250 of money to the defendants in gambling transactions. I cannot see how, under these circumstances, there can be any question of any accounting between the parties at all. The transactions which he pleads are undoubtedly gambling transactions, and he so designates them himself in his brief. If this is so, he is entitled, under

the statute, to recover whatever he put up, and there is no doubt as to what he put up, and no room for any accounting with respect thereto. The complainant endeavors to break the force of this obvious course of reasoning by suggesting that, if it should turn out that the defendants actually purchased certain stocks for his account, he would be willing to permit them to recoup themselves for any losses with respect thereto. This, however, is a matter of grace, and not of law, and does not affect the situation in the least. The only ground upon which the complainant seeks to recover is that the transactions were prohibited, and the statute enables him to recover whatever he put up with respect to the prohibited transaction. The fact that he is willing, in the face of the law, to suffer a certain loss, or to suffer loss under certain circumstances, does not change the legal aspect of the question involved. Under the present bill, as I view it, he pleads that he was gambling, and that he put up a certain sum of money, which he specifies; and if he proves those facts he is entitled to a return of that money. There is, as has been above stated, no occasion for any accounting whatever.

Nor could the case be saved, even by a resort to the idea that a discovery is necessary, and that equity, taking jurisdiction for that purpose, would retain it for all purposes. No discovery whatever is shown to be necessary. The complainant sets forth the date and the amount of each payment that he made to the defendants, and if he is entitled to anything he is entitled to a return of those accounts, or the aggregate thereof, and he not only does not show the need of any discovery with respect thereto, but himself possesses the best information as to them.

The demurrer will be sustained.

(74 N. J. E. 546)

BIJUR et al. v. STANDARD DISTILLING & DISTRIBUTING CO. et al.

(Court of Chancery of New Jersey. Oct. 2, 1908.)

#### 1. CORPORATIONS — STOCKHOLDERS' RIGHTS — ACTS OF COMMON DIRECTORS.

The rule allowing stockholders to avoid contracts made with another corporation by common directors, applicable where the contract is made through the directors alone, is inapplicable to the action of directors in those statutory proceedings where the final action is that of the stockholders themselves, acting in their individual rights and according to their individual interests.

#### 2. ESTOPPEL — CORPORATIONS — DISSOLUTION.

Complainants, stockholders of a dissolved corporation, having sued to wind up its affairs and having consented to a decree for a sale of the assets, the proceeds to be distributed among the stockholders, are precluded from showing in a subsequent suit against another corporation that the dissolution was brought about through fraud of such other corporation, as one of the stockholders, acting through its own directors.

### 3. CORPORATIONS—STOCKHOLDERS' AGREEMENT—CONSTRUCTION.

Preferred stockholders agreed that if defendant, another corporation, would guarantee 6 per cent. dividends on their stock, they would consent to a reduction of their dividends from 7 per cent., as fixed by the charter. The stockholders' agreement required defendant's agreement to be indorsed upon new stock certificates to be exchanged for old certificates and to be deposited with a trust company. *Held* that, since the trust company was bound to receive the new certificates and surrender the old, it must be assumed, in the absence of proof, that the trust company accepted the new certificates from the corporation issuing them, with the form of agreement adopted by defendant and consented to by the other corporation, to carry out the agreement of indorsement, and as a sufficient indorsement under the agreement, that the new certificates were accepted by the stockholders as being properly indorsed, that the old certificates were surrendered without objection, and that the previous negotiations cannot be resorted to, to give the indorsed agreement any operation different from that expressed on its face.

### 4. SAME—NATURE OF AGREEMENT.

Defendant corporation's agreement, "guaranteeing" payment of a fixed dividend on stock of another corporation, did not constitute a guaranty, but an independent contract, where it was made in a readjustment of such other's corporation's affairs, in which defendant was interested; defendant receiving substantial independent consideration on a consummation of the whole plan.

### 5. SAME—STOCK CERTIFICATES—NATURE.

A stockholder's rights do not necessarily depend on the issue or holding of the stock certificate itself, but are rights of which the certificate is the evidence or muniment of title; the certificate not being the property itself.

### 6. SAME—STOCKHOLDER'S RIGHTS.

A stockholder's rights, evidenced by a certificate, include the personal rights inherent in a stockholder as a member of the corporation, as the right to attend meetings, vote, etc., the property right to share in the dividends and in distributions of assets, and the rights conferred by law to protect such personal and property rights.

### 7. SAME—DISSOLUTION—EFFECT.

Dissolution of a corporation terminates a stockholder's personal, but not his property, rights.

### 8. SAME—DIVIDEND AGREEMENT CONSTRUED—"OUTSTANDING" CERTIFICATES.

Defendant corporation guaranteed payment of a fixed dividend on stock in another corporation, so long as the certificate of stock should be "outstanding." *Held*, that a dissolution of such other corporation, and a decree distributing its assets, terminated a stockholder's right to dividends under the agreement; the term "outstanding," as used, meaning "lawfully outstanding," and the certificate remaining effective only for the purpose of production as evidence of the holder's right under the decree of distribution.

### 9. SAME.

Defendant corporation, by guaranteeing payment of a fixed dividend on stock in another corporation, in which it held stock, so long as the guaranteed certificates should be outstanding, did not impliedly agree that it would not exercise its statutory right as a stockholder to vote to dissolve such other corporation, because a dissolution might terminate its liability under the agreement.

### 10. SAME—EFFECT OF DISSOLUTION—BREACH OF CONTRACT.

A claim for breach of contract by a corporation is chargeable against its assets on dissolution.

Bill by Nathan Bijur and another against the Standard Distilling & Distributing Company and others. Decree dismissing bill advised.

James E. Howell, Mr. Bijur, and Mr. Engelhard (Coulst & Smith, of counsel), for complainants. R. V. Lindabury, Levi Mayer, and O. C. Deming (Lindabury, Depue & Faulks, of counsel), for defendants.

EMERY, V. C. The Standard Distilling & Distributing Company, a corporation organized under the general corporation act, the corporate defendant in this suit, has been dissolved by the voluntary action of its stockholders under the act, and is now being wound up, under the act, by the individual defendants, the directors at the time of the dissolution. The complainant Bijur, as a creditor of the Standard Company, filed this bill, on behalf of himself and other creditors, for the adjudication of his claims and their payment out of the assets of the corporation. By stipulation of the defendants, made on the application for a preliminary injunction restraining the distribution of the assets pending the adjudication of complainant's claim, the bill, being sworn to, was taken as a presentation of complainant's proof of claim, and an order was made in the cause that it be so taken.

Complainant's claim against the Standard Company is based on written agreements indorsed by or on behalf of the Standard Company on the certificates of first preferred and second preferred stock of another corporation, called the "Spirits Distributing Company." These certificates of stock were issued under date of April 13, 1899, and the indorsement on the certificate for first preferred stock is in the following form: "For good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned hereby guarantees and agrees to pay to the holder of record of the within certificate, so long as said certificate shall be outstanding, but not to exceed the present unexpired term of the period for which said Spirits Distributing Company is incorporated, 1½ per cent. dividend on the 15th days of January, April, July, and October in each year, beginning with the year 1899, on every share of first preferred stock of said Spirits Distributing Company represented by the within certificate. Standard Distilling & Distributing Company, by N. E. D. Huggins, Secretary." The indorsement on the certificates for second preferred stock is similar in form, except that the payments are "1 per cent. dividend on the 15th days of April and October in each year, beginning with the year 1899."

Complainant Bijur, since April, 1899, has been the owner of 404 shares of first preferred, one certificate for 54 shares issued to one Arnold, and one certificate for 350 shares issued to one Liebman, and also the owner

of 1,100 shares of second preferred stock in a single certificate, issued also to Liebman. Arnold and Liebman are still the holders of record, but it is admitted by the pleadings and at the hearing that the stock standing on the record in their names always has been, and is now, owned by the complainant Bijur, who has the certificates in his possession, and has also assignments of their interests, and is entitled to whatever may be due or become due on the certificates. The other complainant, Windmuller, who was allowed to intervene in the suit, is the owner and holder of record of 10 shares of the first preferred and 10 shares of the second preferred stock. Payments were made by the Standard Company to the complainants as owners or holders of the certificates, according to the terms of the indorsement, from the date thereof up to, but not including, the payments of April 15, 1902. For the payments due, or claimed to be due, on that date (about \$1,731) suit was brought against the Standard Company, in the Supreme Court of the state of New York, by the complainant Windmuller, on his own behalf and as assignee of Liebman, and judgment recovered, which judgment was affirmed on appeal to the Appellate Division (*Windmuller v. Standard, etc., Co.*, 106 App. Div. 248, 94 N. Y. Supp. 52), and also by the Court of Appeals (186 N. Y. 572, 79 N. E. 1119) in November, 1906.

The present claim of complainant's bill, which was filed September 30, 1905, is based on the payments alleged to be due from and including July 15, 1902, to the filing of the bill, and the payments subsequently accruing and to accrue up to the year 1946, the period for which the Spirits Distributing Company was incorporated (50 years from January 6, 1896), expiring on January 6, 1946. The situation as to the liability of the Distributing Company to the holders of certificates, upon the agreement indorsed, is changed, or claimed to be changed, since April 15, 1902, by reason of the dissolution of the Distributing Company by vote of its stockholders, and proceedings for that purpose taken under the act, beginning with a resolution of the directors advising dissolution, passed December 27, 1901. The formal regularity of these statutory proceedings for dissolution is not disputed, and this company was dissolved on June 2, 1902. Two days later, and on June 4, 1902, the two complainants, together with Arnold, filed a bill in this court, as the holders and owners both of the first and second preferred stock, against the Spirits Distributing Company and its directors at the time of the dissolution, alleging the dissolution of the company by the proceedings taken, and praying, for reasons stated in the bill, the appointment of a receiver, other than the directors, to wind up the affairs of the company. In this cause a decree was made on July 8, 1902, the complainants in the cause consenting to it, for the sale to a corporation,

called the "Distilling Company of America," of all the assets of the Spirits Distributing Company, of every kind and description, for \$1,243,538.80. It was further declared by this decree that this sum constituted the total assets for distribution among the shareholders of the Distributing Company, less liabilities, which were fixed at \$209,910.03, leaving for actual distribution \$1,033,628.77, or \$82.69 for each of the first preferred shares of the company, which were by the charter of the company entitled to be first paid the par value of their shares before any distribution on the second preferred or common stock; and it was ordered by this decree of July 8, 1902, that the trustees (the directors at the time of the dissolution being by the order continued as trustees) forthwith make distribution among the first preferred shareholders of this sum, according to their respective holdings, as set out and determined in the order itself, including Arnold (for Bijur) as owner of 54 shares first preferred stock, Liebman (for Bijur) as holder of 350 shares first preferred and 1,100 second preferred, and Windmuller as holder of 10 shares first preferred and 10 shares second preferred stock. The payments, however, were not required to be made by the trustees, except to such stockholders as should present their certificates of first preferred stock and permit the indorsements of the payment of the dividend to be made thereon. The further direction was made "that the distribution of the assets of the Spirits Distributing Company herein provided for is intended to be and is a final distribution of all the assets of the said corporation of every kind among its shareholders." This decree for a final distribution of assets among all shareholders entitled was made to carry out the leave reserved by a previous order, made July 2, 1902, when, after the complainants had accepted the offer of purchase, the cause was directed to stand over for the purpose of giving notice to the stockholders of record, not represented in court, and by this order of July 2, 1902, special leave given on the final acceptance of the offer to apply at once for the orders and decrees necessary to carry the same into effect, and for a decree of final distribution of the assets of said Spirits Distributing Company among the parties entitled thereto. This decree of July 8, 1902, consented to and procured by complainants, was not appealed from, and must stand as in substance and effect a decree for the payment of a definite sum fixed as complainants' share of the assets of the Distributing Company on dissolution.

Complainants do not appear to have tendered or presented their certificates of stock to the trustees for the receipt of dividend, under this decree, from the assets of the Distributing Company. The present claim against the Standard Company on its agreement indorsed on the certificates is based on the view that, notwithstanding the dissolution of

the Spirits Distributing Company, their claim against the Standard Company on its agreement is still a continuing claim, and will continue until the time expressly fixed as limiting the period of its liability, viz., the time for which the Distributing Company was incorporated, January, 1946. This claim is by the bill based (1) on the construction of the agreement, which, it is insisted, was not made to depend upon the existence of the Distributing Company, so that the certificates are still "outstanding" without regard to the dissolution; and (2) because, if dependent on the existence of the company, the dissolution was fraudulent and void as against complainants, and of no effect, for the reason that it was brought about unlawfully and in fraud of complainants and of their rights under the certificate. The resolutions for dissolution passed in December, 1901, are attacked because not honest, but in the interest of the Standard Company and of the Distilling Company of America, which together, as owners of nearly all of the stock, preferred and common, of the Distributing Company, controlled the latter in its interest and dissolved the company for the purpose of terminating liability under the agreement. The further ground of fraud alleged is that the three companies interested in the termination of the contract were governed and controlled by the same or common directors, which seems to be claimed as of itself making the proceedings of the directors for dissolution fraudulent against the minority stockholders. The rule allowing stockholders of a company the option to avoid contracts or agreements made by common directors, on behalf of both companies, and which is applied in proper cases where the contract, finally binding the company and all its stockholders, is made through the directors alone, has no application to the action of directors in those statutory proceedings where the final action is that of the stockholders themselves, acting, as they are entitled to act, in their individual rights, and, if they choose, according to their individual interests. In *Colgate v. U. S. Leather Co.* (N. J. Ch.) 87 Atl. 657 (1907), I examined this question with reference to the statutory proceedings in the merger of corporations. This case is now pending in the appellate court. Substantially the same view was taken in reference to the rights of the stockholders in voting upon the dissolution now complained of by Judge Kirkpatrick in a suit brought by the complainants and Arnold against the Standard Company and the Distilling Company of America, the record of which has been offered.

Nor has the charge of fraud in the passage of the resolution been at all made out. On the contrary, the evidence of the witnesses called by complainant on this hearing to testify in relation to the passage of the resolution for dissolution disproves the charge, and on the hearing and in the briefs the evi-

dence mainly relied on to support the charge is that of the reports of the several companies and the financial condition of the company as inferred from these reports. These statements do not justify such inference. But as to all of the objections to the dissolution of the Distributing Company, based on the alleged fraud of the Standard Company as one of the stockholders, acting through its own directors, I think the complainants are concluded by the bill and proceedings in their own suit in chancery above set forth, in which they accepted the dissolution, took proceedings to carry it into effect, and procured a final decree distributing its assets among all its stockholders, including as well the Standard and Distributing Company as themselves. The decree is set up in the answer as *res adjudicata*, and it must therefore be given full effect on all the matters foreclosed by it. The claim of complainants against the Standard Company, therefore, must depend upon the contract, and this is the ground upon which the claim is mainly placed by the bill; the allegation of fraud in the proceedings for dissolution being set up apparently only as an alternative answer or basis of relief, in case the contract be construed as terminated merely by the dissolution of the Distributing Company.

Construing the contract, the complainants claim that the contract must be construed solely by its terms, and that the certificate is still "outstanding," within the meaning of the agreement, and that, in the absence of any express provision to that effect, the dissolution of the company does not of itself terminate the contract. The defendants, upon this branch of the case (the construction of the contract), claim that the contract itself contemplates payment of the dividends only during the existence of the company, and that by the dissolution of the company the certificate ceased to be outstanding; and as a further defense, upon the continuance of the claim for dividends after dissolution and affecting the construction of the contract in this respect, they set up that the agreement, in the form signed, was the result of, and intended solely to carry into effect, prior negotiations (through one Eicks, an intermediary promoter), to which the Distributing Company and the Standard Company and their individual stockholders, including complainants, were parties. The following facts in relation to these negotiations appear by the undisputed evidence: In these negotiations the stockholders' agreements (signed by the complainants on their part, along with the other stockholders) described and referred to the proposal of the Standard Company as one by which it would "guarantee the payment during the existence of the said Spirits Distributing Company of a dividend of  $1\frac{1}{2}$  per cent. upon the 15th days of January, April, July, and October in each year, upon \$1,250,000 of said first preferred stock, or so much thereof as may be out-

standing from time to time." The stockholders' agreement recited, among other things, that in consideration of this guaranty they were willing on their part to consent to the reduction to 6 per cent. of the dividend on their stock (fixed by the original charter at 7 per cent.). This reduction was one of the features of the readjustment. As to the form which the contract of the Standard Company thus referred to should assume, the stockholders' agreement further provided that the new certificates of stock (to be exchanged for the old certificates) "shall have indorsed thereon the agreement of said Standard, etc., Company to pay to the holder of said first preferred stock a dividend of  $1\frac{1}{2}$  per cent. upon the par value thereof, on the 15th days of January, April, July, and October in each year," etc., and that upon receiving certificates so guaranteed the Manhattan Trust Company (the depository of the stock) was authorized to cancel the old certificates of stock deposited with the Trust Company under the agreement and surrender them to the Distributing Company.

The stockholders' agreement was ratified by the stockholders, including complainant Bijur, who had, however, procured an injunction in a suit brought by one Pronick against carrying out an amendment to the charter of the Spirits Distributing Company, which was also a feature of the adjustment. This injunction, as he says on the hearing in this case, was released upon the matter being adjusted in a way satisfactory to him, and he then deposited his stock and took the new stock. The form of the agreement of the Standard Company actually indorsed on the new certificates differs from that given in the stockholders' agreement in this respect, viz.: Instead of following the precise language of the agreement "to pay during the existence of the Spirits Distributing Company a dividend of  $1\frac{1}{2}$  per cent., etc., on every share of first preferred stock represented by the within certificate, or so much thereof as may be outstanding (or provided the same be outstanding)," the agreement is, "guarantees and agrees to pay to the holder of record of the within certificate, so long as said certificate shall be outstanding, but not to exceed the present unexpired term for which the company is incorporated." The above facts, relating to the matter of the form of the agreement as originally proposed and finally executed, are undisputed. How the form in question came to be adopted does not appear, but inasmuch as, under the agreement, the Trust Company was charged with the duty of receiving the new certificates and surrendering the old ones, it must, in the absence of proof, be assumed that the Trust Company accepted from the Distributing Company the new certificates, with the form of agreement adopted, as the form adopted by the Standard Company and consented to by the Distributing Company to carry out the agreement of indorsement, and as a sufficient in-

dorsement under the agreement; and it must also be assumed that the certificates so indorsed were accepted by the stockholders (including complainants) from the Trust Company as having indorsed thereon the agreements to which they were entitled, and which they were bound to receive under the agreement, and that without objection from any stockholder the old certificates were surrendered by the Trust Company on the delivery of the new certificates.

Under these circumstances, my view is that the previous negotiations cannot be resorted to for the purpose of giving to the indorsement in question any construction or operation different from that expressed in the agreement itself finally delivered, and that the parties on both sides must stand on the contract as finally executed and accepted. The right to resort to prior negotiations for the purpose of qualifying, by circumstances ultra the contract, the terms of the contract by construction or otherwise, is sometimes allowed under special rules relating to contracts of guaranty, and on the ground that a guaranty is a secondary liability, which in such cases arises only on the whole circumstances of the case as proved; and cases are cited by counsel which authorize such evidence. But, as bearing on the question whether these prior negotiations can be resorted to for the purpose of controlling the contract in the present case, it is proper further to add that the Standard Company, although referred to as guarantor, in this one feature of the plan of adjustment—the indorsement of the certificates—really occupied the position of an independent contractor, when the entire scope of the negotiations is considered, and it received consideration for the contract of guaranty, which was only one of the contracts made in a transaction which was a readjustment of the financial condition of the Distributing Company, in which the Standard Company had an interest. On the consummation of the whole plan, it received substantial independent consideration, which was sufficient legal basis for the contract in question, considered as an independent and original contract, and the contract was in form made, not as a contract merely of guaranty, but in the words "guarantee and agree to pay." The contract in question was, in the Windmiller Case in New York, above referred to, construed to be such original contract of payment, and not a mere contract of guaranty, and the whole transaction was held by that court to be "in reality only a method of paying part of the price which the Standard Company was willing to expend for the acquisition of the controlling interest which it sought." It was, therefore, held not to be ultra vires as a mere guaranty.

The right of the complainants to recover from the Standard Company dividends after April 15, 1902, depends, therefore, in my judgment, solely on the construction of the

contract for payment indorsed on the certificates; and on the undisputed facts above stated the precise question is whether, after the dissolution of the company and the final decree for distribution of its assets to the shareholders, including complainants, and made in the suit instituted by them for that purpose, the certificates are, within the meaning of the contract, "outstanding." The solution of this question involves some consideration of the nature of a certificate and its relation to the shareholders' rights in a company. The shareholder's rights in the company of which he is shareholder are not necessarily dependent on the issue or holding of the certificate itself, but are rights of which the certificate is the evidence or muniment of title, and, so far as relates to the stockholder's rights in the company, the certificate is not itself the property. 2 *Thomps. Corp.* § 2348; *Lowell, Transfer of Stock*, § 109. The rights of the stockholder evidenced by the certificate are all comprised in two classes: First, the personal rights inherent in a stockholder as a member of the corporation, being the right to attend meetings, vote, and the like, and including all personal rights as member; and, second, the property rights, which are the rights to share in the dividends of the corporation and in the distribution of its assets. These rights, with those conferred by law, as incidental solely to their protection, comprise, I think all the rights of the stockholder; and the certificate of stock is, as between the shareholder and the company and all its other shareholders, the evidence of this membership and right to share in the property and assets. A dissolution of the corporation terminates those rights of a shareholder which are merely personal to him as a member, but does not terminate his property right in the assets. It has, however, been held by high authority, which has never been questioned, that on dissolution the title evidenced by the certificate becomes merely an equitable right to a distributive share in the funds, and that the stockholder can no longer convey any legal title to his stock by the mere assignment of the certificate. *A. & A. Corp.* (10th Ed.); *James v. Woodruff*, 10 *Paige* (N. Y.) 541, affirmed on appeal 2 *Denio* (N. Y.) 574 (1845).

Taking this to be the true nature and scope of the certificate, as I think it is, the question of construction is narrowed to this: In view, first, of the dissolution of the company, which destroys all membership and rights of membership, and, second, of the final decree of a court of equity distributing the assets of the corporation, adjudicating the property rights of the shareholder, and decreeing payment to the complainants of specified sums of money as their proportionate share of the assets, can the certificates be now said to be "outstanding"? This must be taken to mean "lawfully outstanding," and for what lawful purposes is the certificate

now outstanding? By the decree of distribution, giving complainants a definite sum out of the assets, the general right to share in those assets, evidenced by the certificate, has been merged and ended, and no further right to the assets continues to exist under the certificate. The sole purpose for which the certificate now exists is its production to the trustees, as evidence of the right to receive the money adjudicated to complainants by the decree. The trustees, by the decree of the court, now hold a fixed sum in special and direct trust for the complainants, in satisfaction of the general property right evidenced by the certificate while lawfully outstanding against the company, and this requirement of production for indorsement of payment cannot be considered as in any sense creating by the decree itself a situation which continues the certificate as "outstanding," within the meaning of the agreement. Suppose the Standard Company had indorsed the bonds, instead of the stock, of the Distributing Company, agreeing to pay interest on each bond so long as said bond is "outstanding"; such liability to pay interest would continue so long and to the extent interest was due on the unpaid principal, and after as well as before the principal became due. But should judgment be recovered for the principal when due, and the money be paid into court on writ of execution; could the bond be then said to be "outstanding," merely because the holder declined to apply for the money in court and retained the bond? When merged and extinguished by the judgment and its payment, the bond is no longer lawfully "outstanding." The decree of distribution was in fact and in form a judgment in favor of the shareholder for the amount due on his certificate, and the direction to the trustees to pay out of the moneys in hand the amount adjudicated to the complainants was an execution in their favor; and, so far as the Distributing Company and its shareholders are concerned, the certificate is certainly from that date no longer outstanding. As a matter of construction of contract, therefore, I conclude that the complainants have no claim under the agreement for any payment of dividends after the dissolution and decree of distribution.

In the complainants' brief a liability to pay, continuing after dissolution and distribution, was also pressed on the ground, first, of a supposed obligation of the Standard Company not to exercise its right as shareholder in order to dissolve the Distributing Company, implied by law from the terms of the agreement; and, secondly, because of an estoppel against denying the continued existence of the company, based on equities claimed to arise from all the circumstances of the case.

The first ground depends on the construction of the contract itself, and there is no reason why the principle, "expressum facit



cessare tacitum," should not apply to a contract of this kind. The limit of time expressly agreed on by the parties for the payment of dividends on the shares represented by the certificates was "so long as the certificates are outstanding." The statutory right of a shareholder to vote upon the question of dissolution existed at the time the contract in question was made and accepted, and the contract in its present form must be taken to have been made in contemplation of it. An obligation from the nature of the contract itself, that the contractor will not exercise such independent right because of its possible effect as terminating the contract, if construed according to its terms, cannot be implied by law. Several of the cases cited upon the point of implied obligations are those of courts where the dissolution of a corporation is held to have the effect of so terminating contracts for employment, or like continuing contracts, that no action against the corporation for damages for breach of contract exists, and these courts have applied the doctrines of implied obligation or of equitable estoppel in these cases, where the act of dissolution was that of the contractor itself and was inequitable. We have not adopted this doctrine that the mere dissolution of the contracting company itself dissolves its continuing contracts, and under our law the claim for damages for breach of the contract is chargeable on its assets. *Spader v. Mural* Dec. Co., 47 N. J. Eq. 18, 20 Atl. 378 (McGill, Ch.; 1890), *Bolles v. Crescent Drug Co.*, 53 N. J. Eq. 614, 32 Atl. 1061 (Reed, V. Ch.; 1898), approved and followed in *Rosenbaum v. Credit System Co.*, 65 N. J. Law, 255, 48 Atl. 237, 53 L. R. A. 346 (Err. & App., 1898). Had the Standard Distilling Company trustees set up the dissolution of the Standard Company itself as a defense to an action on its contract, these cases on estoppel cited would be applicable, if the rule were here in force that the dissolution itself ordinarily or generally terminated a contract which on its face did not refer to the dissolution, but which would have continued, had there been no dissolution. In this case, the question is the altogether different one whether, by its own terms as to continuance, the contract has not terminated, and, if so, then whether any different or other time for its termination can be fixed, by applying the doctrine of implied obligation to affect the period of termination fixed by the terms of the contract.

As to the second ground set up in the briefs—the estoppel to deny the continued existence of the Distributing Company—the facts relied on to raise the estoppel are the same as those relied on to sustain the charge of fraud in the dissolution of the Distributing Company, which I have held not to be sustained.

I will advise a decree dismissing the bill.

(223 Pa. 4)

# GREENSBORO GAS CO. v. HOME OIL & GAS CO.

(Supreme Court of Pennsylvania. June 2, 1908.)

## CORPORATIONS—CONTRACTS—VALIDITY—ESTOPPEL.

Where negotiations leading up to a contract of a natural gas company to sell its gas to another company were known to the directors, and the other company made large expenditures to convey the gas to its mains and secured rights of way, and both companies had treated the agreement as valid, the natural gas company was estopped to allege that the contract was invalid, because not approved at a directors' meeting when a quorum was present.

Appeal from Court of Common Pleas, Fayette County.

Suit by the Greensboro Gas Company against the Home Oil & Gas Company. From a decree dissolving a preliminary injunction, plaintiff appeals. Reversed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

H. L. Robinson, for appellant. D. M. Hertzog and Gans & Jones, for appellee.

ELKIN, J. This is an injunction bill, filed to restrain the respondent company from selling or disposing of the natural gas produced from certain wells to any person or persons other than the complaining company, and from interfering or tampering with the connections and appliances which have been or may hereafter be placed by the complainant on the premises for the purpose of obtaining the gas from said wells. The whole controversy depends upon whether a valid contract was entered into between the parties for the purchase and sale of the gas in the first instance; or, if the negotiations between the parties did not amount to a binding agreement, was there such a ratification by subsequent acts as to make an enforceable contract?

The learned court below, sitting as a chancellor, found as a fact that there was not a quorum present at the meeting of the board of directors, October 13, 1906, at the time a proposition was submitted by the complainant company to take all the gas produced by the two wells in question at the rate of four cents per 1,000 cubic feet, and concluded as a matter of law that nothing done or attempted to be done at that meeting would be binding on the respondent. We have concluded that this finding of fact and conclusion of law were justified under the facts, and that there was no such manifest error as to warrant a reversal of the decree on this account.

The only remaining question is as to a subsequent ratification, and this we think is important. In order to fully understand the situation of the parties, it will be necessary to briefly recite some of the facts. The complainant company was in the business of selling gas to consumers. The respondent had

developed some gas territory, and could supply a limited amount of gas, but had no customers or pipe lines to supply them. It was deemed advisable to make an arrangement to sell gas to a larger company, and these conditions led up to the negotiations between the parties to this controversy. A meeting was arranged for and held at Smithfield on the date above mentioned, at which were present several members of the board of directors of the respondent company, as well as representatives of the complainant company and of another gas company. At this meeting a resolution was adopted appointing a committee of three to make an agreement with the complainant and report to a future meeting. In this connection, it may be remarked, even if a quorum had been present, we do not agree that a resolution authorizing a committee to make and report an agreement is sufficient authority to authorize a committee so appointed to make and enter into a binding contract without reporting. The resolution evidently intended a preliminary agreement to be arranged by the committee, and the final contract to be submitted for approval or disapproval at a future meeting. However, it is just as clear that the board of directors were not only willing, but anxious, to make a contract for the sale of gas, and took all the preliminary steps looking to the consummation of such an agreement. The committee so appointed, whether with proper authority or without it, did attempt to close a contract with the complainant embodying the terms upon which to sell and deliver all the gas produced from the wells specified. On October 29, 1906, two members of the committee so appointed met the officers of the complainant company and concluded a formal contract, under the corporate seals of the respective corporations, signed by their presidents, and attested by their secretaries. The contract thus executed was on its face regular in form, properly executed and attested, and presumptively was what it purported to be—that is, a contract between the parties; and in such a case the burden is on the corporation attempting to repudiate its terms to rebut the presumption by showing that the officers did not have the authority to bind the company by the contract so executed. This burden is met in the present case, as the court below has found; but, while the officers were not authorized to execute the contract, they went ahead under the contract and did undertake to carry out its terms. They secured rights of way for complainant to lay its pipes for the purpose of transporting the gas to the mains of complainant, and they permitted the complainant, at a cost of more than \$2,000, to make the connections in order to carry out the terms of the contract, and appointed an employé to read the meter in connection with an employé of the complainant company, so as to determine the amount of gas taken daily. The employés reported to their respective

companies the amount of gas turned into the mains of the complainant company each day. In other words, both companies treated the agreement as a valid contract, and did everything required to be done under its terms, for a considerable length of time. The complainant tendered payment for the gas taken, which was refused by respondent on the ground that a valid contract did not exist between the parties, because no quorum was present at the time the committee was authorized to make and report a contract.

After due consideration, we are of opinion that in view of the negotiations between the parties, known to the members of the board of directors, and presumptively to the stockholders, the expenditure of money on the part of complainant necessary to convey the gas to its mains, the appointment of employés to read the meters, the securing of rights of way, and all the other acts done in furtherance of the terms of the agreement, are sufficient in law to constitute a ratification of the contract attempted to be made, and which was in point of fact executed, but without proper corporate authority.

Decree reversed, and record remitted to the court below, with instructions that the injunction be made permanent as prayed for.

(223 Pa. 32)

**COMMONWEALTH ex rel. GLESSENER,  
Dist. Atty. of York County,  
v. KESSLER.**

(Supreme Court of Pennsylvania. June 2, 1908.)

**1. BRIDGES—CONSTRUCTION BY COUNTY.**

A stream must cross a public road or highway before a bridge can be erected over the same by a county.

**2. SAME—DUTY TO MAINTAIN.**

Where a county, under a mistake as to the facts, erected a bridge across a stream within a city at a point where a public street extended only to the bank of the stream, but thereafter an extension of the street was opened on the other side after the opening the county was liable for the maintenance of the bridge, but, if the original portion of the street was vacated, the liability of the county ceased.

**3. MANDAMUS—WHEN LIES.**

Mandamus goes out only where there is a clear legal right in the relator and a corresponding duty on the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 37.]

Appeal from Court of Common Pleas, York County.

Application by the commonwealth, on the relation of James G. Glessener, district attorney of York county, for writ of mandamus to Robert G. Kessler and others, county commissioners. From an order refusing the writ, relator appeals. Affirmed.

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

John L. Rouse, City Sol., for appellant.

H. C. Brenneman, County Sol., for appellee.

**BROWN, J.** The situation in this case is somewhat anomalous. In 1892 proceedings were instituted in the court of quarter sessions of York county for the erection of a bridge by the county of York over the Codorus creek at a point where it was alleged in the petition asking for the appointment of viewers "College avenue, a public highway in the city of York, crosses the same." Viewers were appointed, who reported in favor of the bridge and that it would require more expense than it was reasonable the city of York should bear. This report was subsequently approved by a grand jury and the court, and the bridge was erected at the expense of the county. It is now out of repair, and this appeal is from the refusal of the court below to require the county commissioners to keep it open and in repair for the traveling public. There was a demurrer filed to the alternative mandamus issued at the instance of the mayor of the city of York, and the case was heard on the petition, return, demurrer, and facts agreed upon. The proceedings for the erection of the bridge were instituted and carried on under an impression that the Codorus creek crossed College avenue, a public highway of the city of York. As a matter of fact, now admitted, neither this avenue nor any public street had ever been opened by ordinance or order of court west of the creek to its western bank at the point where the bridge was erected, and the creek did not, therefore, cross a public road or highway. But, for the misrepresentation appearing in the petition for the appointment of the viewers, no doubt innocently made, the bridge would not have been erected by the county; for, if the real situation had been known to the court, the viewers could not have been appointed. A stream must cross a public road or highway when a bridge is to be erected by a county. The conclusion of the learned judge below was that this bridge "was a creature of misrepresentation from its beginning." In 1902 College avenue west of the creek was opened and adopted as a public highway up to the western terminus of the bridge, and, if this were all that was in the case, we should not be inclined to sustain the judgment below, for the situation would be the crossing of the creek by a public highway, and what the viewers, grand jury, and court found to be necessary in 1892 would certainly be more so in 1908 with the growth and development of the city.

On the east bank of the creek a very different situation now exists. East College Avenue, which at the time the bridge was erected extended to the creek, no longer reaches it. Before the county refused to continue its maintenance and repair of the bridge, that avenue was vacated as a public highway from a point east of the right of way of the Northern Central Railway Company to the east bank of the creek. What the exact

distance is does not appear. True, a span extends from the western terminus of East College avenue over the tracks of the railway company and connects with the bridge across the creek, and it may be regarded as part of the bridge, but, even if there was at any time a duty upon the county to maintain this span, that duty ceased when the street under it was vacated. There is no longer a street of the city over the tracks of the railway company reaching to the east bank of the creek to which East College avenue formally had extended. This is just the situation as gathered from the pleadings and the admissions, and if a duty ever did rest upon the county to maintain and repair the bridge and span and keep them open as part of a public highway, that duty was suspended with the suspension of the highway. On the west bank of the creek West College avenue abruptly now ends. A gap extends thence all the way across the creek up to and over the railroad tracks. In this gap as it now exists the city of York has no rights, and within it there is no duty to be discharged by the county. Mandamus goes out only where there is a clear legal right in the relator and a corresponding duty upon the defendant. *Commonwealth v. Fittler*, 136 Pa. 129, 20 Atl. 424.

Judgment affirmed.

(222 Pa. 142)

#### In re NEILL'S ESTATE.

(Supreme Court of Pennsylvania. June 23, 1908.)

#### 1. WILLS—REVOCATION—MARRIAGE.

Subsequent marriage revokes a will previously executed by an unmarried woman.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 469, 474.]

#### 2. SAME.

An unmarried woman placed one-half of her estate in the form of a spendthrift trust, and provided that after her death in default of issue her estate was to go to such uses as she should by will or by writing in nature of a will appoint, subsequently, after bequeathing certain legacies by will, she directed that the residue of her money should be given to her husband, or the man who was to be her husband, naming him, without any reference in the will to the power in the act of trust. Thereafter she married the man named and in a few months died without issue. *Held*, that the will was revoked by the subsequent marriage, and was not a paper in the nature of a will, within the meaning of the deed of trust, and there was no valid appointment over of the portion of the estate covered by it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 469, 474.]

#### 3. POWERS—EXECUTION.

Act June 4, 1879 (P. L. 88), providing for the execution of powers over real and personal estate by the person in whom such powers are vested, is limited in its operation to wills, and does not affect a power created by a deed.

Mitchell, C. J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

In the matter of the estate of Julia Mac-

alester Neill. From a decree dismissing exceptions to auditor's report, George Lewis Mayer appeals. Affirmed.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Charles Biddle and H. Alan Dawson, for appellant. H. Gordon McCouch and John Marshall Gest, for appellees.

POTTER, J. On May 23, 1902, Julia Macalester Neill made a deed of trust for the purpose of putting one-half of her estate in the form of a spendthrift trust. She provided that after her death, in default of issue or children, the estate was to be conveyed "to such uses and for such estate or estates as the said grantor by any deed or by her last will and testament or writing in the nature thereof shall direct, limit, and appoint, and in default of such deed, will, or other appointment then to grant, assign, and convey the same to such person or persons and for such estates and in such parts or shares as would be entitled to the same by the intestate laws of the commonwealth of Pennsylvania if said grantor had died seised and possessed thereof absolutely and in fee." On May 3, 1904, Miss Neill made the following will: "When I die I want my money left as follows: Five thousand to my cousin Neill Wolfe. Five thousand to S. Clements Church, one thousand of which to be given by them to missions. Three thousand to be paid yearly to my aunt Matty D. Neill until her death when the capital shall go to my husband. All the rest of my money to be given to my husband (or the man who is to be my husband) George Lewis Mayer. I want him (my husband) to see that Mrs. Haas is never in want and to give her one hundred (\$100) for me. Julia M. Neill." On May 5, 1904, she was married to George Lewis Mayer. On August 4, 1904, she died without issue. The auditor and the court below held that the power of appointment reserved by the deed of trust was not exercised.

Clearly the paper signed by Miss Neill on May 3, 1904, is not her will; for, under the provisions of section 16 of the act of April 8, 1833 (P. L. 1832-33, p. 251), it must be deemed to have been revoked by her subsequent marriage. And, as the court below points out, even if it be considered as a paper in the nature of a will, yet it lacks an essential to the execution of a power, in that the paper itself does not show the intent of the person attempting to execute the power. The language relied on to sustain the appointment is: "All the rest of my money to be given to my husband (or the man who is to be my husband) George Lewis Mayer." There is an entire absence of any reference to the power which it is claimed she intended to exercise, and there is no description of the property which would identify it with that included in the trust deed. In Bing-

ham's Appeal, 64 Pa. 345, Justice Agnew said (page 349): "It may be admitted that the intention of the donee of a power is the true criterion to determine its execution. But this intention must appear in the instrument itself. In Pennsylvania the rule is that the instrument must refer to the power to be executed, or actually dispose of the subject of it. *Wetherill v. Wetherill*, 18 Pa. 265; *Thompson v. Garwood*, 3 Whart. 287, 31 Am. Dec. 502; *McKonkey's Appeal*, 13 Pa. 253; *Keefer v. Schwartz*, 47 Pa. 503; *Commonwealth v. Duffield*, 12 Pa. 277; *Heffernan v. Addams*, 7 Watts, 116. When the donee of a power refers to it, or when he disposes of the subject of it by such a description as identifies it, the intent to execute it is free from uncertainty." But both of these requirements are lacking in the present case.

Nor can it be said that the paper is meaningless unless it be held to refer to the trust estate; for it seems that only one-half of Miss Neill's estate was put into the trust, and she had at the time of her death a considerable estate, which was subject entirely to her own personal control and disposal, outside of that which had been placed in trust. We see no reason why the paper in question may not be regarded as an intended disposition of her property which was not included in the trust.

As the act of June 4, 1879 (P. L. 88), providing for the execution of powers over real and personal estate by the person in whom such powers are vested, is limited in its operation to wills, it does not aid in any way the contention of counsel for appellant. The specifications of error are overruled.

The decree of the court below is affirmed, and this appeal is dismissed, at the cost of appellant.

MITCHELL, C. J., dissents.

(222 Pa. 146)

KASARDA v. LEHIGH VALLEY R. CO.  
(Supreme Court of Pennsylvania. June 23, 1908.)

# 1. RAILROADS—ACCIDENT AT CROSSING—QUESTION FOR JURY.

Where the witnesses disagree as to the actual condition with respect to sight and hearing at the time of an accident at a railroad crossing, these conditions can be determined only by the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1152-1192.]

# 2. SAME—CONTRIBUTORY NEGLIGENCE.

In an action for injuries at a railroad crossing, where the evidence was conflicting as to what in fact caused an obstruction of the view, whether due to the darkness of the morning and the storm prevailing, or to the steam and smoke from passing trains, the question of plaintiff's contributory negligence was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1152-1192.]

Appeal from Court of Common Pleas, Luzerne County.

Action by Joseph Kasarda, in his own right

and in behalf of his son, John Kasarda, against the Lehigh Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

J. B. Woodard, for appellant. Thomas F. Farrell, Edward A. Lynch, and Hugh A. Shovlin, for appellee.

STEWART, J. John Kasarda, one of the plaintiffs, a young man about 17 years of age, in attempting to cross the tracks of the defendant company's road at a public crossing, at an early hour, before it was yet day, and while it was snowing, was struck by a passing engine and seriously injured. The plaintiff testified that when he reached the crossing a train of coal cars was passing west on the track furthest from him, and that he stopped when within 2 or 3 yards of the nearest track, and there waited until the last car of the coal train had passed beyond the crossing for a distance of 25 feet; that before starting from this point he looked up and down the track and listened, and, not seeing or hearing signal or warning of an approaching train, he advanced upon the track immediately in his front, and was struck just as he reached the farthest rail by the engine of an east-bound passenger train. The fact that there was a passing train on the second track beyond when plaintiff reached the crossing is without significance, except as the noise and escaping smoke and steam contributed to make the situation more perilous to one attempting to cross over at the time, by interfering with hearing and sight. We have but a single question to consider: Was contributory negligence on part of the plaintiff so apparent from the evidence as to preclude recovery?

Appellant's contention is that, accepting plaintiff's statement as to his position and surroundings before he advanced upon the track, it was not the darkness of the morning, or the condition of the weather, that prevented him from seeing and hearing the approaching train, but the escaping smoke and steam from the engine attached to the coal train, and the noise made by that train in its movement. To this state of facts counsel would apply the doctrine asserted in *Kraus v. Pennsylvania Railroad*, 139 Pa. 272, 20 Atl. 993, that, when a traveler's view is obstructed by a passing train, it is his duty to remain at a safe distance until his view of the track is clear. Doubtless it sometimes occurs that smoke and steam from a passing train obstruct the view of the railroad tracks quite as much as the moving cars. When this is the case, it may be the duty of the traveler—depending always on conditions at the time—to await the lifting or removal of the obstruction; but to say that such a duty rested on the plaintiff here is to beg the question. The argument proceeds on the assump-

tion that it was an admitted or established fact in the case that but for the smoke and steam the plaintiff could have seen the train approach, and but for the noise he could have heard it, both in ample time to be warned of the danger and escape it. Such fact was neither admitted nor established. Plaintiff and his witnesses testified that what obscured the situation was the darkness of the morning and the wind and snow that prevailed. Not one of them attributes the obscurity to steam or smoke; and, while all testified that no signal of the approach was given, none speak of conditions interfering with their hearing, had any signal been given; nor were they inquired of with respect to any such conditions, even on cross-examination. The evidence with respect to the steam as an obstruction to view was confined to the testimony offered on part of the defense, and rests largely, if not wholly, upon the testimony of the engineer and fireman on the engine that struck the plaintiff. They testified that the steam from the passing train hung low upon the track, and prevented them from seeing the plaintiff before the engine was upon him. Not only is this testimony directly at variance with that of plaintiff's witnesses, but it is somewhat difficult to reconcile it with that of other witnesses for the defense, who say that they saw the train approach when 250 feet away. The intervening cloud of steam would be quite as likely to obstruct on the one side as on the other. The fact that it was a very stormy morning, as all the witnesses testified, and the wind was blowing in the same direction as the coal train was moving, only adds to the difficulty. Be that as it may, there was no agreement among the witnesses as to what were the exact conditions with respect to sight and hearing at the time, and, these being what the case turned on, they could be determined only by the jury.

Any fuller discussion of the facts of the case is unnecessary. The only question submitted for our consideration, as stated by the appellant, is whether "the plaintiff's failure to wait until the coal train, which arrested his further progress on the highway the morning he was injured, had passed more than 25 feet beyond the crossing, was contributory negligence." In view of the conflicting evidence in regard to the situation and conditions at the time of the accident, and the circumstances surrounding this was a question for the jury. The court below very properly so held.

The assignments of error are overruled, and the judgment is affirmed.

(223 Pa. 1)

CONROY v. CITY OF PITTSBURGH.

(Supreme Court of Pennsylvania. June 2, 1908.)

BRIDGES—DEFECTS—ACTION—VARIANCE.

In an action to recover for injuries received, plaintiff's statement alleged that, where a

street crossed a stream by means of a wooden bridge, defendant had permitted "an unguarded opening or depression between the earthen part of the highway and the bridge plank." The evidence showed that at the end of sidewalk near the bridge was a hand rail, and that any one walking there at night and guided by the hand rail was in danger of stepping into an open sluiceway. *Held*, that there was no variance between the allegations and the proof.

Appeal from Court of Common Pleas, Luzerne County.

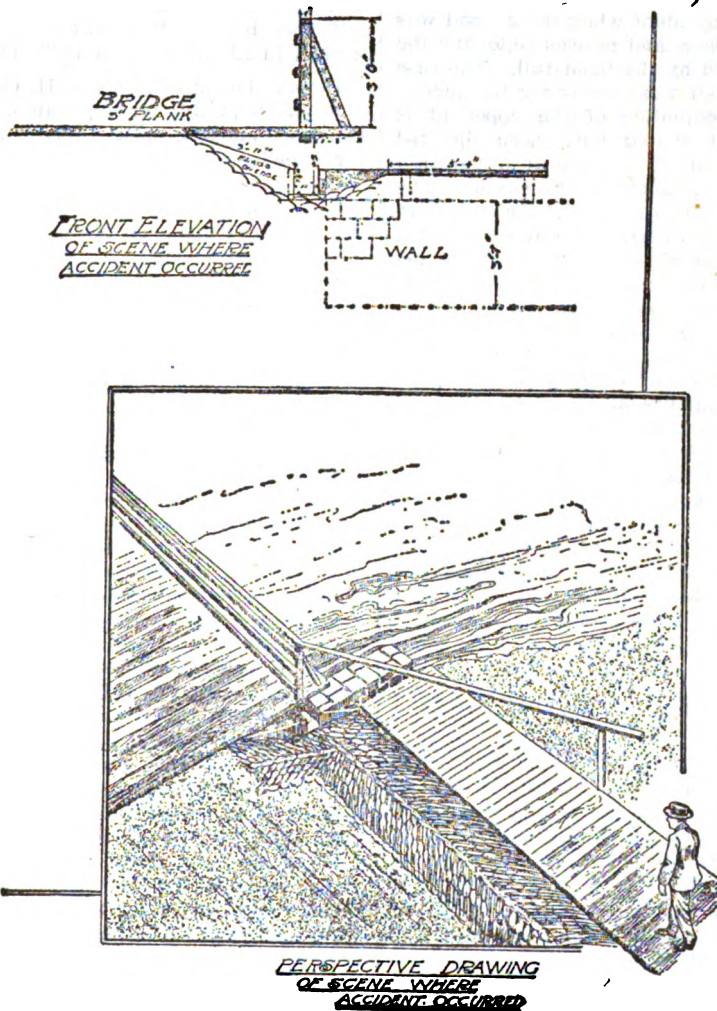
Action by Peter Conroy against the city of Pittston. Verdict for plaintiff, and defendant appeals. Affirmed.

The locality of the accident appears from the following drawings:

bridge into a paved gutter 10 inches; the paving extending on three sides of the sluiceway. There is no evidence of an unguarded opening or depression between the earthen part of the highway and the bridge planking. Therefore the verdict must be for the defendant"—the answer of the court being: "Denied, without reading to the jury."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

S. J. Strauss and George F. O'Brien, for appellant. James L. Lenahan, Frank A. Battle, Edward A. Lynch, and John T. Lenahan, for appellee.



Defendant presented this point: "(6) The declaration in this case alleges the defect in the highway to have been an unguarded opening between the earthen part of the highway and the bridge planking. The proof in this case is that a sluiceway 11 inches wide and 9 $\frac{1}{4}$  inches deep extended from the end of the

FELL, J. It appeared from the plaintiff's testimony that he was injured by stepping into an open box or sluiceway constructed at the side of a city street and in a passageway provided from the end of a sidewalk to a bridge. The street was unpaved, except for the space of five feet at the gutter at one



side between the roadway and the footwalk. The bridge was of the width of the roadway only, and, to prevent pedestrians from stepping off the end of the sidewalk into the stream, there was a hand rail that extended diagonally from the outside of the sidewalk to the bridge. The sluiceway was 11 inches wide, 10 inches deep, and extended from the bridge 10 inches into the gutter, and was directly in the line in which travel was directed by the hand rail. It was not a gutter at a crossing where a break in the continuity of the pavement might be expected, but a hole in the footwalk provided, into which any one directed by the hand rail was in danger of stepping. The plaintiff had no knowledge of the sluiceway, and stepped into it late on a stormy night when the ground was covered with snow and he was following the course indicated by the hand rail. The case made out by him was clearly for the jury.

The main contention of the appellant is that a verdict should have been directed against the plaintiff because of a variance between his allegations and his proofs. The negligence alleged in the plaintiff's statement was that at a point where a street crossed a stream by means of a wooden bridge, the defendant had permitted to remain for several weeks "an unguarded opening or depression between the earthen part of the highway and the bridge planking." It is argued that the sluiceway was a part of a special construction for the drainage of the street, and not in a fair sense of the word "an unguarded opening or depression," and that, since it was surrounded by the stone pavement of the gutter, it was not "between the earthen part of the highway and the bridge planking." This contention cannot be sustained. The defect in the street proved was substantially that described in the statement.

The judgment is affirmed.

(222 Pa. 48)

**MCKINNEY et al. v. PENNSYLVANIA  
R. CO.**

(Supreme Court of Pennsylvania. June 2, 1908.)

**1. EASEMENTS—EXTINGUISHMENT—RIGHT OF WAY.**

An owner of a private right of way across railroad tracks extinguishes the same if he participates in proceedings to establish a public road embracing the private right of way, and the enjoyment of which cannot be separated from that of the private right of way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 85.]

**2. SAME.**

The son of an owner of a private right of way across railroad tracks testified that his father's signature to a petition for viewfers to lay out a public road which embraced the private right of way was in the handwriting of another son, who had transacted some business for his father. It did not appear that the owner ever objected to the proceeding for laying out the highway, or repudiated it, though he lived more than six months after the order of the court making the road and crossing public property, *held*, that a finding that the signing of the owner's name to the petition was ac-

quiesced in by the owner, and that by participating in the proceedings to establish the public road he abandoned his private right of way and the same was extinguished, was justified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 85.]

**3. INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—GRADE CROSSINGS.**

Grade crossings, whether private or public, ought in all cases to be done away with, and equity will protect a right to use them by injunction only when such right is so clear that a chancellor must recognize it.

Appeal from Court of Common Pleas, Allegheny County.

Bill for an injunction by Catharine McKinney and others against the Pennsylvania Railroad Company. Decree for defendant, and complainants appeal. Affirmed.

Argued before FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Donald Thompson, George H. Calvert, and John Rebmam, Jr., for appellants. James S. Crawford and Patterson, Sterrett & Acheson, for appellee.

BROWN, J. This bill was filed to enjoin the appellee from closing an alleged private grade crossing. The court below in its findings of facts, none of which are excepted to by the appellants, goes back to the situation in the lifetime of William McKinney, their grandfather, who, in 1850, conveyed to the appellee a strip of land four rods in width for the construction of its railroad. Over this strip there was at that time a private road, laid out by McKinney, and, after the construction of the railroad, it was kept open with the consent of the appellee for his use as a means of access to and egress from his property, consisting of several hundred acres of land. In 1851 the appellee constructed a crossing at grade on the line of this private road over its track on the land purchased by it from McKinney, and maintained the same at its own cost and expense continuously until November 7, 1906. From 1857 until November, 1906, this private road and crossing were continually used and traveled over by the general public. William McKinney died in July, 1860. All of his lands were devised to his sons, John and Robert, and the latter, the father of the appellants, became, by deed in proceedings in partition, the owner in fee of the lands adjoining the strip conveyed by his father to the railroad company. On June 12, 1882, Robert conveyed in fee to the appellee a strip of land on the north side of its railroad about 100 feet in width, adjoining that previously conveyed to it by his father, and containing 5.336 acres. In his deed to the appellee he reserved to himself, "his heirs and assigns forever, the right to have, keep open, use and enjoy a wagon road over and across the Pennsylvania railroad and the premises hereby granted. \* \* \* the said road crossing hereby reserved to be constructed by the said railroad company at their own expense, at the grade

of the said railroad as constructed." On the same day the appellee agreed in writing, in consideration of the aforesaid deed to it and in view of the provision or reservation contained therein in reference to the wagon road and railroad crossing, that it would "construct a road, of the width of fifteen feet, in a good and workmanlike manner, of proper materials, on the location and in the course designated by red dotted lines on the plan hereto attached and made part hereof." McKinney accepted the road or crossing after it had been so constructed by the railroad company, and agreed that his acceptance of it should be "a full and ample release" from him to the appellee from all liability by reason of the building of the said road. This road is the road mentioned and provided for in his deed of June 12, 1882, and is the crossing that was in use at the time the railroad was built through the property. In 1886, in pursuance of proceedings instituted in the court of quarter sessions of Allegheny county at September term, 1884, a public road in Wilkins township, now part of the borough of North Braddock, was laid out and opened on the location of the above-mentioned road, wholly including the same and the railroad crossing at grade within its lines. The records of the court of quarter sessions show that the petition for this public road was filed September 27, 1884, and on it appear the names of W. J. McKinney and Robert McKinney as signers thereof. The records further show that the appellee opposed this proceeding. W. J. McKinney was a son of Robert McKinney, and at the hearing of this case in the court below on June 7, 1907, Harvey McKinney, one of the complainants, testified on cross-examination that the name "Robert McKinney," appearing on the petition filed in the court of quarter sessions for the laying out of the road, was in the handwriting of W. J. McKinney, adding that his brother William had transacted some business for his father. Robert McKinney died July 18, 1887, leaving to survive him a widow and children, to whom, under the intestate laws, his real estate descended, and they are the plaintiffs in this bill. In November, 1903, the borough of North Braddock, by an ordinance duly passed and approved, entered into a contract with the appellee by which the latter agreed to construct and forever maintain underneath its tracks a passageway for the use of the public, 25 feet wide and properly arched, to be located at Dooker's Hollow street, in said borough. It also agreed to construct a sewer underneath said arch to connect with a sewer then in process of construction by the said borough. All of these improvements were to be made for the use of the public and at the cost of the railroad company, in consideration of which the borough agreed to vacate 352 feet of the public road or highway laid out by the court of quarter sessions as aforesaid, including the said grade crossing of the high-

way over the roadbed of the appellee. The appellee made the improvements agreed upon, with the exception of grading a street, at a cost of more than \$76,000 for the stone arch alone, and the road or underground passageway was thrown open to the public. Thereupon, on November 6, 1906, the borough passed an ordinance vacating the said public road and grade crossing, and this ordinance was approved on the following day. The railroad company immediately closed the part of the road so vacated, tore up the planks at the crossing, and the same has remained closed ever since; the company refusing to restore and reopen it. When the crossing was first made in 1851, there was but one railroad track. When it was closed, it crossed four main tracks and a siding, and 174 passenger trains and 126 freight trains passed over it daily except on Sunday. The foregoing are the material facts as found by the court, and upon which it concluded that the appellants' bill ought to be dismissed.

While every private right of the appellants will be protected from encroachment by the appellee, the right which, in this proceeding, they allege is being interfered with, must clearly appear. Its existence must be free from all doubt. What we are asked to protect is an alleged private right of way upon the roadbed of a railroad company over which 300 trains pass almost daily. The settled policy of the state is humanely against such a crossing, and we shall not be astute to discover error in the legal conclusion of the learned court, following unchallenged findings of fact, that the ancestor of the appellants had parted with the right which they now claim as his heirs. The fee over which Robert McKinney's right of way passed was in the appellee by conveyances from him and his father. It resisted the laying out of the public road, which embraced the right of way within its limits. Without the consent of the appellee, and in the face of its opposition, the public road was laid out, increasing the servitude upon its land, and if Robert McKinney co-operated in the effort for the increase of the servitude, the enjoyment of which could not be separated from that of his private right of way, such conduct on his part may be regarded as having operated to extinguish his easement altogether. Washburn on Easements & Servitudes (2d Ed.) 627. If Robert McKinney had signed his name to the petition for the appointment of viewers to lay out the public road and had not objected to its being laid out over his private right of way, doubt could hardly be entertained that he intended that right to be extinguished whenever the public road was actually opened. His name appeared upon the petition, and it was presumptively his signature. The court acted upon it as such in appointing the viewers. A son, one of the appellants, testified that it was in the handwriting of another son, William, now de-



ceased, but under an admission that William had transacted some business for his father. The statement is made by counsel for appellants in their brief of argument that there is not a word in the record to show that Robert McKinney had the least knowledge of the proceeding for the laying out of the public road. This is inconsistent with what appears from the records. The viewers reported that they had met for the discharge of their duties, "pursuant to legal notice." Presumptively this means that Robert McKinney had been notified of their meeting. That he knew they had been appointed and that the road as laid out by them would embrace within its limits his private right of way conclusively appears from a part of their report, the correctness of which the appellants have not questioned. It is as follows: "The undersigned further report that they endeavored to procure from owners of land over which the road passes releases in writing from all claims to damages that may arise from opening the same, and, having failed to procure such releases, we report that the benefits to be derived by the landowners from said road passing through their land will exceed the damages, and we annex a plot or draft of road laid out stating the courses and distances and noticing, briefly the improvements through which the same passes." Robert McKinney was one of the owners of the land over which the road passed, and from him, according to the report of the viewers, they tried to procure a release in writing from all claims to damages. He therefore knew exactly what had been done. Under this state of facts it cannot be said that the court below erred in reaching the following legal conclusions:

"(4) The signing of Robert McKinney's name to the petition to the court of quarter sessions, at No. 3, September sessions, 1884, by a son who did 'some' business for him, cannot but be treated as the act of Robert McKinney himself, in view of the facts, that the court so considered it; that the said road and crossing became a public road and crossing in virtue of said court proceeding, which was based on said petition; that Robert McKinney himself never repudiated it, although he lived more than six months after the order of the court making the road and crossing public property; that no one since, until the hearing in this case, has ever questioned it; and that Harvey McKinney, his son, who now testifies, simply says that the handwriting is not that of his father, but of W. J. McKinney, who did 'some' business for his father. We are of opinion that the signing of Robert McKinney's name to said petition was acquiesced in by, and should be treated as the act of, Robert McKinney.

"(5) By participating in an act, the purpose and effect of which were to increase the burden of the railroad company, by forcing upon it the responsibility of a public crossing

at grade, instead of a mere private crossing at grade, Robert McKinney renounced and abandoned his private easement in said road and crossing and the same was thereby extinguished. There is no question of damages or compensation.

"(6) The Pennsylvania Railroad Company, in making its contract with the borough of North Braddock for the building of the viaduct and the vacation of the public road and crossing, had good reason to rely upon the proceeding in the court of quarter sessions, at No. 3, September sessions, 1884, as evidence of Robert McKinney's abandonment of his private easement in said road and crossing; and the heirs of Robert McKinney should not at this late day be heard to deny it.

"(7) The vacation of the public road and Bessemer Grade crossing by the borough of North Braddock, by ordinance of November 6, 1906, approved by the burgess November 7, 1906, was an abandonment of the road and crossing by the proper public authorities, and, there being no private easement therein, the railroad company was within its rights when it closed the same as it did."

The most that can be said of appellants' claim to an existing private right of way over the roadbed of the appellee is that it is involved in doubt, and for this reason alone the bill ought to have been dismissed. Grade crossings are constant perils, not only to those using them, but to those upon trains passing over them, liable to be wrecked by collisions. Such crossings, whether private or public, ought in all cases to be done away with, and equity will protect a right to use them only when such right is so clear that a chancellor must recognize it. No class of cases calls more strongly for the application of the rule that all doubtful questions must be resolved against an injunction.

Appeal dismissed and decree affirmed, at appellants' costs.

(22 Pa. 56)

## ROBINSON v. JONES.

(Supreme Court of Pennsylvania. June 2, 1908.)

### 1. WILLS—CONSTRUCTION—NATURE OF ESTATE.

Testator devised the residue of his estate to his three children, with provision that, if any one of them wished his or her money out of the estate, the children should choose three disinterested persons to appraise the estate, and, if either should die without lawful heir, his share should fall to the last named heir or heirs. *Held*, that the children took an estate in fee simple.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1319-1326.]

### 2. SAME—WORDS OF SURVIVORSHIP.

Where there is a devise of a fee simple absolute in the first instance and the gift is immediate, words of survivorship will be referred to the death of the testator, and not to death generally, whenever it may occur.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1162, 1303.]

Appeal from Court of Common Pleas, Lancaster County.

Suit by George W. Robinson against Howard Jones. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. U. Hensel, for appellant. M. G. Schaeffer, for appellee.

**PER CURIAM.** There was no error in holding that the testator's children took estates in fee under the following clause in his will: "I give, bequeath and devise all the rest, residue and remainder of my real and personal estate to my other three children, viz.: Elizabeth Miller, Sarah Jane Miller and Joseph P. Miller, equally, share and share alike. In case any one or more of my last named children—wishes her, or his or their money out of said estate, it is my will that they choose three disinterested persons to appraise said estate at cash value. It is my will and desire that if either—shall die without a lawful heir, her or his or their share of the estate to fall to the last named heir or heirs." Where there is a devise of a fee simple absolute in the first instance and the gift is immediate, words of survivorship will be referred to the death of the testator, and not to death generally, whenever it may occur. The first taker is entitled to the benefit of every implication, and his estate will not be cut down unless the intention to do so clearly appears. *Mickley's Appeal*, 92 Pa. 514; *Mitchell v. Railway Co.*, 165 Pa. 645, 31 Atl. 67; *Richards v. Bentz*, 212 Pa. 93, 61 Atl. 613. Moreover, the direction as to an appraisement in the event that any of his children should desire to convert his share into money indicates an intention that their estates shall be absolute.

The judgment is affirmed.

(222 Pa. 96)

# FRANKLIN TRUST CO. v. PHILADELPHIA, B. & W. R. CO.

(Supreme Court of Pennsylvania. June 23, 1908.)

## 1. ALTERATION OF INSTRUMENTS—BURDEN OF PROOF.

Where plaintiff sued a carrier to recover for losses sustained by lending money on bills of lading which did not represent goods delivered to the carrier, where palpable alterations appeared on the face of the bills and a witness for the carrier testified that the forgeries and alterations were made after the bills had left his hands, the burden is on plaintiff to explain the same.

## 2. CARRIERS—BILL OF LADING—CONCLUSIVE-NESS.

A bill of lading, in so far as it is a receipt, is not conclusive, but is open to explanation between the original parties, and, where marked "not negotiable," the same rule applies to third parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 148-165.]

## 3. SAME—RIGHTS OF INDORSEER.

The right conferred by the indorsement of a bill of lading is limited to that which might have been exercised by the indorsee, had the goods themselves been transferred.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Franklin Trust Company against the Philadelphia, Baltimore & Washington Railroad Company to recover damages for loss occasioned by taking bills of lading which represented no goods delivered to the carrier. Judgment for plaintiff, and defendant appeals. Reversed.

The trial court charged in part as follows:

"The plaintiff claims that it was induced to believe that the accounts were true and existent, and that the buyers had got the goods, by the certificates of the defendant, that say, the defendant had the goods for shipment to those respective persons, and was going to ship them, or had shipped them. To this I do not understand that the defendant admits that it issued these receipts, but it gives no explanation, of why the goods did not reach the people, except to say, 'We never got the goods.' Not to have got the goods is an excellent reason for not shipping them, but it is not an excellent reason for issuing shipping receipts; and why the defendant issued those receipts does not, to my recollection, appear in the evidence. Nobody testifies why they were given. Though the man who signed them was on the stand in this courtroom, he does not explain why he gave the receipts. It is true another man signed two of them; but these men, after all, are only the authorized expression of the company's power. They are confessedly the agents of the company, and it is exactly as if the company itself signed the receipts, and they do not tell us why they signed the receipts. In the absence of any explanation, we have here, then, the case of the company certifying that it got the goods, and that certificate being used by the person who gets it from the company to get money from the plaintiff.

"There is, however, a third class of transactions, and those are the ones to which I alluded in the beginning, when the company gave its receipt, and there was no alteration. On them the question of fact arises.

"But the plaintiff contends that all these other things were taken out of his case before he laid it before the jury, and that he is now dealing with you only on the case of the certificates that were never altered. Respecting such certificates (if you find that this plaintiff has such certificates before you), I say to you that the defendant is liable to the plaintiff for its loss by reason of untrue certificates of shipments having been issued by it, because, as I pointed out before, there is absolutely no explanation or qualification of those certificates by the defendant. To say that it got no goods would be a splendid reason for having issued no receipt; but, having

issued the receipt, to say that it got no goods is nothing. It is absolutely without reason to say that. Can you impute to any defendant, standing here, a total absence of reason? No; they do not mean to stand in that bald position. What they mean to say is this: 'We have issued this receipt. Somehow we never got the goods. We never would have issued it, if we had not been somewhat fooled, and there are only three people in the world that could have fooled us—Warnock, his clerk, and Binz. Warnock and his clerk we trust. Binz must have done something, we do not know what, by which he perpetrated this fraud.'

"What we have here is their receipt, and no explanation of how it came, provided you do not find that these were originally rightfully issued papers and altered by Binz. You, therefore, stand in this position. If these papers were rightfully issued, issued by the company, as they appear to be, then the company is responsible for having placed in the hands of Binz a weapon of deceit with which to cheat any ordinary mortal, and that, not because the paper is negotiable in any legal sense, or has any element of negotiability, but because it is against common right to issue weapons of offense and place them in the hands of people with which to hurt others.

"Can you impute to any defendant, standing here, a total absence of reason? No; they do not mean to stand in that bald position. What they mean to do is to say this: 'We have issued this receipt. Somehow we never got the goods. We never would have issued it, if we had not been somehow fooled, and there are only three people in the world that could have fooled us—Warnock, his clerk, and Binz. Warnock and his clerk we trust. Binz must have done something, we do not know what, by which he perpetrated this fraud.' What?

"What could Binz have done? How could Binz perpetrate the criminality of signing Warnock's name, which Warnock signed himself? That is what we do not know. Warnock and his clerk both signed the names. What could Binz have done? He could have done something if Warnock and his clerk had signed a batch of these things and handed them to Binz in blank, so he could fill them up. But we cannot say that, because Warnock and his clerk are innocent. He might have done something else. Warnock might have had leisure time one evening, and sat down and signed a bunch of these in blank, and locked them up in his desk, and then Binz might have committed a burglary and got them, and used them afterwards; but there is no such evidence. If that had happened they would know. Where is the evidence?"

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

E. J. Sellers, for appellant. Alex. Simpson, Jr., Alfred Aarons, and Henry N. Wessel, for appellee.

POTTER, J. The record in this case discloses a most unusual state of affairs. It appears that the factory of the R. E. F. Binz Carpet Corporation was located at Glen Riddle, Pa., and its manufactured product was shipped on the railroad of the defendant company from Glen Riddle station. The method of shipping was as follows: When goods were ready for delivery to the railroad, to be transported, the consignor made out a shipping order, containing a description of the articles to be shipped, the name of the consignee, and the destination. This was handed to the agent of the common carrier to be retained by him. The agent of the railroad then made out and signed and gave to the shipper a bill of lading, intended to be forwarded to the consignee, and supplied, also, a memorandum copy of the bill of lading, which was intended to be retained by the shipper. As a matter of precaution, and of easy identification, the railroad company had the shipping orders printed on blue paper, the bills of lading upon white paper, and the memorandum copies of the bills of lading upon pink paper. The bills of lading bore the words "Not Negotiable" plainly printed across the ends, and were not negotiable instruments. It appears, further, that the common practice is for the shipper to fill up the shipping order, and the blanks in the bill of lading and its copy in advance, and by the use of carbon paper inserted between the pages the three papers can be filled out at one and the same writing; the bill of lading and its memorandum copy requiring the signature of the agent of the common carrier to complete them. In the present case the Binz Carpet Corporation sold its goods upon a credit of three or four months' time, and in the course of its business it arranged with the plaintiff, the Franklin Trust Company, to borrow money from it, by assigning to it the accounts of its customer and procuring an advance thereon. In arranging for the loans, a statement of the account would be made out upon the bill head of the corporation, and an assignment of the account would be placed upon the sheet, with a notice that it was payable to the Franklin Trust Company; and as evidence that the goods which were the subject of the account had been actually shipped to the customer the carpet corporation would, according to the testimony of the president of the trust company, turn over to the trust company the original bill of lading and the memorandum copies thereof, and the original bills of lading were, it is said, generally forwarded to the consignees with a notice that the account had been assigned to and was payable to the trust company.

The plaintiff states that between October 17 and December 23, 1905, it loaned in this

way the sum of \$12,771.70 to the carpet corporation, relying upon the shipping receipts as evidence of the shipment by the carpet corporation of the goods which were made the basis of the accounts. The shipping receipts were nonnegotiable, and the trust company did not depend upon them to retain title to itself to the goods; for it sent the receipts at once to the consignees, and relied for its security as to the loan upon the financial standing of the carpet corporation and the consignees of the goods from whom payment of the accounts was to come. No satisfactory explanation is found in the testimony as to why there should have been such long delay, from October until January, upon the part of the trust company in obtaining acknowledgments from the consignees of the assignments and of the correctness of the accounts and of their acquiescence in the transfer. It will be seen that the use of the bills of lading in this case was very different from that of the ordinary commercial transactions, in which bills of lading representing shipments of goods are attached to a sight draft, which must be accepted or paid before the bills of lading are turned over to the consignee, and where neither title to nor possession of the goods can be had without the transfer of the bills of lading. In such case the bill of lading is regarded as the symbol of the goods or property and as the real security for the money advanced, and the credit of the consignee does not enter into the transaction. But here the bills of lading were only regarded by the trust company as evidence that the goods had been received for transportation by the common carrier, and the bills of lading were at once forwarded to and surrendered to the consignee, with the expectation that the goods would be at once delivered to them upon arrival, although a considerable term of credit was yet to elapse before payment for them was to be made by the consignee. Some time in the month of January, 1906, the plaintiff discovered that no goods, for which these receipts or memorandum copies of the bills of lading purported to have been given, had ever been delivered to the defendant company for shipment, and that the papers in question were fraudulent and represented purely fictitious shipments. The carpet corporation was found to be insolvent, and R. E. F. Blinz, its president and treasurer, who had used the bills of lading to aid his fraudulent purpose in procuring the loans, committed suicide. The trust company then brought this action against the railroad company to recover the amount of its loss, occasioned by the loans it made on the credit of the accounts supposed to have been created by the shipment of the goods set forth in the fraudulent bills of lading.

At the trial of the case counsel for defendant company asked for binding instructions in its favor upon the ground, among other things, that the receipts upon which suit was brought were forgeries made by Blinz, the

treasurer of the carpet corporation. The request was refused, and the case was submitted to the jury, who found a verdict for the full amount of the plaintiff's claim, with interest. The court below also overruled a motion for judgment non obstante veredicto, and discharged a rule for a new trial, and entered judgment upon the verdict. The defendant company has appealed, and in its third, fourth, and fifth assignments has complained of error in certain portions of the charge of the trial judge; and in the sixth assignment error is alleged in the refusal to enter judgment for the defendant non obstante veredicto.

A careful examination of the record, and of the testimony, and of the exhibits in this case, has satisfied us that the trial judge entirely failed to appreciate the significance of the evidence. He certainly could not have personally examined the papers offered in evidence as alleged memorandum copies of the bills of lading, or he would not, as he did in his charge, have placed the burden upon the defendant company of explaining palpable forgeries and alterations which appear upon the face of the papers. For instance, he says: "The plaintiff claims that it was induced to believe that the accounts were true and existent, and that the buyers had got the goods, by the certificates of the defendant, that say the defendant had the goods for shipment to those respective parties and was going to ship them or had shipped them. To this I do not understand that the defendant makes any reply." This statement indicated a serious misunderstanding of the situation. The agent of the defendant company testified that all shipments as made were noted in his manifest book, and that the memorandum copies of the bills of lading which were shown to him at the trial were false, in so far as they differed from the entries in the manifest book. He also testified that in some of the memorandum copies which were offered in evidence the figures were raised in amount over those which were upon the paper as it was signed by him. Notwithstanding this explanation by the agent as to the fact and the manner in which the memorandum copies were altered and turned into forgeries, the court goes on to tell the jury that the agent had given no explanation as to why he gave the receipts. It was not the place of the agent to explain these alterations in the memorandum copies. He had testified clearly that alterations were made and figures were raised in the papers after they had been signed by him and had left his hands. In such a case the burden was clearly upon the plaintiff to explain these matters, and the jury should have been so instructed, and, if any comment were to be added, it should have been to call the attention of the jury to the fact that the plaintiff had failed to explain the alterations, and that, unless it did so, there could be no recovery. It is true that in other portions

of the charge the trial judge intimated that the jury might find that the papers, when originally issued, were rightful, and that they were afterwards altered by Binz; but he dealt so much at arm's length with this aspect of the case that the effect of the charge as a whole upon the minds of the jurors must have been to impress them with the idea that the duty of explanation of the alterations was upon the defendant company or its agent. Then the learned judge goes further in his charge than the testimony warrants, in his suggestion to the jury that they should impute no crime to the agent of the defendant company or to his clerk on mere inference, if they could possibly avoid it. There was no excuse whatever for putting the matter in this way, for there is not a particle of evidence in the case to justify even an intimation of wrongdoing on the part of the agent or his clerk; and, on the contrary, Binz, the treasurer of the corporation was conclusively shown to be a rogue.

Counsel for appellee admits that Binz did perpetrate fraud upon the trust company in many of the accounts assigned; but he contends, and the testimony of the president of the trust company is, that the fraudulent papers were not included among the list of those for which recovery in this case was obtained. But this is clearly a mistake. The recovery was for the full amount of all the items contained in the schedule, marked "Exhibit A," and aggregated the sum of \$12,771.70, and this amount, with interest, was the verdict awarded by the jury and it includes many of these altered and raised papers. A detailed examination of the alleged memorandum copies of the bills of lading offered in support of these items shows in many, if not in most of them, the most glaring and palpable instances of fraudulent alteration of figures in the numbers of the articles written into the paper, and above the signature of the agent of the defendant company. In all these cases the burden was upon the plaintiff of showing just how, and when, and by whom, these alterations were made. It is apparent that the only satisfactory way to do this would be to produce the original bill of lading in each case, and the shipping order, and compare them with the alleged memorandum copy, to see if all three of the papers agreed; for, according to the testimony, they all having been made at the same time, and with carbon paper, the shipping order, bill of lading and memorandum copy should have agreed precisely. If there was a difference, it was for the plaintiff to explain.

An inspection of the alleged memorandum copies of the bills of lading, and in some instances of the alleged original bills of lading, attached to the accounts which are made the basis of this suit, reveals many transparent and palpable changes. Thus the figure "1" is sometimes altered into a figure "7," sometimes into a "9," and sometimes into a "4" and in one case, by adding a tail to it, into a "5."

Again, the figure "1" is inserted before the figure "5," turning "5" into "15"; again, the figure "2" is inserted before a "5," thus raising the amount from "5" to "25"; again, an "0" is inserted after the figure "5," thus multiplying it by 10, and changing it into "50." In the majority if not in all, of the items going to make up this schedule, for which recovery was here obtained, alterations of one kind or another seem to have been made, and they were so palpable that the burden of explanation and of comparison with the original bill of lading and shipping order was certainly upon the plaintiff. We can only account for the failure of the trial judge to place the burden in this respect where it belonged upon the supposition that he did not make any personal examination of the alleged memorandum copies of the bills of lading offered in Exhibit A.

The third, fourth, and fifth specifications of error are sustained.

Of course, if the bills of lading upon which this suit is based were all forged or altered, they are invalid, and no recovery whatever can be had. But another question is raised in this case, and that is as to the effect upon the liability of the defendant company of nonnegotiable bills of lading in the hands of a third party who was misled by them, and where the bills of lading were issued through the negligence or mistake of the agent, when no goods were actually delivered to the company for transportation. It is contended by counsel for appellee that in such case the defendant company would be estopped from showing that the goods were in fact received for transportation, and in support of this view the decision in *Brooke v. New York, etc., R. R. Co.*, 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235, is cited. In that case, however, it does not appear that the bill of lading was nonnegotiable; but at any rate the transaction arose in the state of New York, and the decision avowedly followed and was controlled by the law of New York. But the view taken of this question by the courts of New York is directly opposed to the overwhelming weight of authority, which holds that the master of a vessel or the agent of a common carrier has no authority to issue bills of lading for goods which have not been received; and that as a consequence, if the agent of the carrier fraudulently or inadvertently issues a bill of lading for goods which have not been received, he cannot be considered as acting within the scope of his authority, and the bill of lading so issued is void. The decisions of the English courts are uniformly to this effect, and hold that, even as against a bona fide consignee or indorsee for value, the carrier is not estopped, by the statements of the bill of lading issued by the agent, from showing that no goods were in fact received for transportation. The same rule applies in Canada, and it is the established doctrine of the Supreme Court of the United States and of the federal courts, and in

many of the state courts. There has been much conflict over this question, but over and over again it has been pointed out in the decisions that a bill of lading partakes of the nature both of a receipt and a contract to carry; and in so far as it is a receipt it has always been held that it was not conclusive, but was open to explanation as between the original parties. In the present case the bills of lading were not negotiable instruments. The defendant company took the pains to limit its responsibility as regards third parties by printing across the bill the notice that it was "Not Negotiable."

But, aside from that fact, bills of lading do not occupy the position of bills of exchange or other commercial paper. This court, speaking by Thompson, C. J., in *Empire Transportation Co. v. Steele*, 70 Pa. 188, said: "Lord Loughborough, in *Lichbarrow v. Mason*, 6 East, 21, delivering the opinion of the Exchequer Chamber, held that the indorsement of bills of lading had never been regarded in the commercial world as resting on the footing of bills of exchange or other strictly commercial paper, that inquiry was a duty, and consequently that the indorsee took such paper on the credit of the indorser. So in the case of *Kingsford v. Merry*, 11 Exch. 577. In *Mechanics' Bank v. New York & New Haven R. R. Co.*, 13 N. Y. 599, and in *Brower v. Peabody*, 13 N. Y. 121, the same thing is contended, in the principle announced that a bill of lading is a mere symbol, its delivery or negotiation produces no greater effect than would the delivery of the goods it represents, and that the right conferred by the indorsement will be limited to that which might have been exercised by the indorsee, had the goods themselves been transferred, instead of the bill." And in the opinion of the Supreme Court of the United States, in *Friedlander v. Texas, etc., Ry. Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991, it is said: "Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential, to enable them to perform their peculiar functions, that he who purchases them should not be bound to look behind the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part. But bills of lading answer a different purpose, and perform different functions. They are regarded as so much cotton, hay, iron, or other articles of merchandise, in that they are symbols of ownership of the goods they cover."

In *Bank of Batavia v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440, speaking of the liability of the common carrier upon a bill of lading, the court says (page 200 of 106 N. Y., and page 434 of 12 N. E. [60 Am. Rep. 440]): "If he desires to limit his responsibility to the named consignee, alone, he must stamp his bills as 'Nonnegotiable'; and where he does not do that he must be understood to intend

a possible transfer of the bills, and to affect the action of such transferees." This would seem to be an intimation that the New York courts would not hold the carrier estopped from showing the truth with regard to the nondelivery of the goods when a bill of lading stamped "Not Negotiable" was found in the hands of a third party. But, however that may be, in view of the fact that this case is to go back for another trial, we have called attention to these authorities, in order that the decision in *Brooke v. New York, etc., R. R. Co.*, 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235, may not be regarded as declaring the law of Pennsylvania. It is conclusive only as to its own facts, and as applying to them the law of the state of New York, where the transaction occurred. It is not to be regarded as decisive of the law of Pennsylvania in a case where by mistake or fraud a nonnegotiable bill of lading is issued, when no goods have been received for shipment and the bill of lading is transferred to third parties. In such case the question is to be regarded as at least an open one in Pennsylvania.

In the present case, the judgment of the court below is reversed, and a venire facias de novo is awarded.

(222 Pa. 18)

#### FUNK v. H. S. KERBAUGH, Inc.

(Supreme Court of Pennsylvania. June 2, 1908.)

#### DAMAGES—PUNITIVE DAMAGES.

Where the superintendent of a corporation recklessly, for months, persists in using unusually heavy blasts of dynamite, with full knowledge that they are shattering a house and barn, and does such work because it is easier to pay damages for the injuries caused than to do the work in a different way, the corporation is liable for punitive damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 197.]

Appeal from Court of Common Pleas, Lancaster County.

Action by Isaac S. Funk against H. S. Kerbaugh, Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

The verdict was as follows:

And now, to wit, December 6, 1906, we, the jurors impaneled in the above case, find in favor of Isaac S. Funk, and against H. S. Kerbaugh, Incorporated. Damages as follows:

To house .....	\$2,000 00
To barn .....	1,800 00
To crops .....	25 00
Removing stone .....	75 00
For mule .....	150 00
Impunity damages .....	1,000 00
	\$5,050 00

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

W. U. Hensel, Philip T. Meredith, and Frank S. Groff, for appellant. H. Frank Eshleman, William H. Keller, and John A. Coyle, for appellee.

**PER CURIAM.** The main question presented by this appeal is whether a recovery of punitive damages should have been allowed. The action was to recover for injuries to the plaintiff's property caused by the negligent and reckless acts of the defendant in blasting rocks in constructing a line of railroad. At a place 1,100 feet from the plaintiff's building, an excavation was made 2,200 feet long, and at places 80 feet deep through solid rock of great hardness. In blasting this rock holes were drilled to an average depth of 30 feet, and charges of 4,000 pounds of dynamite were set off simultaneously. The testimony produced by the plaintiff tended to show that the work could have been done in the usual manner by lighter blasting without injury to his property; that the heavy blasting shattered and practically ruined his house and barn; that the use of heavy blasts was persisted in recklessly and defiantly for months notwithstanding his complaints. Too great caution cannot be exercised in permitting the recovery of punitive damages for the willful or reckless act of a servant not authorized or approved by the master. The rule that permits a recovery in such cases is a harsh one, and the plainest principles of justice call for caution in its application. *Phila. Traction Co. v. Orbann*, 119 Pa. 37, 12 Atl. 816. But in this case the acts complained of were done by direction of the defendant's superintendent after notice and with full knowledge of the damage they were doing the plaintiff's property. Apparently they were done in wanton disregard of his rights, and because it was cheaper to pay damages for the injury they might cause than to do the work in a different way. We find no error in the record that calls for a reversal.

The judgment is affirmed.

(222 Pa. 108)

In re **FOX'S ESTATE.**

Appeal of **GABELL et al.**

(Supreme Court of Pennsylvania. June 23, 1908.)

**1. WILLS—CONSTRUCTION—TRUST FUND.**

Testator gave his estate in trust for his four daughters, each to receive one-fourth of the income for life, and on the death of any daughter leaving issue the principal to be assigned to such issue, and on the death of any of the daughters without issue the share of such daughter to be held in trust for her surviving sisters in the same manner. Two of the daughters died leaving children, among whom their shares were distributed. A third daughter afterwards died leaving no children. *Held*, that the share of the third daughter did not go to the surviving sister, but should be distributed one-third to her and the remainder to the children of the deceased sisters per stirpes.

**2. SAME—"SURVIVOR"—"SURVIVING."**

The word "survivor," or "surviving," will be understood as the equivalent of the word "other," where in any other sense it would lead to intestacy or inequality among those standing in the same degree of relationship to the tes-

tator, or to a distribution not in accordance with the general scheme of the will.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 8, pp. 6825-6832.]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Charles Fox, deceased. From a decree dismissing exceptions to adjudication, Columbus W. Gabell, Jr., and Catharine H. Chestnut appeal. Affirmed.

Charles Fox, by his will probated May 28, 1853, directed as follows:

"Item.—I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed whatsoever and wheresoever and of which I may die seized or possessed unto my Father-in-law John Hagy and my friends Jacob R. Eckfeldt and George Gardom and unto the survivor or survivors of them and the heirs executors, administrators and assigns of such survivor To Have and To Hold the same unto the said John Hagy, Jacob R. Eckfeldt and George Gardom and unto the survivor or survivors of them and the heirs, executors, administrators and assigns of such survivor In Trust nevertheless to and for the following uses, intents and purposes that is to say, to collect and receive the rents, issues and profits thereof and apply so much of the same to the support, maintenance and education of my four daughters, viz.: Sally Ann Fox, Hannah L. Fox, Catharine H. Fox and Anna Margaretta Fox as may be necessary for that purpose and in the same manner as they are now supported and educated until my eldest daughter living shall arrive at and attain the age of twenty one years then upon the further Trust to choose and appoint five disinterested persons to value, divide and apportion the said estate in equal parts or shares between my said Four daughters Sally Ann Fox, Hannah L. Fox, Catharine H. Fox and Anna Margaretta Fox and the issue of such of them as may be deceased leaving lawful issue such issue to be entitled to the share which his, her or their Mother would have been entitled to if living. If more than one as tenants in common and not as joint tenants.

"And upon the further Trust to hold the Estate so divided in Trust to pay over the whole of the income of the share of the said eldest daughter living into her own hands for her own proper use without being responsible for the debts or engagements of any husband she may have and to continue to apply so much of the income of the shares of my other daughters for their maintenance, support and education as may be necessary for that purpose in the same manner as they are now supported and educated until they respectively arrive at the age of Twenty one years from which time the whole of the income of their respective shares accruing thereafter shall be paid to them into their

own proper hands for their own proper use without being responsible for the debts or engagements of any husband or husbands they or any of them may have and in case of the decease of any of my said daughters leaving lawful issue then upon the further Trust that they the said John Hagy, Jacob R. Eckfeldt and George Gardom Trustees as aforesaid or the survivors or survivor of them and the heirs, executors, administrators and assigns of such survivor shall grant, convey and assure the said share of such deceased daughter and the absolute estate inheritance and fee simple thereof unto the lawful child or children and unto the lawful issue of such of them as may be deceased leaving lawful issue their heirs and assigns forever to be equally divided between them if more than one share and share alike as tenants in common and not as joint tenants and if but one such child then to the use, benefit and behoof of such child his or her heirs and assigns forever and in case of the death of any of my said daughters without leaving lawful issue then upon the further Trust that they the said John Hagy, Jacob R. Eckfeldt and George Gardom Trustees as aforesaid or the survivors or survivor of them and the heirs, executors, administrators and assigns of such survivor shall hold the share of such deceased daughter in trust, for the use and benefit of her surviving sisters in the same and like manner as is hereinbefore expressed and declared of and concerning the respective share of her said surviving sisters and upon the further Trust that it shall and may be lawful and I do hereby authorize and empower the said John Hagy, Jacob R. Eckfeldt and George Gardom Trustees as aforesaid and the survivors and survivor of them and the heirs, executors and administrators of such survivor to let on Ground Rent or to sell and dispose of at any time after my decease all or any part of my real estate either at public or private sale for the best price or prices that can be had for the same and to make, execute, sign, seal, acknowledge and deliver good and sufficient deed or deeds of conveyance or assurance in the law so as to vest the same and the title thereof in the purchaser or purchasers thereof in fee simple or otherwise."

Two of the daughters died, each leaving issue her surviving, to which issue, in the case of each daughter, the principal of her original share was duly conveyed. The daughter Hannah, who became the wife of one Andrew Lindsey, died on February 18, 1903, without issue. The only surviving sister was Catharine H. Chestnut, a widow. The share of Hannah was claimed by the trustee of Catharine, and also by Catharine herself. The court directed the same to be divided into three parts, and ordered the same to be paid, one-third to the trustee for Catharine, and one-third to each descendant of each of the daughters who had first died.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

John G. Johnson and Frederick L. Breitinger, for appellants. Daniel A. Stewart, for appellee.

MITCHELL, C. J. The general intent apparent throughout the scheme of the will was to make equality among his daughters during their lives, with remainder to the children of those leaving issue. In pursuance of this intent the estate was to be held as a unit until the oldest daughter should come of age and then severed as to her, and so on to each daughter in turn until the youngest reached full age, when there would be four separate trusts, one for each daughter in severalty. If one of the daughters had died without issue before any severance, there can be no doubt that the others would have taken her share as survivors by the express terms of the will; if such daughter died after her share had come to be held separately, the direction of the will is the same, and the others would have taken as survivors; but, if the daughter first dying left issue, her share would be distributed to them, and it is argued that then they would have received their full share, their claims under the will would have ended, and they would be excluded from participation in the share of another daughter subsequently dying without issue. As was forcibly said by Judge Penrose: "If the word 'surviving,' as used by the testator, is to be understood in its precise, literal sense, it necessarily follows that while he made careful provision for his grandchildren, giving to them the 'inheritance and fee simple' of the shares originally held in trust for their mother, whose interest was expressly confined to the term of her life, he intended that only the children of a daughter who survived a sister who left no issue should share in the distribution of the part held in trust for her, and to exclude all others; and it also follows that he must have intended, if the last survivor of his daughters should die without issue, even though all his other daughters had left children still surviving, there would be an intestacy."

But this result is clearly not in harmony with the general intent and scheme of the testator. He treated all his daughters alike, and gave each one-fourth of his estate for life, with remainder to her issue. Not one of them was vested with power to break the succession of her issue in remainder, and nowhere is there any indication that he intended to make any distinction among his descendants of the second generation as to their ultimate share in his estate. That the issue of a sister dying first should thus be cut off from participation in the share of a sister dying subsequently without issue would be giving an accidental and irrelevant



fact an effect contrary to the manifest general intent, and an exercise of the power withheld from the daughters themselves. As said by the auditing judge below: "It is well settled, however, that the word 'survivor,' or 'surviving,' will be understood as the equivalent of 'other,' where in any other sense it would lead to an intestacy, or to inequality among those standing in the same degree of relationship to the testator, or to a distribution not in accordance with the general scheme of the will in its entirety. *Lapsley v. Lapsley*, 9 Pa. 130; *Williams on Executors*, 1577; *Theobald on Wills*, 355. See, also, *Vance's Estate*, 11 Pa. Dist. R. 197, s. c. 209 Pa. 561, 58 Atl. 1063; *Park's Estate*, 21 Wkly. Notes Cas. 227; *Hubbert's Estate*, 6 Pa. Dist. R. 96; *Vogdes's Estate*, 16 Pa. Dist. R. 377; *Lewis' Appeal*, 18 Pa. 318," etc

It is not necessary to resort to the artificial and arbitrary construction that "survivors" meant survivors at the testator's death. The time in testator's mind was clearly the death of each daughter dying without issue; but he did not mean to make shares of any group of his grandchildren dependent on the accident of their mother's survival of her childless sister. The word "other" very clearly expresses his general intent, and that is the sense in which he used the word "survivors."

Decree affirmed.

(222 Pa. 58)

KAUFMANN et al. v. KAUFMANN et al.

(Supreme Court of Pennsylvania. June 23, 1908.)

1. PARTNERSHIP—PURCHASE BY SURVIVOR OF INTEREST OF DECEASED PARTNER.

Partnership articles providing that on the death of any partner the survivors should have the option to purchase his interest at a valuation to be ascertained in a manner specifically set forth cannot be changed by a court of equity merely because the good will of the partnership has enormously increased in value, and the method of valuation prescribed would lead to inequitable results.

2. EQUITY—PLEADING—DEMURRER—ADMISSIONS BY DEMURRER.

An averment of a bill that certain of defendants had arbitrarily, and without right, and unjustly and unfairly seized upon a deceased partner's interest, and forcibly sought to obtain possession thereof as the sole absolute owners, was not admitted by a demurrer to be true, since it was but an inference on the part of plaintiffs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 494.]

3. SAME.

Though all facts fairly pleaded are admitted by a demurrer, it does not admit argumentative conclusions, or doubtful inferences from undisputed facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 494.]

4. PARTNERSHIP—WHO ARE PARTNERS—PARTICIPATION IN PROFITS.

A mere participation in the profits will not make the parties partners inter sese, whatever

it may do as to third persons, unless they so intended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 3, 15–28.]

5. SAME.

Sharing in the profits of a business as compensation for services does not constitute one a partner in the business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 23.]

6. SAME.

A contract between a partnership and its employé, whereby the employé was to continue to give his services to the partnership in the same capacity as theretofore, in consideration of which he was to receive as salary a sum equal to a certain percentage of the net profits of the partnership business, and providing that the employé should advance a certain sum of money, which should remain on deposit until the termination of the agreement, when the same should be repaid, or sooner if the net assets of the partnership should fall below a certain amount, did not constitute the employé a partner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 23.]

7. EQUITY—PLEADING—ADMISSIONS BY DEMURRER.

A demurrer to a bill does not admit an averment that certain of the defendants had made advances to a business as capital, where it appears from papers annexed to the bill that the moneys contributed were to be mere deposits, and not contributions to the capital.

Appeal from Court of Common Pleas, Allegheny County.

Bill for an injunction by Augusta Kaufmann, executrix, and others, executors of the will of Jacob Kaufmann, deceased, against Isaac Kaufmann and others, individually and as surviving partners of Jacob Kaufmann, deceased. Decree for defendants, and complainants appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

D. T. Watson, John G. Johnson, and John M. Freeman, for appellants. W. B. Rodgers, Samuel Dickson, and Joseph Stadfield, for appellees.

BROWN, J. If this bill had been filed against Isaac, Morris, and Henry Kaufmann alone, as surviving partners of the firm of Kaufmann Bros., with no reference to the contracts entered into by that firm with the seven other appellees, it could hardly be seriously contended that the articles of copartnership of the firm of Kaufmann Bros., attached to and to be regarded as part of the bill, would not be conclusive of the right of the surviving partners to settle with the personal representatives of their deceased partner in the mode therein described. Jacob, Isaac, Morris, and Henry Kaufmann had, for some years prior to 1897, been engaged in business as partners, dealing "chiefly in men's wear, and but slightly in other branches." Up to November 24, 1897, there was no written agreement between them, but on that day they entered into written articles of agreement, stating in detail the terms of

their copartnership. The thirteenth clause of the said agreement, to evade which this bill was filed, is as follows: "In the event of the death of any one or more of said copartners, the deceased party's estate shall not continue to retain the decedent's partnership interest, but the said interest shall, within thirty days after such death, be considered as absolutely withdrawn and severed from the business of said firm, and the surviving partners shall purchase all the right, title and interest therein of the decedent for a sum equal to his share of the net assets of the firm, at the inventory last preceding the said death, minus such amounts as he may have drawn in cash or merchandise and plus such amounts as he may have contributed over and above his share, as set forth in article two of this agreement, from the time of his death back to the last preceding inventory; and further plus an amount equal to ten per cent. (10) of the aforesaid decedent's partnership interest, in consideration of the decedent's part of the good will of this firm. Provided, however, that the said last preceding inventory shows the net profits of this firm, for the one year preceding such inventory, to have been not less than ten per cent. (10) of the said total capital, as set forth in the second section of this agreement; and in case such profits shall have been less than 10 per cent., as last aforesaid, then the decedent's estate shall be entitled to and receive only, one hundred (\$100) dollars in consideration for the decedent's part of the good will of the firm." The fourteenth clause provides how payment is to be made by the surviving partners for their purchase of a deceased partner's interest in the business. The terms of payment on such a purchase differ from those on a purchase of the interest of a withdrawing or retiring member of the firm.

The appellants do not aver that the three surviving partners of the firm of Kaufmann Bros.—Isaac, Morris, and Henry—have refused to settle with them and account in accordance with the written articles of copartnership. On the contrary, the admission in the tenth paragraph of the bill is that these three appellees concede the right of the appellants to receive from them \$288,750, as the value of Jacob's fourth interest in the partnership. There is no averment that this sum is not all that ought to be paid for that interest, under the thirteenth clause of the agreement, which provides how its value is to be ascertained; but a mere claim is made that Jacob's interest in the partnership was worth more at the time of his death; that it was then "fairly worth \$1,750,000," as the good will of the firm had largely increased from 1897, and, at the time of his death, "was worth the sum of at least \$8,000,000." According to this, the assets of the firm, exclusive of the good will, were worth, at the time Jacob died, \$1,000,000, and in the sum of \$288,750, which the three surviving partners

are willing to pay the appellants, there is included an item of \$38,750 for the interest of the deceased in the good will; and this is all the appellees are required to pay for it, if its value was arrived at in the way pointed out by the deceased partner himself. There is no averment that the value was not so arrived at, and if Jacob's estate, in the judgment of those now representing it, is not getting all that his interest in the good will may be actually worth, it is, as the learned judge below aptly said, "because he so agreed." The bill recites at length the growth and increase of the business of the firm of Kaufmann Bros. from 1897 to Jacob's death in 1905, and, in the oral argument of counsel for appellants, this was given as a reason why Jacob's estate should not be held to the agreement made under different business conditions. There is no averment that, as the business grew and expanded, he ever asked for a change or modification of the clause providing how his interest should pass to his brothers in the event of his death. The agreement remained unchanged and unmodified, just as it was written, until he died, and it became operative. The business grew and expanded, as the partners manifestly hoped when they put their compact of copartnership into writing, but, because it may have grown even beyond their expectations the terms of their partnership were not changed, nor their rights as partners affected. Until they themselves changed their agreement it continued to be the law of their partnership existence, though the number of their delivery wagons, increased from 10, in 1897, to 54, in 1905, their employes in the shipping room from 6 to 20, their total floor space from 200,388 feet to 465,400, and their business was divided into 52 departments at the time of Jacob's death. The increase of the business of the firm went on under the eyes of each of the partners, but the partnership which had existed prior to 1897, and which they continued by their agreement of November 24th of that year, continued until Jacob's death, unchanged by any other agreement between them. Though they made no change in their written agreement, the court below was asked by this bill to change it, or to hold that it ought not now, in equity, to be regarded as binding.

The thirteenth clause of the agreement is so plain that it would be the work of supererogation to demonstrate that, upon the death of Jacob, his one-fourth interest in the firm vested in the survivors, subject to their paying for the same a sum to be ascertained in the mode fixed by the parties. This clause was as fair to each of the four parties as it was to the other three, and we repeat as to it what we said of another agreement between partners, stipulating that, on the death of one, the survivor should have the right to purchase his interest in the business at a valuation provided for by them in their

agreement: "It was a value fixed irrespectively of the actual value, which would change from year to year, and which they considered it just that the survivor should pay and the estate of his deceased partner receive. Neither could know to whom the option to purchase would fall; and if, during the running of the agreement, because of large additions or deductions, the price might become inequitable, either party had the remedy in his own hands, as without his assent they could not be made. The agreement was in force over 11 years before the death of one of the parties. \* \* \* We are left then to the construction of the agreement as it is written. Considering the condition of the property at the time, the mutual interest of the parties, and the end they had in view, their desire to make certain the price at which the survivor could take, and their knowledge that the cost would not be a criterion of the value, we think that they meant to say that the valuation of \$25,000 was to remain, subject only to the conditions which they imposed, the fixed value for the purpose of the agreement. What is of much more and of primary importance in interpretation, we find that this is what they did say. We see no want of equity in the agreement, nor any hardship to result from its performance which should lead a chancellor to deny the prayer for specific performance. There was no inequality of terms; it applied to both alike, and the advantage to be gained by the survivor was not more certain than that which would result to the estate of the deceased." *Rohrbacher's Estate*, 168 Pa. 158, 32 Atl. 30.

There is an averment in the bill that the appellees—Isaac, Morris, and Henry Kaufmann—"have arbitrarily, and without right, and unjustly and unfairly seized upon the said one-fourth interest of the said Jacob Kaufmann in the said firm, and forcibly seek to retain possession thereof as the sole absolute owners thereof"; and it is contended that the demurrer admits this to be true. This averment is but an inference on the part of the appellants that Isaac, Morris, and Henry have arbitrarily, without right, and unjustly and unfairly taken Jacob's one-fourth interest in the firm. The thirteenth clause of the agreement, provides how they may take it, and the averment is not that they have taken it in violation of that clause. While all facts fairly pleaded are admitted by a demurrer, it does not admit argumentative conclusions or doubtful inferences from undisputed facts. *Getty et al. v. Pennsylvania Institution for the Instruction of the Blind*, 194 Pa. 571, 45 Atl. 333. "The averments of the bill as to the purport and meaning of the provisions of the indenture, the object of their insertion in the instrument, and the obligations they imposed upon the corporation and the trustees, and the rights they conferred upon the plaintiff when his contract was approved, are not admitted by

the demurrer. These are matters of legal inference, conclusions of law upon the construction of the indenture, and are open to contention, a copy of the instrument itself being annexed to the bill, and, therefore, before the court for inspection. A demurrer only admits facts well pleaded; it does not admit matters of inference and argument, however clearly stated. It does not admit, for example, the accuracy of an alleged construction of an instrument when the instrument itself is set forth in the bill or a copy is annexed against a construction required by its terms; nor the correctness of the ascription of a purpose to the parties when not justified by the language used. The several averments of the plaintiff in the bill as to his understanding of his rights, and of the liabilities and duties of others under the contract, can, therefore, exert no influence upon the mind of the court in the disposition of the demurrer. This is not the case of a bill to set aside or reform the contract as not expressing the actual intention of the parties. It is a case where the contention arises solely upon the meaning of the indenture in its bearing upon the contract, and that must be ascertained by applying to its language the ordinary rules of interpretation." *Dillon v. Barnard*, 21 Wall. 430, 22 L. Ed. 673.

In 1903, Kaufmann Bros. entered into a contract with each of the following persons, who were then in their employ, and all of whom are made defendants in this bill: Morris Baer, Julius Baer, Max L. Blum, Ludwig Kaufmann, Theodore Kaufmann, Nathan Kaufmann, and Hugo Baum. The contracts are identical, except as to the percentages to be received by each employé from the profits of the business, the duties to be performed, and the amount to be deposited by him with the firm. The one entered into with Ludwig Kaufmann is annexed to and made part of the bill. Each of these contracts was supplemented by another, entered into in May, 1905. The supplements are identical, except as to the percentages to be received and the amounts to be deposited. The one entered into with Ludwig Kaufmann is also attached to and made part of the bill. The averment in the sixth paragraph of the bill is that, after the "seven agreements of 1903 were duly made, executed, and delivered, the business of Kaufmann Bros. was continued and carried on by the said four Kaufmanns, and the seven named individuals, \* \* \* that the said seven agreements of 1903 and 1905 changed, supplied, and superseded the original agreement of 1897; \* \* \* that by the said agreements of 1903 and 1905 the old partnership of Kaufmann Bros. was dissolved, and a new partnership, with additional members and added restrictions and provisions, was organized." Another averment in the bill is that "each one of the said seven individuals agreed to advance, and did advance, to the capital of the firm" a stated sum, varying from \$35,250, advanced by Ju-

lius Baer and Nathan Kaufmann, respectively, to \$120,000, advanced by Morris Baer. If these averments as to contributions to the capital of the firm are simply what the complainants regard as the effect of the seven contracts, the demurrer does not admit them to be true, and we must therefore turn to the contracts themselves to interpret them and declare what their effect was on the partnership of Kaufmann Bros.

It is first to be noted that each contract is between "Jacob Kaufmann, Isaac Kaufmann, Morris Kaufmann, and Henry Kaufmann, parties doing business as Kaufmann Bros.," of the first part, and one of their employes of the second part, and the very first clause shows that the party of the second part is to continue "to give his services to the parties of the first part," to Kaufmann Bros., "in the same capacity as heretofore"—an employe. In consideration of these services the agreement proceeds in the second clause to provide what the party of the second part shall receive from the party of the first part. It is not a participation in the assets and business of the firm of Kaufmann Bros., but payment by them, to each of said parties, of a sum, "as salary for each and every year," equal to a certain percentage of the net profits of "their business"—Kaufmann Bros.' business, "the parties of the first part." The agreement then describes in detail how the percentage of the profits is to be ascertained. With these details we need not burden this opinion. Nothing in the provision that each of the seven employes is to receive for his services a certain proportion of the net profits constitutes him a partner as to Kaufmann Bros. themselves, in whose services he had been, and in whose services he was to continue, as an employe. "That there is a distinction between partnership as respects the public and partnership as respects the parties is an elementary principle of this branch of the law, so plain that its only difficulty is in its application to particular cases. Where the agreement is silent, there is often room for doubt as to the precise relation in which the parties stand to each other, and then a joint interest in the stock is considered a discriminative circumstance, but, where they explicitly declare there is to be no partnership, it is unnecessary to inquire further; for among themselves the law permits them to determine their respective interests by their own stipulations. It is a matter with which third persons have no concern. \* \* \* The contracts of men are laws, prescribed by themselves to govern their transactions with each other, which, as long as they interfere not with morality, or with the interests of third persons, are of conclusive obligation on the immediate parties to them." Gill v. Kuhn, 6 Serg. & R. 333. "A mere participation in the profits will not make the parties partners inter sese, whatever it may do as to third persons, unless they so intend it. If A. agrees to give B. one-third of the profits of a

particular transaction in business, for his labor and services therein, that may make both liable to third persons as partners, but not as between themselves." Hazard v. Hazard, 1 Story, 371, Fed. Cas. No. 6,279. "While a right to share in the profits may constitute a partner, a commission equal to such a share, as a compensation for services, does not. Ex parte Hamper, 17 Ves. 404; Ex parte Watson, 19 Ves. 459; Miller v. Bartlett, 15 Serg. & R. 137; Dunham v. Rogers, 1 Pa. 255. That this exception to the general rule is founded upon a distinction without any difference has been generally conceded, and it is used by Baron Bramwell in Bullen v. Sharp, 1 Com. Pl. L. R. 86, with great force as an argument against the soundness of the rule itself. It is entirely too late now to question either the rule or the exception. We are bound to stand super antiquas vias, by our own decided cases; for nothing is truer or more important, than the maxim, 'Omnia innovatio plus novitate perturbat, quam utilitate prodest.' The interest of Tracy, Benton & Co. in the profits being, by the terms of the agreement, 'a commission upon the sale of the merchandise consigned to them, equal to one-half of the net profits upon such sale,' did not make them partners, nor attach to them either the rights or responsibilities of such partners." Edwards v. Tracy, 62 Pa. 374. "Parties may so act, or hold themselves out to the public, that the law will hold them answerable as partners, although, as between themselves, they are not partners. But this is where the rights of third parties are involved. As between the parties to the agreement, does the contract constitute a partnership?" Krall v. Forney, 182 Pa. 6, 37 Atl. 346.

Though the averment in the bill is that each of the seven individuals agreed to advance, and did advance, certain specific sums to the capital of the firm, the truth is that no sum was to be advanced by any one of them to the capital of the firm, as clearly appears from the unmistakable terms of each agreement. The demurrer admits the truth of what actually appears therein, but not the argumentative conclusion in the bill of a contribution to capital, if, as a matter of fact, no such contribution was intended by said parties. Instead of making any contribution to the capital of the firm, the agreement is that each of the parties of the second part shall deposit with the parties of the first part, "Jacob Kaufmann, Isaac Kaufmann, Morris Kaufmann, and Henry Kaufmann, partners, doing business as Kaufmann Bros.," a certain sum of money, "which sum shall remain on deposit with the parties of the first part, without interest, until the termination of this agreement, when same shall be repaid to the party of the second part, provided, however, that the said deposit shall continue so long only as the net assets of the parties of the first part in the said business shall not fall below the sum of one million, fifty thousand (\$1,050,-

000) dollars." Why this provision as to a deposit was made is not material in this proceeding. It can well be understood that it might have been required by the parties of the first part as an assurance from the party of the second part that he would faithfully comply with his contract; and the provision as to the reduction of the deposit, upon the reduction of the net assets of the firm, may very naturally have been inserted at the instance of the party of the second part for his own protection. But, as stated, the reasons for the insertion of the clause are not material. It is sufficient that it was inserted, requiring but a "deposit" from the party of the second part, to be returned at a definite, fixed time, without regard to what may happen to the capital of the parties of the first part. It may be impaired or totally wiped out, but no portion of the deposit made by the party of the second part is to be in any manner impaired, but paid back, dollar for dollar, by the parties of the first part.

In the seventh paragraph of the agreement of 1903 it conclusively appears that the deposit made was not to be a contribution to the capital of Kaufmann Bros., for it is there provided that, in case the parties of the first part shall incorporate their business, the party of the second part shall not receive any portion of the capital stock of the corporation, but a sum of money to include his deposit. The separate identity and existence of Kaufmann Bros., composed of Jacob, Isaac, Morris, and Henry, are preserved all through the agreements of 1903 and 1905. They avow their right in each agreement, recognized by the party of the second part, to sell out or incorporate their business, and to take in new partners; the provision as to them being "any male member of the immediate families of any of the parties of the first part may become a partner in the said business, as may also the party of the second part hereto, or any other party whose salary at the date of the execution of this agreement is based on the total profits of said business, to wit, the following persons: Morris Baer, Theodore Kaufmann, Max L. Blum, Hugo Baum, Nathan Kaufmann and Julius Baer." Instead then, of creating a new partnership, as is averred in the bill, the clause just quoted is a distinct admission by each of the parties of the second part that the partnership of Kaufmann Bros. was to remain unchanged by the agreement of 1903, and that by it he did not become a member of the firm. Immediately following the provision that one or all of the seven parties named may in the future become members of the firm is a stipulation that it shall not be binding upon the surviving members of the firm of Kaufmann Bros., who may purchase the interest of a deceased brother. Again, even

If the agreement of 1903 with Ludwig Kaufmann could be tortured into one creating a new partnership, by taking him into the firm of Kaufmann Bros., by what agreement with him did Morris Baer, Theodore Kaufmann, Max L. Blum, Hugo Baum, Nathan Kaufmann, and Julius Baer, the other six employes, become his copartners? If his agreement of 1903 created a new partnership between him and the Kaufmann Bros., certainly no one else could be admitted into such a partnership without his agreement and consent, and this is true of the other six.

One of appellants' averments is that, since the agreement of 1879 was made, the good will of the firm of Kaufmann Bros. has enormously increased, and was, at the time of Jacob's death, worth the sum of at least \$6,000,000, and that this growth in its value was largely made by the seven supplemental agreements. If this be so and the seven employes, who were parties to the seven supplemental agreements, became, as the appellants aver, partners of Kaufmann Bros., why do they exclude them from participation in the value of the good will? While averring that these seven were copartners with Jacob Kaufmann, the appellants, in the same breath, deny their right to an interest in this good will, their claim being that one-fourth of its value, \$1,500,000 belongs to them alone. The primary intent of the agreements of 1903 is the retention of each party of the second part as an employe of the parties of the first part and all through the agreements there runs the clear intent that such employe shall not become a partner, either by sharing in the profits, or by contributing to the capital. Complaint is made by the appellants that, by the agreement of 1903, Jacob's estate may continue to be tied up by liability to the seven employes, but this is a liability of any deceased partner, and it cannot affect such partner's distinct agreement as to how his interest in the firm, upon his death, shall pass to his survivors.

Though a most elaborate brief has been submitted by the learned counsel for appellants, the case, after all, is within a narrow compass, and absolutely free from doubt and difficulty. The agreements which are self-interpreting, were made by persons sui juris. The one as to the purchase of a deceased partner's interest is not an unusual one, and was fair alike to each of the four partners. If the representatives of Jacob are now disappointed that they cannot get more than the survivors offer them, the law cannot help them, for it was so written by him in his agreement with them.

The decree sustaining the demurrer to the bill and dismissing the same is affirmed at appellants' costs.

(74 N. J. E. 776)

## SMITH v. REED et al.

(Court of Chancery of New Jersey. Oct. 9, 1908.)

## COURTS—CONFLICTING JURISDICTION—INJUNCTION.

S. filed a bill of interpleader in the Chancery Court of New Jersey against R. and L., setting up that R. recovered a judgment against him (S.) in the United States Circuit Court, and that L. had attached the judgment debt in his hands by process out of the Camden circuit court of this state, and prayed for an injunction restraining R. from issuing execution against him (S.) out of the United States Circuit Court on that judgment pending the interpleader suit. *Held*, that an injunction will not lie, because the writ, if issued, would be an unlawful interference by a court of a state with the power of a court of the United States to enforce its judgment; the rule being that courts of different sovereignties cannot so interfere with each other, even indirectly by injunction operating upon the parties litigant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Courts, §§ 1412, 1413.]

(Syllabus by the Court.)

Bill by Oliver Smith against William B. Reed and others. Heard on order to show cause why an injunction should not issue. Writ denied.

Lewis Starr, for complainant. Thomas B. Hall, for defendant Reed. William T. Read, for defendant Lowry.

WALKER, V. C. The bill in this case shows that the defendant Reed recovered a judgment in the United States Circuit Court for the District of New Jersey against the complainant for \$750 damages and \$58.45 costs; that the issuing of an execution on the judgment was stayed upon the application of the complainant to set off against it a judgment recovered by him against the defendant Reed in the court of common pleas of Philadelphia, Pa.; that the application was refused; that the defendant Lowry caused to be issued against the defendant Reed an attachment out of the circuit court of the county of Camden, which the sheriff served upon the complainant, and attached in his hands all the rights and credits, moneys and effects, of the defendant Reed, and particularly the money due and owing to the complainant by the defendant Reed upon the judgment recovered in the United States Circuit Court. Then follow the usual averments in an interpleader bill that both defendants claim they are entitled to the money due, and that the complainant is unable to determine to whom it belongs, and is willing to pay the amount to such person as shall lawfully be entitled to it, and to whom he may pay the same with safety, offering to pay the amount into court, and alleging that he does not in any respect collude with the defendants, and that he has not been indemnified by them, or either of them, but brings the suit of his own free will, and to avoid molestation and injury. The bill is verified by the complainant's affidavit.

The defendant William B. Reed has answered, and charges, among other things, that the attachment was not issued and levied in good faith, but by collusion between the complainant and the defendant Lowry, for the purpose of preventing the defendant Reed from having execution against the complainant, Smith, upon the judgment of the Circuit Court of the United States; that the judgment in the Philadelphia common pleas, which is the basis of the complainant's claim, was recovered by him and Lowry; and that Lowry assigned his interest in it to Smith, the complainant, to enable him to use it against his (Reed's) judgment in the United States Circuit Court. The defendant Lowry has also answered, and admits all of the facts contained in the bill, and avers that by reason of his attachment he is entitled to priority over the claim of the defendant Reed upon his judgment.

The complainant also makes an affidavit in which he says that it is not true, as stated in Reed's answer, that the attachment of Lowry against Reed was in any way or manner based upon the judgment against Reed entered in the Philadelphia common pleas court, nor that the complainant has assigned to Lowry the claim against Reed, nor that the claim upon which the attachment proceedings of Lowry against Reed is based is in any way or manner owned by the complainant, nor is he interested therein. The complainant seems to know how the alleged debt for which the attachment issued did not arise, which argues that he knows how it did arise; but he rather disingenuously fails to make any statement concerning that feature of the case.

The bill prays for an injunction restraining the defendant Reed from issuing execution upon his judgment in the United States Circuit Court, or from collecting, or selling, or disposing of any of the real or personal property of the complainant, and that the defendant Lowry be enjoined from further proceeding in the attachment proceedings commenced by him against the defendant Reed, so far as it may refer or relate to the moneys in the hands of the complainant due upon the judgment. Upon filing the bill an order to show cause was made why an injunction should not issue according to its prayer, with an ad interim restraint upon the defendant Reed, enjoining him from proceeding to advertise or sell any property of the complainant on any levy under any execution that might be issued on the judgment mentioned, and from collecting, selling, or disposing of any of the real and personal property of the complainant, and that the defendant Lowry be restrained from further proceeding in the attachment proceedings against Reed, so far as the same refers or relates to the moneys in the hands of the complainant due upon the judgment.

Upon the hearing of the order to show cause the files of this court, in the cause

therein depending wherein William B. Reed is complainant and Oliver Smith, Alfred Lowry, and others are defendants, was introduced in evidence. In that suit the defendants Smith and Lowry (who are the complainant and one of the defendants in this suit) exhibited an answer by way of cross-bill against the complainant, Reed (who is defendant in this suit), in which they set up that they (Smith and Lowry) were induced by Reed to enter into a certain written agreement, dated June 10, 1902, for the purpose of forming a corporation (which is also one of the defendants in that suit) for the manufacture and sale of soap, by virtue of certain false and fraudulent representations made by Reed to them, and they pray in their cross-bill that the contract be declared void and for nothing holden, and that they may be relieved from it in so far as they are holden unto the complainant, and that the complainant be declared not to be entitled to any rights under the contract. Reed, besides filing a special replication denying the fraud, filed a supplemental bill, in which he sets up that Smith and Lowry by their cross-bill have elected to rescind the contract, and have claimed for themselves as individuals the ownership in the stock of the company formed to carry out the terms of the agreement of June 10, 1902, and prays that Smith and Lowry be ordered and directed to release and discharge unto him all and every claim or demand they have against him arising out of any of the matters and things done or omitted to be done under the contract. Now, under the contract Reed was to have \$8,000 of stock in the corporation, to be paid for by a loan to him from Smith and Lowry, and the repayment of which he was to secure by life insurance policies amounting to \$9,000 and a mortgage of \$3,000 upon lands in Pennsylvania, the stock to be issued in the name of Reed and held by the other parties. These conditions were performed, and it is not shown that Reed owes Lowry otherwise than on account of the transaction just mentioned. It will be noticed that Reed's indebtedness to Smith and Lowry under this contract was one to them jointly. Reed now alleges that Smith has assigned to Lowry his interest in the securities, so that Lowry could be in a position to set off his claim against Reed; that being impossible while Reed's obligation was to them jointly, for, upon well-known principles, a joint debt cannot be set off against a several one.

In the matter before me it does not appear by competent proof that Smith and Lowry collude with each other for the purpose of preventing Reed's making out of Smith the judgment which he recovered against him in the United States Circuit Court. But, if the facts stated in the pleadings in *Smith v. Lowry and Others*, and in the answer of Reed in this case, be true, then, there is collusion between Smith and Lowry. What is the fact in this regard, will, of course, be

made to appear upon the final hearing of the cause.

Passing from the question of collusion, which I am unable to decide in favor of the defendant Reed on this application, although the matter savors very strongly of it, I come now to the consideration of the power of this court to interfere with the process of the United States Circuit Court. The principal authority relied on by counsel for the defendant Reed on this head is *United States v. Johnson County*, 6 Wall. 168, 18 L. Ed. 768. In that case a judgment had been recovered in the Circuit Court of the United States for the District of Iowa against Johnson county, in that state and district, for interest on certain bonds issued by the municipal corporation. Execution was issued and returned unsatisfied, and demand was made upon the county officers to levy a tax to satisfy the judgment, and upon their refusal a mandamus was issued by the federal court in which the judgment was recovered, to which the county officials made return that they had been enjoined from levying the tax by a state court in a proceeding between the taxpayers and themselves. The Supreme Court of the United States held "that federal courts and state courts act separately and independently, and in their respective spheres of action the process of the one cannot be enjoined by the other." It is elementary that no court can directly enjoin proceedings in another court. Therefore, when proceedings in court are in effect enjoined, it is because of a restraint operating upon the parties. Although the language of the syllabus in *United States v. Johnson County*, just quoted, refers in terms to the inability of one court to enjoin another, the headnote is to be read in connection with the facts, which clearly show that the injunction was the usual one operating upon the parties, and not one directed to the court. Said Mr. Justice Clifford, speaking for the United States Supreme Court at page 195 of 6 Wall. (18 L. Ed. 768): "State courts are exempt from all interference by the federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. \* \* \* Circuit Courts and state courts act separately and independently of each other, and in their respective sphere of action the process issued by the one is as far beyond the reach of the other as if the line of the division between them was 'traced by landmarks and monuments visible to the eye.' \* \* \* Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control or in any manner to affect the process or proceedings of a Circuit Court, not on account of any paramount jurisdiction in the latter courts, but because in their sphere of action Circuit Courts are wholly independent of the state tribunals." This case (*U. S. v. Johnson County*) is certainly an authority for counsel's contention.

The cases in our state courts are not in conflict with the doctrine of the federal courts upon the question under consideration. In *Shinn v. Zimmerman*, 23 N. J. Law, 150, 55 Am. Dec. 260, it was held: "Money due on a judgment recovered in a court of record, either in this state or another state, cannot be attached in the hands of the defendant in such judgment on an attachment against the plaintiff therein." Chief Justice Green, delivering the opinion of our Supreme Court in that case, said, at page 153 of 23 N. J. Law (55 Am. Dec. 260): "Upon a question of conflict of jurisdiction, it is clear that the court which first acquires jurisdiction of the subject-matter of controversy is entitled to exercise it, and to enforce the execution of its own judgment. If the court in Pennsylvania permitted the attachment to supersede the execution, it would in effect permit the process of the courts of this state to interfere with the execution of its own judgment. It is obvious, moreover, that if executions may thus be arrested, it would, in respect to judgments in this state, as well as elsewhere, present a ready mode of embarrassing the administration of justice and delaying the process of the courts." Nor is the case of *Conover v. Ruckman*, 33 N. J. Eq. 303, in conflict with *Shinn v. Zimmerman*, *ubi supra*. While in *Conover v. Ruckman* it was held that moneys in the hands of a sheriff, raised by him in pursuance of a decree of this court, are liable to seizure under a writ of attachment, the principle announced in *Shinn v. Zimmerman* was expressly approved. Said Mr. Justice Depue, speaking for the Court of Errors and Appeals in *Conover v. Ruckman*, at page 309: "In *Shinn v. Zimmerman*, 23 N. J. Law, 150, 55 Am. Dec. 260, the attachment was issued against the plaintiff in a judgment recovered in the courts of Pennsylvania, and was served on the defendant in that judgment. \* \* \* The defendant in the attachment had recovered his judgment in another jurisdiction and, as the Chief Justice said, there is 'no rule of law, no consideration of policy or courtesy, which would or ought to induce any court of Pennsylvania to suspend its process and to withhold from one of its own citizens the recovery of a debt adjudged to be due, because after the recovery of the judgment the debt has been attached under the process of this state.'" In *Conover v. Ruckman*, 32 N. J. Eq. 685, in this court, Vice Chancellor Van Fleet held that there was an irreconcilable conflict between the decisions of the Supreme Court in *Crane v. Freese*, *infra*, and *Shinn v. Zimmerman*, *supra*, and, because the Court of Chancery had established the doctrine that moneys in the hands of an officer raised on execution were not liable to attachment at all, he dissolved an injunction which had been issued in aid of an attachment. In reversing the judgment in *Conover v. Ruckman*, the Court of Errors and Appeals, adverting to *Shinn v. Zimmer-*

man, remarked (33 N. J. Eq. at page 309) that it was because the attachment in that case had been recovered in another jurisdiction that the doctrine of *Crane v. Freese* did not apply.

In the class of cases of which *Crane v. Freese*, 16 N. J. Law, 305, and *Davis v. Mahany*, 38 N. J. Law, 104, are examples, money in the hands of an officer raised on execution was allowed to be attached in favor of a creditor of the plaintiff, not as the money of the plaintiff, but as a right and credit of the plaintiff; the court in which the money was raised being left to apply it upon consideration of the claims of all the parties. It will be noticed that in these cases the process of execution upon judgments recovered was not arrested, but the moneys raised upon the executions were held to be subject to the rights of creditors. It will be noticed, too, that the attachments, and the execution upon which the moneys attached were raised, were all issued out of courts of the same state. As I understand it, courts deriving their powers from one sovereign cannot, even in the most indirect manner, affect the process or proceedings of the courts of other sovereigns, and attachment will not lie out of a court of one state against moneys raised on execution by process of a court of the United States or of another state. This view is noticed by Mr. Justice Scudder in the opinion in *Davis v. Mahany*, wherein he said (38 N. J. Law, at page 108): "If the plaintiff in execution, or person having a claim paramount to such plaintiff, or the creditors in attachment under which the right or credit has been levied upon, shall be entitled, the court will order payment according to the justice and right of the case. There will be no case of conflicting suits and opposing jurisdictions, but an honest and convenient appropriation of the debtor's property to the payment of his debts, if he be liable." It seems, then, that in *Davis v. Mahany* attachment was permitted to be levied upon moneys in the hands of a constable made under execution for the defendant in another action before another justice of the peace in which the defendant in attachment was plaintiff, because there were no opposing jurisdictions, as there would have been had the money attached been raised upon process out of a court of the United States or of another state. Anyhow, all that was decided in the class of cases now being discussed was that the moneys raised upon execution were liable to attachment as rights and credits of the plaintiffs in those writs, the moneys not being theirs until paid over to them, and neither these cases, nor any others that I have been able to find, are authority for the proposition that process of execution upon a final judgment may be arrested for the benefit of a creditor of the plaintiff in execution.

The cases cited on behalf of the complainant and the defendant Lowry do not bear out the contentions made in their behalf.



One of the cases will be noticed. Counsel for the plaintiff in his brief asserts that interpleader lies in favor of a person sued in a United States court and attached in a state court, and cites *McWhirter v. Halsted* (C. C.) 24 Fed. 828. Upon examination the case will be found not to be authority for the proposition asserted. The facts were these: Halsted, Haines & Co., of New York, on July 12, 1884, made a deed of assignment to Lewis May for the benefit of their creditors. On the same day Deering, Milliken & Co. caused a writ of attachment to be issued out of the Supreme Court of this state against Halsted, Haines & Co., under which the sheriff of Essex attached a debt due from McWhirter & Co. to Halsted, Haines & Co. On December 3, 1884, Lewis May, assignee of Halsted, Haines & Co., commenced an action in the United States Circuit Court for the District of New Jersey against McWhirter & Co. On January 21, 1885, McWhirter & Co. filed their bill of interpleader in the United States Circuit Court, acknowledging their indebtedness to Halsted, Haines & Co. averring their readiness and willingness to pay the same to whomever should be determined to be entitled to it, and alleging that the assignee claimed it and also the attaching creditors. While Nixon, J., in the opinion, seems to have held that the case was properly one for interpleader, he held distinctly that he could not grant any injunction against the attachment proceedings in the New Jersey Supreme Court, putting the decision of that question upon a federal statute which expressly prohibits a court of the United States from issuing an injunction to stay proceedings in a state court, except in cases of bankruptcy. He remarked, at page 830: "Nor is there any difficulty in granting an injunction against the plaintiff in the action at law in this court restraining him from further proceeding therein. He is under its control. But it is different in regard to an injunction against the parties to the attachment proceedings in the state court. They are there pursuing a remedy given by the law against the property of a nonresident debtor, and section 720, Rev. St. (U. S. Comp. St. 1901, p. 581), expressly prohibits a court of the United States from issuing the writ of injunction to stay proceedings in any court of a state, except where the injunction may be authorized by any law relating to proceedings in bankruptcy." He concluded by observing that he was constrained to decline an injunction against the plaintiffs in the attachment proceedings in face of the federal statute. Had the statute not been in existence, and had the court been urged to refuse the injunction because of want of power in the federal court to restrain proceedings in the state court, he must, of necessity, it seems to me, have refused the writ upon the authority of *United States v. Johnson County*, which, it

appears, must have bound him. The ruling of Judge Nixon, just adverted to, was on motion for a preliminary injunction. The cause afterwards came on for final hearing before Judge Wales (10 N. J. Law J. 91), and the bill was dismissed on demurrer, because any decree ordering the parties to interplead would be useless, unless they could at the same time be enjoined from further prosecuting the attachment suit, which was precisely what was forbidden by the federal statute.

In *Central National Bank v. Stevens*, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807, it was held that a state court was powerless to grant an injunction against enforcing a decree of a federal court which had obtained complete jurisdiction before suit begun in the state court, and that to deprive a court of the power to execute its decree is essentially to impair its jurisdiction. I do not understand this case to be disapproved by the opinion of Vice Chancellor Bergen in *Shaw v. Frey*, 69 N. J. Eq. 321, 59 Atl. 811, wherein he says (after citing *Central National Bank v. Stevens*) at page 324 of 69 N. J. Eq., and at page 812 of 59 Atl.: "The doctrine that a state court may never restrain a litigant in a federal court cannot, in my opinion, be supported by the adjudications of the Supreme Court of the United States." And at page 325 of 69 N. J. Eq., and at page 812 of 59 Atl.: "All of these cases (*Central National Bank v. Stevens* and other cases) present different conditions of fact, but the rule established vindicates the right of a federal court to complete its judgment by execution; but I can find no express adjudication holding that a state court having jurisdiction over the party is without power to restrain a litigant in a federal court, no federal question being involved, until he shall make such discovery of evidence as the rules of equity require." Certain it is that courts of the United States have held that final process upon their judgments may not be arrested by injunction out of the state courts operating upon the parties, and I understand, also, that the decisions of our state courts are to the same effect.

Many other grounds have been urged by counsel for the defendant Reed in favor of the denial of an injunction in this cause, and some of the reasons appear to be meritorious. However, I have not considered them, because the proposition just discussed is to my mind controlling, and its decision must necessarily be dispositive of the question under consideration.

For want of jurisdiction in the Court of Chancery to restrain the process of execution on a judgment in the United States Circuit Court, the ad interim restraint heretofore granted in this cause must be dissolved, and the rule to show cause discharged, with costs.

(74 N. J. E. 618)

**McNICHOL v. TOWNSEND.**

(Court of Chancery of New Jersey. June 10, 1908.)

**COVENANTS—CONSTRUCTION—BUILDING RESTRICTIONS—ENFORCEMENT.**

An owner of lots abutting on a street conveyed a lot, subject to a covenant prohibiting the erection of a building within a specified distance of the street line. The lot vested in defendant under mesne conveyances. The owner subsequently sold to complainant a lot across the street, and about 150 feet from defendant's lot, making the conveyance subject to a similar covenant. Before conveying defendant's lot, the owner had made other conveyances of nearly all the lots on either side of the street, about one-half in number, containing no restrictive covenant. *Held*, that complainant could not enforce the covenant against defendant, in the absence of a general scheme for the perpetuation of a defined building line, by the exaction of uniform covenants for the benefit of the several purchasers of lots; there being no sufficient evidence that the covenant in question was for the benefit of the lots remaining when the conveyance was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 50; vol. 16, Deeds, § 543.]

Suit by Anastasia A. McNichol against Walter R. Townsend to enforce a restrictive building covenant. Heard on final hearing, on bill, answer, replication, and proofs. Bill dismissed.

See 67 Atl. 933.

Bourgeois & Sooy, for complainant. Thompson & Cole, for defendant.

**LEAMING, V. C.** I am unable to advise a decree for complainant. The testimony presented at final hearing discloses no facts which can operate to modify the views expressed by me on the motion for a preliminary injunction, as reported in 67 Atl. 933. The evidence at final hearing discloses that, prior to October 19, 1888, when Brown conveyed to Graham the lot now owned by defendant, Brown had conveyed all of the lots on either side of States avenue but three, namely, the lot then conveyed, the lot at the northwest corner of States and Pacific avenues, and the lot now owned by complainant. Of the several conveyances so made, about one-half in number contained no restrictive covenant against erecting buildings adjacent to the avenue. The conveyances which contained no such restrictive covenants were the following: Deed dated March 6, 1880, to Mary Woelpper, and a subsequent deed to the same grantee dated December 7, 1880, increasing the width of the lot first conveyed from 70 to 80 feet, and a subsequent deed of confirmation to the same grantee, dated December 15, 1881. Deed dated November 17, 1881, to William Wilson. Deed dated December 1, 1881, to George M. Troutman. Deed dated October 21, 1881, to Anna Martha Kremer. Deed dated October 3, 1903, to Horace C. Disston. Of two lots conveyed by this deed, one is now owned by F. E.

Hammell and another by William Aikman, free from building restrictions. Deed dated May 25, 1883, to the United States Hotel Company. This deed contained a restriction "that all buildings erected on said land shall be of good style and shall conform as nearly as may be with the cottages now thereon erected." This covenant may relate to the distance buildings are to be erected from the avenue, but that construction is doubtful. These details render it clearer to me that it was at the preliminary hearing that no general scheme can be properly said to have existed for the perpetuation of a defined building line, by the exaction of uniform covenants for the benefit of the several purchasers of lots. In the absence of such a general scheme I am unable to find any evidence which justifies the conclusion that the covenant now in question was for the benefit of the remaining lots owned by Brown when the Graham conveyance was made. Under the opinion in Hemsley v. Marlborough Hotel Company, 62 N. J. Eq. 164, 170, 50 Atl. 14, adopted by the court of Errors and Appeals in 63 N. J. Eq. 804, 52 Atl. 1132, such evidence must be regarded in this court as a necessary element to support the claim asserted by complainant.

I will advise a decree dismissing the bill.

**FALES v. FALES.**

(29 R. I. 303)

(Supreme Court of Rhode Island. Oct. 28, 1908.)

**APPEAL AND ERROR (§ 273\*)—EXCEPTIONS—SUFFICIENCY.**

An exception to the decision of the court in "favor of the petitioner and against said respondent, and granting the prayer of said petition," is too general, and will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1621; Dec. Dig. § 273; Trial, Cent. Dig. § 965.]

Exceptions from Superior Court, Providence and Bristol Counties.

Petition for divorce by Warren R. Fales against Catherine Fales. There was a decision granting the petition, and respondent brings exceptions. Cause remitted for further proceedings.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Charles A. Wilson and Ralph M. Greenlaw, for petitioner. Thomas F. Farrell and Charles R. Easton, for respondent.

**PER CURIAM.** This petition for divorce comes before us upon the petitioner's motion to dismiss the respondent's bill of exceptions, which reads as follows: "And now comes the respondent in the above-entitled cause, and excepts to the decision of said court in giving decision in favor of the petitioner and against said respondent, and granting the prayer of said petition, and states her ex-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ceptions to be as follows: First, that said court made an error of law in granting the prayer of said petition; second, that the decision of said court was against the evidence and the weight of the evidence; third, that said court erred in deciding that said petitioner had demeaned himself as a faithful husband and performed all the obligations of the marriage covenant; fourth, that said court erred in holding that the marriage of the parties was sufficiently established by the evidence. Wherefore the respondent tenders this her bill of exceptions, and prays that the same may be allowed in accordance with law."

The bill of exceptions was allowed by the presiding justice in the following terms: "Immediately after decision granting the petition the respondent excepted to said decision. So far as the above bill of exceptions states said exception, the same is allowed as a bill of exceptions. If the above bill does not state said exception, the said bill is hereby altered to state said exception. August 5, 1908. William H. Sweetland, P. J. Supr. Ct."

The exception allowed, viz.: "And now comes the respondent in the above-entitled cause, and excepts to the decision of said court in giving decision in favor of the petitioner and against said respondent, and granting the prayer of said petition," must be dismissed, because it is too general. It is no more definite than the one criticised in *Moore v. Stillman*, 28 R. I. 483, 68 Atl. 417. The question whether bills of exceptions are applicable to divorce proceedings under our statutes is not properly before us, and therefore will not be considered.

The case is therefore remitted to the superior court for further proceedings.

#### BISHOP v. BISHOP.

(Supreme Court of Rhode Island. Oct. 26, 1908.)

Exceptions from Superior Court, Providence and Bristol Counties.

Action by Henry Bishop against John H. Bishop. From a verdict for plaintiff, defendant brings exceptions. Exceptions overruled, and case remitted.

Argued before BLODGETT, JOHNSON, DUBOIS, and PARKHURST, JJ.

Gorman, Egan & Gorman, for plaintiff. J. Jerome Hahn, for defendant.

PER CURIAM. There is nothing to take the case out of the general rule announced in *Wilcox v. R. I. Co.*, 29 R. I. —, 70 Atl. 913.

Defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

(222 Pa. 113)

In re ROBINSON'S ESTATE.

(Supreme Court of Pennsylvania. June 23, 1908.)

#### 1. HUSBAND AND WIFE—ANTENUPTIAL CONTRACTS.

Antenuptial contracts are not inherently fraudulent, nor is there any such presumption;

and there must be some evidence of gross disproportion, or other facts from which fraud may be inferred, before the onus changes.

#### 2. WITNESSES—COMPETENCY — TRANSACTIONS WITH DECEDENT.

A wife, after the death of her husband, is incompetent to testify that in signing an antenuptial contract she supposed she was signing a different contract, which had been previously shown her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 639.]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Joseph B. Robinson, deceased. From a decree dismissing exceptions to adjudications, Helen C. Robinson appeals. Affirmed.

On October 2, 1902, Joseph B. Robinson was married to Helen M. Clawson. Prior to the marriage an antenuptial contract, had been executed and acknowledged by the parties, under which Mrs. Robinson was to receive \$25,000 in consideration of her releasing all claims of dower and other rights in her husband's estate. The sum of \$25,000 was subsequently paid to her. There was evidence that the decedent had told his wife that he was worth \$100,000, but as a matter of fact he was worth about \$150,000. The auditing judge refused to consider the testimony of the widow, to the effect that she had signed the paper in question under the belief that it was another and a different contract previously read to her. The auditing judge refused the widow's claim to participate in the estate.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

J. Quincy Hunsicker, John H. Schwacke, and J. Quincy Hunsicker, Jr., for appellant. John G. Johnson and Walter E. Rex, for appellee.

MITCHELL, C. J. Antenuptial contracts are not inherently fraudulent, nor is there any such presumption. They require good faith, but fraud is not presumed in them any more than in other cases. There must be some evidence of gross disproportion, or other fact from which fraud may be inferred, before the onus changes. As said by the learned judge below: "The sum given in the present case was an outright gift. The wife took no chance. She was provided for in any and every event. Whether her husband died rich or poor, whether he or she survived, was to her, so far as her temporal welfare was concerned, a matter of no moment. A woman about to be married might readily accept outright a sum equal to one-sixth of her husband's estate, and at the same time be willing to accede to a proposition that she would relinquish at the time of his death that which the law would give her and which by right she should have and get."

The widow was clearly not a competent

witness. As said by the learned judge below: "The contract did not prove itself. Two witnesses were called, who identified the signatures of Joseph B. Robinson and of Helen M. Clawson. With this identification, the contract was not in evidence. The widow was then called, and her testimony was in effect a contradiction of the testimony of the two preceding witnesses. True, she did not deny her signature; but she did deny that, in placing her signature to the paper in question, she intelligently signed the contract. In brief, her testimony was that Mr. Robinson had promised her the sum of \$25,000 as a gift, telling her he was worth \$100,000; had never explained to her that she was to renounce any legal rights as to dower, etc., and that the agreement he originally showed her was not as long as the one she was given to sign—in fact, was on one sheet of paper—and that, when she did sign, she did so upon the supposition that it was the previous contract rewritten, and not a new and a different one." But, even if she had been competent, she was claiming against her husband's estate in contradiction of her formal written agreement, of which a duplicate had been in her possession for several years. The testimony was entirely inadequate for such purpose.

Judgment affirmed.

(222 Pa. 139)

LEWIS et al. v. LINK-BELT CO.

(Supreme Court of Pennsylvania. June 28, 1908.)

**WILLS—CONSTRUCTION—NATURE OF ESTATE—"DEATH WITHOUT ISSUE."**

Under Act July 9, 1897 (P. L. 213), providing that in any bequest or devise the words "die without issue," or "die without leaving issue," or "have no issue," or any words importing the failure of issue, shall be construed to mean a failure of issue in the lifetime or at the death of such person, unless a contrary intent appears, in a devise to a person for life, and then to his issue, "but in the event of the death of the devisee without issue" then over, the words "death without issue" mean a failure of issue in the lifetime of the devisee, and not an indefinite failure, and devisee takes a life estate, and not a fee, under the rule in Shelley's Case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1313.

For other definitions, see Words and Phrases, vol. 3, pp. 2059-2061.]

Appeal from Court of Common Pleas, Philadelphia County.

Case stated in suit of John Thomas Lewis and Florence L. Watson against the Link-Belt Company. Judgment for plaintiffs, and defendant appeals. Reversed.

From the case stated it appeared that the words of the will of Louisa Lewis, out of which arises the controversy in this case, are as follows: "I give and devise unto my beloved husband, James William Lewis, all my real estate and personal property \* \* \*

for and during the whole term of his natural life and at the expiration thereof I give and devise the house and lot numbered 4009 Blabon avenue in the city of Philadelphia unto my stepson, John Thomas Lewis, for and during the term of his natural life, but in the event of his death leaving issue said real estate shall go to and vest in said issue absolutely and in fee, but in the event of the death of John Thomas Lewis without issue then said real estate shall go to and vest in my stepson, Henry James Lewis, absolutely and in fee." A similar devise was made to Florence Lewis, now Florence Lewis Watson, for premises No. 4011 Blabon avenue. The husband, James William Lewis, is now dead, and the question is: What estates did the stepson, John Thomas Lewis, and the daughter, Florence Lewis Watson, take under these devises? The court held that the plaintiffs took an estate tail, which by the operation of the act of 1855 was converted into an estate in fee simple. He accordingly entered judgment for plaintiffs in the sum of \$4,500, being the amount which the defendant had agreed to pay for the real estate in question.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Hampton L. Carson, for appellant. George Bradford Carr, for appellees.

MITCHELL, C. J. It is notable that an act making so serious a change in the previous law has received so little attention as the act of July 9, 1897 (P. L. 213). It entirely changes the presumption which formerly was in favor of an indefinite failure of issue, and substitutes a statutory presumption that, in the absence of words indicating contrary intent, a definite failure is to be presumed. Its language is: "Section 1. Be it enacted, etc., that in any gift, grant, devise, or bequest of real or personal estate, the words 'die without issue' or 'die without leaving issue' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the death of such person, and not an indefinite failure of his issue, unless a contrary intent shall appear by the deed, will or other instrument in which such gift, grant, devise or bequest is made and contained." This is in accordance with the actual intent in the vast majority of cases, and is a legislative step in the direction in which this court has been tending, to restore to its proper place the cardinal rule that actual intent is to prevail. A strong argument was made to show that even under the old rule the intent here was to give the first taker only an estate for life. This is now supplemented by the statutory presumption, and leaves no room for ques-

tion. The attention of the learned court below, unfortunately, was not called to this act.

Judgment reversed

(223 Pa. 116)

**JUAN F. PORTUONDO CIGAR MFG. CO.  
v. VICENTE PORTUONDO CIGAR  
MFG. CO. et al.**

(Supreme Court of Pennsylvania. June 23, 1908.)

**1. TRADE-MARKS AND TRADE-NAMES — INFRINGEMENT AND UNFAIR COMPETITION.**

Where the trade-marks and labels employed by a cigar manufacturer, though not an exact reproduction of those used by another cigar manufacturer, bear such resemblance that it is impossible to reach any other conclusion than that they were designed from them, so as to mislead the unobservant, and with just enough variation to distinguish one from the other when comparison is made between them, the use of such trade-marks and labels may be enjoined.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 79, 81, 86.]

**2. SAME.**

Anything done by a rival in the same business, by imitation or otherwise, designed or calculated to mislead the public into the belief that in buying the product offered by him they are buying the product of another's manufacture, is in fraud of the other's rights, and affords ground for equitable interference.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 79, 81, 86.]

**3. SAME.**

Where a cigar manufacturer not only appropriated the name of another manufacturer, simulated his labels, marks, and designs, but addressed advertisements and circulars to the trade, in which claims were made calculated to create the belief, which was not the truth, that the cigars manufactured by him were the original, if not the only, cigars of a particular brand, he was guilty of unfair trade competition, entitling such other manufacturer to an injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 79, 81, 84, 86.]

**4. SAME—ACTIONS—DEFENSES—LACHES.**

The use of the name of a cigar manufacturer, whose cigars have become widely known thereunder, will be protected by injunction, as against another who bases its claim to the use of the name from a brother of the original manufacturer, who left his employment, started a similar business, wherein he used the family name, became a bankrupt, and thereafter assigned the right to use the name, though the brother had not been enjoined from using the name, and such other had spent large sums in extending its business under the name.

**5. SAME.**

The mere assignment of the family name by a brother of a cigar manufacturer, whose cigars had become widely known thereunder, without an assignment of any secret process or particular formula for making the cigars, is evidence that the assignment was in fraud of the manufacturer's rights, and is, in itself, sufficient to deprive the assignee of claiming any benefit from the doctrine of laches and estoppel.

**6. SAME.**

That plaintiff had been guilty of laches in allowing his brother to infringe his trade-mark and trade-name did not authorize an assignee of his brother so to do.

**7. ESTOPPEL—EQUITABLE ESTOPPEL—AIDING FRAUDULENT PURPOSE.**

The doctrine of estoppel is only applied to promote justice and fair dealing, never to aid a fraudulent purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 122.]

Elkin, J., dissenting in part.

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity for an injunction by the Juan F. Portuondo Cigar Manufacturing Company against the Vicente Portuondo Cigar Manufacturing Company and others. Decree for complainant, and both parties appeal. Affirmed on defendants' appeal, and reversed on plaintiff's appeal, and record remitted, with instructions.

The opinion of the trial court was in part as follows:

"In the disposition of this case the court has answered elaborate requests for findings of fact and law, in addition to making separate findings of its own. These answers and findings practically cover all the points involved, and for that reason we do not feel that the case requires extended discussion. The court is satisfied that to a considerable degree there was a studied effort on the part of Vicente Portuondo to imitate the markings, labels, and general method of dressing his goods that had been pursued by Juan F. Portuondo, and thereby to profit on the magic that had already been given to the name of Portuondo by his brother. When the business of Vicente Portuondo went into bankruptcy, the defendants in this case purchased the labels and other markings which had been used by Vicente, and their use was continued in a like manner by these defendants. In addition to this the defendants organized the defendant corporation under the name of 'The Vicente Portuondo Cigar Manufacturing Company,' and advertised their goods as the original 'Portuondo' cigar, using an imitation of the business signature of 'Juan F. Portuondo.' This course of dealing was such as to constitute that which is known in the law as 'unfair trade competition,' coupled with an infringement of a business name, and in some instances infringement of trade-marks, to such an extent as to entitle the plaintiffs to relief. But the question is as to the measure of the relief that should be given. The plaintiffs and their predecessor, with full knowledge of everything that was going on, have seen fit to rest on their oars, and to do nothing to protect their rights for a period of about 16 years. During this period the business of Vicente Portuondo grew and thrived, and subsequently declined and went into bankruptcy. The tangible assets were bought from the receiver in bankruptcy, and turned over to the corporation defendant in this case, which corporation also acquired, through an agreement executed by the said Vicente Portuondo, the right

to use the name of Vicente Portuondo, for which right they are now paying the widow of Vicente Portuondo a yearly allowance of \$2,000. The name of Vicente Portuondo was the lawful and proper name of that individual; and, after the individual Vicente Portuondo has been allowed the free use of his name for business purposes, without any practical protest, during this long and continued period of years, should a court of equity step in and use the strong hand of a chancellor to stop even a fair and proper use of the name by Vicente Portuondo if alive, or by the defendant corporation, under the agreement executed by him, now that he is dead? That is the question. In this connection it has been strongly argued by the defendants that the plaintiffs have been guilty of such gross laches in asserting their alleged legal rights that they are not entitled to any relief in equity, and many cases are cited to sustain this position. On the other hand, the plaintiffs cite authorities to the effect that long-continued acquiescence, or failure to act, in cases of infringement of trade-marks and of unfair trade competition, although amounting to unreasonable delay or inexcusable laches, will not bar the right to an injunction to stop the unfair and fraudulent conduct complained of, but will only act as a bar to the right to an accounting of profits. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828, approved in *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526. No Pennsylvania authorities, one way or the other, directly on this point have been presented, but the case of *Gowans v. Ahlborn*, 4 Kulp, 31, decided by Judge Rice when in the common pleas, follows the rule contended for by the plaintiffs. As this rule, laid down by the Supreme Court of the United States, has been followed by such an eminent Pennsylvania jurist as Judge Rice, and, farther, as the rule appears to be supported by reason, we consider it controlling in the case at bar. However, as has been well said by the present Chief Justice of the Supreme Court of the United States, in *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526: 'It is in the exercise of discretionary jurisdiction that the doctrine of reasonable diligence is applied, and those who seek equity must do it. A court might hesitate as to the measure of relief where the use by others for a long period, under assumed permission of the owner had largely enhanced the reputation of a particular brand.' So in a case like the present, where a brother, who is a cigarmaker, leaves the employ of his elder brother, who is likewise a cigarmaker, to start in the cigar manufacturing business for himself under his own name, and is allowed to continue the use of that name without practical protest for a period of upwards of 16 years, and where, toward the end of this long period, after business reverses, an arrangement is made to continue the use of his name in the cigar manu-

facturing business for his own benefit, and after his death for the benefit of his estate, by a payment of an annuity to his wife, and where, on the faith of this arrangement, large sums of money are paid out and invested by innocent third parties in order to thus continue the use of the name, even though it may appear that in the conduct of this business the younger brother had been guilty of certain distinct acts of unfair infringement of the elder brother's trade rights, which had been continued by his successor under a belief of right—in a case like this a court may well hesitate as to the measure of relief, and the relief to be given may very properly be measured in accordance with the circumstances, taking into consideration the long delay and the effect thereof.

"Of course it can be argued that the use of the name of Vicente Portuondo by the defendant corporation and the use of the labels and other markings by that corporation are a new use, against which the plaintiff corporation has proceeded promptly enough, and as a strict legal proposition such a contention might be maintained; but, on the other hand, it could as well be maintained that the use of the labels, name, etc., by the plaintiff corporation, dating from the time they acquired their rights from Juan F. Portuondo, would constitute a new use. But the eyes of a chancellor will see that in both instances the facts really constitute the continuation of a prior use, rather than the beginning of a new one. In considering the measure of relief to be given, it must be borne in mind that a certain business value was added to the name of Vicente Portuondo during this 16 years by perfectly fair means and business enterprise, as well as by the unfair means complained of. We cannot say, under these circumstances, that it is plain that Vicente Portuondo had no right in the use of his name. We can say, however, under our findings of fact in this case, that it is perfectly plain that he had been guilty of abuses in the use of the name by his acts of unfair trade conduct. These acts stand out plainly in themselves. They speak for themselves. They have been written down, and are therefore plain, and can be stopped in the future. Although a chancellor will not be keen to sort the good from the evil for the benefit of a slayer, yet the court may, in measuring its relief, do so for the benefit of third parties, whose rights are to be directly affected, where the plaintiff has been guilty of such gross laches as in this case. After this long lapse of years, where the rights of others have intervened, we are not inclined to grant an injunction that will act to restrain a fair and proper use of the name 'Vicente Portuondo' by the defendants in the conduct of their business, so long as no unfair or fraudulent trade use is made thereof. In other words, we do not feel called upon, under the circumstances of this case, to drive the defendants out of business and entirely

cut off the annuity of the widow of Vicente Portuondo, which happens to be her sole and only support. However, Vicente Portuondo would not have had the right during his lifetime to use his own name in the cigar business in such a manner as to deceive the public into the belief that his business and the business of his brother were one and the same, or to have attracted custom to himself on the belief that his product was the same product as that of his brother, nor to have made any other tricky, dishonest, and fraudulent use of his own name, calculated to decoy the purchasing public under a misapprehension as to the real facts; nor would he have been allowed to use the name 'Portuondo' standing alone, as against his brother, Juan F. Portuondo, after that brother had built up a particular and general reputation for a brand of cigars known as the 'Portuondo cigars,' and such a use of the name would have been restrained against Vicente Portuondo if alive, and will now be restrained against others claiming under him. The use of the signature of Vicente Portuondo, which is an imitation of the Juan F. Portuondo signature, and the use of the labels, which are an imitation of the Juan F. Portuondo labels, as found by the court in its findings of facts in this case, will be restrained; and, further, defendants will be restrained from the use of the signs, circulars, and affidavit complained of by the plaintiffs, which have been, and are now, being used in an unfair manner.

"The Exhibit F in plaintiffs' bill has elements of unfair trade competition about it which must be discontinued by the defendants, but we will not restrain the use of the picture of the head and shoulders of Vicente Portuondo. In this connection we will say that, although plantation scenes were to a degree, and no doubt still are, in common use upon the labels in the cigar trade, still, the predominant features in the plantation scene used by the plaintiff are the negro with a hoe, occupying a particular pose, the overseer with an extended arm, and the particular low house in the rear of the scene, and the general color effect. These features immediately attract the eye, and whether the overseer is put on horseback or on foot, or the negro with this particular pose is put on one side or the other of the overseer, makes but little difference. The plantation label of the defendants in several respects is plainly an imitation of this plantation label of the plaintiffs, and its use must be discontinued as it now is, or in any other form using these particular features.

"It has been urged that many of the features on the cigar box of the plaintiffs, such as the word 'Chico,' the oval mark on the top, the red and yellow paper around the edges, are markings common to many cigar boxes in general use, and, therefore, no complaint should be made of their use by the defendants in this case. While this is true, it is also true that, when we find these marks of similarity between the two boxes, together

with the other imitations of labels, imitation of particular wordings, and the plain imitations of the signature of Juan F. Portuondo—all these things taken together justify the finding of unfair trade conduct on the part of the defendants. Of course the defendants have the right to use the word 'Chico,' but in doing so it is not necessary for them to use exactly the same type as the plaintiffs have used, nor to place it on their boxes in exactly the same position relatively to the name of the manufacturer, as the plaintiffs happen to do. We would say that the defendants also have the right to use an oval mark, but in doing so care should be taken not to have it so much like the oval mark of the plaintiffs that the one would be readily taken for the other. The yellow and red edgings are stock trimmings in general use, but, taken with the other imitations of plaintiffs' boxes, their use by the defendants, although possibly without any particular unfair intent, appears suspicious.

"The name of the defendant corporation, 'The Vicente Portuondo Cigar Manufacturing Company,' is plainly and unquestionably an infringement on the business name of the plaintiff corporation, and will be restrained as such. It was not necessary for the defendants to have taken exactly the same words, and the same arrangement of words, so far as at all possible under the circumstances, in order to have found a name for their corporation; but this they have done, as plainly appears by arranging the name of the defendant corporation under that of the plaintiff corporation, thus:

The Juan F. Portuondo Cigar Manufacturing Company  
The Vicente Portuondo Cigar Manufacturing Company

"Such a similarity in names is in prejudice of the plaintiffs' right and will be enjoined as an infringement on the business name of the plaintiff corporation. The plaintiffs are entitled to relief to the extent indicated in this opinion and in the findings in this case, and to that extent only.

"The chief point of similarity between the markings of the boxes of the defendants and those of the plaintiffs are present and are most noticeable in certain of the 'Chico' size boxes, where the coloring of the labels is the same, with the exception of the caution notice, which on the plaintiffs' box is printed in red, while on the box of the defendants it is printed in blue. However, the whole dressing and general appearance of these two boxes is so similar that an ordinarily careful person using due caution would be likely to be misled into buying one cigar for the other. With certain exceptions, as particularly pointed out in the findings of fact, the new box of the defendants, with the picture of Vicente Portuondo thereon, has but few unfair markings or trimmings, but it is not shown in the testimony how extensively this new box is being used, or to what extent the old box has been abandoned. The adoption of

this new box, although to a degree a meritorious act on the part of the defendants, cannot be viewed without seeing therein a show of appreciation on their part of the fact that they had been guilty of certain features of imitation in their old boxes, which were to be replaced by these new ones, and, again, the placing of the word 'Registered' on the plantation label of the defendants, when, in point of fact the label was not duly registered, looks suspiciously as though the defendants themselves appreciated the fact that they had no real right to register that particular label, as in its essential features it was an imitation of the duly registered plantation label of the plaintiffs. We have not overlooked the testimony as to the words 'Five cent straight' marked on the inside ends of plaintiffs' Chico box, and the like marking on the defendants' box (Plaintiff's Exhibit 33), nor have we overlooked the use of the brown bands around the cigars of the defendants, which are like those used by the plaintiffs. But we have not been able to find any testimony to justify a finding that the plaintiffs or their predecessors adopted or used those markings prior to their use by the defendants or their predecessors.

"In reaching our conclusions in this case the letters put in evidence at page 25 of the notes have not been considered. These letters were offered together in three files, containing a large number of miscellaneous written orders, for the purpose of showing that the goods of the plaintiffs were therein referred to as 'Portuondo' cigars, so that the inference might be drawn therefrom that the plaintiffs' cigars were popularly and generally known by that name. The fact sought to be thus established is relevant, and the character of proof offered is competent, but the documents relied upon as proof in this instance were neither properly identified, nor was their history sufficiently shown, to justify the admission thereof as evidence in the case. The court further states that of all the depositions offered, at pages 6-9, and again at pages 128-131 of the notes, only the deposition of Vicente Portuondo has been considered. That particular deposition is competent as a declaration against interest, but the other depositions are not competent evidence at all in the present case. The several features of unfairness which have been pointed out, the infringement on the plantation trade-mark, and the imitation signature, must all be abandoned by the defendant corporation, and the name of that corporation must be changed so as not to infringe on the title of the plaintiff corporation. With these changes, there is not any reason why both concerns should not live and indulge in fair and honorable business competition.

"And now, July 3, 1907, it is ordered, adjudged, and decreed that the Vicente Portuondo Cigar Manufacturing Company, Charles H. Kors, Louis Weinberg, Theodore R. Goodwin, and Nathan Schwab, the defendants, and

each of them, and their and each of their servants, agents, salesmen, and all persons in privity with them, or any of them, be and they are hereby perpetually enjoined as follows:

"(1) From using, in connection with the manufacture, sale, or advertisement of cigars, upon packages, boxes, cards, plates, or otherwise, any representation exactly or colorably simulating the trade-mark of the plaintiffs, the Juan F. Portuondo Cigar Manufacturing Company, called the 'La Flor de Portuondo' mark, consisting of the word symbol 'La Flor de Portuondo,' said mark being registered in the United States patent office, August 11, 1885, No. 12,500; also registered in the United States patent office, December 19, 1905, No. 48,271; also registered in the office of the Secretary of the commonwealth of Pennsylvania, January 23, 1906.

"(2) From using, in connection with the manufacture, sale, or advertisement of cigars, upon packages, boxes, cards, plates, or otherwise, any label, mark, picture, impression, or representation exactly or colorably simulating the trade-mark of the plaintiffs, the Juan F. Portuondo Cigar Manufacturing Company, called the 'Matador,' said mark being registered in the United States patent office, August 11, 1885, No. 12,499; also registered in the United States patent office, December 26, 1905, No. 48,428; also registered in the office of the Secretary of the commonwealth of Pennsylvania, January 29, 1906; also registered in the office of the Secretary of State of Illinois, October 10, 1901, and there recorded in Trade-Mark Record, p. 155.

"(3) From using, in connection with the manufacture, sale, or advertisement of cigars, upon packages, boxes, cards, plates, or otherwise, any label, mark, picture, impression, or representation exactly or colorably simulating the trade-mark of the plaintiffs, the Juan F. Portuondo Cigar Manufacturing Company, called the 'Plantation Scene' mark, said mark being registered in the United States patent office, December 29, 1885, No. 12,879; also registered in the United States patent office, December 19, 1905, No. 48,272; also registered in the office of the Secretary of the commonwealth of Pennsylvania, January 23, 1906; also registered in the office of the Secretary of State of Illinois, October 10, 1901, and there recorded in Trade-Mark Record, p. 154.

"(4) From using, in connection with the manufacture, sale, or advertisement of cigars, upon packages, boxes, cards, plates, or otherwise, any label, mark, picture, impression, or representation exactly or colorably simulating the personal signature of Juan F. Portuondo, or the name 'Vicente Portuondo' in script, with a dash thereunder. [Exhibit D of bill, and described in the eighteenth finding of fact by the court in the adjudication filed in this case.] Or the corporate title 'The Vicente Portuondo Cigar Manufacturing Company,' or the words 'genuine Port-



uondo,' without the word 'Vicente' in connection and immediately before the word 'Portuondo,' such word 'Vicente' to be in the same size and style of type as the word 'Portuondo,' or the word 'original' in connection with 'Portuondo,' or the advertisement set forth in the court's thirty-seventh finding of fact, or the word 'Chico' on cigar boxes in simulation of the style or size of type used by the plaintiffs in its word 'Chico,' or the words 'Trade-mark registered,' on any matter excepting where actual registry thereof has been made, or a label in general imitation of the plaintiffs' end label, or inside label, or the particular small white label on the front of defendants' box, with the words 'The genuine Vicente Portuondo cigars are strictly Cuban hand made, and bear this label and signature Vicente Portuondo' [described in finding of fact 54 by the court in the adjudication filed in this case], or the words 'none genuine without the signature of Vicente Portuondo' [described in finding of fact 46 by the court in the adjudication filed in this case], or the 'Trade Warning Advertisement' set forth in the court's finding of fact No. 39, or the affidavit set forth in the court's finding of fact No. 40, or the words 'Only survivors of the originators making the famous Portuondo cigars,' or the words 'the late Joseph M. Portuondo, the founder of the famous brand of Portuondo cigars,' either alone or in combination with any other word or words, or any word or words, device or devices, color or colors, letter or letters, mark or marks, of like import or so similar to any of the foregoing, as to be calculated to deceive.

"(5) From using, for any purpose whatever, the word 'Portuondo,' unless immediately preceded by the word 'Vicente,' in the same size and style of letters as the word 'Portuondo.'

"(6) From using any box, or boxes, similar in general dress and style to the boxes marked and described in the adjudication as 'Plaintiffs' Box,' 'Defendants' Box 1,' or 'Defendants' Box 11,' excepting that the defendants may use the stock edging referred to in the adjudication, and an oval mark on the top of the box, such mark not to contain lettering made to imitate the general effect of the mark on plaintiffs' box.

"(7) From holding out or representing in any way that the goods manufactured by the defendants are the same as those manufactured by the plaintiffs.

"(8) From authorizing, doing, writing, speaking, or uttering any other act, matter, or thing calculated to cause confusion between the goods of the plaintiffs and the goods of the defendant, with the intention of thereby entering into and indulging in unfair trade competition against the plaintiffs.

"(9) This decree in its operation is expressly limited to cigars sold by the defendants after the date of the entry hereof, and is not to affect cigars in the hands of the defend-

ants' customers delivered before the date of this decree; the decree to be operative on all cigars manufactured by the defendants, or any of them, after the date of the decree, and on all cigars sold by the defendants, or any of them, after the date of the decree.

"(10) The defendants are to pay the costs of this proceeding, with the exception of the witness fees; each side to bear the cost of its respective witness fees."

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

C. Andrade, Jr., and John E. Faunce, for the Juan F. Portuondo Cigar Manufacturing Company. John C. Bell, Samuel W. Salus, and Adolph Eichholz, for the Vicente Portuondo Cigar Manufacturing Company and others.

STEWART, J. Neither party to this controversy is satisfied with the result reached in the court below, and as a consequence we have here two appeals from the same decree. We shall consider first that of the defendants in the proceeding below. Separate reference to each of the 77 assignments of error would be impracticable. Fortunately the case does not require it. More than three-fourths of them relate to the findings of fact by the court, and the complaint, with respect to each, is that it is not supported by the evidence. Following closely the line indicated by each assignment, we have very carefully examined the evidence in the case. From the specific findings, 71 in number, the learned court reached the general conclusion that there was, on the part of Vicente Portuondo, a studied effort to imitate the markings, labels, and general method of dressing his goods that had been pursued by Juan F. Portuondo, with a view to profit on the magic that had already been given to the name of Portuondo by his brother; and that his course of dealing was such as constituted what is known in law as "unfair trade competition," coupled with an infringement of the business name, and, in some instances, infringement of trade-marks to such extent as to entitle the plaintiff to relief. This general finding can be understood and applied only as certain facts connected with the history of the case are made known. Juan F. Portuondo engaged in the manufacture of cigars in the city of Philadelphia as early as 1869. In 1885, in order that his product might be distinguished from that of other cigar manufacturers, he adopted certain labels which, being duly registered, became his peculiar trade-marks, and these he used upon the goods made in his establishment. The cigars manufactured by him came to be known to the trade throughout the United States as La Flor de Portuondo, after one of the adopted trade-marks, or Portuondo cigars, and are so generally referred to by the purchasing public. In January, 1893, the Juan F. Portuondo Cigar Manufacturing Company,

plaintiff, having been incorporated, Juan F. Portuondo assigned to it the manufacturing business conducted by him, together with all the rights therein, including trade-marks, copyright labels, and everything else connected therewith. Up to the time of his death in 1906 Juan F. Portuondo was president of this company, and owned a very large majority of stock interest therein. The company has continued uninterruptedly to the present in the business for which it was organized. Vicente Portuondo, a brother of Juan F. Portuondo, had been employed by the latter in his factory up to 1890, when, quitting his employment there, he engaged in the cigar business with a partner, under the trade-name of Vicente Portuondo. Four years later, in 1904, Vicente Portuondo filed a voluntary petition in bankruptcy, and, having been adjudged a bankrupt, his property passed to the trustee. Within three days thereafter, by agreement in writing, he sold to the individual appellants, for the use of the Vicente Portuondo Cigar Manufacturing Company, the other appellant, a corporation to be formed later, and which was duly incorporated under the laws of New Jersey, April 28, 1904, the right to use the name "Vicente Portuondo," in the title of the proposed corporation. In May, 1904, defendant corporation purchased from the receiver in bankruptcy the entire stock and fixtures, including the labels and stationery of the business of Vicente Portuondo. The bill filed in the case charged an improper and illegal use by defendants of labels on their manufactured goods, which infringed upon trade-marks of the plaintiff an improper use of the name "Portuondo," and a general course of unfair trade on their part towards the plaintiff, resulting in great loss to the latter.

It may be conceded that some of the specific facts found by the court are fairly disputable; but none are without support in the evidence, certainly none which might be regarded as material. The findings, with respect to those disputable, are not open to review, except as manifest error is shown, and that is not the case with respect to any of them. Were these to be passed by without consideration, there would be still enough facts in the case, clearly established, to sustain the final conclusion of the court, as above stated. The trade-marks, labels, and indices employed by Vicente Portuondo speak for themselves. They were not a servile and exact reproduction of those used by Juan F. Portuondo, of whom the plaintiffs are the successors in right, but they bear such resemblance that it is impossible to reach any other conclusion than that they were designed from them, with not too much variation to prevent them from being accredited by the unobservant and unwary as the proper marks and labels of Juan F. Portuondo, intended to identify the goods of his own special manufacture, and with just enough variation to distinguish one from the other when compari-

son was made between them. Except as both were exposed to one at the same time, so that opportunity for comparison was afforded, either could readily be taken for the other. This was not accidental, could not have been, but was evidently the result of careful and studied effort. It is wholly immaterial in this connection that the labels and marks used by the defendants were the same that had been devised and used by Vicente Portuondo. The fact that he had not been enjoined from using them conferred no right upon appellants to use them. They were as much infringement under his use as under theirs.

That the course of dealing pursued by Vicente Portuondo and the defendant company, in the manufacture and sale of their goods, was unfair trade competition, coupled with infringement of business name and trade-marks, is made equally evident. This finding is not dependent upon any fact open to question. The appropriation of name, the use of simulated labels, marks, and designs, would in themselves be sufficient to warrant this finding; but it has far more to rest upon. The advertisements and circulars addressed to the trade by the defendants, in which claims are made calculated to create the belief that the cigars manufactured by the defendant company are the original if not the only, Portuondo cigars, furnish convincing proof that, however excellent in quality defendants' manufactured product was, for their general acceptance in the market defendants depended far more upon the Portuondo association than upon the excellence of the goods. Value was given the name "Portuondo" in association with cigars, and the trade-marks and labels adopted by Juan F. Portuondo were used to distinguish cigars of his manufacture from others in the general market. The general rule is that anything done by a rival in the same business, by imitation or otherwise, designed or calculated to mislead the public in the belief that in buying the product offered by him for sale they were buying the product of another's manufacture, would be in fraud on that other's rights, and would afford just ground for equitable interference. That is the case here. With respect to the measure of relief afforded the plaintiff by the restraining decree of the court, the defendants in the bill have no ground for complaint. It deprives them of nothing that they are entitled to; it simply protects the plaintiff company in the exclusive enjoyment of what it has shown itself to lawfully own. The exceptions in this appeal, No. 397, January Term, 1907, are overruled.

We come now to consider the appeal of the plaintiff company. Here the complaint is that the decree comes short of giving the plaintiff the full measure of protection to which it is fairly and justly entitled under the evidence. The bill asked that defendants "be restrained from using on cigars, or in relation thereto, or in connection therewith,

or in the advertisement or sale thereof, the words 'Vicente Portuondo or Portuondo Cigar Manufacturing Company,' or any colorable imitation thereof, either alone or in connection with other words or phrases." The decree, while enjoining defendants from using any of the distinctive trade-marks of the plaintiff, or devices colorably simulating them, restrains, with respect to the use of the name "Portuondo," no further than to require that when used, it shall be immediately preceded by the name "Vicente," in the same size and style of letters as the word "Portuondo." It is quite evident, from the opinion filed by the learned judge who sat as chancellor, that but for supposed equitable considerations having regard to the delay on the part of the plaintiff to assert its claim to the exclusive use of the name, and the amount expended by the defendants in establishing their business under the corporate name of the Vicente Portuondo Cigar Manufacturing Company, the full measure of protection asked by the plaintiff would have been afforded. While defendants claim a legal right to use the name "Portuondo" under and by virtue of their agreement with Vicente Portuondo, the court bases its denial of the relief asked for by plaintiff on no such grounds, but upon purely equitable considerations. Since the appeal in all such cases is to the discretionary jurisdiction of the chancellor, such considerations as these have their proper place in the inquiry; but the question must always be as to the weight to be allowed these under the facts of the particular case.

The findings show an exclusive original right to the use of the name, in connection with the manufacture of cigars, in Juan F. Portuondo, a legal transfer of that right to the plaintiff company, and continued prejudicial infringement of such right by the defendants. The thirty-second finding is as follows: "The name adopted for this defendant corporation, to wit, The Vicente Portuondo Cigar Manufacturing Company, is so similar to the title of the plaintiff corporation that it is likely to, and has, deceived the public, and thereby created a confusion between the goods of the plaintiff and of the defendants, and has thereby enabled the defendants to profit by the good reputation of the plaintiff and its predecessors, and at the expense of the plaintiff in the cigar trade. The combination of words used in this name constitutes an infringement upon the business name of the plaintiff corporation." A very careful review of all the evidence in the case has satisfied us of the correctness of the findings of the learned judge. We have been aided much, in our investigation of the case, by the orderly and logical manner observed in stating these, and the clearness and conciseness with which they are expressed. Accepting the facts as found, we are to inquire only into these considerations which influenced the court to deny the plaintiff the full

measure of relief, which upon the facts as we have stated them above it would seem to be entitled to. These considerations are of a purely equitable nature. They are, first, laches on the part of the plaintiff in asserting its right to the exclusive use of the name "Portuondo" in its business; and, second, the loss that would result to the defendants in view of the large expenditure made relying upon their right to the use of the name.

That the plaintiff here is chargeable with laches, is an inference derived by the chancellor from certain facts which admit of no dispute. Vicente Portuondo, in the conduct of his separate business, until bankruptcy overtook him in 1894, persistently made use of the name "Portuondo," in a way that was clearly an infringement of the rights of Juan F. Portuondo. This was well known to the latter, who made no attempt by legal proceeding to restrain such continued use by Vicente. It does not appear that the defendant company has to any considerable degree, if at all, enlarged upon the use of the name; but it does clearly appear that it has continued to do all that Vicente did in this regard. Were this a proceeding by Juan F. Portuondo to restrain Vicente from using the name, a chancellor might be justified in calling upon the former for some excusing explanation of his inactivity in asserting his exclusive right during all this time. We do not say that a failure in this regard would necessarily defeat his right to the protection asked, but it would certainly be a circumstance to be considered in adjusting the equities of the parties. Suppose, however, it did so result, the refusal of the court to interfere could not be construed into a recognition of any right, on the part of Vicente, to the use of the name. Any discussion of this case must start with the accepted fact that the original, exclusive right was in Juan F. Portuondo. This right in him was property as much entitled to protection as any other species of property. He, and he alone, could invest another with any right in connection therewith. He might, by indifference and inactivity, forfeit his right to claim the protection of the law against someone's invasion, and this incidentally would result in an unearned advantage to the invader, but it would invest the latter with no right in the property itself. While the latter would be secured against legal interference with his use of another's property, he would have no right in the property itself which he could sell or assign to another, or which he could assert against another attempting to make common use of it with himself. His exemption from legal interference would be purely incidental to the owner's forfeiture of right, and would be personal to himself. The mere fact that the right to protection against all other infringers would remain with the original owner, and no such right against any one in the world could be claimed by the infringer, shows in a most conclusive way that

no right of property could have been acquired by the latter. So that even though Juan F. Portuondo must have failed in any attempt to restrain Vicente from using the name in connection with his business, that fact, accepting it as a fact, establishes no right in Vicente to the thing itself. When he went into bankruptcy, and later when he attempted to sell to the defendant company the privilege of using the name in its business, the sole and exclusive ownership of the property was in those who had acquired it from and through Juan F. Portuondo, without other qualification than that the right to exclusive enjoyment of the thing, as against Vicente, might not be enforceable at law, because of laches on the part of the former owner. The defendants are here claiming, not an immunity from interference, but a right to property derived through purchase from Vicente Portuondo. As we have tried to show, the latter had no property right in the business name, and therefore could convey none. By what principle of law or equity could any one succeed to his immunity from interference by the lawful owner? His was no right, and therefore was not anything that could be transferred. It results, we think necessarily, that the defendant company is in no better position to claim advantage from plaintiff's laches with respect to Vicente than any other infringer would be. It will not be contended that the indulgence shown his brother in this regard interfered with Juan F. Portuondo's right to protection against other infringers; and yet, if one could have succeeded to the immunity allowed Vicente, because of an assignment from him, why not a dozen, or for that matter a hundred or more, to the utter destruction of all value in the plaintiff's rights? We allow the tacking of an adverse possession of the land, by an occupant without right, to the subsequent possession of a purchaser, to form a bar by the statute of limitation; and this may have suggested the application of like method here by analogy, but we are not dealing with the statute of limitations, but with an exemption from legal disturbances which, no matter how long enjoyed, could never ripen into a legal right or title. For the reasons stated we are of opinion that, however guilty of laches Juan F. Portuondo may have been in allowing his brother Vicente to continue undisturbed in the use of the business name "Portuondo," such laches can avail the defendants nothing, and ought not to be considered in connection with their present claim.

The other question, while not one of estoppel, is closely akin to it, since it is allowed a determining effect in measuring the relief the plaintiff is entitled to, by the application of like principles. The defendant corporation, in its attempt to acquire a right to the use of the name "Portuondo," and in various ways enlarging its manufacturing facilities and expanding its trade, has expended large sums

of money. These expenditures have been made in the honest belief that their right to employ the name "Portuondo" was absolute, and by its use of the name the business of the company has increased to a profitable degree. A denial of this right at this time would most probably result in loss to the company, hardly, however, to the extent apprehended by the learned judge, of driving it out of business. But these facts alone can create no equity in the defendants. They can avail to this end only as it is shown that the plaintiff was guilty of such negligence, in failing to assert its adverse title to the exclusive use of the name, as to lead the defendants into a mistaken belief, and that in making their expenditure defendants acted upon such mistaken belief to their prejudice. Open affirmative encouragement on the part of the plaintiff is not pretended; encouragement by silence is what is relied upon. But what was there in the situation that imposed on the plaintiff any duty to speak out? It was an established corporation, doing an extensive business, employing the name of Portuondo, not only in its corporate title, but on the several brands of its manufactured product. All this must have been known to the defendants, who were proposing to establish a like business in the same city, through a corporation to be chartered in a foreign state, under a corporate title which would give marked prominence to the name "Portuondo." Plainly here was duty resting on the defendants to make inquiry as to their rights with respect to a name thus publicly and widely employed by another. We find no corresponding duty resting on plaintiff to give warning to the defendant, for the sufficient reason, if for no other, that it does not appear, certainly there is no finding to that effect, that plaintiff had any knowledge of the contract between defendants and Vicente Portuondo until after it had been formally executed, or any knowledge of defendants' purpose to purchase the stock of Vicente, or to establish a rival corporation, with title liable to be confused with its own. Not only was there no duty on plaintiff to speak out any more distinctly than it was doing through the fact of its incorporation, but no opportunity was afforded it. Besides, it is very evident that this silence on the part of the plaintiff was not at all considered by the defendants, and in no wise induced their action. Having discussed these equitable considerations which influenced the court to deny the plaintiff the full measure of relief it asked, and having concluded that too much weight was given them, we might rest the case here; but it presents a feature which seems to have been overlooked, and which, because to our mind it outweighs every consideration of the prejudice that would result to defendant from a restraining decree, calls for some reference. Briefly, it is this: The use by the defendant company of the name "Portuondo" is consistent with no

honest purpose that we can discover. Defendants rest their right to the use of it on their contract with Vicente, now deceased. That contract did not introduce him as a party in the proposed business enterprise, nor did it pretend to do more than give to the defendants the right to use the name "Portuondo" in the corporate title. It gave to the defendants no trade secret, nothing that would require or enable them to manufacture for the market a product corresponding in peculiar quality to the cigar made by Vicente Portuondo, and which had given that cigar its special value, and made for it a distinct market. To what end did the defendants desire the name? What that peculiar quality in the Vicente Portuondo cigar was we of course do not know, but that it characterized and distinguished this cigar from others is manifest from the extent of the public demand for it. The name stood as a pledge for this particular quality so long as Vicente was engaged in the manufacture, and equally a pledge that the cigars bearing his name were of his own manufacture. Neither in the contract, nor in any part of all this voluminous testimony, is there even a suggestion that defendants could produce cigars with this distinguishing quality. And yet they are to-day engaged in marketing a product of their own which the public is given to understand are Portuondo cigars. If the cigars manufactured by them have any claim to be called Portuondo cigars, other than because they are made by a corporation under a corporate name which includes the word "Portuondo," we have failed to discover it. The facts are pregnant with suspicion that the purpose in acquiring

the name, was to mislead and deceive the public into the belief that the cigars made by the company were made, if not under the supervision of Vicente Portuondo, at least after a formula adopted and used by him, and to which the company had succeeded. In this connection it is to be borne in mind that the doctrine of estoppel is only applied to promote justice and fair dealing, never to aid a fraudulent purpose. Before defendants would be entitled to any benefit whatever of this doctrine to save them from loss, they would at least have to acquit themselves of the suspicion of fraudulent purpose, which their transactions naturally excite. Apart from the circumstance here considered, our conclusions as to the equities of the case would be the same. We have referred to it only as a matter calling for at least equal consideration with those relied upon by the court. In our judgment it makes largely against the defendants in any attempt to balance the equities between the parties.

For the reasons stated in the opinion, the appeal of the defendants to No. 397, January Term, 1907, is dismissed, at the cost of appellants. The appeal of plaintiff, No. 306, January Term, 1907, is sustained, and it is ordered that the record be remitted to the court below, with the instructions that it be amended and enlarged, so as to restrain the defendant from making any use whatever of the name "Portuondo" in connection with the manufacture and sale of cigars; the cost on both appeals to be paid by the defendants.

ELKIN, J., dissents in No. 306, January Term, 1907.

(74 N. J. E. 587)

## SCRYMSER et al. v. SEABRIGHT ELECTRIC LIGHT CO.

(Court of Chancery of New Jersey. Oct. 6, 1908.)

## 1. DEEDS (§ 172\*) — RESTRICTIVE BUILDING COVENANTS—FACTORIES—ELECTRICITY.

An electric light station, with the necessary incidents attending its operation, is a factory, within a restrictive building covenant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 547; Dec. Dig. § 172.\*]

## 2. DEEDS (§ 172\*) — RESTRICTIVE BUILDING COVENANTS—SCOPE.

Under a restrictive covenant, pursuant to a general building scheme in a residential district, excluding factories, no distinction can be drawn between manufacturing businesses in existence when the scheme was adopted and those thereafter coming into existence.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 172.\*]

## 3. DEEDS (§ 197\*) — RESTRICTIVE BUILDING COVENANTS—FACTORIES—BURDEN OF PROOF.

If any special and restricted use of an electric light plant would alter its character as a factory, within a restrictive building covenant, the burden was on the light company to prove it.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 197.\*]

## 4. ESTOPPEL (§ 110\*) — PLEADING—NECESSITY.

Defendant must plead an estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.\*]

Bill by James A. Scrymser and others against the Seabright Electric Light Company. Decree for plaintiffs.

John W. Slocum and Frank P. McDermott, for complainants. Edmund Wilson, for defendant.

STEVENSON, V. C. This cause, which long ago, I understand, ceased to contain anything of practical importance to the parties, in view of the removal of the electric light plant of the defendant company from the Monmouth Beach property, may be very briefly disposed of.

1. The complainants, when the bill was filed, were entitled to an injunction restraining the defendant company from continuing the common-law nuisance, the existence of which, in my judgment, was fully proved. Before the defendants filed their answer the nuisance was probably abated, and long ago entirely ceased, when the defendant ceased to operate any plant within the limits of the Monmouth Beach tract. The form of the injunction, so far as it restrains a common-law nuisance, will probably not give rise to dispute between counsel.

2. The only matter remaining for determination is whether, at the time of the filing of the bill, the complainants were entitled to an injunction restraining the defendant from operating their power plant for electric lighting on their lots situate within the limits of the Monmouth Beach tract. The test question is a very narrow one, viz.: Is or is not an electric light station, with the usual

equipment of boilers, engines, and dynamos, a manufactory, within the meaning of the covenant and "scheme" which the complainants advance as the basis of this branch of their claim for relief? The covenant and scheme are all exhibited in the report of the case of *De Gray v. Monmouth Beach Club House*, 50 N. J. Eq. 329, 24 Atl. 388. In my judgment it is useless to go into speculative questions as to the nature of electricity or the nature of the product, if there be a product, of the electric plant which the defendant operated at the time of the filing of the bill. At different periods in the history of electrical discovery very different views have been entertained on this subject. At one time this plant might have been regarded as a manufactory of a "fluid." More recently it might be deemed to be turning out electrons or ions. All speculation is stopped, I think, by the recent decision of the Court of Errors and Appeals in the case of *Bates Machine Co. v. Trenton & N. B. R. R. Co.*, 70 N. J. Law, 684, 58 Atl. 935, 108 Am. St. Rep. 811, and the cases cited in the opinion of the Court delivered by Mr. Justice Garrison. This recent decision seems to me to answer the question in regard to the character of the defendant's plant, which has been argued in this case, in favor of the complainants. This electric light station, with the necessary incidents attending its operation, is in my judgment as clearly a manufactory within the meaning of this protective covenant, as it is a manufactory within the meaning of the mechanic's lien law. If a distinction can be made in favor of the defendant in this case, I think that it should be left to the higher court to draw such distinction.

It may be conceded that when this covenant was framed and the Monmouth Beach "scheme" was promulgated, about 35 years ago, the "manufactory" of electricity in electric light stations was unknown. In view of the annoyance and discomforts which it was the intention of the scheme to exclude from this large residential district, no distinction can be drawn between manufacturing businesses which were in existence when the scheme was promulgated, and manufacturing businesses which might thereafter come into existence. It should be noted, I think, that no effort was made by the defendant to show that the electric lighting which the defendant proposed to effect by means of the operations carried on at its station lay wholly within the limits of the Monmouth Beach tract. The evidence, I think, indicated otherwise. However that may be, when the general character of the defendant's plant of boilers, engines, and dynamos was proved, if any special and restricted use of the plant would alter its character within the purview of the covenant, it was incumbent upon the defendant to make proof of that fact.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. Counsel for defendant at the argument endeavored to set up as a defense an alleged estoppel on the part of the complainants. It is sufficient to dispose of any such defense to point out that it is not set up, or even suggested, in the answer.

The complainants are entitled to costs.

(76 N. J. L. 402)

**ROYAL MFG. CO. v. BOARD OF EQUALIZATION OF TAXES OF NEW JERSEY et al.**

(Supreme Court of New Jersey. Oct. 30, 1908.)  
**TAXATION (§ 496\*)—EXCESSIVE VALUATION—EVIDENCE.**

On certiorari to a valuation for taxation of a manufacturing property as excessive, evidence examined, and held to justify the valuation complained of.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 906; Dec. Dig. § 496.\*]

(Syllabus by the Court.)

Certiorari by the Royal Manufacturing Company against the board of equalization of taxes of New Jersey and others to review an assessment. Judgment affirmed.

Argued February term, 1908, before REED, PARKER, and VOORHEES, JJ.

Tennant & Haight, for prosecutor. Francis V. Dobbins, for defendants.

PARKER, J. The proceedings in this case are for the purpose of obtaining a review by this court of an alleged excessive valuation for taxes in the year 1906 of a manufacturing property belonging to the prosecutor in the city of Rahway. After the original valuation by the local assessor the property was revalued by the county board of taxation, and from the new valuation by that board an appeal was taken to the state board of equalization of taxes, which affirmed the valuation. The prosecutors then sued out a writ of certiorari, addressed to the mayor and common council of the city of Rahway; but, as it appeared in the record submitted to this court at that time that there had been a determination by the state board of equalization of taxes on the very question, and the proceedings and finding of that board were not brought up by the writ, the whole matter was sent back for the purpose of adding those proceedings and that finding to the record. *Royal Manufacturing Company v. Rahway* (N. J. Sup.) 67 Atl. 940. A second writ of certiorari was thereupon sued out, and the state board was directed by rule of court to certify with the return the facts found by that board on the appeal taken, and the grounds for its determination. Accordingly the board returned the record of the appeal, and certified that it had found as a fact that the valuation complained of "was not in its judgment in excess of what the property would have sold for at a fair and

bona fide sale by private contract on May 20, 1906" (the date for assessing), and accordingly had dismissed the appeal and had affirmed the assessment, but that no record of the evidence was kept. Upon this return this court consolidated the two writs and gave the parties leave to take depositions to show what facts were proved before the state board, as a preliminary to examining the evidence taken under the first of the two writs. A number of depositions were taken under this rule to show what witnesses had testified before the state board and what their testimony had been. Objection was made to this manner of proof; but, as all the facts claimed to have been presented to the state board are before us in other aspects, the point is not important.

There was, of course, no hearing before the local assessor, and there was no hearing before the county board. The original assessment made by the city officials was \$3,000 for the land and \$12,000 for the buildings, including a house. The county board, in the performance of the duty laid upon it by law of revising valuations throughout the county, employed a professional builder to examine this and other factory plants, and on his report raised the valuation of the buildings to \$46,800, leaving the valuation of the land unchanged; and it was from this valuation that the appeal was taken to the state board, which, after hearing the testimony above referred to, gave judgment as already stated. The prosecutor now makes two claims: First, that the assessment is in excess of assessments levied against other properties in Rahway, the true values of which, respectively, are greater than the true value of the property of the prosecutor; secondly, because the assessment in question is in excess of the true value of the property.

A number of reasons are advanced, but they all are fairly comprised within these two, excepting one point with regard to the alleged rejection of evidence by the state board, which will now be disposed of with the first reason. So far as this claim is concerned, viz., that there are other properties in Rahway worth more than this one and valued at less, this would be a good ground for pressing for an increase of valuation for the other properties, but not for reducing the valuation of the property in question. Any taxpayer, who considers that other property in the same tax district is undervalued, is entitled to go to the county board and apply to have the valuation of such other property raised. P. L. 1906, p. 212, § 3; *Laffin & Rand Powder Company v. Township of Wayne* (N. J. Sup.) 68 Atl. 909. Since the passage of the act creating a county board of taxation (P. L. 1906, p. 210), there has been no legal warrant, if there ever was any, for scaling down valuations of taxable property in this state by adopting a uniform percentage of actual val-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ue, although such was the general practice for years. By that act the county boards are required to secure taxation of all property at its true value; so that the fact that the property of A. is assessed at its true value, and the property of other taxpayers within the same district is assessed below its true value, affords A. no ground for demanding a reduction of his valuation, though it does entitle him to apply for an increase in the valuation of the others. It therefore follows, not only that the first reason was without any legal merit, but that the offer to prove before the state board on the appeal from the valuation of the prosecutor's property that other property was valued proportionately lower was properly rejected by that board.

We come now to the second ground of complaint, which is that the property was assessed above its true value. It appears from the testimony that Mr. Samuel Joseph, the president and principal organizer of the Royal Manufacturing Company, and at the time of the hearing the holder of nearly all its stock, had acquired a considerable tract of land in the northern part of Rahway, on which stood a good-sized dwelling house, and had built on this land six or seven factory buildings, specially adapted for the purposes of the business for which the corporation was organized, and which, although only one story in height, covered a good deal of ground. He also made certain improvements to the house at considerable expense. The cost of the house and land was \$13,500. The cost of the repairs to the house seems to have been about \$4,000. The buildings were erected under contract by a building concern from Connecticut, and, while it appeared that the work was defectively done in respect to the reinforced concrete called for by the contract, the buildings had been accepted under an adjustment between the contractor and Mr. Joseph, and on May 20, 1906, were entirely completed, with the exception of some \$200 or \$300 worth of work still to be done. Mr. Joseph admitted that the cost of the building had been \$50,000 or more, and the representative of the Connecticut builders testified that the cost was between \$50,000 and \$60,000. There was no substantial dispute as to any of these facts; the controversy in the case being due to the claim of prosecutor, which was supported by considerable expert evidence, that a factory property is worth for purposes of sale ordinarily about 50 per cent. of its cost, and that these particular buildings were of an unusual type, constructed especially for the purposes of the prosecutor, and unsuited to ordinary manufacturing purposes, and therefore in case of sale would command a still less percentage, which was placed by one of the witnesses as low as about 40 per cent.

In view of the construction of the buildings for the business of prosecutor, counsel claim that the decision of this court in *Turn-*

ley v. Elizabeth, 68 Atl. 1094, is in point, and that in view of that decision the state board erred in giving undue weight to cost as a criterion of value, and should have regarded only the testimony as to sale value; this being the test fixed by the statute. We have given due consideration to this claim, and, conceding its substantial correctness, are of opinion that the affirmance by the state board of the increased valuation is justifiable. In *Turnley v. Elizabeth* the subject of assessment was a private residence, with expensive features to suit the whim of a wealthy owner, and which features added little or nothing to its market value, some, in fact, impairing it; but, as the court said in that case, "the criterion established by the statute is a hypothetical sale." Now at the date of assessment the buildings, though substantially completed, had not yet been occupied. The business of the prosecutor was a new enterprise, in which they were just embarking, and no question of disposing of the property as a secondhand factory plant had arisen or seemed likely to arise. While it may be true that a disused factory property is liable to depreciate in value from year to year, and may be unsalable as compared with other classes of property, or with a factory property used by a going concern, neither the county board nor the state board was called on to treat a factory plant just completed on any such basis. Hence most of the expert testimony as to the sale value of secondhand factory properties was irrelevant and useless.

Moreover, an examination of the expert testimony shows that the witnesses for the most part viewed the property from the standpoint of its availability for being cut up into subdivisions, to be rented out as such, with power supplied by the landlord. They claimed that a disused factory, to secure a market, should consist of one compact building of several stories and cellar, with complete steam heating and power plant, and be located in a city or town, quite disregarding the contingency of a purchaser looking for a one-story plant with detached buildings, such as is often seen in operation as a tannery, foundry, or dyehouse, for example, which he might readily make over to suit his own purposes. On the other hand, we have the testimony of Mr. Joseph himself as to an actual sale of this very property by him to the corporation for \$100,000 in stock. He says this was in September, when the buildings were finished, and that they were not so finished in May; but a careful examination of the testimony shows, as already stated, that the buildings were substantially completed in May, except the defective concrete, which was accepted. No fraud of the directors in overvaluing the property is shown or alleged, so that this figure may fairly be considered as the judgment of a willing buyer and a willing seller as to value.



In view of this fact, and of the other testimony, we cannot say that there was any error of the state board in affirming the reassessment, and its judgment will accordingly be affirmed here.

(74 N. J. B. 686)

**LOCKPORT FELT CO. v. UNITED BOX BOARD & PAPER CO.**

(Court of Chancery of New Jersey. Oct. 18, 1908.)

**1. RECEIVERS (§ 128\*)—GENERAL APPEARANCE.**

There is a general appearance by a mortgagee of insolvent, giving the court jurisdiction of it, at least for the purpose of an application by the receiver for leave to borrow money and issue receivers' certificates of indebtedness, to be a lien prior to the mortgage, the mortgagee having, for purposes unconnected with such application, filed its petition in the suit in which the receiver was appointed, and having in open court consented to a portion of the prayer of the receiver's petition on such application.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 219, 222; Dec. Dig. § 128.\*]

**2. RECEIVERS (§ 128\*)—RECEIVERS' CERTIFICATES—PRESERVATION OF PROPERTY.**

Unlike the case of a public service corporation, the receiver of a strictly private corporation may be authorized to borrow money on receivers' certificates, which shall be a lien prior to that of a subsisting incumbrance only for one purpose—the preservation of the property and the expenses of realizing on it by a sale, except, possibly, the continuance of insolvent's business, as an absolute essential to such preservation.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 219; Dec. Dig. § 128.\*]

**3. RECEIVERS (§ 118\*)—RECEIVERS' CERTIFICATES—PAYMENT OF INSURANCE AND MORTGAGE.**

To provide a fund for paying insurance on the property of insolvent, and interest and an installment of \$13,000 on a mortgage of \$188,000 on a piece of property valued at \$500,000, such mortgage being subject to foreclosure in default of the payment, the receiver will be authorized to borrow money on receivers' certificates, to be a lien prior to that of a second mortgage on that and all other property of insolvent; it being shown that no other course can be successfully adopted to preserve the property.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 206; Dec. Dig. § 118.\*]

**4. RECEIVERS (§ 117\*)—RECEIVERS' CERTIFICATES—LIEN ON FOREIGN PROPERTY—JURISDICTION.**

Part of the property of insolvent being lands out of the state, the court has no jurisdiction to authorize the issue of receivers' certificates which shall be liens thereon, but application therefor must be made in each of the jurisdictions in which the property lies.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 204; Dec. Dig. § 117.\*]

**5. RECEIVERS (§ 112\*)—RECEIVERS' CERTIFICATES—AUTHORITY TO ISSUE.**

The powers of a receiver are limited by the terms of the order of his appointment and the statute authorizing it; so that, in the absence of authority therein for his borrowing money on receivers' certificates, which shall create a specific lien on the property in his custody, he must be specially authorized by the court having jurisdiction over him and the property.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 112.\*]

**6. RECEIVERS (§ 121\*)—APPLICATION TO ISSUE CERTIFICATES—HEARING—NOTICE.**

The hearing of an application by a receiver to borrow money on receivers' certificates, the lien of which shall be superior to existing liens on insolvent's property, must be on notice to the security holders whose rights are sought to be affected.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 209; Dec. Dig. § 121.\*]

Suit by the Lockport Felt Company against the United Box Board & Paper Company. The receivers appointed for defendant apply for leave to borrow money. Petition granted.

Sherrerd Depue, for receivers. William H. Carey and Mr. Boston, for Trust Company of America.

**HOWELL, V. C.** In July, 1908, this court appointed receivers of the property and assets of the United Box Board & Paper Company, a New Jersey corporation, which is now in process of being wound up under the statute. The company was engaged in the business of manufacturing box board at 18 mills scattered about the United States and situated within several jurisdictions. Among the others, it owned a mill in Indiana called the "Wabash Mill," which was valued in a recent report made to the court at \$500,000, but which has been spoken of in other proceedings before the court as having a value much larger. At the time it was conveyed to the box board company, it was subject to a mortgage made to a trustee to secure an issue of bonds aggregating \$200,000. There is an agreement in the mortgage that, beginning with the present year, the company would redeem a certain number of the bonds secured by this mortgage at stated periods. On September 1, 1908, the company was under obligation by the terms of the mortgage to purchase and retire \$13,000 of these bonds, it having previously and before the receivership redeemed 12 of the bonds aggregating \$12,000, so that now the mortgage stands as security for \$188,000. The interest on these bonds matured also on the 1st day of September. The company is given three months after the 1st of September in which to pay this interest and redeem the 13 bonds. If a default occurs at the expiration of the three months, the whole mortgage money becomes at once due and payable. The insurance policies on all the company's property have recently expired, and there is required upwards of \$24,000 to pay the premiums in order to effect a renewal of the policies for another term. The receivers are without funds for these purposes, and they now apply to the court for leave to borrow a sum aggregating upwards of \$42,000 for the purpose (1) of paying the overdue insurance premiums on the policies of insurance; (2) of paying the arrears of interest on the underlying mortgage on the Wabash Mill; (3) of raising the sum of \$13,000 to redeem bonds of the Wabash

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Company as is required by the terms of the mortgage. The whole property of the company is covered by a mortgage to the Trust Company of America, a New York corporation, to secure an issue of bonds made by the company aggregating about \$1,250,000. This is a second mortgage on the Wabash mill. The application includes a prayer for leave to issue receivers' certificates of indebtedness to the amount necessary to be raised, and the making of such certificates representing such indebtedness a lien on the property of the company prior to the mortgage held by the Trust Company of America, but, so far as the Wabash property is concerned, subsequent to the underlying mortgage thereon. The Trust Company of America appeared by counsel, and in open court assented to the prayer of the petition to raise money with which to pay the insurance premiums, and to that extent to displace the trust company's mortgage, but as to the interest on the Wabash mortgage, and the redemption of the 13 bonds required by the mortgage, counsel for the Trust Company of America deny the jurisdiction of this court over the trust company, and as to these two sums deny the right of the court to displace the mortgage held by it thereby. The question, therefore, is whether this court may authorize the borrowing of money on receivers' certificates of indebtedness to meet the interest and the sinking fund appertaining to the Wabash mortgage, and in so doing displace the mortgage of the Trust Company of America, not only without its consent, but against its protest. The objection made by the Trust Company of America that this court has no jurisdiction over it, and therefore cannot make the order prayed for, must fall for two reasons: (1) Because the same company appears by the records of the court to have filed its petition in this suit for purposes unconnected with the present application seeking affirmative relief and without any permission to appear specially for the purpose; and (2) because the appearance on this application is general, inasmuch as it consents in open court to a portion of the prayer of the petition. These steps in the cause must be held to be a general appearance, at least for the purposes of the pending motion.

If there were no specific and fixed liens and incumbrances upon the property of the company, there could be no question but that the court could authorize the receivers to borrow moneys for proper purposes and make the securities therefor first liens upon the property in the receivers' custody. The difficulty arises in this class of cases in the desire or attempt to make this sort of securities a lien prior to existing incumbrances on the specific property. With regard to corporations of a quasi public nature, such as railway and telegraph companies and other corporations which belong to the public service class, there appears to be little difficulty

either on authority or in reason as to the right to displace prior liens by receivers' certificates. These corporations, their stockholders, and bondholders hold subject to the public right; and, if corporations of this class become insolvent, and thereby fall in the performance of their duty to the public, the court has the right to pledge the property and all the interests of the owners and lienors to raise money with which to enable the receivers to carry out the public duties and obligations of the corporation. It will be sufficient to cite on this point the opinion of Mr. Justice Bradley in the Supreme Court of the United States in the case of *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895. See, also, *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 839. The cases as to this class of corporations are numerous, and will be found collected in 3 Cook on Corp. §§ 876, 877. The same rule prevails in the English courts. *Greenwood v. Algeciras Railway* (1894) 2 Ch. 205; 63 L. J. Ch. 670.

There is, however, in principle and on authority a wide distinction between the power of the court to authorize the displacement of subsisting mortgages and liens in the case of public corporations and its power in the case of mere private enterprises which have taken the corporate form. The general power to authorize the issue of receivers' certificates of indebtedness for the purpose of continuing a business which exists in the case of a public corporation does not exist in the case of a private corporation. When a receiver is appointed of a private corporation, under our statute the court may authorize him to continue the business temporarily, but with the purpose of winding up, provided the receiver has in his possession sufficient assets to enable him to go on; but, if he should find it necessary to borrow money with which to continue the business, the rule undoubtedly is that he shall not be authorized to issue receivers' certificates to raise money therefor which shall displace the lien of a subsisting incumbrance. The reason for this is very obvious. It would be a gross violation of that clause of the federal Constitution which prohibits the states from passing laws violative of the obligations of contracts. There is, however, one circumstance which will justify the court in issuing these certificates and displacing prior liens thereby. That occurs in a case in which the money is required, not for the purpose of operating the business, but for the purpose of saving the property from destruction. A brief examination of the cases will demonstrate the validity of this position. In *Porch v. Agnew* (N. J.) 57 Atl. 546, the question came under the consideration of Vice Chancellor Grey. The suit related to the receivership of a large and valuable frame hotel property at Atlantic City. The principal value of the property was in the building, and there was no income from it

with which the receiver could pay insurance premiums and the services of a watchman, which were indispensable under the terms of the insurance policies. The bondholders opposed the receiver's application, but the Vice Chancellor granted it upon the principle that it was necessary for the preservation of the property. A similar application was dealt with by the Court of Appeals of New York in the case of *Raht v. Attrill*, 108 N. Y. 423, 13 N. E. 282, 60 Am. Rep. 456. There a receiver had been appointed for the purpose of winding up an insolvent corporation whose property consisted largely of an unfinished hotel building at Rockaway Beach. The receiver sought authority to borrow money for the purpose, among other things, of paying off workmen, who, in default thereof, had threatened to burn the building. The Court of Appeals denied the power of the court of first instance to supersede the lien of the first mortgage to raise money to pay the laborers, and said: "The act of the court in taking charge of property through a receiver is attended with certain necessary expenses of its care and custody, and it has become the settled rule that expenses of realization and also certain expenses which are called 'expenses of preservation' may be incurred under the order of the court on the credit of the property, and it follows from necessity, in order to the effectual administration of the trust assumed by the court, that these expenses should be paid out of the income, or, when necessary, out of the corpus of the property before distribution, or before the court passes over the property to those adjudged to be entitled." The court held, further, that there was no paramount necessity arising out of the fact that the workmen had threatened to burn the building, but that this situation must be dealt with by the ordinary legal methods. In *Karn v. Rorer Iron Company*, 86 Va. 754, 11 S. E. 431, the property in question consisted of a mine which had no marketable value independent of a railroad constructed and used by its owner for the transportation of ore. The court authorized its receiver to protect the title to the railroad and to repair it, and to borrow money on certificates which should be a first lien on all the company's property. The Court of Appeals gave this reason for holding the action valid: "It was necessary to raise money in some way to preserve the property from destruction or serious injury and to put it in salable condition, and the only practical mode of accomplishing that fact was by issuing receivers' certificates." In *Dalliba v. Winchell*, 11 Idaho, 364, 82 Pac. 107, 114 Am. St. Rep. 267, it was said that courts of equity have power to direct their receivers to care for, protect and preserve the property, and to decree that the charges and expenses thereof be prior and preferred liens over other subsisting liens, mortgages, or incumbrances, but to go beyond the preservation of the property and issue certificates

for money to be used in paying running expenses is beyond the power of the court. The Supreme Court of Maryland in an opinion by Mr. Justice McSherry in *Hooper v. Central Trust Company*, 81 Md. 591, 32 Atl. 506, 29 L. R. A. 262, goes further. He says: "When the property of private corporations or of individuals has been placed in the hands of a receiver, all expenses for safekeeping and preservation are properly payable out of the income, if there be any, or, if there be none, then out of the proceeds of the corpus of the estate when sold; but this necessary power by no means includes authority in such instances to allow the creation of liens through the medium of receivers' certificates which will take priority over existing antecedent liens. Extensive as are the powers of the courts of equity, they do not authorize the Chancellor to thus impair the force of solemn obligations, and destroy vested rights." Other cases in the state courts are *Osborne v. Big Stone Company*, 96 Va. 58, 30 S. E. 446; *International Trust Company v. United Coal Company*, 27 Colo. 246, 60 Pac. 621, 83 Am. St. Rep. 59; *Merriam v. Victory Mining Company*, 37 Or. 321, 58 Pac. 75, 58 Pac. 37, 60 Pac. 997.

The point has received the largest illustration in the federal jurisdiction, and there are many cases in the Circuit Court of the United States in the several circuits in which the doctrine above stated has been adhered to. In *Farmers' Loan & Trust Company v. Grape Creek Coal Company*, 50 Fed. 481, 16 L. R. A. 603, the subject-matter of the suit was the foreclosure of a mortgage on the property of a coal mining company. The receiver sought an order authorizing him to issue receivers' certificates which should be a first lien on the trust property to enable him to pay taxes then due, to take up certain outstanding certificates, and to continue the operation of the mine. Gresham, circuit judge, quotes the words used by Judge McSherry in the Maryland case, and, after discussing the right of the court to deal with public corporations, he proceeds: "Private corporations owe no duty to the public, and their continued operation is not a matter of public concern. It is only against railroad mortgages that the Supreme Court of the United States has sustained orders giving priority to receivers' certificates representing particular indebtedness, and, as already stated, then only on principles having no application to a mortgage executed by a private corporation owing no duty to the public." In the case of *Fidelity Insurance Trust & Safe Deposit Company v. Roanoke Iron Company* (C. C.) 68 Fed. 623, the complainant was foreclosing a mortgage on the property of the defendant, a private corporation engaged in the production of iron. A receiver was appointed who petitioned for leave to issue receivers' certificates and to borrow money thereon for the purpose of carrying on the business of the company. The prayer of the

petition was denied upon the principle that it was beyond the authority of the court to authorize the receiver of a private corporation to issue certificates which should displace the lien of a subsisting mortgage for any such purpose. In the case of *Hanna v. State Trust Company*, 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201, the court appointed a receiver for a private corporation engaged in business of irrigation and colonizing arid lands, in a suit brought to foreclose a second mortgage. It was held that the court appointing the receiver had no authority to authorize its receiver to issue certificates to raise money to carry on the business of the insolvent corporation and improve its lands already covered by a mortgage. In *Doe v. Northwestern Coal Company* (C. C.) 78 Fed. 62, it was held that receivers' certificates issued by the receiver of a private corporation cannot be made a charge upon the assets of the corporation in preference to existing liens, and as against lienors who have not given their consent thereto. In *International Trust Company v. Decker Bros.*, 152 Fed. 78, 81 C. O. A. 302, 11 L. R. A. (N. S.) 152, the insolvent company, a Maine corporation owning property in Alaska, mortgaged the same to the complainant, a Massachusetts corporation. Proceedings were taken to foreclose the mortgage, in which proceedings the receiver was authorized to issue certificates on which to borrow money with which to carry on the company's business, and they were by their terms made a first lien upon the property of the corporation. It was held by the Circuit Court of Appeals that the mortgage could not be displaced, following *Baltimore B. & L. Association v. Alderson*, 90 Fed. 142, 82 C. C. A. 542, in which the Circuit Court of Appeals said: "In case of private corporations, the court cannot authorize the issue of receivers' certificates for the purpose of improving, adding to, or carrying on the business of the company without first having the consent of the creditors whose liens would be affected thereby."

The English rule will be found in the judgment of Mr. Justice Kekewich in *Securities & Properties Corporation v. Brighton Alhambra*, 62 L. J. Ch. 566. *Kerr on Receivers*, 195.

From the cases above cited and from the constant course of practice in this state the rule may be deduced that, in case of private corporations, the court may authorize its receiver to borrow money upon the faith and credit of all the property of the corporation, and authorize the issuing of securities which shall displace all prior liens and incumbrances, but only for one purpose, viz., the preservation of the property and the expenses of realizing upon it by a sale. This necessity should be imperative and paramount, and under no other circumstances can a court justify itself in attempting to undermine prior liens.

The rule which forbids the displacement of prior liens by receivers' certificates, at all events in the case of private corporations, is not the reasonable rule. It goes too far. It may well be that one of the chief reasons for appealing to the court to appoint a receiver is that the property may be preserved from spoliation or destruction; and if, after the court shall have assumed to care for the property, it finds that there is no income to support it, and that the court has no power to pledge the property for its own preservation or realization, the original action in appointing the receiver would be futile. Under no circumstances would the court be justified in authorizing its receiver to borrow money and make the obligation thereof a first lien on the property of a private corporation by the displacement of existing liens for the mere purpose of continuing the business in which the company was engaged, unless possibly in a case in which it satisfactorily appeared that the continuation of the business was absolutely essential to the preservation of the property in the receiver's custody. In the case of a private corporation this necessity is made the criterion.

In addition to the limitations thus set to the power of the court, it may be well to add that in every case the power now appealed to is an extraordinary one, and is liable to abuse unless exercised with the utmost caution. The court should be satisfied by a preponderance of circumstances that no other course could be successfully adopted, and that practical ruin would ensue if the authority were withheld. All the facts should be exhibited which make the necessity apparent, all the parties affected should be notified, and a full hearing accorded to all objectors.

I think that the required necessity exists in this case. As to the payment of the insurance premiums, that may be dismissed with a word. It is only common prudence to provide a fund for that purpose. *Porch v. Agnew*, supra.

As to the Wabash mill, it appears that, unless the interest on the bonds and the sinking fund so called shall be met within three months from September 1st, the holders of the underlying bonds may foreclose their lien. In the latest report of the condition of the company this mill is valued at \$500,000. It has been carried on the books of the company at a very much higher valuation. It is subject to a mortgage of \$188,000, leaving a substantial equity, which ought to be protected for the benefit of the bondholders under the second mortgage who are represented by the Trust Company of America. In case a default should happen, the underlying mortgage would be foreclosed, and in the present condition of the trust the receivers would have no money with which to protect the equity at the sale, and thus the stockholders and bondholders of the box board company would lose the entire property. I therefore think that the prayer of the petition should

be granted, and that the receivers should be permitted to issue certificates to the amount required for the purposes above mentioned, which shall bear interest at a rate not greater than 6 per cent. per annum, and be disposed of at not less than their par value, and be made a lien on all the property of the company in the possession or under the control of the receivers prior to the mortgage held by the Trust Company of America and prior to the claims of the bondholders secured thereby, but subject and subsequent to the underlying mortgage of \$188,000 now on the Wabash mill. Inasmuch, however, as this court has no jurisdiction to authorize the issue of receivers' certificates which shall be a lien on the lands in another state (*Pool v. Farmers' Loan & Trust Company*, 7 Tex. Civ. App. 334, 27 S. W. 744), it will be necessary to apply for and obtain a similar order in each of the jurisdictions in which property of the company lies.

There are some questions of practice which may well be referred to here. Counsel will find in many of the cases that receivers have undertaken to borrow money on receivers' certificates without the authority of the court. It is perhaps unnecessary to say that in this jurisdiction a receiver has no such power by virtue of his office, nor has he any power to issue any form of evidence of indebtedness which shall create a specific lien on the property in his custody as an officer of the court. He may only do so by the formal enabling decree of the court which has jurisdiction over the receiver and over the property. It may be stated as a general rule that a receiver's powers are limited by the terms of the order of his appointment or by the statute which authorized it. *Runyon v. Farmers', etc.*, Bank, 4 N. J. Eq. 480; *Verplanck v. Mercantile Ins. Co.*, 2 Paige (N. Y.) 438; *Quincy, etc., Railroad v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632; *Smith on Receiverships*, § 25. No receiver, therefore, would be justified in incurring any indebtedness on the faith of the property and in issuing obligations therefor, unless the act were sanctioned by the order of the proper court. *Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743. It must likewise be remembered that the court has no authority to hear an application of this nature, unless notice thereof shall have been given to all the security holders whose rights are sought to be affected. As has already been noted, such notice was given in this case. *Laughlin v. U. S. Rolling Stock Co.* (C. C.) 64 Fed. 25; *Third Street Railway v. Lewis*, 79 Fed. 196, 24 C. C. A. 482.

#### WATERS v. COLLINS.

(Court of Chancery of New Jersey. Dec. 5, 1895.)

#### 1. DEEDS—BUILDING RESTRICTION—"FRONT PROPERTY LINE."

The "front property line," within the restriction of deeds of property platted into lots

that no building shall be erected within 20 feet of the front property line of any street, includes, in the case of a corner lot, the line of the street on which is the side of the lot, as well as the line of the street on which the lot faces.

#### 2. SAME—RELIEF FROM RESTRICTION—SUBSEQUENT ACTS.

The contractual rights which one has by reason of the restriction, in the deed to him and in the deed to another of platted lots, that no building shall be erected within a certain distance of any street cannot be affected by a subsequent resolution of the company which platted the property and retained title to the unsold lots.

#### 3. SAME.

There having been no general abandonment of the scheme on which platted lots were to be sold, and no general change in the neighborhood rendering useless a restriction, in deeds of lots, that no building shall be erected within a certain distance of any street, a grantee is not relieved from such restriction in his deed because of several houses having been built by others within the prohibited distance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 543.]

#### 4. SAME—PRACTICAL CONSTRUCTION.

Where the language of a restriction in a deed is unambiguous, its force cannot be varied by acts as a practical construction.

Suit by Talcott P. Waters against Daniel L. Collins. Decree for complainant.

Harry Wootton, for complainant. C. L. Cole, for defendant.

REED, V. C. This bill is filed by Mr. Waters to restrain Mr. Collins from erecting a structure on his lot, within 20 feet of Montpelier avenue, Atlantic City. The complainant and the defendant both own lots fronting upon this avenue. The title of both lots are derived from the Chelsea Beach Company. This company was organized on July 24, 1883, for the purpose of buying and selling real estate; and at that date they bought a large tract of land, which they platted into streets and lots, of which lots they had sold a large number. The complainant's lot was sold by the company to Amelia Burnham on June 24, 1887. She sold it to Ann A. Bell and Louis P. Scott on January 4, 1895. They sold it to complainant on February 13, 1895. The lot of Collins, the defendant, was sold by the company to Mary A. Riddle on March 16, 1887. She sold it to Enoch B. Skull on June 9, 1887, and he sold it to the defendant August 8, 1895. The deed from the Chelsea Beach Company to Amelia Burnham contained certain restrictions and covenants. Among them was this: "That no building shall at any time be erected within twenty feet of the front property line of any street or avenue, except on Atlantic avenue; nor within five feet of the side lines of such lot, except where a party may own two or more contiguous lots; then, a building may be erected on any part of the lot or lots, the owner thereof may desire, without regard to the intervening line or lines; provided the same is not built within five feet of the outside line of said lots, nor within twenty feet

of the front property line thereof; and also that no building of less value than five hundred dollars shall be erected thereon." There are other restrictions in regard to the kind of buildings that shall be erected, and how they shall be used. Then follows the agreement that the several covenants above specified shall attach to and run with the land, and shall be lawful, not only for the said Chelsea Beach Company and its successors, but also for the owner or owners of any lot or lots adjoining in the neighborhood of the premises hereby granted, deriving title from or through the said Chelsea Beach Company, to institute and prosecute any proceedings at law or equity against the person or persons violating, or threatening to violate, the same. These restrictions were incorporated in all the deeds constituting the line of title from the Chelsea Beach Company down to the complainant. The same restriction and covenants were contained in the deed from the Chelsea Beach Company to Mary A. Riddle, but not included in the deed from Skull to the defendant. The lot of the defendant is plotted on the northeast corner of Atlantic and Montpelier avenues. It lies 50 feet on the former avenue, and 113 feet on the latter avenue. The lot of complainant also faces the north side of Montpelier avenue, and is the second lot south of complainant's lot, on the same side of the avenue. The defendant has begun the erection of a building on his corner lot, which building will stand a distance of 7 feet only from the north side of Montpelier avenue. The complainant insists that, by force of the restriction already mentioned, the defendant must set his proposed building back at least 20 feet from the north side of Montpelier avenue. If this proposed erection is violative of the restriction contained in the respective deeds from the Chelsea Beach Company to the grantors of the complainant and defendant, there can be no question but that the complainant has the right to invoke the action of this court to restrain the defendant from continuing the erection of his proposed structure. This is not denied. The right of the complainant, however, to invoke the aid of this court in the present instance is, in the first place, resisted on the ground that the restrictive clause contained in these deeds does not apply to that part of the defendant's lot which lies on Montpelier avenue.

The argument upon this point is to this effect: That the plan of lots upon the map filed by the Chelsea Beach Company displays complainant's lot as fronting on Atlantic avenue, with its south side on Montpelier avenue; that the language of the restriction is that no building shall be erected within 20 feet of the front property line of any street or avenue; that the present structure is not upon the front property line, but is upon the side property line of Montpelier avenue. At the argument I was impressed with this view of the scope of the

restriction. But a more deliberate examination has convinced me that this is not the meaning to be extracted from the language of the clause. The object of the clause was to preserve an uninterrupted view throughout the length of the street, and this could not be effected if the corner buildings were placed within 5 feet of the side street line, although all the remaining buildings in the block should be kept back the limited distance. And it is perceived that, if this construction of the 20-foot limitation does not apply to this corner lot, it does not apply to any corner lot; and therefore the view from the thoroughfare to the ocean on each of the four avenues could be intercepted at each corner. The distinction drawn between the two restrictions, the 20 feet and the 5 feet restrictions, is a distinction between boundaries by other lots and boundaries by street lines. Now a lot fronts on a street when it lies face to face with, or opposite to, a street. The front property line of any street is a boundary which delimits private property lying along that street from the street itself. Both at Atlantic avenue and Montpelier avenue this condition of affairs exists. There is therefore on both streets a front property line of defendant's lot. "The front of the lot," remarked Judge Miller in his opinion delivered in the case of *City of Des Moines v. Dorr*, 31 Iowa, 89, "is very well known to be that part of the same which faces a street or streets. It may front on one street only, or it may front on two. What is the front of a lot, is determinable by its facing upon a public street or streets." In this case the lot faces upon two public streets, and it was held in the last-mentioned case that a corner lot fronted on both of the streets which formed the angle. I am therefore of the opinion that the restriction does apply to Montpelier avenue.

Again, the answer sets up that, even if the original restriction applies to defendant's lot, yet its effect was nullified by a resolution passed by the board of directors of the Chelsea Beach Company in 1889. This resolution was to the effect that no building shall at any time be erected on a corner lot on Atlantic avenue within 5 feet from the side street property line, but may be erected to full party line of the adjoining lot, and on all other Atlantic avenue lots may be erected to full party line of adjoining lots. This restriction, the answer states, was put into deeds made inferentially for lots on Atlantic avenue subsequently sold. Now, as appears by the above statement, this resolution was passed after both the deeds from the Chelsea Beach Company for the two lots in question were executed. Nothing, therefore, can be clearer than that such resolution was entirely efficacious to affect in any respect the contractual rights to the parties to those deeds. The company could not sell lots, holding out to the grantees a restrictive scheme intended to advance the value of the prop-

erty sold, at the expense of property to be yet sold, and afterwards receive an enhanced price for subsequent lots, by a removal in whole or in part of the restriction bargained for. To the point that a party cannot be absolved from such a restriction by a subsequent agreement or resolution is the case of *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190.

It is again insisted that there was a practical construction of this clause, to the effect that it meant to restrict the side street lines to a 5-foot space; that Mrs. Riddle built a house in 1885 within 5 feet of Brighton avenue; that a Mr. Collins had been informed that he had the right to build a house within the 20-foot limit on Morris avenue; and that a Mr. Lake built within that distance on Chelsea avenue. Now, in respect to practical construction, neither these nor any other acts can vary the force of a restriction where the language is unambiguous. Nor do the resolutions of the board of directors, so far as they are relied upon, seem to be a practical construction of the original restriction, but rather a subsequent modification of those restrictions. So upon that point I am unable to perceive anything to modify the construction already given to the covenant in question.

It is again insisted that, not only have the houses already mentioned been built, but that on other streets verandas and porches have been built within the 20-foot limit, and that subsequent deeds have been made modifying the restriction as to corner lots on Atlantic avenue. Now there are cases which hold that where there is a general abandonment of a scheme by which lots were to be sold to grantees, who were to be restricted, or were restricted, in the method by which the lots should be occupied, all the grantees became absolved from the performance of any restrictive covenant. But no such general abandonment is exhibited by the answer in this case. There has been no general change in the neighborhood which rendered the restrictions useless, and the inference is that a great number of grantees have conformed to the restriction.

My conclusion is that the rule to show cause should be made absolute, and an injunction issued in accordance with the prayer of the bill.

(74 N. J. E. 600)

In re VAN HORNE.

(Court of Chancery of New Jersey. Oct. 1, 1908.)

**1. CONSTITUTIONAL LAW (§ 209\*)—"EQUAL PROTECTION OF LAW"—DISCRIMINATIONS PROHIBITED.**

The "equal protection of law" required by Const. U. S. Amend. art. 14, means equal security or burden under the law to all similarly situated, and the law must bear alike on all in-

dividuals, classes, and districts which are similarly situated; the purpose of the amendment being to prevent arbitrary and capricious laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. § 209.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2423-2426.]

**2. CONSTITUTIONAL LAW (§ 212\*) — EQUAL PROTECTION OF LAW—EXERCISE OF POLICE POWER.**

Under its police power, the state may make regulations to protect the health, morals, and safety of the people, which interfere with the conduct of the individual in relation to the public; and the legislative determination as to what is a proper subject for regulation will rarely be reviewed by the courts, but a statute which discriminates without proper basis therefor cannot be sustained under the police power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 684; Dec. Dig. § 212.\*]

**3. CONSTITUTIONAL LAW (§ 217\*) — EQUAL PROTECTION OF LAW—DISCRIMINATION AS TO PLACES.**

Laws 1908 (P. L. 1908, p. 375) c. 185, § 2, makes it a misdemeanor for the manager, etc., of any theater or place where theatrical or vaudeville performances are given, to admit thereto children under 16 years old, unless accompanied by a parent, etc., provided that the section shall not apply to entertainments held upon piers devoted to public entertainments. *Held*, that the distinction between entertainments in theaters, etc., and on public piers was arbitrary, as making an act criminal in a particular place, which is necessarily a crime elsewhere, if a crime at all, and the section violated Const. U. S. Amend. art. 14, guaranteeing the equal protection of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 718; Dec. Dig. § 217.\*]

**4. STATUTES (§ 64\*)—VALIDITY—PARTIAL INVALIDITY.**

Laws 1908 (P. L. 1908, p. 375) c. 185, § 2, making it a misdemeanor to admit children under 16 years old to theaters, etc., but exempting from its operation entertainments held on public piers, being void because of such exemption, the entire section was void.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.\*]

Habeas corpus by William H. Van Horne. Writ granted, and petitioner released from custody.

Pierre F. Garvan, for the State. Robt. F. Hudspeth, for Wm. H. Van Horne.

**GARRISON, V. C.** This is a writ of habeas corpus brought on behalf of William H. Van Horne, who was apprehended and charged with the violation of section 2, c. 185, Laws 1908 (P. L. 1908, p. 375).

The section in question reads as follows:

"2. Any person having the management or control of any theater or place wherein theatrical, acrobatic or vaudeville performances are given by said performers, or wherein any moving-picture show is given, his agents or servants, who shall admit thereto or permit or suffer to be or remain therein any child under the age of 16 years, unaccompanied by a parent, or guardian, or adult friend with the knowledge and consent of the parent or guard-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ian, shall be guilty of a misdemeanor: Provided, this section shall not apply to any performance given by or under the auspices of any public or private school or any church or Sunday school, or by any charitable organization or society, nor to entertainments held upon piers devoted to public entertainment."

The misdemeanor alleged against the prisoner was in permitting an unaccompanied child, less than 16 years of age, to be or remain in a place of amusement at 380 Jackson avenue, Jersey City, under the management and control of the prisoner, where a performance of the kind mentioned in the statute was being given.

It is claimed on behalf of the prisoner that his apprehension and detention are illegal, because that section at least of the statute in question is unconstitutional. It is claimed on his behalf that it violates the fourteenth amendment of the Constitution of the United States, in that it denies the equal protection of the laws; and also that it is violative of article 4, § 7, par. 11, of the Constitution of the state of New Jersey.

I have reached the conclusion that the statute is in conflict with the fourteenth amendment of the federal Constitution, and is therefore unconstitutional, at least so far as respects the section in question.

"Equal protection of the laws" must certainly mean equal security or burden, under the laws, to every one similarly situated.

A statute, to escape condemnation as infringing the rights guaranteed by this amendment, must bear alike upon all individuals and classes and districts that are similarly situated, in a similar manner, and with uniformity; otherwise, there would be unjust discrimination, which this constitutional mandate prohibits.

The purpose of the constitutional amendment must have been to prevent that which was arbitrary or capricious, and to require uniformity and equality under like conditions.

The so-called police power of the Legislature, which enables it to make regulations and restrictions to protect the health, morals, safety, and welfare of the people, undoubtedly justifies the enactment of many laws which interfere with and regulate the conduct of the individual in his relations to the public; and the judgment of the Legislature is to be given great, if not controlling, weight as to what conduct on the part of individuals constitutes a menace to the health, morals, safety, or welfare of the general public; and its determination will rarely, if ever, be interfered with by the courts. But this does not justify a legislative enactment which discriminates where there is no basis for discrimination.

Wherever an enactment has attempted to make that a crime in one place which by all laws of reason must be a crime else-

where within the same jurisdiction, such attempted distinction is found by the courts to be illusory, and the act is held unconstitutional.

Enough has been said to show the test which I find should be applied, and which I have applied, in determining the constitutionality of this act.

Exercising the police power of the state—which, for the purpose of this decision, I assume the Legislature is properly exercising in this instance—this act makes it a misdemeanor for owners of amusement places to permit the attendance, unless accompanied by adults, of children under the age of 16, at certain classes of amusements or performances, excepting such amusements or performances as are "held upon piers devoted to public entertainment."

If any tenable reason were suggested why a certain class of amusements might be injurious to the health, morals, safety, or welfare of children unaccompanied by adults, if the place at which the entertainment was held was upon land rather than upon a structure extending into or over water, I would not interfere with the law enacted by the Legislature containing such a distinction. I have not, however, in a long and careful consideration of this matter, been able to even state, let alone support, a reason which justifies any distinction of that character, nor has the learned prosecutor, who appeared before me on behalf of the state, been able to suggest one. Therefore, it seems too apparent to require further illumination that the distinction attempted to be made is without warrant and is arbitrary.

All of the authorities hold that under such circumstances the law is unconstitutional, and I so hold with respect to this statute, so far as respects the section in question.

It was not even suggested upon the argument that the clause excepting the entertainment upon piers could be excised and the law thus saved. No reason has occurred to me which would authorize or warrant any such treatment of the situation. The section must stand or fall as enacted.

The result of my conclusions is that the prisoner must be released from custody.

(74 N. J. E. 789)

#### NIXON v. HASLETT et ux.

(Court of Chancery of New Jersey. Oct. 18, 1908.)

#### 1. MORTGAGES (§ 260\*) — ASSIGNMENT — DEFENSES—ESTOPPEL.

A mortgagor is estopped, in a foreclosure suit by the mortgagee's assignee, to claim a rescission on the ground of the mortgagee's fraud, where at the time of the assignment he declared in writing that he had no claim, set-off, etc., against the mortgagee.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 692; Dec. Dig. § 260.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



**2. MORTGAGES (§ 260\*) — ASSIGNMENT — DEFENSES—ESTOPPEL.**

Oral as well as written statements by a mortgagor that he has no defenses or set-off against the mortgage will estop him to assert one against the mortgagee's assignee.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 692; Dec. Dig. § 260.\*]

**3. MORTGAGES (§ 260\*) — ASSIGNMENT — DEFENSES—ESTOPPEL.**

Payment by a mortgagor of interest and his promise to pay the principal after assignment of the mortgage and after he discovered fraud by the mortgagee in obtaining the mortgage would not estop the mortgagor to assert such fraud, since the assignment was made without consideration passing from the assignee to him, and since the payment and promise referred to the original debt, but such conduct warrants an inference that the mortgagor's attempt to rescind the mortgage results solely from an attempt to defeat foreclosure.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 692; Dec. Dig. § 260.\*]

**4. MORTGAGES (§ 247\*) — RESCISSION — RIGHTS OF ASSIGNEE.**

If, on a mortgagee's assignee's suit to foreclose, the mortgage should be rescinded for the mortgagee's fraud, the assignee would be entitled to a sale of the land as the mortgagee's land to reimburse him for the price of the assignment.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 247.\*]

**5. JUDGMENT (§ 243\*) — ESSENTIALS—PARTIES AND PLEADING.**

In a foreclosure suit by a mortgagee's assignee, no decree could be had against the mortgagee on the ground of his fraud, where he was not before the court, and no cross-bill had been filed.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 428; Dec. Dig. § 243.\*]

**6. MORTGAGES (§ 85\*) — RESCISSION — REMEDIES.**

The question of the sufficiency of a mortgagee's misrepresentations as ground for rescinding as to the mortgagor can be tried in a suit by his assignee to foreclose, on an application for the surplus money, if any be raised by a sale of the land or by other appropriate action.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 85.\*]

Foreclosure suit by James B. Nixon against James Henry Haslett and wife. Decree for complainant.

Horace F. Nixon, for complainant. Martin V. Bergen, Jr., for defendants.

**WALKER, V. C.** This is a foreclosure suit. The bill charges that on July 28, 1906, the defendant Haslett was indebted to Oliver Bright in the sum of \$5,500, and gave his bond and mortgage (his wife joining him in the mortgage) to Bright on two tracts of land in the borough of Holly Beach, Cape May county, to secure the sum mentioned; that the mortgage was duly acknowledged, and afterwards on August 1, 1906, was recorded; that afterwards, and on January 27, 1907, Bright assigned the bond and mortgage to the complainant Nixon; that the whole amount secured by the mortgage, with interest from July 28, 1907, remains due,

whereby, etc. The defendants answered, admitting the execution of the bond and mortgage and setting up: That Bright on July 10, 1906, and for many years previous, had represented the defendant Haslett in several real estate transactions in Holly Beach, acting as his confidential adviser. That at the time of the purchase by Haslett from Bright of the property in question (July 10, 1906) and immediately before that time, as a means to arrive at the value thereof, Bright informed Haslett that one of the properties was rented for \$350 a year and the other for \$500 a year. That, based principally on these statements, Haslett arrived at an estimate of the value of the premises at \$11,000. That subsequently Haslett ascertained that the premises were not rented at those amounts, but at the following amounts: One for \$250 and the other for \$350. That Haslett paid to Bright the purchase price of \$11,000 as follows: \$5,500 in cash and a purchase-money mortgage for \$5,500 (the mortgage being foreclosed). That the property was not worth \$11,000 at the time of the purchase (actually made July 28, 1906) and the mortgage was obtained by fraudulent representations of facts relied upon by Haslett which led him to overestimate the value of the property. The answer then proceeds to assert that the defendants deny that the complainant is a bona fide purchaser of the mortgage for value, and that he had full knowledge of the transaction, and is the holder of the mortgage for Bright and is foreclosing it for him. A replication was filed, and, on the hearing of the cause, the defendants Haslett and wife presented a petition for leave to file a cross-bill, and by consent the petition was filed, and leave to file a cross-bill was given. The hearing then proceeded as though the cross-bill were filed. The cross-bill has not yet been filed, and, if it were, its prayer would doubtless follow the last averment in the petition, which is that the defendants desire to rescind, revoke, and set aside the contract of sale on the ground of the fraudulent representations mentioned, and they assert that such a rescission would set aside the bond and mortgage, and would require Bright to refund to Haslett the moneys paid by him to Bright as the consideration of the properties, Bright to be made a party.

The facts developed upon the trial show conclusively that the complainant is a purchaser of the mortgage for value. In this posture of the case I confess that I do not understand exactly in what position the defendants would place the complainant with reference to the mortgage security. Neither by pleading nor by argument have they informed the court on this score. The bill prayed for an answer without oath, and the answer, very properly, is not sworn to. The petition for leave to file a cross-bill avers that the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

petitioners are informed and believe that the complainant was fully informed of the fraud which had been practiced on them at the time of accepting the assignment, and that he did not purchase the mortgage for any consideration passing from him, but is the holder of the same for Bright. This petition is sworn to, and, by consent, was treated as the testimony of the defendant on the subject.

On this question of fraud so far as the complainant, the assignee of the mortgage, is concerned, we have the defendant Haslett testifying that he is informed and believes that the complainant was cognizant of it, without stating the source of his information, while the complainant testified that he paid \$5,500 for the mortgage, and took from Haslett, the owner of the equity of redemption and mortgagor, a declaration that he had no offset against the mortgage debt, which paper was in his hands before he paid the money for the mortgage; that he did not personally examine into the value of the property, nor have any consultation with Mr. Bright upon the subject, but became satisfied that the property was worth the amount of the mortgage by accepting the word of Mr. Horace E. Nixon, his solicitor. Mr. Horace E. Nixon was sworn as a witness, and said that, at the time Bright applied to him to sell the mortgage he represented to him that the properties were rented at \$350 and \$300, respectively; that he went to examine the property and found out that the rents were \$250 and \$300, and also \$150 for still another building on the premises. This was before the loan was made, and, notwithstanding the properties were not rented for as high a figure as Bright said they were, he was satisfied with the security, and took the mortgage. Besides testifying that he invested \$5,500 in the mortgage, the complainant put in evidence the check of his solicitor (for that amount less the solicitor's charges for searches, etc.), which went to Bright. It is admitted that the property is not worth the \$11,000, the price at which Haslett bought it from Bright, but that it is worth about \$8,000, and that the sale went through on the basis that the rent be paid a year in advance, and that Haslett did not discover the true amount of rents until the spring of 1907, which was after the assignment of the mortgage to the complainant.

In *Magie v. Reynolds*, 51 N. J. Eq. 118; 26 Atl. 150, a mortgage was procured to be given by fraud and without any consideration. It was assigned for a consideration, and, upon foreclosure under a cross-bill by the mortgagors and owners of the equity of redemption to have it canceled, Vice Chancellor Pitney held that the complainant's bill should be dismissed as to them, and that they were entitled to have the bond and mortgage delivered up to be canceled. This upon the ground that the assignee of a mortgage takes the same subject to all defenses which the

mortgagor had, to the debt which the mortgage was given to secure. He held, however, that it is the duty of a person about to take the assignment of a bond and mortgage to inquire of the obligor and mortgagor as to his liability thereon. It will be remembered that this inquiry was made in the case at bar, and that the defendant and mortgagor gave to the complainant a declaration in writing that he had no charge, claim, demand, plea, or set-off upon, for, or against the mortgage in any way or manner, the declaration commencing with the recital that the very mortgage in question was about to be assigned from the holder to the assignee, who is the complainant, and notice of which assignment had been received by the mortgagor who made the declaration. To allow the defendant's claim in the face of his solemn declaration in writing would be to overthrow the whole doctrine of estoppel with reference to the assignment of mortgages made after inquiry of the mortgagor or person owning the equity of redemption as to whether the mortgage is due, so that the intending purchaser can safely take an assignment of it as a valid and existing security. In *Woodruff v. Morristown Institution for Savings*, 34 N. J. Eq. 174, Vice Chancellor Van Fleet held: "Where one person, by either words or conduct, induces another to believe that he may safely purchase certain property, or take a certain security, and subsequently, relying on such representations, acquires the property or security, the former will never be permitted in a court of equity to overthrow the title so acquired." In *Magie v. Reynolds*, *ubi supra*, Vice Chancellor Pitney (51 N. J. Eq. 118, 26 Atl. 154), remarked that Chancellor Vroom in *Shannon v. Marselis*, 1 N. J. Eq. 413, 424, examined the authorities in England and New York, and quoted with approbation the language of Chancellor Kent, in which he stated that it is the duty of the assignee to make inquiries of the obligor or mortgagor or person owning the equity of redemption before taking an assignment of a bond and mortgage. He cites, also, *Matthew v. Walkwyn*, 4 Ves. 118, in which Lord Chancellor Loughborough observed at page 127: "Persons most conversant in conveyancing hold it extremely unfit, and very rash, and a very indifferent security, to take an assignment of a mortgage without the privity of the mortgagor as to the sum really due, that, in fact, it does happen that assignments of mortgages are taken without calling upon the mortgagor; \* \* \* but no conveyancer of established practice would recommend it as a good title to take an assignment of a mortgage without making the mortgagor a party, and being satisfied that the money was really due." It appears that this estoppel will arise, not only where a certificate in writing that there are no defenses or set-offs against the mortgage is given, but even where oral statements are made to that effect. 20 Am. & Eng. Ency. of Law (2d Ed.) p. 1042.

It is true that the investigation made by the complainant's solicitor when he was inquiring into the title and value of the property disclosed the fact that the rentals were \$750, instead of \$850, per annum; but that did not necessarily show that the property was worth less than the defendant gave for it. The complainant, as prospective assignee of the mortgage, was not so much interested in the rental value as in the intrinsic value of the property. The solicitor satisfied himself that the property was well worth an investment of \$5,500 on a mortgage, and so reported to his principal. Then, to make sure of the availability of the security, he procured from the mortgagor and owner of the equity of redemption a solemn declaration in writing under seal that the whole amount for which the mortgage was given was still due and owing, and that he had no defense whatever against the payment of the moneys secured by the mortgage. More than this, the defendant Haslett paid the complainant an installment of interest on the mortgage in July, 1907, which was six months after the complainant had purchased the mortgage on the strength of his declaration of no set-off. Further, on September 10, 1907, the defendant wrote the complainant's solicitor as follows: "In reference to paying that \$1,000 on account of mortgage, am not able as yet to do so." Later, and on October 19, 1907, he wrote again to the solicitor as follows: "In reply to your letter of the 18th, would say I expected to have been able to take up the whole mortgage before this, and feel confident that I shall do so very soon. Trusting you will show me some leniency in the matter, I remain," etc. These letters refer to the mortgage under foreclosure. The defendants set up that it was not until late in the spring of 1907 that they learned of the fraud that had been practiced on them. It will be remembered that they purchased the property July 10, and took title July 28, 1906, and gave the declaration of no set-off January 21, 1907. The installment of interest was paid to the complainant two or three months after the discovery of the fraud, and the letters excusing payment of principal were written some time after that. Of course, the payment of interest and the promise to pay the principal after the discovery of fraud would not work an estoppel, for the assignment had been made without any consideration passing from the complainant to the defendant Haslett, and the payment and promises had reference to the original debt; but the conduct of Haslett in paying the interest, and promising, as it appears, to pay to the complainant part, if not the whole, of the principal, are circumstances from which it is inferable that the attempt to rescind the contract and throw the property back on Bright and secure a return of the consideration actually paid him is born solely of an attempt to de-

feat the foreclosure of the mortgage. Anyhow, in this posture of the affair, the complainant would still be entitled to have a decree for the sale of the property to satisfy his mortgage out of the land, as against Bright, if not as against Haslett. A somewhat similar situation arose in *Magie v. Reynolds*, ubi supra. In that case the mortgage was given by Reynolds and wife to one Sumner, who assigned it to one Bloss, and Bloss assigned it to the complainant. As already stated, it was ascertained that the mortgage in its inception was without consideration. The complainant made the fatal mistake of not inquiring of the mortgagee and obligor as to whether or not the mortgage was a valid and subsisting security and what was due upon it, and it was held that the defendants as against the complainant were entitled to a dismissal of the bill, and to have the bond and mortgage delivered up for cancellation. Not so with reference to the defendant Bloss, who in his assignment to the complainant covenanted and agreed to guarantee the payment of the bond and mortgage. The complainant was allowed to amend the bill by inserting a prayer for payment by Bloss, and a decree for payment by him was made. Now, surely, if it were to be decreed that the transaction was fraudulent and should be rescinded and Haslett and Bright restored to their former status, the decree would be, further, that the mortgaged premises be sold as the property of Bright to raise and pay the money due to the complainant, for Bright, having received the mortgage from Haslett, and having sold it to Nixon, could not defeat Nixon's claim for the money which he (Bright) got from Nixon upon the strength of the mortgage security. I say "if" it were to be decreed that the transaction be declared to be fraudulent, because the cross-bill is not in, and Bright is not represented before the court by any solicitor, and therefore no decree can be made against him. If Bright's misrepresentations, for such on this record they appear to be, are sufficient in law to rescind the transaction and restore the status in behalf of Haslett, the question can be tried on an application for the surplus money, if any be raised by the sale of the mortgaged premises, or by other appropriate action.

There will be a final decree of foreclosure in favor of the complainant against the defendants, with costs.

(74 N. J. E. 730)

#### SPENCE v. SPENCE.

(Court of Chancery of New Jersey. Oct. 13, 1908.)

#### 1. JUDGMENT (§ 654\*)—RES JUDICATA.

In a suit for divorce a mensa et thoro, on the ground of extreme cruelty, if the facts constituting the alleged cruelty are disproved, a decree dismissing the petition of complaint

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

will operate *res judicata*, and be a bar to pleading or proving the same facts in any subsequent suit; but, if the facts be true, but insufficient to entitle the petitioner to relief, then a decree of dismissal may be entered without prejudice to the petitioner's right to plead and prove the same facts, in addition to any other or others, which may afford the ground of a subsequent suit against the defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1163; Dec. Dig. § 654.\*]

## 2. DIVORCE (§ 130\*)—CRUELTY—EVIDENCE.

Facts of this case held to be insufficient in law to entitle the petitioner to relief. *Held* also, that the petition should be dismissed, but without prejudice.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 442-445; Dec. Dig. § 130.\*]

(Syllabus by the Court.)

Bill by Johanna Spence for divorce against Thomas H. Spence. Complaint dismissed.

Marvin A. Spaulding and Barton B. Hutchinson, for petitioner. John Sykes and Linton Satterthwait, for defendant.

**WALKER, V. C.** This is essentially a fact case, and at the close of the hearing I took occasion to remark that I was in a state of dublety concerning the decision. I regarded, and regard the case as a very close one. Upon the hearing I also remarked that unfounded charges of adultery by the husband against the wife were the principal facts of the alleged extreme cruelty. In *Black v. Black*, 80 N. J. Eq. 215, Vice Chancellor Van Fleet, at page 221, used this language: "Slight violence by a husband, who has evinced a hatred almost diabolical, against his wife, in attempting to blast her reputation by fabricating a charge of adultery against her, has been deemed sufficient." So, it appears there must be some form of violence, coupled with a false charge of adultery, to entitle a wife to a decree, and it seems it need not be the actual infliction of physical injury, but may be threatened only, provided there be reasonable ground to apprehend that it will be inflicted. *Close v. Close*, 25 N. J. Eq. 526; *Smith v. Smith*, 40 N. J. Eq. 568, 594, 5 Atl. 109. The defendant in this case seduced his wife before marriage, and, whether from that fact or not, he seems to have taken more or less delight, during the 10 years they lived together, in denying the parentage, not only of his first, but his second child. He frequently informed his wife, and several times in the presence of others, that he was not the father of her children. This, of course, amounts to a charge of adultery as to the last child, and fornication with some one other than himself as to the first child. There were also some acts of violence testified to, but they were few and far between, and not severe. He was also guilty of some acts of cruelty not violent in character. The rule is that a divorce from bed and board for extreme cruelty is not granted by way of punishment for past offenses, but as a

preventive measure, to protect the health or life of the wife from threatened danger in the future. *Weigel v. Weigel*, 60 N. J. Eq. 322, 47 Atl. 183. Now the effect of Mrs. Spence's testimony is that her greatest apprehension, if not her only fear of her husband—that is, fear of bodily harm from him—is the fact that he had a revolver in the house. He did tell her that he would show her what he would do with it, but she admits that he never pointed it at her, or threatened her directly with it in any way.

Spence upon the witness stand expressed a desire to have his wife return to him, and promised to treat her well in the future. His conduct toward her in the past, to say the least of it, was that of a dastard, and it may be regrettable that the evidence, under the authorities, does not entitle her to a decree. His conduct was certainly intolerable at times, but did not, in my judgment, according to the adjudications, amount to what in the law of this state is denominated extreme cruelty. In this cause, as I view it, the petitioner just falls short of making a case under the law. It is certainly not to be regretted that, in dismissing the wife's petition in this case, I may do it without prejudice to her so that, if she should accept his proffer and renew marital relations with him, then, in the event of any other outbreak on his part, justifying another appeal by her to this court, the offenses which were made the subject of her present complaint will be available to her in addition to any fresh outrage he may commit. This course was adopted in *English v. English*, 27 N. J. Eq. 579, in which the Court of Errors and Appeals said, at page 586: "The bill will be dismissed without prejudice, so that the facts urged in this complaint may be used if the case should again be brought before the court." Such will be the decree in the case at bar.

I have no hesitation in pronouncing the rule to be this: If the facts constituting the alleged cruelty are disproved, a decree dismissing the petition of complaint will operate *res judicata*, and be a bar to pleading or proving the same facts in any subsequent suit; but that, if the facts be true, but insufficient to entitle the petitioner to relief, then a decree of dismissal may be entered without prejudice to the petitioner's right to plead and prove the same facts, in addition to any other or others, which may afford the ground of a subsequent suit against the defendant. Too often, I fear, men like Spence interpret a decree dismissing absolutely a wife's complaint in causes like this as a judicial indorsement, and they consequently feel that they can continue their cruel course of conduct toward their wives with impunity. Whenever it is possible, in a case of this kind, they should be informed otherwise, and given to know that, if their wives return to them, a repetition of the past, coupled with the past, is likely to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lead to a judicial separation, with an award of the custody of children and alimony against them, of a permanent character.

(74 N. J. E. 581)

**KNIKEL et al. v. SPITZ et al.**

(Court of Chancery of New Jersey. Oct. 3, 1908.)

**1. WILLS (§ 222\*)—FRAUDULENT WILLS—EQUITABLE JURISDICTION.**

Equity has no jurisdiction to decree fraudulent wills void.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 643; Dec. Dig. § 222.\*]

**2. EQUITY (§ 1\*)—JURISDICTION—EXERCISE OF JURISDICTION.**

Jurisdiction of equity, when properly invoked, must be exercised in the absence of good reason to the contrary based on a definite principle of equity.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 1.\*]

**3. EQUITY (§ 42\*) — JURISDICTION — OBJECTIONS.**

In the absence of objection in limine that the remedy at law is adequate, equity will exercise its jurisdiction unless on its own motion it sees fit to remand the parties to a court of law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 119, 120; Dec. Dig. § 42.\*]

**4. CANCELLATION OF INSTRUMENTS (§ 10\*)—JURISDICTION—REMEDY AT LAW.**

A bill which alleges that a will and deeds were procured by fraud, and prays that the deeds be set aside, and that the title to the lands disposed of by the deeds and will be re-vested in complainants as heirs at law of the grantor and testator, presents a case for equitable relief so far as the bill prays for the cancellation of the deeds, and, in the absence of seasonable objection on the ground that the remedy at law is adequate, equity will take jurisdiction to that extent, though a court of law in ejectment has jurisdiction to determine the validity of the will and deeds in one action.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 9; Dec. Dig. § 10.\*]

**5. EQUITY (§ 233\*)—JURISDICTION—OBJECTIONS—DEMURRERS.**

A demurrer to a bill within the jurisdiction of equity on the ground of want of equity is too indefinite to raise the objection that the remedy at law is adequate.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 509; Dec. Dig. § 233.\*]

**6. EQUITY (§ 147\*)—PLEADING—BILLS—MULTIFARIOUSNESS.**

The rule as to multifariousness in a bill in equity is based largely on considerations of convenience, especially in those cases of multifariousness which are more properly termed "misjoinder."

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 147.\*]

**7. EQUITY (§ 148\*)—PLEADING—MULTIFARIOUSNESS.**

A bill by heirs which alleges that the ancestor was induced by fraud to execute a will and deeds, and which prays for the cancellation of the deeds, and that the title to the lands be vested in complainants as heirs at law, is not multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-348; Dec. Dig. § 148.\*]

**8. CANCELLATION OF INSTRUMENTS (§ 35\*)—PARTIES—NECESSARY PARTIES.**

A bill by heirs for the cancellation of deeds executed by the ancestor on the ground of fraud, which makes heirs whose interests are concurrent with those of complainants defendants without giving any reason for the failure to join them as parties complainant, is bad on demurrer, under the rule that all tenants in common should be joined as parties complainant unless some of them refuse to join as complainants, in which case they should be made defendants with a proper allegation setting forth their refusal to join as complainants.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 35.\*]

Suit by Christian Knikel and others against Elizabeth Spitz and others. On demurrer to bill. Demurrer sustained.

M. T. Rosenberg, for complainants. John J. Fallon, for defendants.

**STEVENSON, V. C.** The following are my conclusions:

The general specification of "want of equity" is not sustained. The bill is filed by heirs, and alleges that the ancestor made a will and also deeds of conveyance under which the defendant Elizabeth Spitz claims title to the land which is the subject-matter of this litigation, and further alleges in effect that the ancestor was non compos mentis, and that the deeds and the will were procured by fraud, duress, undue influence, etc., and prays that the deeds may be set aside and declared null and void, and that the title to the lands may be decreed to be vested in the complainants as the heirs at law of their ancestor, and that the defendant in whose favor the will and deeds were made may account for rents. This court has no jurisdiction to decree the will void. Fraudulent wills constitute the great exception to the jurisdiction of courts of equity arising from fraud. 2 Pom. Eq. § 913; Trustees v. Wilkinson, 36 N. J. Eq. 141, 144. It would seem that so much of the bill as alleges that the will was procured by fraud, undue influence, or duress, and prays that the title of the complainants be established against the devisee, might have been the subject of a separate demurrer. Disregarding this portion of the bill, the remainder clearly presents an equitable cause of action of a very common type. It is true that, if the complainants succeed in having the deeds set aside, the defendant Elizabeth Spitz may still assert her title under the will, and that title may finally prevail in a test action in a court of law. But the complainants have no interest in any attack upon the devise to the defendant Elizabeth Spitz in the appropriate tribunal where that matter may be tried, unless they can have these deeds declared void. They bring this suit in a court of equity invoking the full extent of the jurisdiction of the court in order to get a decree which will

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

enable them advantageously to prosecute an action for the enforcement of their rights in another court. The limitation upon the jurisdiction of this court above mentioned may be a defect in our system, and in this and in other similar cases the result may be a great increase of the extent and expense of litigation in order to determine all the controversies between the parties. Still the undoubted jurisdiction of this court, when properly invoked, must be exercised, in the absence of a good reason for refraining from the exercise of such jurisdiction based upon a definite principle of equity.

2. Upon the argument of the demurrer the suggestion was made by the court to counsel for the complainants that they had an adequate remedy at law for the grievances alleged in the bill in respect of both the deeds and the will. The question for consideration is whether the jurisdiction of this court based upon fraud, while beyond all question so far as the deeds are concerned, ought to be exercised where the remedy at law is even more ample and adequate than any remedy in a court of equity. *Eggers v. Anderson*, 63 N. J. Eq. 284, 49 Atl. 578, 55 L. R. A. 570; *Gnitchel v. First Nat. Bank of Hightstown*, 66 N. J. Eq. 88, 89, 53 Atl. 1041. In this case not only must the complainants resort to an action at law in order to test the validity of the will alleged to have been procured by fraud, but in the same action they seem to have ample opportunity to test the validity of these deeds. The fraud alleged in the procurement of these deeds is plainly cognizable at law as well as in equity. It is unnecessary to consider the very narrow question, if there be one, whether in an action of ejectment a deed of real estate may be declared void on the ground of undue influence practiced upon the grantor, where there is no other feature of the case which makes the alleged defect in the conveyance classifiable as a fraud. I know of no reason why a jury in an action of ejectment may not pass on the question whether such influence was brought to bear upon the mind of the grantor as to deprive him of his free agency, and to subject his will to the absolute control of others when precisely this same issue in respect of a devise of land not only may be, but practically must be, tried by a jury in an action of ejectment. Passing this question, however, the case made out in the bill against these deeds is one of gross fraud as well as duress. It is plain that a court of law in an action of ejectment would have full jurisdiction to adjudicate that these deeds are void on the ground of fraud in their execution. If the question were an open one and properly presented now on this demurrer, no doubt an argument could be made worthy of careful consideration in favor of the proposition that, while this court has jurisdiction to entertain a suit to declare these deeds void on the ground of fraud, such jurisdiction ought not to be exercised

when the court is powerless to decide the whole case—when in case the deeds shall be set aside the function of this court ends, and the complainants must then resort to an action at law to determine the validity of the will—while the courts of law stand ready in a single action to determine the whole controversy over both deeds and will. It seems to be settled, however, that the objection to the exercise of the jurisdiction of this court in a particular case based upon fraud must be made in limine. *Eggers v. Anderson*, supra; *Krueger v. Armitage*, 58 N. J. Eq. 357, 361, 44 Atl. 167. In the absence of seasonable objection on the ground that the remedy at law is adequate, this court will proceed to exercise its unquestioned jurisdiction unless of its own motion it sees fit to exercise the discretionary power of remanding the parties litigant to a court of law. *Varrick v. Hitt*, 66 N. J. Eq. 442, 57 Atl. 406; *Lehigh Zinc Co. v. Trotter*, 43 N. J. Eq. 185, 204, 7 Atl. 650, 10 Atl. 607. The defendant by refraining at the first opportunity from raising the objection to the exercise of jurisdiction by this court, which objection, if sustained, will compel the complainant to commence his litigation over again in another court, may well be deemed to be stipulating or assenting to the proposition that the remedy at law is not adequate, and that, therefore, the complainant's case should be disposed of by the exercise of the jurisdiction of this court. In this case the only specification of a ground for demurrer which can possibly cover the objection under consideration is the general specification of want of equity. Inasmuch as the court has jurisdiction, such a specification seems to me to be too general and indefinite. Moreover, the argument of the demurrer made by counsel for the defendant did not suggest the point. The parties did not come before the court to argue such a question, and, in fact, it was not argued except so far as counsel for the complainant endeavored to answer the questions of the court. I do not think that it would be fair to consider this possible objection to the exercise of jurisdiction in this case as presented to the court by the demurrer. To meet the suggested difficulty in the way of the complainants' case, counsel for complainants cites the decision of Vice Chancellor Pitney in the case of *Foth v. Ellenberger* (N. J. Ch.) 47 Atl. 216. That case is substantially on all fours with the present one, excepting that the case was on final hearing on bill, answer, and proofs. The objection above set forth was not taken. The court held that, for the purposes of that action, the will "must be laid out of view," and a decree was advised setting aside the fraudulent deed. In view of this authority and of the form of the demurrer, I have concluded that, even though the proofs have yet to be taken, this court of its own motion should not refuse to exercise its jurisdiction in respect of the perfectly plain case of fraud

infesting these deeds set forth in the complainants' bill. If the complainants fail in this suit, it would seem that the whole controversy between the parties will be finally settled. If the complainants succeed, it may be that the defendant Spitz will not deem it worth while to assert title under the will. It is therefore by no means certain that the entire litigation between the parties in respect of this tract of land will not be conducted to a final conclusion in this court. The complainants have a great interest in settling these deeds aside. This court has power to set these deeds aside if the allegations of the bill in respect of them are sustained by proofs. All the reasons above indicated why this court might in its discretion decline to exercise its jurisdiction because of the adequate and even more complete convenient and less expensive remedy which the complainants may have in a court of law are plainly presented upon the face of this bill. The demurrer does not even specify that the complainants have a remedy at law. The grounds of demurrer beyond the general objection of want of equity and lack of jurisdiction in this court are confined to matters of practice and procedure in courts of equity.

3. The objection that the "bill is multifarious and joins distinct and separate matters together which ought not to be united in one bill" is not sustained. The rule in regard to multifariousness in a bill in equity is based largely on considerations of convenience. This is especially true in these instances of multifariousness which more properly are termed misjoinder. *Emans v. Emans*, 14 N. J. Eq. 114. It would be the veriest technicality to sustain this demurrer on the ground that the bill sets forth a good cause of action against the deeds, and a bad cause of action—a cause of action which might have been eliminated by a demurrer—against the will. There is no inconvenience in trying the cause of action in relation to the deeds of which this court has undoubted jurisdiction.

4. The remaining specifications of causes of demurrer may be dealt with together. The objection presented is that three parties who are heirs of the ancestor, and whose interests are concurrent with those of the complainants, are made parties defendant, and are not made parties complainant, and that "no reason is given for failure to join such persons as parties complainant." This technical objection I think is well taken. All these tenants in common should be joined as parties complainant under a familiar rule, unless some of them refuse to join as complainants, in which case they should be made parties defendant with a proper allegation in the bill setting forth their refusal to join as complainants. 1 *Dan. Ch. Pl. & Pr.* (6th Am. Ed.) p. \*190, note "a"; *Morse v. Hovey*, 9 *Paige* (N. Y.) 197.

An order will be advised sustaining the

demurrer on the ground above set forth, and permitting the complainant to amend his bill within 20 days after service upon his solicitor of a copy of the order, and further providing that, in default of such amendment, the defendant may apply on notice for an order dismissing the bill.

(74 N. J. E. 578)

**MONMOUTH COUNTY ELECTRIC CO. v.  
EATONTOWN TP. IN MONMOUTH  
COUNTY.**

(Court of Chancery of New Jersey. Oct. 2, 1908.)

**1. EXECUTION (§ 172\*)—ENJOINING ISSUANCE  
—PLEADING.**

Allegations, in a bill to restrain the entry of a final judgment and the issuance of execution thereon as to various errors of law committed by the judge trying the cause without a jury, must be disregarded.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 172.\*]

**2. ESTOPPEL (§ 111\*)—EQUITABLE ESTOPPEL  
—LEGAL AND EQUITABLE DEFENSE.**

Equitable estoppels are cognizable at law and in equity, and where the conduct of plaintiff, in an action of law alleged to constitute an equitable estoppel precluding a recovery, is as capable of investigation by a jury, under the direction of the law court, as by an equity judge, the defense is available at law.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 299; Dec. Dig. § 111.\*]

**3. JUDGMENT (§ 731\*)—EQUITABLE JURISDICTION—RES JUDICATA.**

A defendant, whose equitable estoppel has been erroneously disregarded by a court of law, need not take a writ of error but he may come into equity to have his estoppel recognized and tried, and thereupon the inability of the law court to take cognizance thereof is *res judicata* between the parties.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 731.\*]

**4. JUDGMENT (§ 407\*)—EQUITABLE RELIEF.**

Where, in an action at law, evidence establishing an equitable estoppel precluding a recovery was presented, though not pleaded, and there was nothing to show that the court would not take cognizance of the defense and adjudicate on it, defendant could not maintain a bill to restrain the entry of the judgment against him, but his remedy was by writ of error.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 771; Dec. Dig. § 407.\*]

Suit by the Monmouth County Electric Company against the township of Eatontown, in the county of Monmouth. Motion for injunction, heard on bill, answer, and affidavits, denied.

John M. Enright, for the motion. James Steen, opposed.

STEVENSON, V. O. My conclusion is that no case is made out for a preliminary injunction. The bill is filed to restrain the defendant from entering final judgment against the complainant in the Monmouth county circuit court, upon a finding of the judge of that court, who tried the cause, by

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

consent, without a jury, and from issuing execution or taking any action or proceeding for the recovery of the amount found by the court to be due. A great deal contained in the bill appears to be directed toward the exhibition of various alleged errors of law committed by the learned judge who tried and decided the cause in the law court. All such allegations of course must be disregarded.

The first question is whether the complainant shows that it has an equitable defense which could not be pleaded and proved in the action at law. The only suggestion of any defense cognizable in equity is the defense of an equitable estoppel. It is well settled that equitable estoppels at the present time, as a general rule, are cognizable at law as well as in equity. 2 Pom. Eq. 802. *Ruckelschaus v. Oehme*, 48 N. J. Eq. 436, 443, 22 Atl. 184; *Kronson v. Lipschitz*, 68 N. J. Eq. 367, 60 Atl. 819. No pretense is made that this is a peculiar and complicated case where equity ought to intervene, and transfer the trial of the equitable estoppel, which of course involves the trial of the whole cause, from the law court to this court, in accordance with the procedure which was approved by the Court of Errors in *Society v. Lehigh Valley R. R. Co.*, 32 N. J. Eq. 329. The conduct of the defendant, the plaintiff in the legal action, which it is argued constitutes an equitable estoppel prohibiting the defendant from enforcing the claim which it advanced in its lawsuit, seems to be extremely simple, and fully as capable of investigation and comprehension by a jury, under the direction of a law court, as by an equity judge. Nor is this a case where the equitable estoppel has been erroneously excluded from consideration by the law court, in the mistaken belief that such defense was cognizable only in equity. *Borcherling v. Ruckelschaus*, 49 N. J. Eq. 340, 24 Atl. 587; *Headley v. Leavitt*, 65 N. J. Eq. 748, 755, 55 Atl. 731. In such case the party, whose equitable estoppel has been erroneously disregarded in the law court, is not obliged to take a writ of error, but may come into a court of equity to have his equitable estoppel recognized and tried, and thereupon the inability of the law court to take cognizance of the equitable estoppel will be deemed *res adjudicata* between the parties.

In the present case the equitable estoppel was not specially pleaded. If such a defense cannot be proved under the general issue, the complainant has merely lost its case at law because of the inadequacy of its pleadings—a predicament in which parties to lawsuits frequently find themselves. If, however, the complainant's equitable estoppel was available under its pleadings in the lawsuit, then it follows, either that the law court erroneously held that it could not take cognizance

of an equitable estoppel, or adjudicated, either erroneously or correctly, that the equitable estoppel was not, in point of fact, established by the proofs. Evidence tending to establish the alleged equitable estoppel was plainly presented to the law court in this case. There is absolutely no indication, in the motion papers in this cause, that the learned judge of the Monmouth circuit court erroneously held that he could not take cognizance of the defendant's alleged equitable estoppel. If the defense in question was presented to the law court by the pleadings, the presumption is that the law court held that such defense was not established. It is unnecessary to point out that this court will not review the decision of the law court in regard to that matter. The bill, in describing the course of the action in the circuit court, sets forth certain contentions of the complainant before that court, one of which was that the conduct of the defendant, the plaintiff in the law court, set forth in the bill, constituted an estoppel which barred the defendant from any recovery. The bill then alleges that the court "overrules such contention in an opinion or finding," a copy of which opinion is annexed to the bill. In the opinion or finding above referred to the court considers the claim of estoppel, and holds that it cannot be sustained, for reasons which are stated. While this opinion of the law court subsequently was substituted by another, which I understand does not refer to the claim of estoppel, the fact still remains that there is no evidence in this case that, if this equitable estoppel was properly presented by the pleadings and the evidence to the law court for its determination, that court did not take cognizance of it and adjudicate upon it.

It seems to me quite clear that, if the complainant will suffer any injustice by the entry and enforcement of the judgment against it in the Monmouth circuit court, its remedy is by writ of error.

(74 N. J. E. 589)

CAVAGNARO v. JOHNSON et al.

(Court of Chancery of New Jersey. Sept. 21, 1908.)

SPECIFIC PERFORMANCE (§ 32\*)—CONTRACTS—VALIDITY—MUTUALITY OF AGREEMENT.

Complainant was willing to pay a certain sum for land, if the owner would induce his tenant to vacate, or if complainant could make satisfactory arrangements with the tenant, the owner being willing to give a warranty deed if he sold, and on June 15th complainant wrote to the owner, inclosing a deed, which he stated would be satisfactory if executed, and that complainant would be ready to take title the first week in July, provided the tenant vacated the premises before that time. The owner stated that he was unwilling to give a general warranty deed, and that he was unwilling to compel the tenant to vacate within 60 days, but suggested that, if complainant paid a certain sum

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



on account, he would have the tenant vacate within that time, and thereafter the parties had a telephone conversation and agreed to meet the following week. Complainant had the purchase price during these negotiations, and was ready to make settlement for the property. *Held*, that the minds of the parties did not meet upon the terms of the sale, and there was no mutuality to the agreement, so as to constitute a completed contract.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 89-99; Dec. Dig. § 32.\*]

Suit for specific performance by John D. Cavagnaro against Harvey F. Johnson and others. Bill dismissed.

D. W. McCrea and Robt. L. Lawrence, for complainant. W. J. Wright, for defendants.

GARRISON, V. C. (orally). This is a bill filed for the specific performance of a contract by John D. Cavagnaro against certain defendants succeeding to the rights of Harvey F. Johnson and Ruth Johnson, his wife.

Johnson, in his lifetime, was the owner of a tract of land at Northvale in the state of New Jersey. Correspondence ensued between the parties, or their representatives, looking to the sale by Johnson to Cavagnaro of this property, for the sum of \$2,000, with a small sum in addition thereto to pay for the expense of passing title.

Up until the 30th of June, 1906, the general situation was that Johnson was willing to sell for \$2,000, provided satisfactory arrangements could be made with the tenant, who was then in the property. Cavagnaro was willing to buy for \$2,000 also, provided he could either force Johnson to have the tenant vacate the property, or could himself arrange satisfactorily with the tenant.

Johnson agreed that if he sold, he would give a warranty deed.

On the 15th of June, 1906, the representative of the complainant wrote to the representative of the defendants that they inclosed a deed which, if executed by Johnson and his wife, would be satisfactory to the purchaser, and that the purchaser would be ready to take title some time in the first week in July, 1906, but that it would be necessary to have the tenant vacate the premises before that time. The representative of the seller replied to this letter on the 30th of June, 1906, stating that he had received from his client, Johnson, the deed, but that it had not been executed as drawn; that Johnson was unwilling to give a warranty deed, and therefore the deed as executed contained no warranty excepting as against grantor's acts. This letter further states that the seller, Johnson, does not wish to have the tenant compelled to move under 60 days, and suggests that, if the purchaser wishes the house vacated, he should pay \$500 on account, and then the seller will have the tenant vacate within 60 days.

No more correspondence ensued between the parties concerning this subject-matter.

Some time about 10 days or more after this letter of June 30th, there is a telephone conversation between the attorneys of the seller and of the buyer. The attorney of the buyer telephoned to the attorney of the seller, stating that he had not yet received any reply to his letter, and he wished a date fixed for closing. He states that he is not feeling well at the time, and wishes to know whether the attorney for the seller will not be coming shortly to New York city, to which the attorney for the seller replied that he would, and states a time, then about a week off, when he would be down there. The attorney for the purchaser states that during this time he had in his hands the \$2,000 to make settlement for the property.

It is contended, on behalf of the complainant, the purchaser, that there was a completed contract, which he is in a position to have enforced.

So far as the letters between the parties contain the terms of any contract, it is perfectly clear that there was no meeting of the minds, and therefore no agreement. According to the letters, the seller was to give a deed with full warranty, and the property was to be vacant, this latter being an insistence of the purchaser. The seller, being unwilling to give a full warranty, reforms the deed sent him, and omits from it the clause of warranty against any acts save those of grantor. He also refuses to agree to deliver the property vacant, and suggests that the tenant be allowed to remain there 60 days, the purchaser paying \$500 on account, and getting the property at the end of 60 days upon payment of the balance.

There is no competent evidence before me that the purchaser ever agreed to any such performance of the contract as the seller tendered or suggested that he would tender. The only occurrence, after the cessation of the written communications between the parties, is a telephone talk, by which a time of meeting is fixed. It may have been, and probably was, the intention of the purchaser at that meeting to either accept that which the seller should offer, namely, a deed without warranty, except as against grantor's acts, and a property incumbered with a tenant, or then come to new terms; but he had not agreed to do so, and there is nowhere any evidence of a meeting of the minds of these parties upon the terms of their bargain.

The mutuality required in these contracts is entirely lacking. If the purchaser were the defendant in this suit, there is no proof of any contract which could be enforced against him, just as I do not find any proof of any contract to be enforced by the purchaser against the seller.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

This is not a case in which the terms are agreed upon, and the complainant is willing to accept such partial performance thereof as the defendant tenders, with damages for the unperformed part. It is a case, as stated above, where the terms are not proven.

I will advise a decree dismissing the bill with costs.

(222 Pa. 150)

CAVANAUGH et ux. v. AVOCA COAL CO.  
(Supreme Court of Pennsylvania. June 23, 1908.)

MASTER AND SERVANT (§ 124\*)—INJURY TO SERVANT—DEFECTIVE BOILER.

In an action to recover for the death of plaintiff's intestate by the explosion of a boiler, where the only negligence alleged was the want of proper inspection, but the evidence showed that the boiler, though secondhand, had been purchased from a reputable dealer under a guaranty; that the dealer and defendant had it carefully inspected, and it had been thereafter examined every six months by a qualified person, as provided by Act June 2, 1891, art. 5, § 1 (P. L. 187), and had been inspected about four months before the explosion—there was no evidence that the boiler was used by defendant while in a dangerous or defective condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

Appeal from Court of Common Pleas, Luzerne County.

Action by William Cavanaugh and Catharine Cavanaugh against the Avoca Coal Company. From a judgment for defendant, notwithstanding a verdict, plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

Paul J. Sherwood, Wm. H. Hines, and Edward Lynch, for appellants. John McGahren and P. A. O'Boyle, for appellee.

POTTER, J. In this action the parents of Malachi Cavanaugh sought to recover damages for his death, which they alleged was the result of the negligence of the defendant company. Cavanaugh was 23 years of age, unmarried, and lived with his parents. He was employed by the defendant, the Avoca Coal Company, Limited, at its colliery at Avoca, Luzerne county, Pa., as fireman in the boiler house. On July 17, 1903, about 7 a. m., one of the boilers in charge of Cavanaugh exploded, and he was killed. It was alleged by plaintiffs that the explosion was due to the negligence of defendant. The boiler which exploded was one of a group of seven, and was the last of the seven installed in defendant's works. It was purchased secondhand about March, 1899, and used by defendant about four years and four months. Plaintiffs charged that the boiler was not in good condition when purchased, and that it was not properly inspected, and that it was never fit for use

while in defendant's possession, and that if it had been properly inspected, its condition would have been discovered, and the explosion would not have occurred. Defendant denied that the boiler was unsafe, and contended that the explosion was due to low water, caused by the neglect of Cavanaugh himself to fill it at the proper time. The company also alleged that the boiler had been regularly inspected and reports made every six months, in compliance with the requirements of Act June 2, 1891, art. 5, § 1 (P. L. 187); the inspection being made by Edward Newlin, an employé of defendant, who was claimed to be "a qualified person," within the meaning of the act. An inspection was made on April 1, 1903, between three and four months before the explosion, and Newlin then reported the boiler as safe and in good condition. The trial judge refused a request to give binding instructions for defendant, and submitted the case to the jury, who found a verdict for plaintiffs. Subsequently, upon a motion for judgment non obstante veredicto, the court entered judgment for the defendant. Its action in so doing is here assigned for error by plaintiffs.

It appears from the evidence that the defendant company purchased the boiler from Mr. Touhill, a reputable dealer, under a guaranty that it could be safely used at a working pressure of 100 pounds of steam to the square inch; that before selling it to the defendant, Mr. Touhill had the boiler tested by the hydrostatic test, at a pressure of 150 pounds, and found it all right. In addition to this Mr. Newlin, an expert machinist and master mechanic, was employed by the defendant to examine and test the boiler before it was purchased, and he made an examination and tested it by what is known as the "hammer test," and reported the boiler as satisfactory. Afterwards, while the boiler was in use, it was examined every six months for the purpose of making a report to the mine inspector. We do not find anything in the evidence to indicate that Mr. Newlin, the inspector, was incompetent, or that he was not a proper person to have the oversight and care of the boiler. On the contrary, the evidence is positive that he was competent for the work, and that he was selected for that purpose with care and judgment. As the learned judge says: "There is nothing in the evidence to show that these various inspections and examinations were made in a perfunctory and careless manner; nor is there anything in the evidence to show that the defendant company, being the owner of such boiler, relied, for its information as to the condition of said boiler, upon any one except the qualified inspector selected and by them designated, pursuant to the act of Assembly, for the purpose of inspecting and examining the same." We find no evidence in the case of any lack of proper inspection or

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

care. On the contrary, it appears that everything, which the knowledge of a careful and prudent man could suggest in the care and maintenance of the boiler, was done. If there was anything in the evidence tending fairly to show that the owner used the boiler while in a dangerous or defective condition, it would of course be answerable for any damages resulting therefrom, but there is an entire absence of any such testimony.

The evidence does disclose circumstances from which other reasons for the explosion than those alleged by plaintiffs may fairly be inferred. It may have been owing to failure to supply water to the boiler at proper intervals, or to the fireman permitting the boiler to become overheated, and then admitting cold water. But whatever may have been the cause, it is sufficient to say that, in so far as concerns the allegation that the explosion was due to the lack of competent and careful inspection and examination of the boiler by the representatives of the defendant company, there was not sufficient evidence to justify the submission of the question to the jury. We find no conflict of evidence as to any material fact, or any reason why there should not have been a binding instruction in favor of the defendant.

We agree with the conclusion reached by the court below, and the judgment is affirmed.

(222 Pa. 154)

**BIRKBECK v. WADSWORTH.**

(Supreme Court of Pennsylvania. June 23, 1908.)

**WILLS (§ 598\*)—CONSTRUCTION—NATURE OF ESTATE.**

Testator directed that all his real estate should be converted into cash, except one piece specifically described, which "shall be held in reserve for my widow." *Held*, that the widow takes an estate in fee in the property reserved, in the absence of any devise over.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1327-1331; Dec. Dig. § 598.\*]

Appeal from Court of Common Pleas, Luzerne County.

Action by Mary Birkbeck against Eleanor Wadsworth. Judgment for plaintiff. Defendant appeals. Affirmed.

From the case stated it appeared that the plaintiff, who was the widow of Joseph Birkbeck, claimed title to the property in question, at the corner of Dana and Grove streets in the city of Wilkes-Barre, under a clause in her husband's will which was as follows: "It is my desire that all bonds and stock shall be taken at their face value and all real estate shall be converted into cash, with the exception of the property at the corner of Dana and Grove streets, which shall be held in reserve for my widow together with all household utensils, except piano and music which I desire to be set apart for my step-daughter for her sole and separate use." The court in an opinion by Ferris, J., held

that the widow took a title in fee, and entered judgment in favor of the plaintiff for \$8,000.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

S. J. Strauss, for appellant. George R. Redford and Lawrence B. Jones, for appellee. H. W. Palmer and C. O. Stroh, for heirs of Joseph Birkbeck.

MITCHELL, C. J. If the testator had devised the house to his wife and then directed the conversion of all the rest of his real estate, there would have been no doubt; and yet the meaning is clearly the same. What he said was that the real estate should be converted into cash with the exception of the property at Dana and Grove streets, which should be "held in reserve for his widow." The expression, "held in reserve," is not apt, nor in itself entirely clear, but the testator certainly meant the house was not to be converted. His wife was to have it, and the expression, "held in reserve," must be taken as equivalent to what he said about the piano for his daughter, that it was to be "set apart" for her. It being clear, therefore, that he meant the house to go to his wife in the first instance, the statutory presumption is that his entire estate in it passed to her. There is no devise over or anything showing contrary intent.

Judgment affirmed.

(222 Pa. 156)

**DILLON et al. v. HEGARTY et al.**

(Supreme Court of Pennsylvania. June 23, 1908.)

**1. QUIETING TITLE (§ 42\*) — PLEADING — AMENDMENT.**

Where the allegations of a bill and the averments of the answer show that it was a bill to remove a cloud on title, but the prayer of the bill simply asked that an instrument attached thereto be declared as a simple obligation for the payment of money, the court may allow plaintiff, after the hearing, to substitute a prayer that the instrument be declared void and stricken from the record as a cloud on title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 83; Dec. Dig. § 42.\*]

**2. QUIETING TITLE (§ 7\*) — WHERE RELIEF GRANTED.**

Equity will strike from the record as a cloud on title an instrument purporting to convey 50 acres of mineral lands, where it did not describe the property conveyed, except as a part of a tract of 200 acres.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 14-18, 20; Dec. Dig. § 7.\*]

Appeal from Court of Common Pleas, Clearfield County.

Bill by Ida Dillon and others against A. L. Hegarty and W. W. Hegarty. Decree for plaintiffs, and defendants appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and STEWART, JJ.

Thos. H. Murray, Singleton Bell, H. B. Hartswick, Jas. P. O'Laughlin, and Hazard Alex. Murray, for appellants. Cyrus Gordon, B. F. Chase, and Harry Boulton, for appellees.

STEWART, J. The bill filed in this case contains averments which, if true, show a clear case for equitable relief, but not the specific relief asked for in the prayer of the bill. If the instrument which gave rise to the dispute is simply an obligation for the payment of money, it is difficult to see how it could be a cloud upon plaintiff's title to the land; and, if that is all it is, it is quite as difficult to see how a court of equity could relieve against it. Whether it is an enforceable pecuniary obligation, and, if so, how much is owing upon it, are questions to be settled in a common-law action. The instrument purports to be a conveyance of real estate; that is to say, of mineral rights severed from the surface. It has been recorded as a deed, and the defendants are claiming under it as a sufficient legal title to 50 acres embraced in the larger tract owned by the plaintiffs. The bill discloses this, and yet the only relief asked was that the instrument be declared a simple obligation for the payment of money, and that the amount due thereon, if anything, be ascertained and determined by the court. The answer shows a much more accurate apprehension of the real issue, and, after asserting that disputes have arisen as to the legal effect of the recorded instrument above mentioned and as to the estate owned by the defendants in said land, and the precise location upon the ground of the 50 acres, gives assent to the same being determined in this proceeding, that litigation may be avoided and titles quieted. The case was heard on bill, answer, and evidence; but it was not until the evidence was closed that plaintiffs asked leave to amend the prayer for relief. The amendment proposed, and allowed by the court, was a substitute for the original prayer, and was as follows: First, that the court decree that the paper mentioned in paragraph 2 of the bill, dated February 22, 1877, and recorded, is null and void as a conveyance either by deed or mortgage; and, second, that it be stricken from the record as a cloud upon plaintiffs' title. The action of the court in allowing the amendment was excepted to, and is here assigned for error.

The principal objection urged was that the amendment introduced a new cause of action. But this is clearly a mistaken view. The cause of action as set out in the bill admits of no other relief than that indicated in the amendment. What was complained of was that the recorded instrument was a cloud upon the plaintiffs' title, and the action was brought to have the cloud removed. The defendants in their answer recognize this as the purpose, and agree that the question shall be determined in this proceeding. The amendment was certainly at variance with

the theory of the plaintiffs as to the nature of the recorded instrument when the bill was filed; but this is of no consequence, so long as it introduced no new fact, and left the cause of action the same. Before allowing it the trial judge gave every opportunity to the defendants to offer additional evidence, and even proposed a continuance of the hearing to a subsequent date if defendants so desired. In view of the real question involved, and the only one, it is impossible to see how the defendants could have been prejudiced by the amendment. The whole case turns upon the question whether the recorded instrument, which was claimed to be a cloud upon the plaintiffs' title, could operate as an efficient legal conveyance of an interest in the land. The defendants insisted that it could, and were claiming under it. The plaintiffs contended it was ineffectual as a deed, and, because defendants were asserting the contrary, it was a cloud upon their title exposing them to vexatious litigation. This was the issue, and the only question was one of law, to be determined by the court from an inspection of the instrument itself.

The paper that gave rise to the dispute reads as follows: "Know all men by these presents, that I, John B. Dillon, of Clearfield county, Pa., in consideration of the sum of six hundred dollars, to me in hand paid, or secured to be paid, by John Clark, of Williamsport, Pa. (it being the same six hundred dollars due from me, the said John B. Dillon, to the said John Clark, referred to in an article of agreement dated February 1, A. D. 1877), have granted, bargained, sold, and transferred unto the said John Clark, his heirs or assigns, all the right, title, interest, and benefit in and to fifty acres of mineral land, or, in other words, the proceeds and benefits of the mineral of fifty acres of land. Said fifty acres of land is situate in Becarla township, Clearfield county, Pa., and in that part of the Abraham Witmer and Thomas Ketland, situate on the north side of Turner Run, and the same piece of land allotted to me, the said John B. Dillon, in a division made by the Weston lands as by article of agreement before referred to and dated February 1, A. D. 1877. Witness my hand and seal this February 26, A. D. 1877. [Signed] John B. Dillon. [Seal]." The defendants claim under the John A. Clark mentioned in the above paper, and their contention is that this paper vested in Clark and his assigns a freehold interest in 50 acres of mineral land out of the larger tract owned by Dillon, with the right in Clark—now in them—to locate and determine the lines and boundaries. The learned trial judge held that the description of the land which was the subject of the conveyance was so defective and imperfect that it was not possible to locate with certainty the land attempted to be conveyed.

We do not understand that the correctness of this ruling is challenged. The effort is to avoid its legal effect. It is argued that,

conceding the impossibility to locate accurately the 50 acres from the description in the deed, yet, inasmuch as they were included within the prescribed boundaries of several larger tracts, the conveyance gave to the grantee the right to locate and adopt any 50 acres within such defined boundaries as he or his grantees might select. The argument overlooks entirely the nature and character of the instrument under which this claim is made. Were it an executory contract between Dillon and Clark, we will not say that the latter might not be heard to assert such right; but it is not. It is a deed of conveyance. Of this there can be no question. There is nothing about the paper to suggest that the parties contemplated other or further assurance. It was a final act, expressing the ultimate intention of the parties. The legal presumption from its acceptance by Clark is that it was a fulfillment of all previous negotiations, and that into it were merged all previous understandings. At no time after acceptance of this deed by Clark could he have asserted a right to select his 50 acres out of the larger body, except through a reformation of the deed because of fraud or mistake. This he never attempted; nor do defendants here allege that any ground exists for a reformation. They stand on the paper as a final conveyance, and by it their rights are to be judged. As a conveyance the instrument is fatally defective, since it furnishes no description of the land which would serve to locate it. All that can be gathered from its terms is that the 50 acres intended to be conveyed were part of a tract four times as great; but what part is left undefined and undetermined? That is the whole case. Whether out of the transaction between Dillon and Clark arose any right on the part of defendants to share in the fund realized from the sale of the entire tract, and which is now in court for distribution, is not a question to be decided here. The orphans' court is the proper tribunal to dispose of it. The decree of the court below does not cancel the instrument under which defendants claim. It strikes it from the record as an ineffectual deed of conveyance and as a cloud upon plaintiffs' title. If it can take effect for any other purpose, the decree does not impair its vitality.

The assignments are overruled, and the decree is affirmed, at the costs of the appellants.

(222 Pa. 179)

In re PRUNER'S ESTATE.

Appeal of HILTNER.

(Supreme Court of Pennsylvania. June 23, 1908.)

WILLS (§ 767\*)—SPECIFIC LEGACY—ADEMPTION.

Where testator bequeathed to his niece certain insurance policies, which he held on the

life of her husband to secure a debt against the husband, she to pay the premiums till the policies matured, and testator survived the insured, and collected the proceeds of the policy, and used the money to buy bonds which he held in his own name, the legacy was specific, and was adeemed by the payment of the policies before the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1936-1989; Dec. Dig. § 767.\*]

Appeal from Orphans' Court, Centre County.

In the matter of the estate of E. J. Pruner. From a decree dismissing exceptions to auditor's report, the administrator appeals. Affirmed.

Argued before MITCHELL, O. J., and FELL, BROWN, POTTER, and STEWART, JJ.

O. H. Hewit, for appellant. John G. Love, P. J. Little, and Harry Keller, for appellee.

FELL, J. The question presented by this appeal arises under the following clause of the testator's will: "I also give to my niece, Clara R. Moyer, the life insurance policies which I hold on the life of A. C. Moyer, she to pay the premiums on the same till they mature." A. C. Moyer was the husband of Clara R. Moyer, and the testator held by absolute assignments two policies of insurance on his life. The testator paid the premiums for a number of years and charged them in ledger accounts headed "A. C. Moyer Life Insurance Policy, New York Life" and Mutual Life Insurance Co., N. Y., Investment in Policy on A. C. Moyer's Life." The insured died before the testator, who received the proceeds of the policies and deposited them in his account in the bank of which he was president. He used the money received from the insurance, with other money, in the purchase of bonds, which he placed in a safe deposit box where he kept his securities. The auditor found that at the time of the assignment of the policies the testator was a creditor of the insured and had an insurable interest in his life, that there was nothing to indicate that the bonds purchased in part with the money received from the insurance companies were not the absolute property of the testator, and that the legacy was specific, and was adeemed by the maturity and payment of the policies before the death of the testator. These findings were affirmed by the orphans' court.

It is conceded that, under the findings of fact, the appellant can succeed only on the ground that the legacy was not specific and adeemed by the payment of the policies. It is argued with much earnestness and ability that the words in the bequest, "she to pay the premiums on the same till they mature," disclose an intention on the part of the testator not to give his niece the insurance policies freed of any charge upon them, but to give her the proceeds of the policies less the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

amount of the premiums paid by him, and that the legacy was a bequest of a sum of money payable out of a particular fund, and was demonstrative, and not adeemed by the payment of the policies. In order to guard a legatee against the risk of ademption, and in order that the legacy may be liable to contribution and abatement in case of a deficiency of assets, courts incline against construing legacies as specific. But this well-recognized doctrine must not be allowed to contravene the plain import of the will. Notes to *Ashburner v. Macgillre*, 2 Leading Cases in Eq. \*267. The bequest of the "life insurance policies which I hold on the life of A. C. Moyer" is clearly specific. The added words, "she to pay the premiums on the same till they mature," refers to payments that might become due after the policies passed by the will to the legatee. If they had been in force at the death of the testator, his niece would have received them free of any charge for premiums paid by him. We think the conclusion expressed by the learned judge of the orphans' court, that it was "the intention of the testator to give the policies to his niece on the condition and understanding that after his death his estate should no longer be chargeable with the maintenance of the same," is correct.

The decree is affirmed, at the cost of the appellant.

(232 Pa. 172)

**TAYLOR & MCCOY COAL & COKE CO. v. HARTMAN et al.**

(Supreme Court of Pennsylvania. June 23, 1908.)

**DISCOVERY (§ 6\*)—WHEN ALLOWED.**

The lessee of an upper vein of coal had the option under the lease to purchase or lease a lower vein on as favorable terms as may be offered bona fide by any other person or persons. He defeated a lease to another person whose name with the terms offered had been furnished to him by setting up a claim for the coal. *Held*, that he could not, when another offer was made to the owner and the terms of the offer communicated to him, compel the owner by bill to reveal the name of the party making the offer, unless he has first demanded such information and been refused.

[Ed. Note.—For other cases, see *Discovery*, Dec. Dig. § 6.\*]

Appeal from Court of Common Pleas, Blair County.

Bill by the Taylor & McCoy Coal & Coke Company against Jesse L. Hartman and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and STEWART, JJ.

O. H. Hewitt, for appellant. A. V. Dively, for appellees.

FELL, J. A statement in detail of the facts is essential to a proper understanding of the relation of the parties at the time the

bill was filed. In 1887 Dennison and McLanaghan were the owners of a tract of some 600 acres of land underlaid with two veins of coal, the upper of which was known as the "Lemon vein" and the lower as the "Miller vein." They leased the Lemon vein to Taylor & McCoy, whose rights have been acquired by the plaintiff. The lease contained the following clause: "In case the lessors desire to sell or lease the Miller vein, the lessees shall have the option to purchase or lease the same on terms as favorable as may be offered bona fide by any other person or persons." On December 9, 1902, the defendants, who are the heirs and legal representatives of Dennison and the owners of four-fifths of the land, notified the plaintiff that they had a bona fide offer to lease their interest in the Miller vein. The notice set out in detail the following terms of the offer: The time the lease was to run, the royalty to be paid, the minimum amount of coal to be mined or paid for, whether mined or not, the obligation to operate the mine to its full capacity, the proportions in which the cost of sinking a shaft should be borne, and the manner in which the lessor's portion should be paid. It ended with this statement: "Under your contract you have the right to lease the Miller vein on terms as reasonable as may be offered by any person. You will please inform us if you will lease the Miller vein on the above terms." On December 12, 1902, the receipt of this notice was acknowledged by the defendants by letter, in which it was stated that the matter would be given consideration at as early a date as possible. On January 12, 1903, the defendants wrote, calling attention to the notice of December 9th, and the plaintiff's reply thereto, and notifying it that, unless the terms of the proposed lease were accepted by January 19th, the plaintiff's right to it would be considered forfeited. After January 19th, negotiations were resumed with the party who had desired a lease, but were abandoned by him because of information received from the plaintiff that it claimed a right under its option. On November 14, 1903, in reply to a letter from the defendants threatening suit for the plaintiff's interference to prevent a lease to another party, the plaintiff wrote asking the name of the party from whom an offer had been received, in order that it might satisfy itself by evidence other than the mere statement of the defendants that a bona fide offer had been made by reliable parties. This information was promptly given. Upon application by the plaintiff to the party named it was informed that a proposition to lease had been made by the defendants, but that nothing definite had been done because they could not lease the whole interest. On March 1, 1904, the defendants wrote stating that a party desiring to lease their interest had written them that it had been informed by the plaintiff that it would not permit a lease

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to be made, and notifying the plaintiff that, if this interference caused a loss of this second opportunity to lease, it would be held answerable in damages. In reply to this letter the plaintiff asked for an outline in detail of the terms of the proposed lease and the name of the lessee, in order that it might decide whether it would take the lease itself or allow another to take it. The defendants replied that they had no hesitation in telling the exact terms of the lease, and gave the amount of royalty per ton and the minimum amount to be mined each year, but refused to name the proposed lessee, for the reason that on a former occasion the plaintiff had demanded the name of the lessee, and on being informed of it had notified him that it would not permit a lease to be made to him. A bill was then filed by the plaintiff, the prayers of which were for an order requiring the disclosure of the name of the proposed lessee and the terms in full of the proposed lease, and for an injunction restraining the defendant from leasing the Miller vein until these disclosures had been made and the plaintiff had been given a reasonable time thereafter in which to accept the lease. The bill was dismissed, for the reason that it would be inequitable to enjoin the defendants because of the lapse of time, the change of parties, the practical difficulty of reaching an understanding with a proposed lessee as to the numerous details of a lease and then holding the matter in abeyance until the plaintiff should elect to accept or decline a lease on the same terms, and the refusal or neglect of the plaintiff to act upon the notice of December 9, 1902, followed by the assertion of its claim to the coal, by which the consummation of a lease to another party had been prevented.

The situation was one that presented many practical difficulties if not met in a spirit of entire fairness by the parties. It was the defendants' interest to lease the coal and derive an income from it, and it was the plaintiff's interest to delay any action on its option until the upper vein of coal was exhausted and it had use for the lower vein. It was in its power practically to prevent the lease to another party by the continued assertion of its right to lease. It was not bound to act until notified by the defendants and furnished with a statement of the terms offered by any other person. The notification of December 9, 1902, was a compliance with the agreement, and the failure after a reasonable time to accept might have been held as a waiver of the plaintiff's right. It was not, however, so regarded by the defendants, who continued to recognize the plaintiff's right and made a second offer on March 7, 1904. If the plaintiff desired fuller information as to the terms of the lease referred to in this offer, it should have asked for it, and, until it had asked and been refused, it was not in a position to maintain its bill. It was not

its right under the circumstances to demand the disclosure of the name of the lessee.

The decree is affirmed, at the cost of the appellant.

(222 Pa. 201)

**LATSHA v. SHAMOKIN & E. ELECTRIC RY. CO.**

(Supreme Court of Pennsylvania. June 23, 1908.)

**1. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

In an action by a motorman to recover damages in a head-on collision between his car and another car, the question of plaintiff's contributory negligence held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.\*]

**2. MASTER AND SERVANT (§ 190\*)—INJURY TO SERVANT—"FELLOW SERVANT."**

Where the superintendent of an electric railway company takes out a car to test it, acting as a motorman, he is not a fellow servant of a motorman injured by the negligence of the superintendent while so operating the car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 452; Dec. Dig. § 190.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, p. 7662.]

Appeal from Court of Common Pleas, Northumberland County.

Action by Lewis A. Latsha against the Shamokin & Edgewood Electric Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Defendant presented the following points:

"(1) Under all the evidence in the case your verdict must be for the defendant. Answer: Refused."

"(3) The act of June 10, 1907 (P. L. 523), relating to employer's liability, is not retroactive, and does not apply to this case because the suit was brought before the passage of the act, and, further, because the accident occurred prior to the passage of the said act of assembly. Answer: Refused."

"(5) Under the undisputed evidence in the case, the plaintiff is guilty of contributory negligence, and cannot therefore recover. Answer: Refused."

"(6) If the court decline to affirm the defendant's fifth point, then the court is respectfully requested to charge the jury that if the jury find that the plaintiff's car was entering the curve at the Weigh Scales when Reed's car was entering the curve at the other end, that the length of the curve was 261 feet, that Latsha's car could have been stopped 35 or 40 feet, going at eight miles an hour, that the front door of his car was open at the time of the collision, and that one or two steps backward would have protected him from the injury, that the brakes and electrical equipments of his car were in good condition, that the plaintiff did not reverse the current, was going up a slight grade at the time of the collision—then the plaintiff would be guilty of contributory negligence, and cannot recover.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"(7) The proximate cause of the accident was the negligence of Reed, if any, in operating the car at or near the point of the collision. The sending out of the car without notice to the plaintiff was at most the remote cause of the injury, or was the mere occasion of the injury for which the defendant cannot be held liable. Answer: Refused."

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

Grant Herring, J. W. Gillespie, S. P. Wolverton, S. P. Wolverton, Jr., and J. Mal Gillespie, for appellant. Fred. B. Moser and Geo. B. Relmensnyder, for appellee.

STEWART, J. The defendant company operates a single-track line of electric railway extending from Shamokin borough to Weigh Scales, a distance of about 2½ miles. The plaintiff, employed by the company as motorman, and so acting at the time, left Shamokin with car No. 2 at 4:30 in the afternoon to make a run to Weigh Scales and return. Within a few minutes after he had started, and without notice to him that another car was to follow, the superintendent of the company, Jerome Reed, started with a new car for the purpose of testing it, upon the same course, himself acting as motorman. The plaintiff, on the return from Weigh Scales, had proceeded with his car only about a fourth of a mile, and so far as appeared, on schedule time, when the two cars came together in what is known as a "head-on collision," with the result that plaintiff was seriously injured. The action was brought to recover damages for the injury sustained, and resulted in a verdict for the plaintiff, which the court refused to disturb, overruling a motion for judgment non obstante.

The collision was the result of extreme carelessness on the part of one or other of the motormen, perhaps of both. Reed, the superintendent, acting at the time as motorman on car No. 15, the new car which he was testing, when called as a witness for defendant, admitted that he saw the other car approach his when the two were 1,200 feet apart, and that he could have stopped his car at any time in a distance of 30 feet. Since the distance between the cars when plaintiff first saw the car operated by the superintendent approach, and the opportunity afterwards allowed him to avoid collision, are matters in dispute, and inasmuch as they must be for consideration hereafter in connection with the question of plaintiff's contributory negligence, we will assume nothing in regard to them. The question immediately before us does not require that we assume or undertake to determine anything with respect to the plaintiff's conduct. It is enough to know, in order to ascertain what was the immediate, proximate cause of the collision, that it occurred in broad daylight, between two cars with brakes and general equipment, mechanical and electrical, in good working condition, and that the peril was observed by at least

one of the motormen, if not both, in ample time, in the exercise of even ordinary care, to avoid it. With such facts as these not only established but admitted, why look further for a proximate cause? Further search for a cause would not only be useless, but would be a diversion well calculated to raise a false issue, as it certainly did in this case. How far the issue thus raised determined the verdict we cannot of course know; but the jury were directed to consider it, and were instructed to allow it determining effect, upon an affirmative finding of certain facts alleged in connection therewith. The submission of the court was in these words: "I leave it to you to determine whether the sending out or the permitting of this car [No. 15] to go out over this line, following No. 2, without notice to those operating car No. 2, was or was not negligence." If the case was determined against the defendant on the issue thus presented, it was manifestly wrong; and how are we to know that it was not so determined? The law adopts the practical rule of regarding the proximate rather, than the remote, cause of the occurrence. It follows back along the chain of causation until it finds an adequate, efficient cause, and there it stops, adopting that as the *causa causans* in all questions affecting individual liability for the occurrence. Never was a proximate cause more clearly revealed than in this case. It was negligence of motorman or motormen in not arresting the car or cars before collision. The question whether the company was chargeable with negligence in sending out car No. 15 without notice to those in charge of car No. 2 was wholly outside the case. Of course, the collision could not have occurred had not car No. 2 been sent out; but it does not follow that a collision should have been anticipated as a matter of definite inference in the natural and ordinary course of events; and even though it were negligence to send it out without notice—a proposition to which we must not be understood as assenting—here was intervening negligence, operating directly and immediately to produce the collision, wholly independent of the earlier negligence in sending out the car. When such intervention occurs, the law applies the maxim, "*Causa proxima, non remota, spectatur.*"

The same error that appears in the charge with respect to the cause of accident is repeated in the answers to points submitted; and the assignments cover both charge and answers. So far as they relate to this particular error, without more, they are sustained.

The answer of the court to the fourth point submitted by the defendant is the subject of the fifth assignment of error. This point, after asserting that it was not negligence in the company to send out the second car without notice, asked instructions to the effect that, if the jury found the plaintiff's injuries had been caused by Reed's negli-



gence in failing to stop his car, there could be no recovery against the company, inasmuch as Reed and the plaintiff were fellow servants. The point was negative only because of what it asserted with respect to the sending of the second car. Herein it was directly contrary, as we have seen, to the expressed view of the court. The learned judge did not intend by this ruling to hold that Reed and the plaintiff were not fellow servants, or that the company could be liable in any event, except as negligence could be imputed to it in connection with the sending out of the second car. On the contrary, he expressly instructed the jury that they were to regard Reed and the plaintiff as fellow servants, and that, if plaintiff's injuries were occasioned by the negligence of Reed, there could be no recovery, as fully appears by the following extract from the charge: "I charge you further, and to this I draw your special attention, that if you find that the railway company was not negligent in permitting or sending out this car No. 15 that then your verdict must be for the defendant, because in that event the accident was the result of the negligence of a coemployé, or the result of the negligence of the plaintiff, or the result of the concurrent negligence of the plaintiff and Reed who then acted in the capacity of coemployé, and, if concurrent, then, of course, the plaintiff contributed to it." But for the fact that the case must go back for another trial we might well be content to dismiss this assignment without comment, since the ruling of the court upon it was manifestly correct; but the reasons which prevailed to reach this result were so manifestly wrong, and as it is evident that the same questions will again arise on a retrial of the case, we feel it our duty to give some expression of view with respect to them.

Under the ruling of the court, plaintiff's right to recover, as we have seen, was made to depend entirely and exclusively upon the finding of the jury in the matter of the alleged negligence of the company in sending out the second car. This feature of the case must be entirely eliminated. The question of defendant's liability is to be determined alone from a consideration of the immediate, proximate cause of the accident. Where was the negligence that produced the collision? If it was wholly Reed's, was the company liable therefor? There can be no doubt as to the proper answer to this question. Reed was not in any sense a fellow servant with the plaintiff. While operating the motor or controller on car No. 15 for the purpose of testing the car, he was strictly in the line of his duty as superintendent of the company. It is not for the ordinary motorman in his duty as an employé to test the sufficiency and completeness of cars before they are adopted as part of the equipment of the

road. His duty is to accept the car given him to operate, and with it goes the company's implied assurance that it is sufficient for the purpose intended. When Reed was testing this car on the day of the accident, it was not being employed in the work of the company, or serving the public, but was out for the one purpose of having it determined whether it would meet requirements; and Reed in operating the controller was doing just what was necessary to inform himself on this point. In this connection, and for the time being, he was a principal, and his act was the act of the company. If the negligence was his, and his alone, plaintiff's right to recover follows necessarily. Did or did not the plaintiff through any negligence of his contribute to the result? This it seems to us is the only question in the case. It was not submitted to the jury, because, in the view taken of the law by the trial judge with respect to the matters we have considered, it was unnecessary. On another trial its full importance must be allowed. All we deem it necessary or prudent to say on the subject is to express the conclusion we have reached, after a careful review of the evidence, as to its effect. The plaintiff's evidence presented a state of facts, which, however contradicted, made the case one in which the proper inferences with respect to plaintiff's contributory negligence could only be derived by the jury.

Judgment reversed, and venire facias de novo awarded.

(223 Pa. 175)

#### KOUGH v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. June 23, 1908.)

#### EMINENT DOMAIN (§ 293\*)—DAMAGES—ACTION TO RECOVER—PLEADING AND EVIDENCE.

In an action against a railroad company for injuries to property caused by taking a certain strip of land, where the statement alleged that the defendant, without having tendered a bond, appropriated the land and placed a track thereon, and that his house, by the moving of trains, became less desirable as a residence, and that shade trees were destroyed and earth thrown on a part of the land not taken, and the evidence showed that the strip taken was a public road, and that no shade trees had been injured, and the only evidence of injury was that the track interfered with means of access to plaintiff's property, he could not recover; there being nothing alleged in the statement as to injury from that cause.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 802; Dec. Dig. § 293.\*]

Appeal from Court of Common Pleas, Huntingdon County.

Action by William E. Kough against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

The court charged in part as follows: "If, in taking this narrow strip, 70 feet long, the defendant destroyed the plaintiff's ac-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cess to and from his property, or interfered with it and made it harder to get to and from his home, and by so doing rendered this property less valuable in the market, then the plaintiff can recover to just such an extent as the evidence shows you he has been injured; and in considering this matter you must bear in mind the conditions that existed before, and the conditions that existed after, the said defendant took possession. There was smoke, noise, and cinders there before the taking. How much did the increase of these elements, if any, interfere with the access of the plaintiff to and from his property, and thereby affect the market value of the property? You must be satisfied that the defendant company took a portion of the plaintiff's property, and interfered with his access to and from his home, and thereby injured him, before you can find for plaintiff. If you find that the defendant company has taken a portion of his land, and interfered with his access to and from his property, how much, if any, has the market value of the property been affected? And, in considering this matter, you must take into consideration the testimony of the witnesses who testified as to the value of the property immediately before and immediately after the taking, taking into consideration any advantages or disadvantages that accrued to the plaintiff."

Verdict and judgment for plaintiff for \$1,700.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and STEWART, JJ.

John D. Dorris, for appellant. James S. Woods and H. H. Waite, for appellee.

FELL, J. The appellant's contention that a recovery against it was allowed for a cause of action not declared on must be sustained. The substance of the allegations in the declaration is that the defendant, without having tendered a bond as required by law, entered by force upon and appropriated to its use a strip of the plaintiff's land adjoining its right of way and placed an additional track thereon; that the movement of trains on this track made his house less desirable as a residence because of vibration, noise and dirt; that the defendant destroyed shade trees and threw stones and earth on a part of his land not appropriated.

The proofs at the trial were that in the borough of Mt. Union the defendant's road was 8 feet below the grade of a public street on which the plaintiff's property was situated. There was a sloping bank  $6\frac{1}{2}$  feet in width on the north side of the street, between the level portion thereof and the defendant's roadbed. By authority of the borough council, granted by ordinance, the defendant removed the bank, built a retaining wall, and occupied  $6\frac{1}{2}$  feet of the street at

the grade of its tracks on the side opposite the plaintiff's property. The grade of the part of the street that was traveled was not changed, nor was any part of the plaintiff's land taken. The claim for damages for the injury to shade trees was not sustained by proof, and was withdrawn from the jury by the court; and the throwing of dirt and stones complained of was not on the private property of the plaintiff, but on the surface of the public street during the progress of the work. The only ground for the recovery of damages that the testimony tended in any way to establish was interference with the means of access to the plaintiff's property. This was not alleged as a ground for recovery, nor was it a natural result of the grounds laid, and its submission to the jury was error.

When testimony on this subject was first objected to, the plaintiff was proceeding on the theory that a street had not been laid out in front of his property and that a part of his land in actual occupation had been taken. The objection was properly overruled, because, if a part were taken, the testimony was admissible to show the injury to the remaining land. But it was afterwards shown beyond controversy and admitted that a public street had been established by dedication by a previous owner and by adoption by the borough, and the question of the right to recover for interference with the means of access was raised by a request for charge. The change of front by the plaintiff during the trial no doubt led to the error; but it cannot be said that the defendant acquiesced in the submission of a question not involved in the issue. The plaintiff may have a cause of action for the impairment of a right incident to his property, under the principles stated in *Jones v. Erie, etc., Railroad Co.*, 151 Pa. 30, 25 Atl. 134, 17 L. R. A. 758, 31 Am. St. Rep. 722, and the cases there cited; but it is a cause differing from that laid in the declaration. It is not enough that the evidence shows a cause of action. It must show the cause alleged.

The judgment is reversed.

(222 Pa. 182)

#### IN RE FULLER'S ESTATE.

#### Appeal of ANDERSON.

(Supreme Court of Pennsylvania. June 23, 1908.)

#### 1. WILLS (§ 316\*) — DEVISAVIT VEL NON — GRANT OF ISSUE.

An issue devisavit vel non will not be granted where the testimony of two expert witnesses in handwriting is all that is opposed to positive proof of the execution of the will and the evidence of numerous witnesses familiar with the handwriting of the deceased for years that the signature was genuine.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 744; Dec. Dig. § 316.\*]

## 2. EVIDENCE (§ 573\*)—COMPARISON OF HAND-WRITING—EXPERT EVIDENCE.

Though experts may testify whether a writing is real or a feigned hand, and may compare it with other writings already in evidence, very little reliance should be placed on this kind of evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2399; Dec. Dig. § 573.\*]

Appeal from Orphans' Court, Fayette County.

In the matter of the estate of William B. Fuller. From an order dismissing a petition for an issue devisavit vel non, Harriet R. Anderson appeals. Dismissed.

Argued before FELL, BROWN, MES-TREZAT, POTTER, and ELKIN, JJ.

D. E. Mitchell and John G. Johnson, for appellant. W. E. Crow, for appellee.

BROWN, J. It is hardly conceivable that on the testimony offered by the appellant in support of her application for an issue devisavit vel non any jury would return a verdict against the will, and it is certain that such a finding would be promptly set aside by a trial judge. We have repeatedly said that in every such case the issue should be refused; and, while we have usually said so in connection with an application for an issue on the ground of lack of testamentary capacity or undue influence, there is no reason why the rule should not apply when the testimony of one or two experts is practically all that is opposed to positive proof of the execution of the will or the evidence of a cloud of witnesses familiar for years with the handwriting of the deceased that the signature is genuine. "Experts are received to testify whether the writing is a real or a feigned hand, and may compare it with other writings already in evidence in the issue. \* \* \* But upon this kind of evidence learned judges are of the opinion that very little, if any, reliance ought to be placed." 1 Greenleaf on Evidence (15th Ed.) § 580, note.

In the present case all that was presented to the court below by the appellant, when she announced her testimony closed, was the opinion of two alleged experts in handwriting, neither of whom had ever seen the deceased. These two witnesses—the greater portion of the testimony of one of them being his exploitation before the court of his own importance—testified that in their opinion W. B. Fuller had not signed the will. There was no dispute that the body of it was in his handwriting, and, as against the opinion of the two experts, the appellee—first called as a witness by the appellant—testified that her husband had made and delivered the will to her. This was proof of its actual execution by him. She further testified that after his death she gave it to her brother-in-law, F. M. Fuller, in whose possession it remained until he died. In this she is cor-

roborated by his widow, Sarah Fuller, who testified that she saw the appellee give the will to her husband within a few days after W. B. Fuller's death, and that it bore his genuine signature. Minnie Wyatt testified to the same effect. Thirteen witnesses who had known W. B. Fuller for years, and had frequent opportunities to become acquainted with his handwriting, testified that the signature to the will was genuine. Some of these witnesses testified against their own interest. In addition to this the court had before it, for comparison with his signature, 18 admittedly genuine signatures of William B. Fuller to checks and notes, and its conclusion from the comparisons was that W. B. Fuller had signed the will. The delay of the appellee in admitting it to probate is explained by her statement that F. M. Fuller, her coexecutor, had so advised for business reasons, and the deputy register of the county testified that F. M. Fuller, shortly before his death, had called and arranged for the probate of the will.

The only support given to the experts was the testimony of a witness who was discovered after the testimony on each side had been announced as closed. She stated that several weeks after the death of W. B. Fuller the appellee had said to her that he had made a will, but had failed to sign his name to it. Of the testimony of this witness the learned judge below very properly said: "Coming in the manner and at the time it does it has not convinced us that the testimony of Mrs. Amanda Fuller and Miss Wyatt is false"—and concluded that the will and signature, in comparison with the other writings and signatures produced, indicated to an ordinary mind that they were written by the same hand.

An appeal could not well have less merit than this, and it is dismissed at appellant's costs.

(222 Pa. 197)

In re HOSTETTER'S ESTATE.

Appeal of GROVE et al.

(Supreme Court of Pennsylvania. June 23, 1908.)

## EXECUTORS AND ADMINISTRATORS (§ 380\*)—SALE OF DECEDENT'S REALTY—DEFECTIVE TITLE.

The administrators of an estate, in making a sale under order of court, agreed before the sale that the purchasers might examine the title through a case stated before they should be required to accept a deed and pay the purchase money. The purchasers, relying on the agreement, paid a portion of the purchase money and allowed a sale to be confirmed. *Held*, that the purchaser could not have a decree entered setting aside the sale and order repayment of the money for insufficiency of title, where no action had been taken by either party as to a case stated.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 380.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Orphans' Court, York County.

In the matter of the estate of Sarah J. Hostetter. From a decree vacating confirmation of sale, Mary Grove and Barbara F. Witmer, administrators, appeal. Reversed.

The court entered the following decree: "And now, March 9, 1908, the rule to open the decree of the court is made absolute, at the costs of the estate of Sarah J. Hostetter, deceased; and we direct the administrators de bonis non, Barbara F. Witmer and Mary Grove, to pay the costs out of the estate, and also that out of said estate they refund to the petitioner, C. J. Delone, the sum of \$2,502.62 paid by him on account of the price or purchase money of the real estate hereinbefore mentioned, on or before April 9, 1908, on his accounting for the income and the profits derived from the real estate during his possession of the same, and delivering possession of the said lands to said Barbara F. Witmer and Mary Grove, administrators de bonis non. And an exception is sealed for the respondents."

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

Edw. Chapin and C. E. Ehrehart, for appellants. Allen C. Wiest, for appellee.

STEWART, J. At an administrator's sale of the real estate of Sarah J. Hostetter, deceased, the appellee, C. J. Delone, became the purchaser of one of the tracts at the price of \$10,017.50. The first installment of purchase money having been paid, the sale was duly returned to the court, and on October 30, 1905, was confirmed. The purchaser entered into possession and has retained it ever since. On April 1st, following the confirmation of sale, the administrator tendered to Delone a deed and demanded the balance of the purchase money. Delone refused to accept the deed, and thereupon suit was instituted against him to enforce payment. The action was halted by the present proceeding, begun by petition of Delone to the orphans' court, praying that the confirmation of the sale be revoked, for certain reasons fully set out in the petition. To the rule granted, the appellants, who had succeeded to the trust on the death of the administrator who had made the sale, made answer, denying the material averments in the petition. From the evidence submitted the court derived the following facts: On the day of the sale, and before Delone had bid on the property, it was mutually agreed between the administrators and Delone that, in case the latter became the purchaser, he should receive a fee-simple title, and that before delivery of the deed and payment of the purchase money there would be a sufficient case stated submitted to the court for the purpose of determining the sufficiency of the title. Except for this agreement Delone would not have bid at the sale. Relying upon it, he became the purchaser, and allowed

the sale to be confirmed absolutely. The doubt suggested in regard to the sufficiency of the title relates to an undivided half interest, and arises from the will of Mary C. Hostetter, a sister of the deceased, in which she disposes of her interest in the premises. The suggestion is that it may be regarded as disputable whether under the will Sarah J. Hostetter took a life estate or fee simple in this undivided half.

We need particularize no further. The learned judge expresses the opinion that the will gives to Sarah C. a fee-simple estate, and that the whole title to the land was vested in her at the time of her death; but, because his finding in this regard concluded no one, and the matter was open to future controversy, he was further of the opinion that the purchaser, who had bargained for a fee-simple title, ought not to be required to accept one thus exposed to attack, and which because of this circumstance could not be regarded as marketable. He accordingly entered a decree vacating the order of confirmation, and directing that the administrator refund to Delone the money paid by him on the purchase (\$2,502.62), upon his accounting to them for the income and profit derived by him during his occupancy of the land, and that the administrators pay the costs of the proceeding. This was in effect a decree setting aside and annulling the sale, and to this extent it afforded the petitioner a larger measure of relief than he was entitled to, or than he had even asked. He had shown no cause whatever why he should be released from the obligation of his purchase at this time, nor had he asked to be so released, except upon refusal of the administrators to keep and observe the agreement made between him and their predecessors in the trust, namely, to submit to the court a case stated, in which the sufficiency of the title might be determined. The orphans' court is not a tribunal for the determination of questions of title, not even upon agreement by the parties to the controversy, and the inquiry of the learned judge as to the sufficiency of the title here involved was wholly gratuitous. Whether right or wrong, it was nothing to the purpose, since this was not a question involved in this particular proceeding. Here was a case where an administrator, in making sale under an order of court, had agreed in advance of the sale that, before the purchaser could be required to accept a deed and pay the purchase money, the sufficiency of the title should be determined through a case stated. He had no right of course, to make any such stipulation; but, having made it and the party having purchased on the strength of it, equitable considerations might well prevail with the court to do what was necessary to save the purchaser from prejudice under such circumstances. Until, however, it had been determined by some authoritative tribunal

that the title was defective, there could be no grounds whatever for the court's interference.

The submission of a case stated for the determination of the sufficiency of this title did not rest exclusively with the administrators. It was something in which all parties were required to unite, and so far as appears one side was as much in default with respect to it as the other. Certainly there is no finding that the administrator had ever refused, or had ever been asked, to proceed in this way. The facts with respect to the agreement having been found, the proper procedure would have been to suspend final action until the determination by a case stated of the question at issue had been reached. Nothing but a purpose on one side or the other to escape the arbitrament could prevent an agreement upon the case stated, for the case stated would properly present nothing but the question arising under the will of Mary C. Hostetter, deceased, which, as we have above indicated, is a question of law pure and simple. A refusal by either to join in such case stated should be regarded by the court as determining the matter against the party refusing. The decree appealed from finds no sufficient warrant in the facts found by the court. It was premature at least. The ninth specification, which assigns for error the decree itself, is sustained. The other assignments are overruled.

The decree is reversed; and it is now ordered that the proceedings be reinstated, and the orphans' court is directed to fix by order the time within which a case stated shall be filed in the proper court for the determination of the sufficiency of the title, the matter thereafter to be proceeded with in the manner indicated in this opinion.

#### TAYLOR v. LUMB KNITTING CO.

(Supreme Court of Rhode Island. Oct. 28, 1908.)

##### 1. PARTIES (§ 27\*)—INJURY TO SERVANT—ACTIONS—PARTIES.

Under Court and Practice Act 1905, § 240, providing that where, in any action, plaintiff is in doubt as to the person from whom he is entitled to recover, he may join two or more defendants, and section 243, authorizing the bringing in of new parties, etc., an employé, who sues his employer for injuries received in consequence of the falling of an electric arc lamp, should make a third person a party defendant on it appearing that an employé of the third person had two weeks prior to the accident repaired the lamp.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 35; Dec. Dig. § 27.\*]

##### 2. APPEAL AND ERROR (§ 1178\*)—REVIEW—GRANT OF NEW TRIAL.

Where, in an action for an injury caused by negligence, the evidence tended to show that the person whose negligence caused the injury was an employé of a corporation not made a party, and to which his negligence should be imputed, and the evidence is insufficient to show

that the defendant against whom judgment was rendered has been proved guilty of any negligence, but, if the court on appeal should so determine, and order judgment for such defendant, it might be supposed impliedly to find that the other company not before the court was liable through the negligence of its servant, the case will be remitted, with directions to grant a new trial and to cause such other corporation to be summoned as a party defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1178.\*]

Exceptions from Superior Court, Providence and Bristol Counties.

Action by Mary Taylor against the Lumb Knitting Company. There was a verdict for plaintiff, and defendant brings exceptions. Sustained, and cause remitted to the superior court, with direction to grant a new trial and to bring in a third person as a party defendant.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Hugh J. Carroll and Irving Champlin, for plaintiff. Vintcent, Boss & Barnefield, for defendant.

PER CURIAM. The testimony shows, and it is not disputed, that the accident to the plaintiff comes within the doctrine of "res ipsa loquitur," and that there was not and could not have been any contributory negligence on the part of the plaintiff, and that the plaintiff sustained injuries by reason of the accident, and that she is entitled to recover compensation for such injuries as she has suffered, if the accident was due to negligence, from such person or corporation as she can show by preponderance of evidence to have been guilty of such negligence. The defendant contends that it has been guilty of no negligence. The testimony shows, and it is not disputed, that the defendant, finding that the electric arc lamp, from which the casing and reflector fell and caused the plaintiff's injury, required repair or readjustment as to its internal arrangements, procured the New England Machine & Electric Company to send one of its employés to make the necessary repair or readjustment; and that a man named Herson was sent, and did make such repair or readjustment; that the New England Machine & Electric Company was a reputable concern in this line of work, and that Herson was in its employ and was an experienced man capable of doing the work required; that he placed the casing and reflector back in position upon the lamp and left it, to all appearances in proper condition; that it stayed in place for about two weeks after the work was done, and there was nothing about its appearance to indicate to any one that it was not in proper condition; that the defendant had not in its employ any person capable of doing this repair or readjustment; that it did not in any way interfere with Herson,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

or give any directions as to the performance of the work; that it did not touch the lamp, or in any way interfere with it, after Herson left it and prior to the accident; that the defendant had had this lamp and several other similar lamps in use in the same room for several years before the accident, and that never before this accident had the casing of this lamp, or of any of the others, fallen or shown any indication of falling; that the repair or readjustment required and made was not to the casing or reflector, but to the interior mechanism of the lamp, which required that the casing and reflector be taken off and replaced.

Under this state of the testimony the defendant contends that it is not liable, on the ground that it fulfilled its whole duty as master to the plaintiff as its employé, when it procured this work to be done by a reputable concern, which sent its own expert employé to do it, under the familiar doctrine relating to liability for injury where an independent contractor is employed, and that therefore the verdict of the jury against the defendant is not supported by the evidence, and should be set aside, and that this court should either direct judgment for the defendant or a new trial. It is suggested on behalf of the defendant that negligence may be inferred from the testimony of Herson, the employé of the New England Machine & Electric Company, who cannot testify positively that he remembers giving the casing a quarter turn after he had pushed it up in position, as was shown by him to be necessary to make it absolutely secure in its position, and that if any one has been guilty of negligence, causing the plaintiff's injury, it was Herson, and that his negligence should be imputed to his employer, viz., the New England Machine & Electric Company. On the other hand, the plaintiff claims that Herson's negligence, if any, should be imputed to the defendant, Lumb Knitting Company, on the ground that the defendant was under a duty to its employé to furnish her with a safe place to work and suitable and safe appliances, and that it cannot exonerate itself by delegating this duty to another.

If the plaintiff had exercised the right conferred by section 240, Court and Practice Act 1905, and had joined the New England Machine & Electric Company as a party defendant, the trial of the cause in the superior court might have enabled the court and jury to come to a definite and satisfactory conclusion, and possibly to a different conclusion, as to the liability for this injury; and the record of testimony taken at such a trial, where all the parties having knowledge of the facts relating to the accident were before the court and all under the obligation to make full disclosure of facts within their knowledge, in accordance with the rules applicable to cases of injuries coming within

the doctrine of "*res ipsa loquitur*," might have enabled this court to come to a final decision and settle the question of liability as between the several parties involved. As the case now stands, we are not satisfied that the defendant has been proved guilty of any negligence; yet, if we so determine, and order judgment for the defendant, we might be supposed impliedly to find that the New England Machine & Electric Company (not now before the court) was liable through the negligence of its servant, Herson. We do not wish, even impliedly, to make any such finding against a party which has not had an opportunity to defend itself.

We think justice requires that the New England Machine & Electric Company should be made a party defendant in this cause (Court and Practice Act 1905, § 243) forthwith, in view of the fact that the time limited by statute within which suit may be brought (section 248) has nearly expired, so that the whole question of the plaintiff's right of recovery as against either of these parties may be tried and determined in this suit.

The defendant's exception, based upon the denial of its motion for a new trial on the ground that the verdict is against the evidence and the weight thereof, is sustained, and the case is remitted to the superior court, with direction to grant a new trial of the action and to cause the New England Machine & Electric Company to be summoned in as a party defendant forthwith, upon such terms as to time for appearance and pleading as the superior court shall in its discretion allow.

STONE et al. v. WATERMAN, Town Clerk.  
(Supreme Court of Rhode Island. Oct. 23, 1908.)

#### ELECTIONS (§ 144\*)—NOMINATION PAPERS—SIGNATURES.

A nomination paper was insufficient where the names of part of the requisite number of signers did not correspond with the names on the voting list; some names on the paper not appearing on the list, and some initials, abbreviations, and residences on the paper not corresponding with those on the list.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 144.\*]

Petition by Michael A. Stone and others for mandamus against Daniel D. Waterman, town clerk. Petition denied and dismissed.

This is a petition for writ of mandamus. The cause was heard on the return day of citation to show cause why writ should not issue. Respondent filed no pleadings, but his defense was that not enough names on the nomination paper corresponded with the names as they appeared on the voting list. Some names on the nomination paper did not appear on the voting list. Some initials and abbreviations on the nomination

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

paper did not correspond with initials and abbreviations on the voting list. Some residences as given on the nomination paper varied from residences as they appeared on the voting list. These facts were proved by the testimony of respondent given before the court.

The following is a copy of the petition for writ of mandamus:

"To the Honorable the Supreme Court of Rhode Island Sitting within and for the County of Providence.

"Respectfully represent your petitioners, Michael A. Stone, Thomas P. Davis, John R. Watson, Sereno T. Jenckes, George M. Smith, John E. Anderson, Joshua B. Hale, Henry A. Benchley:

"(1) That they are residents in and duly qualified electors of the town of Cranston in the county of Providence and state of Rhode Island, and duly authorized to vote at all elections held in said Cranston.

"(2) That nomination papers placing in nomination your petitioner Michael A. Stone for the office of town sergeant of said town of Cranston and your petitioners Thomas P. Davis, John R. Watson, Sereno T. Jenckes, George M. Smith, John E. Anderson, Joshua B. Hale, and Henry A. Benchley for the offices of councilmen in said town of Cranston, and Daniel D. Waterman for town clerk of said town of Cranston, Joseph A. Shaw for town treasurer of said town of Cranston, and William H. Place, Henry A. Munroe, Harry E. Jenks, William G. Rickard, and William A. Leach for justices of the peace of said town of Cranston, and John B. Sheldon, Elmer E. Schofield, and William M. Lee for members of the school committee, Edward Stanley for assessor of taxes, Benjamin W. Grim for judge of probate, and William O. Towne for town moderator, with the designation 'Independent Party,' were submitted to Daniel D. Waterman, town clerk of said Cranston, according to law.

"(3) That upon said nomination papers there were the signatures of fifty-seven (57) voters of said town of Cranston qualified to vote for the officers above mentioned in said town and to sign such nomination papers.

"(4) That said nomination papers were formally and duly filed with said Daniel D. Waterman, town clerk as aforesaid, on, to wit, October 19, 1908, and that said nomination papers contained the names of fifty-seven (57) qualified voters of said town of Cranston, a sufficient number of such qualified voters in said town of Cranston to insure the placing of the names of said candidates upon the official ballot in accordance with the provisions of section 11 of chapter 11 of the General Laws [of 1896].

"(5) That said Daniel D. Waterman, town clerk as aforesaid, certified thereon that there were only twenty-seven (27) of the signers of said nomination paper qualified as voters in said town of Cranston.

"(6) That said Daniel D. Waterman, town clerk as aforesaid, has refused and still refuses to certify correctly the number of signatures upon said nomination papers, and that your petitioners and the other candidates have the right to have their names placed upon the official ballot for the election of town officers to be held in said town of Cranston on Tuesday, November 3, 1908.

"Your petitioners therefore pray that a writ of mandamus may be issued out of and under the seal of this honorable court, directed to said Daniel D. Waterman, town clerk of the town of Cranston, commanding him forthwith to certify correctly what number of the signatures upon said nomination papers are names of qualified voters in said town of Cranston, to the end that the names of the nominees named in said nomination papers may be printed upon the official ballot for said town of Cranston to be used at the next town election in said town of Cranston, to wit, on the 3d day of November, A. D. 1908, which is also the date of the next general election to be held in said town.

"Michael A. Stone,

"Thomas P. Davis,

"John R. Watson,

"Sereno T. Jenckes,

"George M. Smith,

"John E. Anderson,

"Joshua B. Hale,

"Henry A. Benchley,

"By Their Attorney,

"James A. Williams.

"State of Rhode Island, Providence—sc.:

"In Providence, on this 22d day of October, A. D. 1908, personally appeared Michael A. Stone and made oath that he has read the above petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated to be on information and belief, and as to those matters he believes them to be true.

"James A. Williams, Notary Public."

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

James A. Williams, for petitioner. Benjamin W. Grim, for respondent.

PER CURIAM. The court is of the opinion that the petitioners fail to show that a sufficient number of duly qualified electors signed the nomination papers in question.

Petition denied and dismissed.

(29 R. I. 297)

**ENOS v. RHODE ISLAND SUBURBAN RY. CO.**

(Supreme Court of Rhode Island. Oct. 28, 1908. Additional Opinion Dec. 9, 1908.)

**1. EXCEPTIONS, BILL OF (§ 55\*)—PROCEEDINGS TO ESTABLISH EXCEPTIONS.**

Under Court and Practice Act 1905, § 492, requiring the presiding justice to examine bills of exceptions, and, if correctly stated, to allow them, and section 494, providing that if the justice fails to act on or return the bill of exceptions filed, or shall disallow, refuse, or alter the same, so that either party is aggrieved, the true bill of exceptions may be established before the Supreme Court on petition, the burden of ascertaining whether the exceptions are stated clearly and separately is upon the trial justice, but no exception to his allowance is permitted by statute: the remedy of the aggrieved party by the failure of the justice to act, or his disallowance, alteration, or refusal to alter the same, being to establish the truth of the exceptions under section 494, and an inquiry to establish their truth will not be restricted by the form of the prayer in the petition.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 90-93; Dec. Dig. § 55.\*]

**2. EXCEPTIONS, BILL OF (§ 8\*)—SUFFICIENCY OF STATEMENT.**

Court and Practice Act 1905, § 490, requiring bill of exceptions to state separately and clearly the exceptions relied upon, is for the benefit of the parties, as well as of the court, and it should clearly appear upon what grounds exceptions will be urged, so that respondent may be advised upon what questions to prepare for argument; and, if any exceptions are waived by the excepting party, they should be eliminated from the bill of exceptions rather than at a later stage.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 10; Dec. Dig. § 8.\*]

**3. EXCEPTIONS, BILL OF (§ 8\*)—SUFFICIENCY OF BILL OF EXCEPTIONS.**

Exceptions on the ground of error in admitting or excluding evidence, when in fact the rulings were confined to refusals to admit testimony, are insufficient under Court and Practice Act 1905, § 490, requiring bills of exceptions to state separately and clearly the exceptions relied upon.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 10; Dec. Dig. § 8.\*]

**4. EXCEPTIONS, BILL OF (§ 8\*)—SUFFICIENCY OF BILL OF EXCEPTIONS—SEPARATE STATEMENT OF RULINGS—NECESSITY.**

The grouping in one exception of eight rulings, two being shown on one page, four on another, and one each on other pages of the transcript, does not meet the requirements of Court and Practice Act 1905, § 490, requiring a bill of exceptions to state separately and clearly the exceptions relied upon, as the eight rulings should have been set out separately.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 10; Dec. Dig. § 8.\*]

**5. TRIAL (§ 131\*)—REMARKS OF COUNSEL—EXCEPTION—SUFFICIENCY.**

In an action for injuries by an accident on defendant's street car, a question had to be repeated to plaintiff, whereupon his counsel remarked that plaintiff was hard of hearing, and he thought that the accident affected plaintiff's ears, to which defendant excepted, and the court stated that there was no such allegation, whereupon defendant's counsel remarked, "I think it

improper for counsel to say it before the jury," when the matter was dropped. *Held*, that no exception was taken to the remark, and none was allowed, so that the exceptions claimed will be disallowed in proceedings to establish the truth of the exceptions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 314; Dec. Dig. § 131.\*]

**6. EXCEPTIONS, BILL OF (§ 8\*)—SUFFICIENCY—ERROR IN DENYING MOTION—SETTING OUT GROUNDS OF MOTION.**

An exception to a decision denying a motion for a new trial is not objectionable, because the grounds on which the motion was based are set out.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 10; Dec. Dig. § 8.\*]

Exceptions from Superior Court, Providence and Bristol Counties.

Action by Antone Enos against the Rhode Island Suburban Railway Company. On petition by plaintiff to establish the truth of defendant's bill of exceptions. Exceptions allowed as stated, and cause to stand for further proceedings.

See, also, 67 Atl. 5.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Waterman, Curran & Hunt (Lewis A. Waterman, of counsel), for plaintiff. Joseph C. Sweeney and Clifford Whipple, for defendant.

DUBOIS, J. This case comes before this court upon the plaintiff's petition to establish the truth of the defendant's bill of exceptions, under Court and Practice Act 1905, § 494, which reads as follows: "If the justice who presided at the trial shall, for a period of twenty days after a bill of exceptions has been filed, fail to act upon or return the same, or shall disallow, alter, or refuse to alter the same, and either party is aggrieved thereby, the truth of the exceptions may be established before the Supreme Court upon petition stating the facts, filed within thirty days after the filing of the bill of exceptions in the superior court; and thereupon the truth of the exceptions being established in such manner as the court shall by rule prescribe, they shall be heard and the same proceedings taken as if the exceptions had been duly allowed and filed. And upon such petition being filed, the Supreme Court may order the clerk of the superior court to certify and transmit to the clerk of the Supreme Court the papers in the cause."

The material portion of the plaintiff's petition is of the tenor following:

"Respectfully represents Antone Enos that he is the plaintiff in the above-entitled case, entered in the superior court in the county of Providence and numbered 20,465; that said case was tried before the Honorable George T. Brown, a justice of the superior court holden at Providence, within and for the county of Providence, on the 30th day of De-



cember, 1907, and following days, and on the 2d day of January, 1908, the jury returned a verdict for the plaintiff in the sum of two thousand seven hundred and fifty dollars (\$2,750); that on the 11th day of March the said justice filed a decision granting the defendant's motion for a new trial unless the plaintiff remit one thousand dollars (\$1,000) from the amount of the said verdict within ten days; that on the 25th day of May the defendant filed its bill of exceptions; that at a hearing fixed by said justice counsel for the plaintiff objected to the allowance of said bill as the defendant's bill of exceptions, but the said justice on the 28th day of May allowed said bill and transcript.

"And your petitioner says that he is aggrieved by the ruling of said justice in allowing said bill of exceptions, and he is aggrieved by the refusal of said justice to alter the same and to disallow the same as prayed for by the petitioner at said hearing, for the following reasons:

"(1) The defendant has not stated separately and clearly the exceptions relied upon.

"(2) The first group of rulings in said bill should have been stricken out for the reason that the defendant has not stated separately and clearly the exceptions therein relied upon.

"Wherefore your petitioner prays that the truth of the exceptions shall be established by this court, and that the alleged exceptions to the first group of rulings be disallowed and be stricken from said bill."

The defendant's bill of exceptions, the truth of which is sought to be established in this proceeding, reads as follows:

"The defendant in the above-entitled action comes and files its bill of exceptions, and says that said case was tried before the Honorable George T. Brown, one of the justices of said court, and a jury, on the 30th day of December, 1907, and the 2d day of January, 1908, and a verdict was rendered for the plaintiff in the sum of \$2,750, and that certain exceptions have been taken by said defendant in the proceedings in said case, as follows:

"(1) To certain rulings of said justice, at the trial of said action, admitting or refusing to admit certain evidence, as shown on pages 158, 182, 193, and 196 of the transcript of testimony, etc., filed herewith.

"(2) To the refusal of said justice, at said trial, to direct a verdict for the defendant, as shown on page 210 of said transcript.

"(3) To a certain statement made by plaintiff's attorney during the course of said trial, to which exception is noted on page 43 of said transcript.

"(4) To the decision of said court denying the defendant's motion for a new trial, which motion was based upon the following grounds: (a) That said verdict is contrary

to the evidence and the weight thereof. (b) That said verdict is contrary to the law. (c) That the amount of damages awarded by said verdict is excessive.

"And the defendant insists that all of said rulings were erroneous, and that said errors entitle it either to a new trial or to a judgment entered in its behalf. Wherefore the defendant tenders this its bill of exceptions, and prays that the same may be allowed by the court in accordance with law."

The evident purpose of Court and Practice Act 1905, § 494, is to confer upon this court jurisdiction over exceptions that their truth may be established. As we have heretofore said in *Vester v. Rhode Island Co.*, 29 R. I. 214, 69 Atl. 606: "Under Court and Practice Act 1905, § 492, the justice who presided at the trial shall examine bills of exceptions and hear the parties, and if he shall find the exceptions, rulings, instructions, and findings correctly stated, he shall allow them. The burden of ascertaining whether the exceptions are stated clearly and separately is properly placed upon the trial justice to whose rulings the exceptions were taken; but no exception to his allowance is permitted by the statute. The only remedy provided for either party aggrieved by the failure of the justice to act upon the bill of exceptions, or to return the same, or to his disallowance of, alteration of, or refusal to alter the same, is to establish the truth of the exceptions before this court upon petition stating the facts under Court and Practice Act 1905, § 494." But, when this remedy has been invoked by either party, its scope cannot be restricted by the form of the prayer of the petitioner. The court will endeavor to ascertain the truth of the exceptions, and this cannot always be done by exclusion.

In ascertaining whether the exceptions, rulings, etc., were correctly stated, the trial justice had not only the bill of exceptions and transcript of the evidence before him and the counsel for the respective parties to aid him, but he had also the assistance of his memory as to what transpired at the trial. Necessarily we can have no such recollection. In the case at bar we have been obliged to ascertain the truth of the exceptions from an examination of the bill of exceptions and the transcript of testimony. But in making the examination and in arriving at our conclusions we have not been hampered by technicalities. The statutory requirement contained in Court and Practice Act 1905, § 490, in the words "shall state separately and clearly the exceptions relied upon," is intended for the benefit of the opposing party as well as for the benefit of the court upon its examination of the exceptions, so that it should be clearly apparent to such party upon what grounds exceptions will be urged before the court in order that he may be advised upon what questions he must prepare his brief

for the argument of the case. If, as frequently happens, an examination of the case by the excepting party eliminates a large number of questions which are deemed to be immaterial upon final consideration, it is for the benefit of the court, as well as of the opposing party, that those questions be eliminated in the frame of the bill of exceptions, so that the real questions intended to be litigated shall be presented upon bill of exceptions, rather than that the bill of exceptions should be so general in its character as to be notice to the opposing party of the intention to litigate every possible question which appears to be reserved upon the transcript. This work of elimination has to be done sooner or later, and it might well be done upon the bill of exceptions in the first place, rather than upon the briefs upon final argument, thereby relieving the opposing party of the apparent necessity of discussing questions which in the end are waived by the excepting party.

Paragraph 1 of the defendant's bill of exceptions, hereinbefore set forth, does not comply with such statutory requirement. In the first place it is not clear to except to certain rulings upon the ground that the court erred in "admitting or refusing to admit certain evidence," when in fact the rulings of the court were confined to refusals to admit testimony. Neither is it stating clearly and separately to group in one exception eight rulings, whereof two are shown on one page, four upon another, and one each on other pages, of the transcript of testimony. The grounds of the objections which were the foundation of the exceptions are only stated in four instances, viz.: The first objection in which the ground was stated (immateriality) was made to question 25 on page 158 of the transcript of testimony; the second (want of notice to plaintiff) appears to question 48 on page 182 thereof; the third (want of materiality) to question 200 on page 192, exception saved on page 193 thereof; and the fourth ("same objection") to question 101 on page 193 aforesaid. While it is possible for the court to gather from the context the probable ground of the other objections, it is just as easy, or easier, for the counsel who were engaged in the trial of the cause to do this and save the court this trouble. The defendant should have set out his eight exceptions to the refusal of the court to admit the testimony offered. This court, having examined the bill of exceptions and transcript, finds that the defendant did save eight exceptions, as aforesaid; and their truth—that is, the truth that such exceptions in fact were tak-

en—is established, and the same may be properly set out in the bill of exceptions by amendment.

The truth of the exception referred to in the second paragraph of the defendant's bill of exceptions is also established, and is allowed. It may be necessary, however, to renumber the same, and permission is granted for that purpose.

The truth of the exception mentioned in the third paragraph of said bill is not established. No exception was taken to any ruling of the court. The incident appears in the transcript of the plaintiff's testimony as follows:

"Q. 354. Then—didn't you say in direct examination that the passenger car that you took to go home that night was going about as fast as it could go? A. Well, I don't know; took my ticket to get a ride to the conductor and—(question repeated by stenographer). A. About quarter of or 20 minutes of 1.

"Mr. Waterman: He is hard of hearing, and I think the accident affected his ears.

"Mr. Rice: I take exception to that.

"The Court: I think there is no such allegation.

"Mr. Rice: I think it is very improper for counsel to say it before the jury."

There the matter was allowed to rest. No exception was taken in the proper sense of the term, and none was allowed by the superior court at the time. The truth of this exception not having been established, the same is disallowed.

The truth of the exception contained in the fourth paragraph of the bill is established. The same is not objectionable, because the grounds on which the motion was founded are set out, and the same is allowed.

The truth of the exceptions having been established as hereinbefore set forth, the bill of exceptions may be amended accordingly, and the cause will stand for further proceedings.

#### Additional Opinion.

PER CURIAM. The verdict was approved by the justice who presided at the trial of the case in the superior court, and is sustained by the evidence. The court ordered the plaintiff to remit, and he has remitted, \$1,000 of the damages awarded by the jury. We do not consider the damages so reduced to be excessive. The several exceptions of the defendant are without merit, and are therefore overruled.

The case is remitted to the superior court, with direction to enter judgment on the verdict for the amount reduced as aforesaid.

(81 Vt. 405)

**SCOVILLE v. BROCK.**(Supreme Court of Vermont. Washington.  
Oct. 8, 1908.)**1. APPEAL AND ERROR (§ 882\*)—REMAND FOR FURTHER FINDING—RECEPTION OF FURTHER EVIDENCE.**

Where a suit was remanded for a further finding, and on the rehearing additional testimony was first offered by orator, and no objection was made to the taking of further testimony, nor was the master's report excepted to because thereof, orator cannot object on appeal that the mandate did not authorize the taking of additional testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**2. APPEAL AND ERROR (§ 1212\*)—REMAND FOR FURTHER FINDING—AUTHORITY TO MAKE ULTIMATE FINDING.**

Where, on appeal from a ruling on demurrer, it was held that a trustee could not be excused from the exercise of ordinary care in disposing of securities, which had a marketable value, but were in fact worthless, because, if he had ascertained the facts, he could not have sold them without committing a fraud, and it was not determined what knowledge was chargeable to the trustee, and the cause was remanded for a finding as to whether the trustee, in holding the securities, acted with fidelity and diligence, the question before the master on recommitment was not limited to whether the trustee had any excuse for not selling, and the fact that the master found that certain of the securities could have been sold above par without the trustee incurring personal liability did not preclude an ultimate finding exonerating the trustee.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1212.\*]

**3. PLEADING (§ 36\*)—ALLEGATIONS OF OPINION—CONCLUSIVENESS OF ADMISSION.**

Allegations that it was widely believed at the places where companies were located that they were fraudulently organized, and had defendant, a trustee who had invested trust funds in the companies, gone there he would have been satisfied as a prudent man that the investments were unsafe, are not allegations of a matter of fact, but of an opinion or speculation, and their admission by answer does not convert the matter alleged into a positive fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81, 82; Dec. Dig. § 36.\*]

**4. PLEADING (§ 36\*)—CONCLUSIVENESS OF ADMISSIONS.**

The allegation of the belief that the companies were fraudulently organized, if treated as one of fact, would only be an allegation of one element to be considered in determining whether the trustee had exercised due care in investing the funds, and the allegation as to how the ascertainable information would have affected the trustee as a prudent man was but the raising of one speculation on another, both dependent upon the trustee's visit, which was not alleged, and the admission thereof was not conclusive.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81, 82; Dec. Dig. § 36.\*]

**5. PLEADING (§ 36\*)—FORCE OF CASUAL ADMISSIONS.**

A party is not bound by a casual admission in his pleadings of what prudence would have required of him.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81, 82; Dec. Dig. § 36.\*]

**6. TRUSTS (§ 263\*)—REFERENCE TO MASTER.**

In a suit to charge a trustee with negligence in his investments, it was for a master, to whom the case was referred, to say from all the facts the trustee ascertained, and all he ought to have ascertained, whether he exercised the diligence of a prudent man in retaining the securities; and he could treat an admission in his answer as conclusive proof of the existence of the belief stated in the allegation that at the home of the corporation in which he had invested it was held in bad repute, and that and the fact of his visit to such place as conclusive proof that he learned of the belief, and yet not accept the admission as conclusive upon the ultimate fact submitted.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 263.\*]

**7. TRUSTS (§ 262\*)—INVESTMENT OF TRUST FUNDS—DILIGENCE OF TRUSTEE—EVIDENCE.**

Evidence held not sufficient to raise a presumption of negligence of a trustee in not learning facts concerning companies in which he had trust funds invested which rendered the investments unsafe.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 262.\*]

**8. TRUSTS (§ 263\*)—REFERENCE TO MASTER—FINDINGS.**

Where a reference was had to a master to determine whether a trustee had acted with due diligence in retaining securities in which the trust fund was invested, and he found that he had so acted, a party cannot complain of a failure to find whether the trustee could have ascertained the unsafe condition of the companies in whose securities the fund was invested before their failure, since the question would still have remained whether the trustee had exercised due diligence, which question was covered by his finding as made, and which was not inconsistent with the finding called for.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 263.\*]

**9. TRUSTS (§ 263\*)—INVESTMENT OF FUNDS—DILIGENCE OF TRUSTEE.**

While a high rate of interest on securities, frequent increases of stock by the company, and the fact that the securities are not of a class sanctioned by the savings bank law, are facts to be considered in determining whether a trustee acted prudently in keeping the trust fund invested in them, they are not facts which would as a matter of law charge the trustee with the duty of a special examination and with knowledge of the facts that such an examination would have disclosed.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 263.\*]

**10. TRUSTS (§ 217\*)—INVESTMENT OF FUNDS—INVESTIGATION OF SECURITIES—DUTY OF TRUSTEE.**

A personal investigation by a trustee of the affairs of private corporations in whose securities trust funds are invested, which could be acquired only on examination of the books and the securities of the companies and the property covered by the securities, is impracticable by an individual holder.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 217.\*]

**11. TRUSTS (§ 262\*)—INVESTMENT OF FUNDS—DILIGENCE OF TRUSTEE—REPUTATION OF SECURITIES—ADMISSIBILITY OF EVIDENCE.**

On the question of a trustee's prudence in keeping the trust fund invested in certain securities of an Iowa company, which were of such a character that definite personal knowledge was impracticable, but which were held by many people in the locality and actually discussed by

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the local investing public, evidence of the reputation which the securities had in the vicinity while held by the trustee was admissible, and the fact that the securities were not of sufficient importance to be listed in the general market and that there was no active trading in them was immaterial.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 262.\*]

**12. TRUSTS (§ 262\*)—INVESTMENT OF FUNDS—REPUTATION OF SECURITIES—ADMISSIBILITY OF EVIDENCE.**

Even if the admissibility of evidence of the general reputation of the securities in which a trust fund was invested depended upon a reputation of a rather long standing, a reputation extending from 1881 to 1893, during which time they had paid interest and dividends, was sufficient.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 262.\*]

**13. TRUSTS (§ 262\*)—INVESTMENT OF FUNDS—REPUTATION OF SECURITIES—ADMISSIBILITY OF EVIDENCE.**

The rule restricting such evidence to securities of companies in the neighborhood of one's residence or business location does not apply; the knowledge of the affairs of a foreign private corporation available to the general public of its own section not requiring a distinction between localities.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 262.\*]

**14. GUARDIAN AND WARD (§ 53\*)—INVESTMENT OF FUNDS—DILIGENCE—REPUTATION OF SECURITIES.**

A guardian, in investing his ward's funds, need not base his action upon actual knowledge of the soundness of securities retained, but may rely upon their general reputation.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 232-241; Dec. Dig. § 53.\*]

**15. EQUITY (§ 405\*)—MASTER—CREDIBILITY OF WITNESSES.**

The effect of an alleged inconsistency in the testimony of a witness before a master is for the master to determine.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 403.\*]

**16. EQUITY (§ 405\*)—MASTER—POWER TO MODIFY OR REVERSE PREVIOUS FINDINGS.**

With further evidence before him, a master may disregard, modify, or reverse a previous finding.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 405.\*]

**17. TRUSTS (§ 262\*)—INVESTMENT OF FUNDS—PRUDENCE OF TRUSTEE—ADMISSIBILITY OF EVIDENCE—ADVICE ON INVESTMENT.**

Evidence that a trustee had consulted a person of standing as a financier about securities in which trust funds were invested is admissible as evidence of his prudence, though the opinion obtained was not based on a personal knowledge of matters which determine the value of the securities, and such financier had not invested trust funds in such securities.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 262.\*]

**18. TRUSTS (§ 262\*)—INVESTMENT OF FUNDS—DILIGENCE OF TRUSTEE—ADMISSIBILITY OF EVIDENCE.**

The admissibility of the evidence was not affected by the fact that the trustee was himself vice president of the bank of which his adviser was president, and had no reason to suppose that his adviser knew more about the matter than he did.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 262.\*]

**19. TRUSTS (§ 217\*)—INVESTMENT OF TRUST FUNDS—STOCKS AND BONDS OF PRIVATE CORPORATIONS.**

There is no special rule prohibiting the investment of trust funds in the stocks and bonds of private corporations, though located without the state; and in case of loss the question of liability depends upon whether the trustee acted with fidelity and with the care and diligence of a prudent man.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 307; Dec. Dig. § 217.\*]

**20. CONSTITUTIONAL LAW (§ 70\*)—JUDICIAL POWER—ENCROACHMENT ON LEGISLATURE.**

The adoption of special rules determining the classes of securities proper for the investment of trust funds is the office of the Legislature, and not of the courts.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 70.\*]

Appeal in Chancery, Washington County; John W. Rowell, Chancellor.

Bill by William L. Scoville against James W. Brock. Decree of dismissal, and orator appeals. Affirmed and remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Elbridge R. Anderson, Edward H. Deavitt, and Harry O. Shurtleff, for appellant. Hunton & Stickney, for appellee.

MUNSON, J. When this case was last before us (79 Vt. 449, 65 Atl. 577, 118 Am. St. Rep. 975) it was remanded, that the report might be recommitted for the master to find "whether the defendant, in continuing to hold the securities, acted with fidelity, and with that measure of care and diligence that a prudent man would have exercised in the same circumstances." The finding is for the defendant, but the orator contests its validity on several grounds.

It is said that the mandate contemplated a further finding on the case as then made up, and that the taking of additional testimony was not authorized. The order of recommitment is not before us, but presumably it followed the mandate, and the terms of the mandate did not preclude an exercise of the master's discretion regarding the hearing. See *Richardson v. Wright*, 58 Vt. 367, 5 Atl. 287. It is said, however, in view of the circumstances and ground of the recommitment, that the mandate cannot be allowed the construction adopted by the master without doing the orator an injustice, and that the construction is therefore one that the court cannot have intended. But the first reception of evidence at the rehearing was on the orator's offer, and no objection was made to the taking of further testimony, nor was the report excepted to because based on the testimony so taken.

It is said that, when the allegations of the bill were examined on demurrer (76 Vt. 385, 57 Atl. 987), they were held sufficient to show that the securities the defendant received were not proper investments, and that it was his duty to sell them if a sale was feasible;

that the only question before the master on recommitment, if the mandate be given a construction consistent with that decision, was whether the defendant had any excuse for not selling; and that, inasmuch as the master has found that certain of the securities could have been sold above par without incurring personal liability, and had evidence before him from which he ought to have made the same finding regarding them all, his ultimate finding in exoneration of the defendant is beyond his authority. It is said, further, that, since the allegations then passed upon are now admitted by the answer, the record is the same on the merits as on the demurrer, and requires the same decision. These claims are not justified by the scope of the former adjudication. The point of that decision was that the defendant could not be excused from the exercise of ordinary care in disposing of securities which had a marketable value, but were in fact worthless, on the ground that, if he had ascertained the facts, he could not have effected a sale without committing a fraud. It was not necessary to determine just what knowledge was chargeable to the defendant on the pleadings, nor whether that knowledge was such as charged him with the duty of selling.

It is urged that the conclusion of the master is inconsistent with a conclusive admission contained in the answer. This claim is based on a consideration of the admission in connection with certain reported facts. It was alleged, in substance, in the first paragraph of the first amended bill, that the securities were in fact worthless, that it was widely believed at the places where the companies were located that they were fraudulently organized and conducted, and that if the defendant had gone to these places and made an investigation he would have been satisfied, as a man of ordinary prudence, that the investments were unsafe. The defendant, in his amended answer, admitted in general terms the allegations of this paragraph. It now appears that the defendant visited Sioux City while he was holding the securities, and went to the office of the Loan & Trust Company, and inquired how the company was getting along. The master reports that in reaching his conclusion he treated the admission as conclusive of the facts alleged, but not as conclusive of the ultimate fact to be determined. The orator's argument is this: The defendant admits that, if he had gone to Sioux City and inquired as to the standing of the Loan & Trust Company, he would have ascertained its condition. The master finds that he did go to Sioux City and make the inquiry. So he must either have ascertained the facts, or been negligent in his investigation. Upon this reasoning, the fact that the defendant visited Sioux City gives to the admission an effect at variance with the master's conclusion. The question is whether the orator is entitled to have the

admission given a conclusive effect as regards the ultimate fact.

We think the orator's argument is without substantial basis. The allegation of what the defendant would have discovered is not the allegation of a matter of fact, but of a matter of opinion or speculation. It cannot be said that the existence to a considerable extent in the community generally of the unfavorable belief was something which one making a diligent inquiry on the ground must necessarily have discovered. The admission of an allegation of this nature cannot convert the matter alleged into a positive and conclusive fact. Moreover, the matter alleged, if it be treated as a fact, is but one of several elements to be considered in determining the question submitted. The defendant might have learned of the unfavorable views entertained by a portion of the community, and still have become satisfied on reasonable grounds that the company was solvent and well managed. The final allegation, as to how the ascertainable information would have affected the defendant as a prudent man, is but the raising of one speculation on another. The allegation involves, not only what the defendant would have learned, but the effect that the things learned, when considered in connection with other information, would have had upon his judgment as a prudent man. Furthermore, it must be kept in mind that these matters are made dependent upon an event that is not alleged to have occurred, and are admitted as alleged. Now, an admission will not be conclusive unless complete in itself, or made complete by a necessary inference from some other averment. See, *Schwarz v. Sears, Walker Ch. (Mich.) 19*. This completeness cannot be predicated of an admission which depends for its force on the finding of a further fact from the evidence. It should also be noticed that, if the claim now made by the orator is sustained, the defendant will be made liable on a different ground from that set up in the bill; for the bill assumes that the defendant did not visit Sioux City to make inquiry, and charges him with negligence in that respect. These considerations all point to the inconclusiveness of the admission regarded as a pleading, and, if not conclusive under the rules of pleading, it has no conclusive effect. A party is not bound by a casual admission of what prudence would have required of him. *Stowe v. Bishop, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 557*. It was for the master to say, from all the facts the defendant ascertained and all he ought to have ascertained, whether he exercised the care and diligence of a prudent man in retaining the securities. He could treat the defendant's admission as conclusive proof of the existence of the belief stated, and that and the fact of his visit as conclusive proof that he learned of the belief, and yet not accept the admission as conclusive upon the ultimate fact submitted for his determination.

The orator insists that the result must be the same if the admission is rejected. It is argued that the presumption of negligence applies to every act and default of the defendant in relation to the investments, and that the finding as to the particular act or default cannot be for the defendant without evidence rebutting the presumption, and that unless the defendant can be justified as to each particular of his conduct the conclusion of the master cannot be sustained: We shall examine the orator's objections upon this ground without inquiring as to its correctness. It is said that there was no testimony tending to show that the defendant could not have learned the facts while at Sioux City, and that in the absence of such evidence it is to be presumed that he could have learned them, and that his failure to learn them charges him with negligence. It does not appear when the defendant's visit to Sioux City was made, and we treat the case as though it occurred shortly before the failure. The report shows that, when the defendant went to the office of the Loan & Trust Company and inquired how they were getting along, he was given a sworn statement of the company which showed it to be in a safe and prosperous condition, and that he received no other information, and learned nothing that caused him to suspect that the affairs of the company were not as shown by the statement. It is intimated that the defendant should have sought an interview with the officials of the company in their private room, and made his inquiries there. But the fact that the financial statements issued by the company were false is enough to support a conclusion that the defendant would have learned nothing inconsistent with the statements by inquiries in the directors' room.

It is said, further, that if the defendant had made inquiries in disinterested quarters he could not have failed to learn of the unfavorable rumors then rife among the business men of Sioux City. This assumption is based upon the testimony of Mr. Wing, one of the committee which investigated the affairs of the Loan & Trust Company a few months after the failure, who says he then learned from a few conservative men that they had anticipated the failure some months before it occurred. This evidence, if accepted as legitimate, does not go far enough to support the orator's claim. Suspicious, readily asserted after the failure, may not have been freely expressed, or even well-defined, before the event. It is said that the defendant might easily have learned that these companies were formed for the purpose of booming Sioux City and financing other enterprises devoted to the same end. If this had been reported as a fact and as known to the defendant, it would not have changed the legal aspect of the case. It is said that the public records would have shown that the Loan & Trust Company was not so organized

as to make its stockholders liable to assessment, and that the defendant is chargeable with negligence for not ascertaining the fact. There is nothing before us from which we can say what the public records would have shown in this respect, and it is not necessary to inquire how the existence of a record notice of this fact would have affected the duty of the defendant or the finding of the master.

It is claimed, further, that enough appears to charge the defendant without regard to the presumption. The orator insists that he was entitled to have the master determine whether the defendant could have ascertained the real facts concerning the Loan & Trust Company before the failure, and that the findings made and other facts appearing from undisputed evidence would have compelled a finding that he could have ascertained them, and that this would have rendered the conclusion arrived at impossible. It appears that representatives of the holders of the debenture bonds visited Sioux City after the failure to make an investigation, and were refused permission to examine the books of the company, and thereupon applied to the court for an order in that behalf, and that after the application had been made the officials of the company permitted the examination. It was then found that the company originally placed in the hands of the trustees for the bondholders first-class mortgages sufficient to secure the payment of the bonds, but that during the year or two preceding the failure the company had withdrawn these mortgages and substituted other securities having a face value largely in excess of the bonds issued, but actually worth only a small per cent. of the issue. These facts were found from the testimony of Mr. Wing, who was asked the following question in the course of his examination: "From your investigation, and what you had to do in order to get at the facts you discovered, did you make up your mind \* \* \* whether those facts could have been discovered before the failure?" and who replied as follows: "I suppose they could have been discovered if you had gone there and insisted upon an examination of what was behind the debentures." After reciting the above facts, and upon a consideration of this evidence, the master says: "Whether or not these facts could have been ascertained by the defendant before the failure the master cannot determine, but [he] does find that the defendant could not have ascertained these facts without personally going to Sioux City, or sending some competent person there, and making a determined effort in that direction. \* \* \*" The orator cannot complain of the failure to make a more definite finding. Suppose the master had found that the defendant could have ascertained these facts before the failure by a "determined effort" of some designated character; the question would still have remained whether that

course was required of him in the exercise of due diligence. This the master has covered by his concluding finding, and the finding called for would not have been inconsistent with it.

The master recites in this connection, as one of the things considered, the fact that nothing had come to the knowledge of the defendant to put him on inquiry. The orator contends that this is an unwarranted assumption, and suggests, as matters that ought to have put the defendant on inquiry, the large rate of interest, the frequent increases of stock, and the fact that the investments were not of a class sanctioned by the savings bank law of this state. These were facts to be considered by the master in determining whether the defendant acted prudently in retaining the securities, but are not facts which can be said as matter of law to charge the defendant with the duty of a special examination and with knowledge of the facts that such an examination would have been disclosed. The other things suggested are matters which the orator assumes could have been learned by proper inquiry when the defendant was at Sioux City, and these properly belong and have been considered in another connection. We find nothing in the report, upon this or other points, to indicate that the master was influenced in reaching his conclusion by any misapprehension as to the legal rules applicable to the case.

It is argued, further, that the law required the defendant to make a personal investigation of the affairs of the companies, unless it was actually necessary to rely upon others, and that there is no finding that this necessity existed. The principle of the decision in *McClosky v. Gleason*, 56 Vt. 264, 48 Am. Rep. 770, is appealed to in support of this position. In that case an administrator intrusted the collection of a mortgage to an agent, who appropriated the money collected to his own use, and was suffered to retain it four years without any special effort being made for its recovery. That case called for an ascertainment of the rule applicable to a trustee making collections through an agent. This case relates to the duty of a trustee who holds the stock or bonds of a corporation as an investment. It is obvious that the field of duty to be considered here is different in character and scope. A personal knowledge of the matters upon which the value and safety of these investments depended could have been acquired only by an examination of the books and securities of the company and of the property covered by the securities. It must be conceded that such an investigation by an individual holder is impracticable. Then, if investments of this character are to be sanctioned, other methods of reaching a conclusion as to their safety must be permitted.

As bearing upon the question of defendant's prudence, the master received evidence

of the reputation which these securities had in Montpelier and vicinity during the time they were held by the defendant. The orator insists that this evidence was inadmissible, because the reputation was that of securities not listed in the general market nor the subject of active trading; because it was not general, in the sense of being widespread, and did not embrace the locality where the corporation did business; and because it arose at a place remote from the location of the corporation and among people who had no knowledge of the facts on which the value of the securities depended. As regards the necessity of resorting to evidence of this character, no distinction can be made between these securities and others of sufficient importance to be listed in the general market; and its admissibility cannot be made to depend on the test of active trading. It is found that a large amount of these securities were held in Montpelier and vicinity, and the orator's brief says it is apparent from the evidence that there was, in a small way, an exchange market for them. The fact that this local market was remote from the location of the corporation cannot be of controlling importance in these days of easy communication and extended commercial relations. The ease with which one living at a distance from an institution in which he is interested can keep himself informed of whatever may become known to the public of its immediate vicinity is well understood. Some of the facts reported indicate a special connection between these two localities. Mr. Cummings, a resident of Montpelier or the near vicinity, was a director of one of the corporations in question, and his son was the cashier of another. Mr. Ellis, a resident of Montpelier and a director of the First National Bank of Montpelier, who was interested in selling the securities, was accustomed to visit Sioux City two or three times a year. There was evidence tending to show that the usual sworn statements of the financial condition of these corporations accompanied the several remittances of income, and these are an important factor in determining the judgment of actual and prospective investors wherever located. The case also discloses some indications of the extent and activity of the local interest. There was evidence that the securities were sold at the First National Bank by its cashier; that they were owned and recommended by prominent local financiers, who were interested solely as investors; that they were made the subject of frequent discussion and inquiry by persons who held them and persons who had money to invest; that this was so common with the people who visited the office of Mr. Wing, a gentleman not interested in the securities, that he endeavored to keep himself informed regarding them in order that he might answer inquiries. So the case presented is that of securities regarding which definite personal knowledge

was impracticable, held by a considerable number of people in the same locality, and actively discussed by the local investing public.

It is said, however, but without referring us to the cases, that the courts which admit general reputation in excuse of a loss require that it be a reputation of rather long standing, having its origin in the continued high standing of the company for a considerable length of time. The admission of the reputation of these securities could hardly be held error under the rule as stated. The investments were made by the orator's father, who died in 1885, the debentures of the Loan & Trust Company having been purchased in 1881, and the other holdings at dates not given; and all of them paid interest and dividends regularly until the spring of 1893. It is said that these courts require that the reputation be that of a corporation so situated that something pretty definite, although perhaps not in detail, can be known by the general public concerning the character of its business and resources; and it is remarked in this connection that the reputation of these securities in the locality where the companies did business might have been of some value. The ordinary terms restricting evidence of this nature to the neighborhood of one's residence or business location are not applicable here. See Wig. Ev. § 1616. We have already indicated our opinion that the knowledge of the affairs of an institution of this character ordinarily available to the general public of its own section is not so likely to be wanting in an outlying field of investment as to require that a distinction be made between the two localities in this respect. It is clear that the difficulty in this instance was one regarding which proximity gave no special advantage, and that if the reputation shown had been that existing in the immediate neighborhood of the corporations it would not have been a reputation based on the opinions of those who had any definite knowledge of their actual standing.

But the orator does not concede the authority of those cases, and insists that evidence of the reputation of the securities held by a guardian is not admissible in his defense unless that reputation is shown to have been founded on a knowledge of the facts. This is in line with the orator's main contention that a guardian's action must be based upon actual knowledge, and not upon mere beliefs. But in the view adopted by the court the question is one of fidelity and prudence, and we see no reason why a reputation which satisfies the ordinary tests should not be held admissible upon that question in cases involving investments of this character. Reputation is an established means of proving solvency or insolvency, when collaterally in question. But a reputation regarding solvency is merely a consensus of individual opinion, and one man's opinion

of the solvency of another is ordinarily based upon a variety of general indications, and not upon an actual knowledge of the facts which constitute solvency. We think the defendant could properly take this reputation into account in considering the advisability of retaining these securities, and that he had a right to have it appear in evidence, to be given such weight as the master might consider it entitled to.

The master received evidence of the experience and standing as a financier of Homer W. Heaton, deceased, president of the Montpelier Savings Bank & Trust Company at the time in question, and permitted the defendant to testify that he consulted Mr. Heaton about the securities, and was told that they were good investments, and relied partly on this advice; and from this testimony the master has found the facts to be as stated. It is objected that the statement was in direct contradiction of the defendant's previous testimony, that the finding is inconsistent with a former finding, that the evidence was hearsay, and that the opinion shown was not based on a knowledge of the facts. The effect of the claimed contradiction on the credibility of the defendant was for the master to determine. With further evidence before him, the master could disregard, modify, or reverse a previous finding. If the inquiry and advice were legitimate evidence on the question at issue, the testimony was not objectionable as hearsay. We think that an opinion regarding securities of this class may be admissible as evidence of prudence, although not based on a personal knowledge of the matters which determine their value. Mr. Heaton's experience and position gave him a knowledge of the subject not possessed by people in general. He was the president of a bank located in a section where these securities were common—a man accustomed to investing trust funds, and familiar with the rules by which the value of a security is tested, and one whose attention had been directed to these particular securities by his relations to the community in which they were held. It was not necessary to the competency of the evidence that he should have invested trust funds in these very securities. The fact that he was shown by the event to have been misled by the information available for his guidance does not affect the question of admissibility. Nor is the objection aided by the suggestion that the defendant was himself vice president of the same bank, and had no reason to suppose that his adviser knew more about the matter than he did. The fact that a person of experience and skill confers with others of like information and standing upon a question of importance, and tests his own judgment by their views and suggestions, is certainly an indication of care and prudence.

The claims of the orator amount to this: The securities were in fact worthless, as shown by the event. The facts could have



been ascertained before the failures by a sufficient investigation. It was the defendant's duty to know the facts, as distinguished from opinions, or any reputation founded on opinion. This duty covered not merely the facts bearing indirectly upon the standing of the companies, but the very facts upon which the value of the securities depended. The defendant was not confined to any particular securities, and, if he could not learn the facts upon which the safety of these depended, he was not justified in retaining them. He continued to hold them without knowledge of the facts regarding them, and is therefore liable for the loss. This view ignores the rule which makes the diligence of a prudent man the test of liability, and charges the guardian whenever it becomes apparent from subsequent events that an exhaustive investigation, seasonably undertaken, would have secured the safety of the fund. It is obvious that such an investigation in the case of every individual holder of the stock or bonds of a corporation affording extended opportunities of investment is impracticable, that the requirement of it would exclude all securities of that character from the field of investment available to trustees, and that it cannot consistently be made a special and exclusive test of liability in a jurisdiction which recognizes such securities as proper to be held in the exercise of due discretion.

The argument of the orator is apparently influenced by a belief that securities of this class ought not to be recognized as proper holdings for a trust fund. It is not necessary to enter upon a discussion of the views entertained upon this subject in different jurisdictions. The submission of the question now passed upon by the master was in itself a determination that in this state there is no special rule prohibiting the investment of trust funds in the stock and bonds of private corporations, even though located without the state, and that in case of loss the question of liability is to be tested by the general rule embodied in the mandate. If it be considered that the interests of beneficiaries now require the adoption of special rules determining the classes of securities proper for the investment of trust funds, the change should be made by the Legislature, and not by the court. See *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *Lamar v. Micou*, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751.

Decree affirmed, and cause remanded.

(81 Conn. 280)

**PELTON v. GOLDBERG et ux.**

(Supreme Court of Errors of Connecticut. Oct. 27, 1908.)

**1. TRIAL (§ 256\*)—INSTRUCTIONS—REQUESTS—NECESSITY.**

Where counsel for plaintiff, at the close of his evidence, withdrew the second count of the

complaint and the court then so informed the jury, and in its charge stated that what the jury were called on to try was that set up in the first count, the failure to state in the charge that the second count had been withdrawn was not error, in the absence of a request therefor.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

**2. APPEAL AND ERROR (§ 218\*)—OBJECTIONS NOT MADE BELOW—FORM OF VERDICT.**

In an action against a husband and wife for a joint debt, the court prepared a form of a verdict with the caption, "P. against G. et al." and with the statement, "In this case the jury find the issues for plaintiff," and it also prepared another form of a verdict which omitted the words "et al." after G.'s name. The court, at the close of the charge, called the attention of the jury to the forms of verdict. Counsel for defendants remained silent when the forms were explained and delivered to the jury, and when the verdict using the first form was returned and accepted. *Held*, that defendants could not question the form of the verdict rendered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1315, 1316; Dec. Dig. § 218.\*]

**3. TRIAL (§ 327\*)—VERDICT—CONSTRUCTION.**

In an action against a husband and wife for a joint indebtedness, the jury returned a verdict for plaintiff, the caption of which was, "P. against G. et al.," and which stated that the jury had found the issues for plaintiff, and that plaintiff was entitled to recover a specified sum as damages. *Held*, that the court properly treated the verdict as a verdict against both defendants.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 768½; Dec. Dig. § 327.\*]

**4. JUDGMENT (§ 299\*)—ENTEX—CORRECTION—AUTHORITY OF COURT.**

The court may, after the adjournment of the session at which a cause was tried, correct a clerical error in entering the judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 583-586; Dec. Dig. § 299.\*]

Appeal from Superior Court, Hartford County; Milton A. Shumway, Judge.

Action by Oliver N. Pelton against David Goldberg and wife for goods sold. From a judgment for plaintiff, defendants appeal. No error.

Sidney E. Clarke and Louis H. Katz, for appellants. Leslie W. Newberry and Richard J. Goodman, for appellee.

HALL, J. The complaint contained two counts. The first charged the defendants, who are husband and wife, with a joint indebtedness to the plaintiff in the sum of \$1,352.23 as the balance of an account extending over a period of some two years, the debits in which amounted to nearly \$7,000. The second count charged the defendants with such indebtedness as copartners. At the close of the plaintiff's evidence, the defendants moved for a nonsuit, upon the second count of the complaint. Plaintiff's counsel thereupon stated that the second count was withdrawn. The court so informed the jury, and told them that the plaintiff made no claim under that count. The defendants

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

now complain because the court did not in its charge instruct the jury that the second count had been withdrawn.

It was not necessary for the trial judge to repeat in his charge what he had before clearly informed the jury. If the plaintiff desired him to do so, he should have so requested him. Indeed, the court in its charge did tell the jury that the case they were "called upon to try," was that "set up" in the first count. Two forms of a plaintiff's verdict were given to the jury as they retired to consider the case. In the caption of one the case was entitled "Oliver N. Pelton v. David Goldberg et al.," and below this was the following: "In this case the jury find the issues for the plaintiff, and therefore find for the plaintiff to recover ——— dollars damages." The second was like the first, excepting that the words "et al." after the defendant David Goldberg's name in the first were omitted in the second, and David Goldberg was the only defendant named in the second. At the close of his charge, the trial judge called the attention of the jury to these two forms and told them that, since it was admitted that they must return a verdict for the plaintiff against Mr. Goldberg, one of these two forms should be used by filling in the blank space in the one adopted with the amount found to be due the plaintiff, and explained to them that the first form should be used if they found Mrs. Goldberg, as well as her husband, liable for the account, and the second if they found Mrs. Goldberg not liable. The verdict returned and accepted by the court was upon the first of said forms. One of the defendants' reasons of appeal is, in substance, that the court erred in accepting this verdict since it does not state from which of the defendants the plaintiff is to recover, nor that he is to recover from both of them. We have no reason to think that the jury did not fully understand the instructions of the court regarding the two forms of verdict, nor that, in using the form they did, they did not intend to render a verdict against both defendants. It would have been better in preparing the two forms of verdict to have stated in both the correct title of the case, namely, "Oliver N. Pelton v. David Goldberg et ux.," and to have inserted after the word "recover" the words "of the defendants," in the first, and the words, "of the defendant David Goldberg only," in the second. Gen. St. 1902, § 594. But, having remained silent when these forms were explained, and delivered to the jury, and when the verdict was returned and accepted, the defendants cannot now be heard to question the form of the verdict rendered. The trial court properly treated it as a verdict against both defendants. *Houston et al. v. Ladies Union Branch Ass'n*, 87 Ga. 208, 18 S. E. 634.

It appears from the record that the verdict

in the form above stated having been accepted on March 5, 1908, the trial court directed the clerk to enter judgment against both defendants, but that the judgment file dated March 10, 1908, as prepared by the clerk contained this language: "Whereupon it is adjudged that the plaintiff recover of the defendant thirteen hundred fifty-two and twenty-three one hundredths dollars," etc., that on the 13th of April, 1908, the court, Judge Shumway presiding, heard all the parties upon the plaintiff's application to correct the judgment file by adding the letter "s" to the word defendant, and granted the application. Although the defendants have not made this action of the court a reason of appeal, and have only complained of it in their brief, we deem it proper to say that there was nothing irregular in so correcting a mere clerical error, even if the correction was made after the adjournment of the session at which the case was tried.

Other assignments of error are too clearly unfounded to merit discussion.

There is no error. The other Judges concurred.

(81 Conn. 294)

**BULKLEY et ux. v. NORWICH & W. RY. CO.**

(Supreme Court of Errors of Connecticut. Oct. 27, 1908.)

**1. LIMITATION OF ACTIONS (§ 180\*)—PLEADING—DEMURRER.**

A complaint for personal injury was not demurrable because the allegation of the date of the injury showed that limitations had run, since plaintiffs could still prove that the injury occurred at some subsequent day.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 180.\*]

**2. PLEADING (§ 214\*)—IMMATERIAL ALLEGATIONS—EFFECT OF DEMURRER.**

While an allegation of time, originally immaterial, may become material through subsequent pleading, such result does not follow from demurring.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 214.\*]

**3. PLEADING (§ 216\*)—DEMURRER—BASIS—RECITALS IN RETURN.**

The facts attending an officer's action in serving a writ and complaint, though reported to the court in a return, and importing verity, are facts aliunde the pleadings, and must be pleaded by the party seeking to avail himself of them; and hence recitals in the return do not supplement the complaint and so form part of it that they are available to defendant on demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535-538; Dec. Dig. § 216.\*]

**4. RAILROADS (§ 25\*)—ACTION FOR INJURIES—NOTICE—PLEADING.**

Under Gen. St. 1902, § 1130, preventing suits against a railway company for negligent injury unless written notice of the time, etc., of the injury be given within four months thereafter, unless the action be commenced within such period, such notice is not a prerequisite to the owner's right to sue. The section prescribes a limitation analogous to general

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

limitations upon an injured person's right to sue without further proceedings, the limitation creating a condition subsequent by which an existing right might be cut off by nonperformance of the condition rather than a condition precedent to a continuing right; and hence a defense predicated upon it as upon conditions subsequent and limitations generally need not be anticipated.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 25.\*]

Appeal from Superior Court, Middlesex County; Ralph Wheeler, Judge.

Personal injury action by Francis F. Bulkley and wife against the Norwich & Western Railway Company. From a judgment for plaintiffs for \$750, defendant appeals. No error.

The complaint, dated November 21, 1907, alleges in substance that the plaintiff wife, on August 11, 1907, while a passenger, in the exercise of due care, on a car of the defendant common carrier, received bodily injuries as the result of a collision between such car and another car of the defendant going in the opposite direction upon the same track, which collision and injuries were caused by the negligence of the defendant, its servants and agents. There was no allegation of the giving of a written notice to the defendant. The officer's return of his service of the writ and complaint stated that it was made on December 2, 1907. The defendant demurred to the complaint for the following reason: "Because it appears and is alleged in said complaint that the injury to the plaintiffs constituting said cause of action occurred on August 1, 1907, and this action was not commenced within the period of four months from said August 1, 1907, as appears from the officer's return therein, and it is not alleged and does not appear in said complaint that written notice containing a general description of the injury, and of the time, place, and cause of its occurrence, as nearly as the same can be ascertained, was given to the defendant within four months after said August 1, 1907, the date of the neglect complained of in said action." The demurrer was overruled. This action of the court is assigned as the sole reason of appeal.

Donald G. Perkins, for appellant. Richard H. Tyner, for appellees.

PRENTICE, J. (after stating the facts as above). This demurrer involves two false assumptions, to wit: First, that the plaintiffs' allegations of time precluded them from proving that Mrs. Bulkley received her alleged injuries on some day later than that alleged; and, second, that the statements of the officer in his return of service were to be accepted as facts coming within the purview of the demurrer to the complaint. The plaintiffs' averment of the time when the events which furnished the basis of their cause of action occurred was an immaterial one, and, upon a

trial, proof that they occurred upon some subsequent day which would render the demurrer pointless would have been admissible. *Fitzgerald v. Scovil Mfg. Co.*, 77 Conn. 528, 529, 60 Atl. 132; *Sage v. Hawley*, 16 Conn. 106, 111, 41 Am. Dec. 128; Gould on Pleading, c. 3, §§ 63, 64. An allegation of time, originally immaterial, may become material by reason of subsequent pleading. *Fitzgerald v. Scovil Mfg. Co.*, 77 Conn. 528, 529, 60 Atl. 132. Such a result, however, does not follow from demurring. The complaint stated a good cause of action, since under its averments such a cause of action could be proved without creating a variance.

The demurrer was to the complaint. We have held that a complaint may, for the purposes of a demurrer, be read in connection with the writ which it accompanies. *Radetsky v. Sargent*, 77 Conn. 110, 113, 58 Atl. 709. It is a very different thing, however, to say that the statements of the officer serving the writ and complaint in his return may be treated as facts supplementing those set up in the complaint, and so forming a part of the complaint that they may be utilized by the defendant in a demurrer to the plaintiff's statement of his cause of action. We can imagine no justification for such a proposition. The facts attending the officer's action, although reported to the court in a return on file as a part of the record of the cause and importing verity, are facts allunde the pleadings, and must be pleaded by whichever party would avail himself of them, thus permitting an issue of fact to be joined thereon. The language of the demurrer indicates that the defendant appreciated that it was going outside of the complaint for a necessary fact and pleading it as a fact. The demurrer carefully refrains from stating that it appears from the complaint that the action was not begun within the four-month period. On the contrary, it asserts the proposition that such was the fact, thus making it in form, as it was in fact, a speaking demurrer. If the defendant desired to avail itself of the date of service, it was its duty to set it up in a defense in bar of the action.

Section 1130 of the General Statutes of 1902, with which we are here concerned, is quite different in its character from section 2020, relating to actions against municipal corporations by reason of defective highways. The latter section gives a right of action where there would otherwise be none, and makes the giving of a prescribed notice a condition precedent to the existence of such a right under any and all circumstances. *Crocker v. Hartford*, 66 Conn. 387, 390, 34 Atl. 98; *Forbes v. Suffield*, 81 Conn. —, 70 Atl. 1023. On the other hand, an action may be maintained against this defendant upon the facts set up in this complaint. A written notice is not a prerequisite. Section

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1130 simply places a limitation analogous to the general statute of limitations upon the right of an injured party to prosecute such an action without further proceedings. This limitation is to be regarded as creating a condition subsequent, by which an existing right is cut off by the nonperformance of the condition, rather than a condition precedent to a continuing right. Such being its essential character, a defense predicated upon it, as upon conditions subsequent and limitations generally, need not be anticipated, and may properly be left to be pleaded by the defendant. Gould on Pleading, c. 9, § 17.

The court in its memorandum assigned another reason for its action in overruling the demurrer. We have no need to pass upon the sufficiency of this reason.

There is no error. The other Judges concurred.

(81 Conn. 274)

# FORBES v. TOWN OF SUFFIELD.

(Supreme Court of Errors of Connecticut. Oct. 27, 1908.)

## MUNICIPAL CORPORATIONS (§ 812\*)—DEFECTIVE HIGHWAYS—NOTICE OF INJURY—NECESSITY FOR.

Under Gen. St. 1902, § 2020, making the giving of a notice to a municipality of the receipt of injuries caused by a defective highway a condition precedent to a right to sue a municipality therefor, a complaint against a city for such injuries must allege the giving of such notice; service of the complaint containing the required information within the time within which notice is required to be given being insufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1697; Dec. Dig. § 812.\*]

Appeal from Superior Court, Hartford County; Howard J. Curtis, Judge.

Personal injury action by William G. Forbes against the town of Suffield. From a judgment for defendant, plaintiff appeals. Affirmed.

The complaint contains no allegation upon the subject of written notice by the plaintiff to the defendant of the plaintiff's injuries. The demurrer asserts the insufficiency of the complaint for the reason that it does not appear therein that prior to the institution of the action such notice of said injuries and a general description of the same and the cause thereof and the time and place of its occurrence was given within the time and in the manner required by law, and the court so ruled. The injury is alleged to have been re-

ceived on September 15, 1907, and the officer's return states that the service of the writ and complaint was made upon the first selectman of the defendant on November 14, 1907. The complaint describes the injury the plaintiff claims to have received, its alleged cause, and the time and place of its occurrence. The alleged defect did not consist of snow or ice, or both. The plaintiff claimed that the service of the complaint within 60 days after the injuries were received, it being made upon a selectman and conveying all the information specified for the statutory notice, satisfied the requirement of the statute in the matter of such notice, and was a full equivalent for that requirement.

Benedict M. Holden, for appellant. Hugh M. Alcorn, for appellee.

PRENTICE, J. (after stating the facts as above). The right to maintain an action against a municipality for the recovery of damages for personal injuries resulting from defective highways exists only by force of section 2020 of the General Statutes of 1902, which defines and limits the right and prescribes the conditions under which it may exist. One of these conditions is the giving to the municipality within a prescribed time of a written notice containing certain prescribed information. The giving of this notice is expressly made a condition precedent to any right of action. Until it is given, no such right exists. The statute recognizes no equivalents, and it is not competent for the courts to extend the right given beyond the limits fixed by the General Assembly, or to create a right not contemplated by the Legislature and contrary to its peremptory mandate. These principles, cogently expressed in *Crocker v. Hartford*, 66 Conn. 387, 390, 34 Atl. 98, have been recognized as the law of this state too long and repeatedly to permit of question now. *Hoyle v. Putnam*, 46 Conn. 61; *Fields v. Hartford & W. H. R. Co.*, 54 Conn. 9, 4 Atl. 105; *Gardner v. New London*, 63 Conn. 267, 28 Atl. 42; *Breen v. Cornwall*, 73 Conn. 312, 47 Atl. 322.

As the giving of the required notice was a condition precedent to a right of action, the plaintiff was under the necessity of alleging performance, and his complaint without such allegation was open to a demurrer as being insufficient. Gould on Pleading, c. 9, § 13. See *Bulkley v. Norwich & Westerly Ry. Co.*, 81 Conn. —, 70 Atl. 1021.

There is no error. The other Judges concurred.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(81 Conn. 305)

**NORTHROP v. CITY OF WATERBURY.**

(Supreme Court of Errors of Connecticut. Oct. 29, 1908.)

**1. MUNICIPAL CORPORATIONS (§ 666\*)—ESTABLISHING BUILDING LINE—PROCEEDINGS—NOTICE TO PROPERTY OWNER.**

Where N. received under the will of H. a remainder in land of which she was in possession as sole owner after the life tenant's death, and her title appeared from the land records of the town, a notice of hearing in a proceeding to establish a building line on the property served on her husband "as agent of the estate of" H. was not notice to N. which would bring her land within the purview of the proceeding.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1442; Dec. Dig. § 666.\*]

**2. MUNICIPAL CORPORATIONS (§ 666\*)—ESTABLISHING BUILDING LINE—PROCEEDINGS—INVALID NOTICE TO LANDOWNER—RECITALS IN RECORD.**

A general statement, in the report of a board of road commissioners of a hearing in a proceeding to establish a building line, that due notice was given to all persons in interest, is controlled by recitals in its own records showing a notice in fact given which is not sufficient, and the actual appearances; the owner of the land in respect of which insufficient notice was given not appearing to be represented.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1442; Dec. Dig. § 666.\*]

**3. MUNICIPAL CORPORATIONS (§ 666\*)—ESTABLISHING BUILDING LINE—INVALID NOTICE—RECITALS IN RECORD.**

A fortiori, the report of three freeholders signed by them as the "Board of Compensation" that all property owners were legally notified and heard is controlled by the city record reciting the manner of giving a notice which was insufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1442; Dec. Dig. § 666.\*]

**4. CONSTITUTIONAL LAW (§ 278\*)—ESTABLISHING BUILDING LINE IN CITY—PROCEEDING—OPPORTUNITY TO BE HEARD—DUE PROCESS OF LAW.**

A landowner cannot be deprived of property by the establishment of a building line thereon by a city save by due course of law after having had an opportunity to be heard.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 278.\*]

**5. LIMITATION OF ACTIONS (§ 19\*)—ENTRIES ON LAND.**

Where a city in 1888 established a building line on property in a proceeding of which the owner had no notice, and of which she apparently had no knowledge until 1907, but the city had never entered on her land, her suit to enjoin its enforcement is not within the equity of Gen. St. 1902, § 1109, providing that no person shall make entry on land except within 15 years next after his title shall first accrue, and no entry shall be sufficient unless action be commenced thereupon and prosecuted to effect within one year.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 19.\*]

Case reserved from Superior Court, New Haven County; Ralph Wheeler, Judge.

Suit by Agnes D. Northrop against the city of Waterbury to restrain the enforcement of

a pretended building line. On reserved questions. Judgment advised for plaintiff.

Lucien F. Burpee, for plaintiff. John P. Kellogg, for defendant.

BALDWIN, C. J. Agnes D. Hitchcock died in January, 1886. She devised a parcel of land on Central avenue, in the city of Waterbury, to the plaintiff, Agnes D. Northrop of that city, subject to a life estate in Rufus E. Hitchcock. A distribution of her estate was made, pursuant to her will, by proper proceedings in the court of probate, and a certificate of the distribution of this land in conformity with the devise was recorded in the land records of Waterbury on November 24, 1886. Rufus E. Hitchcock died on June 18, 1888, since when Agnes D. Northrop has been the sole owner of the land, and in possession of it. She was the wife of Arthur D. Northrop, who she married after the year 1877.

Proceedings by the city authorities to establish a building line on the lands abutting on Central avenue were commenced on April 4, 1888, and on June 20, 1888, the board of road commissioners directed notice to be given to all owners of such lands to appear before the board on July 11th to be heard in relation to this matter. The records of the board showed that written notice to that effect was served on said Arthur D. Northrop, "as agent of the estate of Agnes D. Hitchcock," on July 5th, and that "the following persons appeared" at this hearing; several being then named. The name of Arthur D. Northrop is not among these, either as agent or otherwise. The board made a report to the court of common council, in which it is stated that it gave due notice of a hearing to all parties in interest. This was adopted and a vote passed establishing a building line 15 feet back from and parallel to the street line. On April 1, 1889, three judicious and disinterested freeholders were appointed by the mayor (see 7 Sp. Laws, p. 222) to assess the benefits and damages arising from the designation of this line, and on April 15th written notice that they would meet at a time stated to hear all owners of lands abutting on said avenue in reference to such assessment was served by the city sheriff on "Arthur D. Northrop as agent of the estate of Agnes D. Hitchcock." The freeholders appointed were also the sole members of a standing board of the city government known as the "Board of Compensation." 7 Sp. Laws, p. 220. The records of this board stated that "at a meeting of the Board of Compensation C. S. Northrop, Samuel A. Chapman, and Edwin L. Frisbie, having been appointed by the Board of Common Council as three judicious and disinterested freeholders" to assess the damages and benefits arising from the designation of building lines on Central avenue, "and the property owners on said avenues, aforesaid, having been legally notified to appear before the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

above committee on this date, and be heard in reference to the matter of damages and benefits arising from the designation of building lines on said avenues, were called and heard. The comm. then adjourned." The date of this meeting is not given. The records of the court of common council contained a copy of a report to it made on May 6, 1889, signed: "S. A. Chapman, C. S. Northrop, E. L. Frisbie, Board of Compensation." In the body of the report they described themselves as "a committee appointed April 1, 1889, to estimate and determine the damages and benefits arising from the designation of building lines on Central avenue," and stated that they caused reasonable notice to be given to all parties in interest "pursuant to the charter and ordinance of the city" to appear before them and be heard at a certain time; that all persons who then appeared were fully heard; and that they assessed and determined the damages and benefits to be equal to all the property owners. There was nothing else in the city records and no other evidence to show that Agnes D. Northrop had any notice of any of these proceedings, or that either she or Arthur D. Northrop appeared at either hearing. Since they were completed no property owner on the avenue has attempted to erect any structure within fifteen feet of the street line. No appeal from any action of the city authorities in reference to the establishment of the building line has ever been taken by any person, although such a remedy is given by the city charter in favor of any party aggrieved.

On March 25, 1907, the plaintiff "not knowing nor believing" that any incumbrance on her land in the nature of a building line "existed, or was or could be legally claimed," sold it to bona fide purchasers without notice, and gave them a warranty deed. They subsequently, on learning of the claim of the city that a building line had been established upon it, made claim for breach of warranty, and the plaintiff was compelled to take the land back. It is worth less than it would be were there no such claim or records. The notice of the hearing before the board of road commissioners, which was given to "Arthur D. Northrop as agent for the estate of Agnes D. Hitchcock," was no notice to the plaintiff. At the date of its service she was the sole owner of the lot in question. Her title appeared from the land records of the town, and it could be affected by no proceedings under the defendant's charter, of which she, either herself or through an authorized agent, as such, did not have due notice. The general statement in the report of the board of road commissioners that due notice was given to all parties in interest is controlled by its own records, which purport to show in detail the notices in fact given, and the actual appearances at the hearing. See *Nichols v. Bridgeport*, 23 Conn. 189, 208, 60

Am. Dec. 636; *Judson v. Bridgeport*, 25 Conn. 426, 430. A fortiori, the report of the three freeholders, signed by them as the "Board of Compensation," that all property owners were legally notified and heard, is controlled by the city record that a notice of the hearing was served on Arthur D. Northrop as agent of the estate of Agnes D. Hitchcock.

Other objections have been taken to the regularity of the proceedings on which it is unnecessary to pass in view of the want of notice to the plaintiff. She could not be deprived of property save "by due course of law" after having had an opportunity to be heard. *Bostwick v. Isbell*, 41 Conn. 305.

It is contended that the plaintiff's case is within the equity of the statute of limitations (Gen. St. 1902, § 1109) as to entries on land. But not only has the city never entered on her land, but so far as appears it was not until 1907 that she had any notice or knowledge that there had been so much as an attempt made on its part to establish a building line. Under these circumstances, she is not chargeable with laches.

The superior court is advised to render judgment in favor of the plaintiff that no building line has been established on her land. Costs will be taxed in her favor in this court. All concur.

(81 Conn. 238)

#### CADWELL v. TOWN OF CANTON.

(Supreme Court of Errors of Connecticut. Oct. 27, 1908.)

##### 1. TRIAL (§ 295\*)—CONSTRUCTION OF CHARGE AS A WHOLE.

In an action against a town for injury to plaintiff's steam road roller, the first count of the complaint alleged that defendant hired the roller, and that, while in defendant's possession, it was injured by defendant's negligence. The second count alleged that it was injured while in plaintiff's possession under a contract of hire by which defendant agreed to be responsible for its care. The court charged that one C., who made the contract for defendant, had no authority to contract that defendant would be responsible for the care of the roller, and that the jury should disregard the second count. Subsequently the court instructed that C., as defendant's agent, would have authority to enter into such an arrangement as plaintiff claimed was entered into with him. Immediately after the second instruction, the court charged that, to recover, plaintiff must have established an agreement by the terms whereof the control of the roller passed to defendant, and also that the roller was injured through the negligence of defendant's servants. *Held*, that the two instructions were not inconsistent; it being clear that the arrangement which the court stated C. had authority to enter into was the agreement of hiring, and not that of guaranty.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-718; Dec. Dig. § 295.\*]

##### 2. DAMAGES (§ 165\*)—EVIDENCE—INSTRUCTIONS.

In an action against a town for injury to plaintiff's steam road roller while being used by defendant, plaintiff offered evidence that the roller was in good condition before the acci-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dent, but thereafter was worthless, and that the damages were as specified in certain letters received in evidence by agreement. The letters were from plaintiff's attorneys to a manufacturer of steam rollers and the latter's replies as to the cost of repairing the roller and as to what plaintiff's damages were. No other evidence as to the money damages was offered. *Held*, that evidence of the fair cost of repairs, less the increased value of the repaired machine, above its value before the injury, was admissible.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 165.\*]

### 3. DAMAGES (§ 113\*)—INJURIES TO PERSONAL PROPERTY.

Where plaintiff let a steam roller to defendant for a certain sum and it was injured while in defendant's possession, the rule of damages was the difference between the fair market value of the roller before and after the accident.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 279; Dec. Dig. § 113.\*]

Appeal from Superior Court, Hartford County; Howard J. Curtis, Judge.

Action by Frank A. Cadwell against the town of Canton for damages for injury to plaintiff's steam road roller through defendant's alleged negligence. Verdict and judgment for plaintiff, and defendant appeals. No error.

Noble E. Pierce and Emerson R. Lewis, for appellant. James E. Cooper and John H. Kirkham, for appellee.

**HALL, J.** At the time of the injury to the plaintiff's property the defendant town was engaged in building a portion of a state road by contract, under the provisions of section 2087, Gen. St. 1902, and the amendments thereto. The proper completion of the road required it to be rolled with a steam roller. That work was performed with the plaintiff's steam roller, operated by one Arnold, an employé of the plaintiff. While it was being so performed, the roller was backed upon a railroad track at a grade crossing, where it was struck by a backing freight train, and injured.

The complaint contained two counts. The first alleged that the defendant hired the roller of the plaintiff, and that, while in its possession, it was injured by the defendant's negligence. The second alleged that it was injured while in the plaintiff's possession, under a contract of hire, by which the defendant "agreed to be responsible for the care and safe return of said road roller." The agreement regarding the use of the roller and the services of the engineer in performing the described work was made by the plaintiff with one Cushing, the first selectman of the defendant town, who had authority to do all that was required in order to properly complete the road. The plaintiff claimed to have proved at the trial that by said agreement the plaintiff was not employed to do

the work in question, but that the defendant by said Cushing hired the roller and the engineer of the plaintiff, and agreed to be responsible for it, as alleged in the second count, and also that the roller was injured through the negligence of the defendant's servants in causing the roller to be driven upon the railroad crossing, without proper precautions having been taken to prevent it from being struck by a passing railroad train. The defendant claimed to have proved that by the terms of the agreement of hiring the plaintiff was employed by the defendant to do the work of rolling the road in question; that he was to furnish his own roller and engineer; that, if the roller was injured through the negligence of any person, it was through the negligence of the engineer, Arnold, who was in the employ of the plaintiff, and who was controlling and operating the roller at the time of the accident; and that the defendant did not agree to be responsible for the care and safe return of the roller. The trial court charged the jury that Cushing had no authority to contract with the plaintiff that the town would be "responsible for the care and safe return of the road roller," and that they should dismiss the second count from their consideration. The defendant claims that the court erroneously withdrew and reversed this ruling by afterwards instructing the jury that "Mr. Cushing, as the agent of the town, would have authority to enter into such an arrangement as the plaintiff claims was entered into with him."

We have no occasion to discuss the correctness of the first of the rulings made by the trial court in these statements to the jury. Assuming, without deciding, that it was right, it is apparent from the context that the two statements were not inconsistent, and that the jury cannot reasonably be supposed to have understood from the second statement quoted that they were at liberty to render a verdict for the plaintiff upon the second count. Although it is true that the only "arrangement" which the plaintiff claimed Cushing "entered into with him" regarding the roller included the alleged contract of guaranty, it also contained the contract of hiring. Proof that Cushing made the arrangement claimed by the plaintiff was proof of both agreements. It is entirely clear from the language of the court which precedes, as well as from that which follows said second statement, that the "arrangement" which the court said Cushing had authority to enter into was the agreement of hiring, and not the agreement of guaranty. Immediately after said second statement, and also later in its charge, the court expressly instructed the jury that, to recover, the plaintiff must have established an agreement with the town through its selectman, by the terms of which the control and management of the roller passed from the plaintiff to the town, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

also the alleged fact that the roller was injured through the negligence of the servants of the defendant town. The charge upon these points was in substantial conformity to the defendant's requests. Whether the engineer, Arnold, during the performance of this work was the agent of the plaintiff or the agent of the defendant, depended upon whether the terms of the agreement of hiring were as claimed by the plaintiff or as claimed by the defendant. Whether the defendant was guilty of the alleged negligence depended upon whether its servants exercised reasonable prudence in operating the roller, and in taking necessary precautions to avoid the accident. Both were questions of fact, and both, under the instructions given, must by the verdict rendered have been decided by the jury in favor of the plaintiff. Whether the evidence justified the verdict we are not called upon to decide.

While all the evidence and rulings, comprising some 60 pages, have been printed upon the defendant's motion under section 797 of the General Statutes of 1902, they serve no useful purpose in the record, since there is neither a request for a correction of the finding, nor a motion to set aside the verdict as against the evidence. In *Dennison v. Waterville Cutlery Co.*, 80 Conn. 598, 69 Atl. 1022, we said that the purpose of making the evidence and rulings a part of the record upon the appellant's motion under section 797, Gen. St. 1902, was to enable him to obtain corrections of the finding asked for in his reasons of appeal. The finding states that at the trial the plaintiff offered evidence tending to prove that the steam roller was in good condition before the accident, and that, after the accident, it was in a worthless condition, and that the damages were as specified in certain letters made a part of the finding, and received in evidence, by agreement of counsel, "in lieu of the testimony of the parties whose opinions were stated therein, and as evidence of the damage done to the roller." The letters referred to were from plaintiff's attorneys to a manufacturer of steam rollers, and the latter's replies to inquiries by said attorneys in their letters as to the cost of repairing the roller, so as to put it "into the same condition as it was be-

fore the accident," and "what Mr. Cadwell's actual damages were," which it was stated by said attorneys would be the expense of repairs less the improvement in the machine after the repairs, over its condition at the time of the accident. In said replies the manufacturer also stated the cost of repairing the roller so that it would be "as good as new." The lowest sum named was over \$1,400. No other evidence as to the amount of damages in money was offered. The court charged the jury, in substance, that in such a case the rule of damages was the difference between the fair market value of the roller before and after the accident; that the letters were the only evidence before them upon that feature of the case; and that from that evidence, in the exercise of their best judgment, they must determine what that difference was. The verdict was for \$1,075. This portion of the charge is one of the errors assigned in the appeal. Just compensation in money for the actual loss sustained is the basic principle of the rule of damages in a case like this. It is not always necessary in such cases to prove what the property would sell or could be purchased for in the market, before and after the accident. Such a machine as that owned by the plaintiff may have had no such market value as would fairly measure the plaintiff's real loss. Evidence of the fair cost of the repairs, made necessary by the injury, less the increased value of the repaired machine, above its value before the accident, was legitimate evidence of the plaintiff's damage (*Barker v. Lewis Storage & Transfer Co.*, 78 Conn. 198-200, 61 Atl. 363; *Pickles v. Ansonia*, 76 Conn. 278-281, 56 Atl. 552); and, in the absence of any objection to the evidence of the statements in the letters, and of any request to charge as to its sufficiency, the trial court was justified in supposing that under the stipulation of counsel, it was agreed that it was proper evidence from which, with the other facts in the case, the jury might fix the amount of the plaintiff's damage.

There are other assignments of error which are so clearly without merit as to require no discussion.

There is no error.



(81 Conn. 300)

**JUDD v. CITY OF NEW BRITAIN.**

(Supreme Court of Errors of Connecticut. Oct. 29, 1908.)

**1. MUNICIPAL CORPORATIONS (§ 812\*)—INJURIES FROM DEFECTS IN STREETS—ACTIONS—NOTICE OF INJURY.**

Gen. St. 1902, § 2020, requires, as a condition precedent to an action against a city for injury from a defect in a street, a written notice of the injury and a general description of the cause, and of the time and place of its occurrence. A notice of injury annexed to a complaint stated that plaintiff slipped and fell on the sidewalk on the south side of C. street, just west of F. street, and that plaintiff thought she had just passed the house on the corner of C. and F. streets when she fell. *Held* that, while the description of the place would have been clearer had the notice stated the direction plaintiff was going when she fell, it was sufficient on demurrer to the complaint.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1701, 1702; Dec. Dig. § 812.\*]

**2. MUNICIPAL CORPORATIONS (§ 812\*)—INJURIES FROM DEFECTIVE STREETS—ACTIONS—NOTICE OF INJURY—CONSTRUCTION.**

The notice of injury and description of its cause and the time and place of its occurrence required by Gen. St. 1902, § 2020, as a condition precedent to an action against a city for injury from a defect in a street, is not to be construed by the rules applicable to pleadings, the purpose being to give such information to the city officials as will enable them to investigate the claim understandingly, and a general description of the nature of the injury, etc., is sufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1701, 1702; Dec. Dig. § 812.\*]

**3. MUNICIPAL CORPORATIONS (§ 812\*)—INJURIES FROM DEFECTS IN STREETS—ACTIONS—NOTICE OF INJURY—SUFFICIENCY.**

Gen. St. 1902, § 2020, requires, as a condition precedent to an action against a city for injury from a defect in a street, a written notice of the injury and a general description of its cause, and of the time and place of its occurrence. A notice of injury stated that plaintiff slipped and fell on the sidewalk on the south side of C. street, just west of F. street, when she had just passed the house on the corner of C. and F. streets, and the evidence showed that at the southwest corner of C. and F. streets there was a 60-foot lot fronting on C. street, upon which was a house facing on that street, the distance from the east line of the house to the west line of F. street being 11½ feet and from the west of the house to the east line of the adjoining lot about 10½ feet, and there was a stump on the sidewalk about 100 feet west of F. street, and that at the time of the accident plaintiff was going westerly on the south side of C. street, and fell at a point about 100 feet west of F. street. *Held*, that there was no material variance between the notice and proof, and the finding of the trial court that the notice was sufficient was not erroneous.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1701, 1702; Dec. Dig. § 812.\*]

Appeal from Superior Court, Hartford County; Howard J. Curtis, Judge.

Action by Mrs. Horace L. Judd against the city of New Britain. From a judgment for plaintiff, defendant appeals. No error.

Frank L. Hungerford, for appellant. John H. Kirkham and James E. Cooper, for appellee.

**RORABACK, J.** This is an action to recover damages for injuries alleged to have been sustained by the plaintiff from falling upon a sidewalk which was slippery and dangerous by reason of the defendant's negligence in allowing snow and ice to accumulate and remain thereon. The plaintiff annexed to and made a part of her complaint a written notice which, in compliance with section 2020 of the General Statutes of 1902, she gave to the defendant. The defendant demurred to the complaint on the ground that the notice does not sufficiently describe the place where the alleged injury occurred. The superior court overruled the demurrer. The case was then tried and the same question as to notice was raised again. The court then found from the facts established by the evidence that the description of the place of the accident was sufficient, and rendered judgment for substantial damages.

The defendant appealed, and now contends that as a matter of law it appears from the face of the notice, and also from the finding of facts, that said notice is insufficient. It is provided by Gen. St. 1902, § 2020, that "any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair; but no action for any such injury shall be maintained against any town, city, corporation, or borough, unless written notice of such injury and a general description of the same, and of the cause thereof, and of the time and place of its occurrence, shall, within sixty days thereafter, or, if such defect consists of snow or ice, or both, within five days thereafter, be given to a selectman of such town, or to the clerk of such city or borough, or to the secretary or treasurer of such corporation." The notice in question, so far as it relates to place, reads as follows: "To the City of New Britain: Notice is hereby given you that I slipped and fell on the sidewalk on the south side of Church street, just west of Fairview street. I think I had just passed the house on the corner of Church and Fairview streets when I fell. The cause of the accident was snow and ice which had been negligently allowed to remain upon the sidewalk in a slippery and dangerous condition." It also appears that the plaintiff was injured December 30, 1904, and gave this notice within four days thereafter. While the notice lacks that clearness and fullness of statement essential to good pleading, yet we think that the decision of the superior court overruling the defendant's demurrer should be sustained. The designation of the place where the injury was received contained in the written notice is that: "I slipped and fell

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on the sidewalk on the south side of Church street, just west of Fairview street. \* \* \* I think I had just passed the house on the corner of Church and Fairview streets when I fell." If the plaintiff had simply added to her description of the place the direction she was going when she fell, it would have made the location clearer and more definite. But the notice is not to be construed by the rules applicable to pleading. "The notice is not a pleading. The object of such a notice is to put the officers of the corporation charged with the duty of investigating the claim made upon it in possession of such facts as will enable them to perform that duty understandingly, and, as to the nature of the injury, the notice is sufficient if it gives a general description, which will reasonably apprise the defendant of its general character. The sufficiency of the notice is to be tested with reference to the purpose for which it is required. If sufficient for that purpose, it is a good notice." *Budd v. Meriden Electrical R. R. Co.*, 69 Conn. 272-285, 37 Atl. 683. Section 20 of the General Statutes of 1902 provides that there shall be given a written notice of the injury containing a general description of the same, and the cause thereof, and the time and place of its occurrence. Under this statute and the familiar rulings of this court upon this subject this notice seems to point with sufficient certainty to the place where the plaintiff claimed to have been injured. A person taking this notice and using ordinary diligence in search of the place described would naturally locate the same upon the sidewalk on the south side of Church street near the house on the corner of Church and Fairview streets.

Upon the trial of the case the evidence showed that: "At the intersection of Church street and Fairview street on the southwest corner, there is a lot about 80 feet frontage facing Church street. Upon this lot was on said day a house facing Church street. The distance from the east line of the house upon said lot to the west line of Fairview street was about 11½ feet, and the distance from the west line of said house to the east line of the adjoining lot was about 10½ feet. At the time of the accident, the plaintiff was going westerly on the south side of Church street toward the center of the city, and fell upon the sidewalk at a point about 100 feet westerly from Fairview street. There is a stump of a tree upon the side of the said walk about 100 feet westerly from Fairview street. At the time of the accident, beginning at a place about 100 feet westerly from Fairview street on the south side of Church street, a sheet of ice covered the sidewalk and extended westerly from 35 to 40 feet. This sheet of ice had existed for many days, and the plaintiff fell upon it immediately after she stepped upon it."

The defendant contends that this notice did not give the city authorities such precise information of the place of the injury as would enable them by the use of ordinary diligence to discover it, as the place of the injury was not in front of the corner lot, but was 40 feet further down the same street, or about 100 feet from the corner. Furthermore, the defendant contends that there was no excuse for the indefiniteness of place, as it appears from the finding that there was a stump of a tree upon the side of said walk where the plaintiff fell about 100 feet westerly from Fairview street. In the case of *Tuttle v. Town of Winchester*, 50 Conn. 498, this court used the following language in regard to the object of the statute requiring notice to be given in this class of cases: "It is obvious that in many cases exactness of statement as to place cannot be expected, for the excitement and disturbance caused by the accident, as well as often the pain which a person injured suffers, make it impossible to observe with any carefulness the place where the accident occurs, and often the person injured is unable to revisit the place within the time allowed by the statute for the giving of notice. In such cases reasonable definiteness is all that can be expected or should be required." The notice states that the place of injury was on the sidewalk on the south side of Church street, just west of Fairview street, and that she thought she had just passed the house on the corner of Church and Fairview streets when she fell. The evidence discloses that the plaintiff was injured on the sidewalk on the south side of Church street, about 100 feet westerly from Fairview street, and about 40 feet west of the dwelling house. Without stopping here to compare all the language of the notice with the facts found descriptive of the place, generally speaking it seems apparent that there is no such material variance between the notice and the proof as to make the notice insufficient. The location of several prominent objects in the notice are found to be substantially correct by the evidence. The discrepancy as to distances is not so great, nor is the fact that the plaintiff could have been more specific so controlling, as to make the decision of the court below erroneous in holding that as a matter of fact the notice was sufficient.

There is no error.

(51 Conn. 276)

#### Appeal of SCHUSLER.

(Supreme Court of Errors of Connecticut. Oct. 27, 1908.)

#### 1. INTOXICATING LIQUORS (§ 69\*)—LICENSES—ISSUANCE—DISCRETION OF PUBLIC AUTHORITIES.

Under Gen. St. 1902, § 2647, as amended by Pub. Acts 1907, p. 750, c. 200, providing that no license, except the renewal of a license, at

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the discretion of the county commissioners, as to suitability of place, shall be granted within 200 feet from a schoolhouse, nor in such proximity to a charitable institution as shall be detrimental to the same, county commissioners have a discretionary power to renew a license, where they are of the opinion that a saloon is a suitable place; but no place is suitable for a saloon which is so near to any building occupied by a charitable institution that the saloon will be detrimental to the interests of the institution.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 73; Dec. Dig. § 69.\*]

**2. INTOXICATING LIQUORS (§ 59\*)—LICENSES—ISSUANCE—DISCRETION OF PUBLIC AUTHORITIES—"CHARITABLE INSTITUTION."**

Under Gen. St. 1902, §§ 3990, 4026, a parochial school supported by private funds is a charitable institution, within Gen. St. 1902, § 2647, as amended by Pub. Acts 1907, p. 750, c. 200, providing that no license, except the renewal of a license at the discretion of the county commissioners, shall be granted within 200 feet of any public or parochial school, nor shall one be granted in such proximity to a charitable institution as may be detrimental to the same.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 59; Dec. Dig. § 59.\*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1074; vol. 8, p. 7600.]

**3. INTOXICATING LIQUORS (§ 69\*)—LICENSES—ISSUANCE—DISCRETION OF PUBLIC AUTHORITIES.**

The fact that the site for a parochial school was bought after the establishment of a saloon in close proximity to it, and after the keeper thereof had become the owner of the saloon property, did not deprive the county commissioners of the right to refuse to issue a renewal license, irrespective of the value of the saloon property.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 73; Dec. Dig. § 69.\*]

**4. INTOXICATING LIQUORS (§ 75\*)—LICENSES—EVIDENCE—ADMISSIBILITY.**

On appeal from the refusal of the county commissioners to grant a renewal liquor license on the ground that the saloon was in close proximity to a parochial school, evidence that the county commissioners had renewed a license to another to sell liquor at a place not far from a church or schoolhouse was immaterial; the commissioners, in dealing with each applicant, being unfettered by what they might have done in dealing with any other.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 75.\*]

Appeal from Superior Court, Hartford County; Howard J. Curtis, Judge.

Application by John Schusler for a renewal liquor license. From a judgment of the Supreme Court, affirming a refusal of the county commissioners to grant a license, the applicant appeals. Affirmed.

Hugh O'Flaherty and Solomon Elsner, for appellant. Marcus H. Holcomb, for appellees.

BALDWIN, C. J. The appellant applied in April, 1908, to the county commissioners for Hartford county for a license to sell intoxicating liquors at No. 100 Ward street in the city of Hartford. He had kept a liquor saloon there, under a license from them, for the preceding 10 years, and for 5 years he had owned the building in which the saloon

was. Two years previously a parish of the Roman Catholic Church had bought the opposite lot, about 75 feet distant, and since June, 1907, had maintained a parochial school upon it, in a building erected by it for the purpose. About 800 children were in attendance at this school. In April, 1907, when Schusler applied for his license for the ensuing year, the commissioners stated to him that his license would not be again renewed after the completion and occupation of the new school building, and he replied that he would not ask for such a renewal. In 1908 they refused to grant him a license, on the ground that, while he was a suitable person to sell liquors, the place where he desired to sell them was not a suitable one. On the hearing in the superior court, he offered evidence of the value of the building and lot used for the saloon, and also of the granting of a renewal license by the board to one Hawksworth to sell intoxicating liquors at another place in Hartford, which was within 200 feet of a church or schoolhouse. He also claimed that it was unfair and inequitable to refuse his application, in view of the fact (which was established) that the parish knew of the existence of his saloon when it purchased the site for the school building. The exclusion of this evidence, and the overruling of this claim, are the sole grounds of the appeal to this court.

Gen. St. 1902, § 2647, as amended by Pub. Acts 1907, p. 750, c. 200, provides that "no license, except the renewal of a license, at the discretion of the county commissioners as to the suitability of person and place and subject to appeal, shall be granted in the purely residential or manufacturing parts of a town or within two hundred feet in a direct line from any church edifice or public or parochial schoolhouse, or the premises pertaining thereto, except to a well-established hotel of good reputation; nor shall one be granted in such proximity to a charitable institution, whether supported by public or private funds, as may be detrimental to the same." The county commissioners therefore had a discretionary power to renew the appellant's license should they be of opinion that his saloon was a suitable place for the sale of liquors. No place could, with propriety, be deemed suitable for such uses which was so near to any building occupied by a charitable institution that these uses could be detrimental to the interests of that institution. A parochial school, though supported by private funds, is a charitable institution. *Fuller v. Plainfield Academic School*, 6 Conn. 532, 544; *Gen. St. 1902, §§ 3990, 4026*; *Hamden v. Rice*, 24 Conn. 350, 355; *Conklin v. Davis*, 63 Conn. 377, 384, 28 Atl. 537. It was fairly to be implied, in support of the finding of the commissioners that the appellant's place of business was an

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

unsuitable one for the further prosecution of his business, that they so found because, in their judgment, to allow its continued use for that purpose would be detrimental to the interests of the Immaculate Conception Parish School. This is amply sufficient to sustain both their finding and that of the superior court to the same effect.

It was of no legal consequence that the site for the school was bought years after the establishment of the appellant's saloon, in close proximity to it, and after his becoming the owner of the saloon property. "All property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler v. Kansas*, 123 U. S. 623, 665, 669, 8 Sup. Ct. 273, 31 L. Ed. 205. Whatever is injurious, either to a public or a parochial school, attacks the welfare of the community at a vital point.

Proof of the value of the saloon building would not have varied the applicability of these rules of law. Whether worth much or little, its owner could not complain if forbidden to use it for a purpose which those invested with authority to decide should determine to be unsuited to its surroundings, because detrimental to interests of a public or charitable nature.

Proof that in some other case the commissioners had renewed a license to some other man to sell liquor at some other place, not far from a church or schoolhouse, was of no materiality in the superior court. The powers of the commissioners in dealing with each application are unfettered by what they may have done in dealing with any other. In each case they are to use their discretion without abusing it, and there was nothing in the present instance before the court below to show that this rule had been transgressed, and nothing in the record in this court to indicate that there was not sufficient cause for affirming their decision by the judgment appealed from. *State v. Gray*, 61 Conn. 39, 46, 22 Atl. 675; *Gray v. Conn.*, 159 U. S. 74, 77, 15 Sup. Ct. 985, 40 L. Ed. 80.

There is no error. The other Judges concurred.

(81 Conn. 320)

### KELLEY v. KILLOUREY.

(Supreme Court of Errors of Connecticut. Oct. 29, 1908.)

#### 1. STATUTES (§ 175\*) — CONSTRUCTION — IMPLIED EXCEPTIONS.

Statutes general in their terms may be construed to admit implied exceptions.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 175.\*]

#### 2. ANIMALS (§ 68\*) — PERSONAL INJURIES — DOGS—STATUTES.

Gen. St. 1902, § 4487, providing that, when any dog shall do any damage, the owner shall be liable therefor, does not render an owner of a dog liable for all damages done by it, under

any circumstances, but admits of the implied exception that, where one's conduct toward a dog is knowingly such as is calculated to provoke it to acts of damage, its natural resulting action, involving consequences to the provoker, is in law referable to him, and, in respect to knowledge of the natural consequences of his acts, he will be presumed to possess such as is common to ordinary rational persons.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 68.\*]

#### 3. ANIMALS (§ 74\*) — PERSONAL INJURIES — DOGS—ACTIONS—INSTRUCTIONS.

Where, in an action for injury by the bite of a dog, the court charged that "fooling with a dog," or spitting in front of its face, was not sufficient to relieve the owner from liability, and that the owner could only justify by proof that the person bit wrongfully provoked the dog, and that the dog bit him in consequence thereof, instructions that Gen. St. 1902, § 4487, defining the liability of an owner of a dog for damage caused by it, ought not to be construed as to authorize a recovery against the owner in every case of such damage, and that no one ought to be permitted to recover for an injury brought on himself by his own wrongful provocation of a dog, etc., were not prejudicial to plaintiff for failing to embody the condition that the action provoking the conduct of the dog should be calculated to cause that provocation, and known to him to be such.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 74.\*]

Appeal from Superior Court, New London County; George W. Wheeler, Judge.

Action by Timothy F. Kelley, administrator, against Daniel F. Killourey, for personal injuries resulting in death, alleged to have been occasioned by the bite of a dog. Judgment for defendant, and plaintiff appeals. No error.

The answer contained the general denial and a special defense in substance that the intestate's injuries were received in consequence of his treatment of the dog, in that he was at the time wrongfully, willfully, and persistently annoying, hurting, torturing, and provoking it, whereby it was angered and provoked, and thereby caused to bite.

Donald G. Perkins, for appellant. Gardiner Greene and Jeremiah J. Desmond, for appellee.

PRENTICE, J. It was a conceded fact that the plaintiff's intestate was bitten by a dog owned and kept by the defendant. Relying upon section 4487 of the General Statutes of 1902, the plaintiff requested the court to instruct the jury, in substance, that upon that state of facts alone, and altogether regardless of any conduct on the intestate's part which was instrumental in his being bitten, the plaintiff was entitled to a verdict for the resulting damage, and also that the defendant could not avail himself of any defense of contributory negligence on the intestate's part. The latter request was complied with. The other was not. On the contrary, the jury were told that certain conduct of the intestate inducing the act of the dog

would be a bar to the plaintiff's recovery. The statute in question is general in its terms, embodies no exceptions, and, when interpreted literally, furnishes justification for the plaintiff's contention that it renders an owner or keeper of a dog liable for all damage done under any circumstances by it to the body or property of any person. Such, however, is not its true intent and meaning. "The letter of a law is not in all cases a correct guide to the true sense of the law maker." Statutes general in their terms are frequently construed to admit implied exceptions. *Ryegate v. Wardsboro*, 30 Vt. 746; *State v. Audette* (Vt.) 70 Atl. 833; *Church of Holy Trinity v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. So statutes defining the liability of owners or keepers for the acts of dogs and couched in unrestricted language similar to that employed in the one under review have been repeatedly held to embody implied limitations. *Plumley v. Birge*, 124 Mass. 57, 58, 26 Am. Rep. 645; *Quimby v. Woodbury*, 63 N. H. 370, 374; *Peck v. Williams*, 24 R. I. 583, 587, 54 Atl. 381, 61 L. R. A. 351. The first two of these cases admit the defense of contributory negligence. We have not gone so far. But in *Woolf v. Chalker*, 31 Conn. 121, 132, 81 Am. Dec. 175, it was observed that the unrestricted language of the statute was not to be interpreted as admitting of no exceptions so that the owner of a dog who had done efficient service for his master in protecting his premises against the perpetration of a felony would be liable to the felon for the consequences to the latter's person. The long existing rights incident to such a situation were recognized as creating an implied limitation upon the operation of the statute which in the literal interpretation of its terms took away those rights in so far as the agency of a dog was concerned. This same case recognizes scarcely less distinctly the necessity for another and more pertinent exception. Page 131 of 31 Conn. (81 Am. Dec. 175). Quoting a statement of Lord Camden in *May v. Burdett*, 9 Ad. & El. N. S. 101, the court adds: "And it would seem that, if the plaintiff have knowledge of the ferocity of the animal and provoke him willfully, he should be considered to have purposely brought the injury on himself and left to bear it, although the owner of the dog be in the wrong in keeping him." Here is stated with approval the central idea of a principle which has had frequent acceptance and is founded in sound reason. *Peck v. Williams*, 24 R. I. 583, 587, 54 Atl. 381, 61 L. R. A. 351; *Muller v. McKeason*, 73 N. Y. 195, 201, 29 Am. Rep. 123; *Fake v. Addicks*, 45 Minn. 37, 39, 47 N. W. 450, 22 Am. St. Rep. 716; *Brooks v. Tyler*, 65 Mich. 208, 211, 31 N. W. 837; *Ilott v. Wilkes*, 3 B. & A. 308, 315. The principle is that, when one's conduct toward a dog or other animal is knowingly such as is calculated to incite or pro-

voke it to acts of damage, its naturally resulting action in so far as it involves consequences to the inciter or provoker is to be regarded in law as his and referable to him, and not to the animal, in such manner as to be chargeable to its owner or keeper. And in respect to knowledge of the natural consequences of his acts he will be presumed to possess such as is common to ordinary rational persons.

In the present case the court, having told the jury that the defendant could not avail himself of the defense of contributory negligence as that principle is applied in negligence cases, so that the plaintiff would be entitled to recover notwithstanding any negligent conduct in relation to the dog on the intestate's part, proceeded to say that the second defense set up something more than contributory negligence, and embodied a sufficient defense to the action, to wit, that the intestate's injuries were due to his own willful and intentional misconduct—to the wrongful and willful provocation of the dog. Commenting upon the statute, it was said that it ought not to be so construed as to authorize a recovery against the owner or keeper in every case where damage results from the acts of a dog. Then followed the following language: "No one under it ought to be permitted to recover damages for an injury brought upon himself by his own willful and wrongful provocation of a dog. Such misconduct ought to bar his right to recover, and in my judgment does, as a matter of law. Any injury from a dog bite voluntarily brought upon one's self while one is engaged in an unlawful act cannot support a recovery. This is not to deny the force of the statute, but to exclude from its remedy one who is engaged in a wrongful or willful and unlawful act. 'Willful' in that connection means intentional, purposely, knowingly. It is unnecessary to discuss at length the ground of such a conclusion. It is sufficient for your purpose to state it. If you find the facts proven by the defendant by a fair preponderance of the evidence as set forth in the second defense, the plaintiff is not entitled to recover, and your verdict should be in favor of the defendant." And later: "It is not, as you have noticed, gentlemen, a provocation that may result in an injury that may follow from a mere accident, as stepping upon a dog's tail, or might occur from negligence in playing or fooling with the dog. It must be this willful and wrongful conduct as set forth in this second defense. Provocation must follow from that, and that consequent biting and injury must follow from that." If this language were presented as an attempt to formulate a broad and comprehensive statement in the abstract of the law as applicable to all situations, it would be open to criticism. It would be easy for instance to criticize, as the plaintiff has done, the broad statement that the remedy

of the statute is to be denied to one who is injured while engaged in a wrongful or willful and unlawful act. And so the language quoted would be inadequate as a precise statement of abstract principles, in that it did not expressly embody the controlling condition that the action of the man which proved to be provocative of the conduct of the dog should be such as was in fact calculated to cause that provocation, and was known to him either actually, or as an un rebutted presumption from common knowledge, to be so. But the court was dealing with a concrete situation and endeavoring to give to the jury intelligent rules for their guidance in respect to that situation. The only unlawful act of which the deceased could under the facts as claimed by either party have been guilty consisted of maltreatment of the dog, and the pronounced character of that maltreatment in order that it amount to a good defense as stated to the jury not only in the passages quoted, but in others commenting upon testimony, was such that the conditions which the law attaches to a valid defense were necessarily implied in them. They were told that "fooling with the dog" or spitting in front of its face, as witnesses testified was the deceased's conduct, was not sufficient, and at least thrice told that the defendant could only justify by proof of the facts set up in the second defense, to wit (as stated by the court in its instructions), that the deceased wrongfully, willfully, and persistently annoyed, hurt, tortured, and provoked the dog, and that the dog bit him in consequence thereof. Such facts involved willful abuse of the dog, and abuse of such a character as to the knowledge of every man of ordinary intelligence, be he the actor or a jurymen, and as a matter of judicial knowledge, would be calculated to rouse a dog to defensive action by the use of its natural weapons of defense. The plaintiff could not have been harmed by the charge as given.

There is no error.

(81 Conn. 268)

#### DUNHAM v. COX.

(Supreme Court of Errors of Connecticut. Oct. 27, 1908.)

#### 1. TROVER AND CONVERSION (§ 32\*)—MONEY—COMPLAINT.

A complaint for the conversion of "\$1,850 in cash" sufficiently describes the money converted; plaintiff being entitled thereunder to prove the specific items of cash delivered and converted.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 184; Dec. Dig. § 32.\*]

#### 2. TROVER AND CONVERSION (§ 1\*)—DELIVERY OF MONEY.

Where plaintiff delivered \$1,850 in cash to defendant to be carried to S. to satisfy a mortgage S. held on defendant's land, pursuant to an agreement that, on paying the same, plaintiff

would accept a note for the amount, secured by a mortgage on the land, and the note was given by defendant to plaintiff, at the time the money was delivered, as a mere receipt for the money, but defendant, instead of paying the money to S., converted it to his own use, the transaction did not amount to a loan passing title to the money to defendant, who was therefore guilty of conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 1; Dec. Dig. § 1.\*]

#### 3. PAYMENT (§ 70\*)—EVIDENCE—RELEVANCY TO FACT IN ISSUE—DECLARATIONS AS TO INTENTION.

On an issue of alleged payment of money claimed to have been converted by defendant, evidence that on a certain day he took the money from a safe and declared his intention of then carrying it to plaintiff was admissible, not as *res gestæ*, but as relevant to a fact in issue.

[Ed. Note.—For other cases, see Payment, Dec. Dig. § 70.\*]

#### 4. EVIDENCE (§ 474½\*)—CONCLUSION.

On an issue of payment, a question calling for a witness' conclusion as to whether defendant's declaration on a certain day related to defendant's business in question was properly excluded.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 474½.\*]

#### 5. APPEAL AND ERROR (§ 1078\*)—WAIVER OF ERROR—FAILURE TO ARGUE.

An assignment not mentioned in appellant's brief will be considered waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256; Dec. Dig. § 1078.\*]

#### 6. TRIAL (§ 267\*)—REQUEST TO CHARGE—DUTY TO GIVE.

The court is not required to charge in the language of a request.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-670; Dec. Dig. § 267.\*]

Appeal from Superior Court, Hartford County; Howard J. Curtis, Judge.

Action by William T. Dunham against Frank S. Cox for conversion of \$1,850 cash placed in defendant's custody to be used for a designated purpose, and wrongfully appropriated to his own use. Judgment for plaintiff, and defendant appeals. No error.

The allegations of the complaint state the following case: The defendant represented to the plaintiff that the defendant was the owner of a piece of land on which one Stevens held a mortgage amounting with interest to \$1,850. The defendant desired the plaintiff to take over said mortgage by paying the amount due thereon to said Stevens. The plaintiff undertook to take up said mortgage, and agreed that, upon paying the same he would accept a note of the defendant for the amount so paid secured by a mortgage upon said land. In pursuance of said agreement, the plaintiff delivered to the defendant \$1,850 in cash for the purpose of conveying and paying the same to said Stevens as a consideration for the discharge of said mortgage, and for no other purpose. The defendant then undertook to convey and pay the money to said Stevens for the plaintiff and for no other purpose, and, as a receipt for the money, then placed in the plaintiff's hands the note which

was thereafter to be secured by mortgage on said premises. The note was not accepted by the plaintiff for any other purpose. The defendant received the money for the purpose stated, but thereafter refused to pay the same to said Stevens in satisfaction of the mortgage, and thereafter fraudulently appropriated the same to his own use, and refused to return the same to the plaintiff when demanded. Upon the trial it was not disputed that \$1,850 in cash was delivered by the plaintiff to the defendant for the purpose of paying the same to Stevens; but the defendant claimed that the money was loaned to him for that purpose, and that, Stevens having refused to receive it and release the mortgage, defendant thereupon repaid the money to the plaintiff. The defendant appeals, alleging as errors the overruling of the demurrer and the court's exclusion of evidence and refusal to charge as requested.

Leslie W. Newberry and Richard J. Goodman, for appellant. Albert C. Bill and Joseph P. Tuttle, for appellee.

THAYER, J. (after stating the facts as above). The demurrer was properly overruled. The claims are that cash or money in general without a particular description or means of identification is not such a specific article of property as will sustain an action for the conversion thereof, and that it appears from the complaint that all title to or property in the cash delivered to the defendant passed from the plaintiff at the time of delivery, so that there could have been no wrongful conversion thereof. If it were to be conceded that the first claim is correct, it would not be essential to a good complaint for conversion of the money that the specific bills or coin constituting the sum claimed to be converted should be specifically described in the complaint. Under the complaint the plaintiff might prove the specific items of cash delivered to and claimed to have been converted by the defendant. Ordinarily in actions for conversion only a very general description of the property—as a certain bay horse—is given. Practice Book, p. 328. The identification is matter of proof. It is the fair purport of the language of the complaint that the identical items of cash delivered to the defendant were to be paid by him to Stevens under the agreement with the plaintiff, and that no title to the money passed to the defendant. It was delivered to him and received by him, as alleged, to be conveyed and paid by him to Stevens for the plaintiff, and for no other purpose. And the note was given and received as a receipt for the money and for no other purpose. Upon these allegations it cannot be said that, as claimed by the defendant, the transaction was a loan, and that the title to the money passed to him. The complaint therefore states a good cause of action.

In the defendant's brief upon which the case has been submitted, it is said that: "Up-

on the trial the defendant claimed that he had repaid to the plaintiff the money advanced to him. Testimony was offered on behalf of both plaintiff and defendant that the defendant deposited for safe-keeping in a safe of a brother of the plaintiff's son-in-law a package of money, and that it was withdrawn on July 22, 1907, and that at the time of its withdrawal the defendant stated he wanted it in order to return it back where he got it from. The defendant testified, in substance, that immediately after taking said money from the safe, and while going from the rear of William H. Carrier's house, where said money was taken from the safe, to the rear of the plaintiff's residence, where it was paid to the plaintiff, he met one Horace T. Hollister and one Lewis Taylor in a hay wagon at the rear of said William H. Carrier's house, and had certain conversation with them. The defendant claimed this conversation (1) to establish the particular day and time when Mr. Hollister and Mr. Taylor saw the defendant on his way to the plaintiff's residence; (2) as *res gestæ*, and as relevant evidence showing the defendant's plan to then pay back the amount in question, and illustrative of the defendant's conduct in going to plaintiff's residence immediately after taking this money from its place of deposit." The record shows that the defendant was asked whether at this meeting he had a conversation with Hollister, and that Hollister, having testified that there was a conversation, was asked whether it related to the defendant's business, and that upon objection this evidence was excluded. These are the rulings which are excepted to and are referred to in the defendant's brief. The defendant treats the questions as if they called for declarations made by him indicating at the time a plan or intention to go to the plaintiff and repay the money. Such declarations, if made under circumstances warranting no inference that they were made for self-serving purposes, would be admissible as bearing upon the probability of the disputed fact that he shortly after returned the money to the plaintiff. If he then had a genuine intention to proceed to the plaintiff's house and pay him, there would be a presumption that the intent continued. The fact that he then entertained such plan or intention was a fact relevant to the disputed fact that the payment was made. It would be admissible, not as a part of the *res gestæ*, but as a fact relevant to a fact in issue. The fact that he had such an intention could be proved by his acts and conduct. His declarations at the time, if genuine, would be verbal acts admissible upon that question. Spencer's Appeal, 77 Conn. 638, 641, 60 Atl. 289; Vivian's Appeal, 74 Conn. 257, 261, 50 Atl. 797; Mills v. Swords Lumber Co., 63 Conn. 103, 108, 26 Atl. 689. But the question asked the defendant was merely a preliminary question—whether there was a conversation—and that asked Hollister called, not for any declaration made by the

defendant, but for the witness's conclusion as to whether the conversation related to the defendant's business. The record shows that there was no claim that it was proposed to supplement them by questions calling for declarations showing a plan or intention on the part of the defendant to repay the plaintiff. When asked by plaintiff's counsel, "Do you claim there was any conversation relating to this money, that he was going to Mr. Dunham's with this money?" the defendant's counsel made no such claim. The defendant, as shown in his brief, was allowed to testify that, when a few moments before he had taken the money from the safe, he stated his intention to be to return it where he got it. It is plain from the record that the court did not understand that the evidence was preliminary to proving a declaration of an intent to repay the plaintiff. Had it been claimed for that purpose, it would doubtless have been admitted as the earlier one was. It was claimed only as *res gestæ* and as fixing the time. So far as appears, there was no issue between the parties as to the day on which the money was taken from the safe, and the answers called for by the questions could in no way throw light upon any fact in issue between the parties. The evidence was not admissible for either of the purposes for which it was offered.

The fourth and fifth assignments of error relate to the court's refusal to charge as requested by the defendant. The fifth assignment is not mentioned in the brief, and we consider it waived. The request referred to in the fourth assignment related to the burden of proof. The court did not charge in the language of the request, and was not bound to do so. But, in substance, it charged clearly and fully as requested by the defendant that the burden was upon the plaintiff to prove, not only that the title to the money remained in the plaintiff while it was in Cox's possession, but that it had not been repaid, and that Cox had wrongfully appropriated it to his own use.

There is no error. The other Judges concurred.

(81 Conn. 293)

#### BARRY v. MCCOLLOM.

(Supreme Court of Errors of Connecticut. Oct. 29, 1908.)

#### 1. LIBEL AND SLANDER (§ 124\*)—PRIVILEGE—INSTRUCTIONS.

Where the inevitable effect of an alleged libel was to injure plaintiff, and the court correctly charged that defendant was protected by his privilege if he honestly believed his statements to be true, and made them in good faith as part of an official report, it was error to also charge that defendant must have had "good reason" or "reasonable grounds" for believing such charges to be true, and was bound to prove that he published them with no intention of injuring plaintiff.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.\*]

#### 2. WORDS AND PHRASES—"INJURY."

The word "injury," as generally used, includes any act or omission which harms or damages another, whether it is justified or not.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3615-3617.]

#### 3. LIBEL AND SLANDER (§ 50\*)—PRIVILEGE—TRUTH—JUSTIFICATION.

Where defendant, as superintendent of schools, made certain libelous statements in an official report concerning plaintiff, a school teacher, it was not necessary to defendant's justification that he should have had good reason or reasonable ground for the statements made; it being sufficient if he honestly and in good faith believed the statements to be true when he made them.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 50.\*]

#### 4. LIBEL AND SLANDER (§ 101\*)—MALICE—BURDEN OF PROOF.

Where plaintiff's averments that defendant's libelous statements were false and malicious were traversed, and at the trial it was admitted that defendant published the libel in an official report, plaintiff could not then rely on presumptions of falsity or malice, but was bound to prove both facts, though the truth of the libel had been specially pleaded.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 273; Dec. Dig. § 101.\*]

#### 5. LIBEL AND SLANDER (§ 124\*)—PRIVILEGED COMMUNICATION—INSTRUCTIONS.

An instruction that if defendant believed "and had good reason to believe" that plaintiff was guilty of the matters of which he accused her in an official report, and he was actuated by no improper or unjustifiable motive, etc., the statements were conditionally privileged until plaintiff removed the privilege by proof of malice, was erroneous.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.\*]

#### 6. LIBEL AND SLANDER (§ 104\*)—PRIVILEGE—EVIDENCE—ABSENCE OF MALICE.

Where, in an action for libel, consisting of statements made in defendant's report as superintendent of schools concerning plaintiff's efficiency as a teacher, he claimed that the statements were privileged, evidence that some days before the report was made the wife of the chairman of the board of school visitors called defendant's attention to the filthy condition of plaintiff's schoolhouse, and he replied that it was in a deplorable condition, and that he had a report to make which he was sorry to send in, was admissible to show absence of malice.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 104.\*]

#### 7. APPEAL AND ERROR (§ 970\*)—REVIEW—DISCRETION OF TRIAL COURT—RECEPTION OF EVIDENCE.

Whether a declaration made by defendant as school superintendent was too remote to be admitted to show his intent in doing a subsequent official act being within the discretion of the trial court, the exclusion thereof is not well assigned as error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3349, 3850; Dec. Dig. § 970.\*]

#### 8. TRIAL (§ 235\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where plaintiff, in an action for libel, was a witness in her own behalf, and one of the alleged libelous statements was that she had not "even the externals of refinement," an instruction that the possession of the externals of refinement was rather a subject of the jury's own observation was erroneous, as misleading



the jury to believe that such observation was the best evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 235.\*]

Appeal from Superior Court, Hartford County; Milton A. Shumway, Judge.

Action for libel by Helen Barry against Edward D. McCollom. Judgment for plaintiff, and defendant appeals. Error, and new trial ordered.

Charles E. Perkins and Herbert O. Bow-ers, for appellant. Benedict M. Holden and Hugh M. Alcorn, for appellee.

BALDWIN, C. J. In May, 1907, the plaintiff was the teacher of a public district school in the town of South Windsor, and the defendant was the superintendent of all the public schools in that and another town. One of his duties was to report to the board of school visitors in each town in regard to the efficiency and qualification of the teachers employed in the different schools. He made a written report to the secretary of the South Windsor board, in which are statements concerning the plaintiff which were libelous, unless protected as a privileged communication. She brought this action, alleging a publication of these statements, and that they were false and malicious. His answer denied that they were false and malicious, set up the official relations of the parties and his consequent privilege, and also averred the truth of everything contained in the report. In the charge to the jury, the trial court, after stating that the defendant could claim the benefit of protection for whatever was contained in the report by a conditional or qualified privilege, and that the controlling question for them to decide was whether he published it in good faith, without any improper or unjustifiable motive, proceeded thus: "The defendant is not obliged to prove the words were in fact true, but he must prove that he believed them to be true, and had reason to believe them to be true, and that they were published in good faith, and with no intention and purpose on his part of injuring the plaintiff, but with an intention of performing his duty in reporting to the school board of South Windsor what he believed to be true, and had good reason for believing to be true. \* \* \* In order to find in favor of the plaintiff in this case, you must find from the evidence the existence of some improper and unjustifiable motive on the part of the defendant when he made the report in question. The defendant may have arrived at conclusions without sufficient evidence, but the privilege protects him from liability in this suit on that ground until the plaintiff has overcome the presumption of good faith by proof of malice in fact, as she assumes the burden of proof of the existence of malice by other proof that the presumption which arises from the mere pub-

lication of the defamatory matter. \* \* \* Now, in determining his good faith, you must ask yourselves upon what evidence did he make these statements. He is relieved by reason of the position which he occupied from the ordinary duty of a person who makes slanderous or libelous statements to prove their exact truth. He is entitled to be relieved from liability if he honestly believed them to be true, and made them in good faith. \* \* \* If the facts stated in the report or any of them imputing unfitness to teach on the part of the plaintiff, Miss Helen Barry, are not true, and the defendant knew they were not true, then the conclusion that he acted in bad faith is almost irresistible. But, if the defendant did not know the statements in the report were untrue, then you should ask yourself the question whether he had reasonable grounds for believing them to be true, and, if you find that he did, you would be justified in finding a verdict in his favor. But, if you find that he had not reasonable grounds for believing his statements to be true, you would be justified in finding a verdict in favor of the plaintiff." The jury were thus correctly instructed at one point in the charge that the defendant was protected by his privilege if he honestly believed his statements to be true and made them in good faith, and incorrectly instructed at other points that he must have had "good reason" or "reasonable grounds" for believing them to be true, and also was bound to prove that he published them with no intention and purpose of injuring the plaintiff. The necessary and inevitable effect of such a report was to injure the plaintiff. It charged her with faults so serious that those charged with the duty of employing her or re-employing her as a teacher, if they gave credit to them, would naturally discharge or decline to re-engage her. The jury could not fail to find that the defendant must have known this, and therefore that he intended to injure her, for the word "injury," as generally used, includes any act or omission which harms or damages another, whether it be or be not justified by law. Nor was it necessary for the defendant's justification that he should have had what might seem to the jury good reason or reasonable grounds for the injurious statements contained in his report. It was enough if he honestly and in good faith, at the time when he made them, believed them to be true. This required nothing more than that there were grounds for such a belief which then seemed to him reasonable and sufficient, and that his motive in making the publication was an honest desire to discharge the duties of his office with fidelity. *Haight v. Cornell*, 15 Conn. 74, 82. The charge was also erroneous in respect to the burden of proof.

The foundation of the plaintiff's case was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the statements of which she complained were false and malicious. Her averment that they were such having been traversed, although their truth had been specially pleaded, when in the course of the trial it became an admitted fact that the defendant made them in an official report, which in its nature was a privileged communication, she could rely on no presumption either of falsity or malice. *Atwater v. Morning News Co.*, 87 Conn. 504, 519, 84 Atl. 865. With respect to this particular point the trial court charged the jury that "if the defendant believed, and had good reason to believe, that the plaintiff was guilty of the matters of which she is accused in the report, and he was actuated by no improper or unjustifiable motive in publishing them, it was his duty to communicate the fact to the board of school visitors, all of whom had a corresponding duty with respect to everything that concerned the welfare of the South Windsor schools, and his statements, under such circumstances, were conditionally privileged until the plaintiff removes the privilege by proof on her part of actual, or, as it is sometimes called, express malice or malice in fact." This was erroneous, for the reasons already stated, in assuming that the privilege relied on might depend on the defendant's having good reason to believe his charges against the plaintiff to be true. One of these was that she was "at fault in her management of the sanitary conditions of the school—conditions which she could adequately deal with, if she wished." A witness offered in defense testified that a week or two before the report was sent in she met the defendant at the schoolhouse, and remarked to him that it appeared to have been unswept for a month, and was in a filthy condition, to which he replied that it was in a deplorable condition, and he had a report to make which he should be sorry to send in. It appears by the evidence in the cause which has been certified up at length that the witness resided in South Windsor, and was the wife of one who filled the office of chairman of the board of school visitors of that town at the time of the conversation in question. It was in answer to her complaint of the unsanitary condition of the school that the defendant admitted the fact, and said substantially that he was sorry to have to report it. This expression of his feeling with reference to the paper which it was his duty to prepare was in reply to a criticism of the administration of school affairs, made by one who had a right to complain and to ask him for an explanation. Proof that he had this feeling when he afterwards sent the paper in would have gone directly to defeat the plaintiff's case. To show that he then had it, proof that he had it a few days previously, at the time of his conversation with the witness, was certainly not irrelevant. For such proof resort could properly be had to his declarations as to his then existing feelings in re-

lation to the subject of inquiry, provided such declarations were made in a natural manner, and not under circumstances leading to a suspicion that he was thus seeking to manufacture evidence in his own favor, for use, if needed, in some anticipated controversy. 3 Wigmore on Evidence, §§ 1714, 1725. They would be admissible, not as part of the *res gestæ*, for they were not explanatory of any accompanying act, but because in their nature, if true, they were the best evidence of the existence of the fact as to which they speak. Whether declarations of this kind, if admitted, are in fact true, is a proper question for the jury, and the danger to be anticipated from letting them be proved is far less than that from admitting the testimony of him who made them, given long afterwards, under the pressure of a strong interest. The evidence now in question was of a declaration of a public officer, accompanying an announcement to one entitled to inquire into his official conduct, of his purpose to do a certain official act, and characterizing that purpose. As such it had a legitimate tendency to explain the nature of the act, soon afterwards done, as being one prompted by duty, and not by malice. But whether this tendency was of sufficient moment to call for the admission of the testimony, or whether remoteness in point of time so weakened its force as to make it not worth while to permit its introduction, was a matter addressing itself to the sound discretion of the trial judge. *State v. Kelly*, 77 Conn. 266, 269, 58 Atl. 705. It was within his power either to receive or exclude it, as he might think would best promote justice in view of all the circumstances attending the trial. Error in its exclusion, therefore, is not well assigned. That evidence is legally admissible does not in all cases necessarily require its admission.

One of the statements in the report was that the plaintiff had not "even the externals of refinement." The court after instructing the jury, in reference to another of its statements, that they must look carefully at the character and interest of the witnesses who had testified regarding its truth or falsity, proceeded as follows: "The possession of the externals of refinement is rather a subject of your own observation, because you know, by seeing a person, whether they have or not the externals of refinement." The plaintiff had taken the stand in her own behalf. Her appearance there was, of course, to be taken into account by the jury in determining whether, nine months before, she had possessed "the externals of refinement"; but it is evident that it might not in all respects be the best evidence. The jury might well have understood from the language used and its collocation that it was the best. The exception to the charge upon this point is therefore sustained.

There are other reasons of appeal, but they

relate to points not likely to recur upon a new trial and require no discussion.

There is error, and a new trial is ordered.

(81 Conn. 261)

**BANK COM'RS v. WATERTOWN SAVINGS BANK.**

(Supreme Court of Errors of Connecticut. Oct. 27, 1908.)

**1. BANKS AND BANKING (§ 309\*)—SAVINGS BANKS—INSOLVENCY—CLAIMS—PRESENTATION.**

Under a statute requiring creditors of insolvents to exhibit their claims, the filing of insolvent savings bank pass books with the receiver, showing nonpayment of accrued interest, constituted a sufficient presentation of claim for such interest.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 309.\*]

**2. BANKS AND BANKING (§ 309\*)—SAVINGS BANK—INSOLVENCY—ASSETS.**

Money recovered by the receiver of an insolvent savings bank from the sureties and property of a defaulting treasurer of the bank partakes of all the characteristics of the money which it replaced, and should be distributed in accordance with the bank's charter.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 309.\*]

**3. BANKS AND BANKING (§ 303\*)—SAVINGS BANKS—PROFITS—DISTRIBUTION—STATUTES.**

Gen. St. 1902, § 3440, declares that the net income of any savings bank in excess of one-eighth of 1 per cent. of its deposits actually earned during the preceding six months may be divided among its depositors, but that no dividend shall exceed 4 per cent. per annum, except as provided in section 3441, which declares that no dividend shall be made, except as provided in section 3440, until the bank's surplus equals 3 per cent. of its deposits, that such banks shall not carry a contingent fund of more than 10 per cent., and that any surplus beyond that amount shall be divided among depositors. *Held*, that such sections did not militate against the right of depositors of a non-stock savings bank to its income or profits, which are to be regarded as a part of the deposits.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1192; Dec. Dig. § 303.\*]

**4. SUBROGATION (§ 33\*)—RIGHTS OF CREDITOR.**

The right of subrogation is one which a surety is entitled to exercise against a debtor, but does not authorize him to control the creditor's action.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 97; Dec. Dig. § 33.\*]

**5. BANKS AND BANKING (§ 309\*)—SAVINGS BANKS—INSOLVENCY—ASSETS—DISTRIBUTION.**

Where the receiver of a non-stock savings bank received money from the sureties and property of the bank's defaulting treasurer, such assets were applicable to the payment of unpaid interest on deposits, the principal of which had been paid in full and was not returnable to the treasurer's sureties.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 309.\*]

Case-Reserved from Superior Court, Litchfield County; Edwin B. Gager, Judge.

Action by the bank commissioners against the Watertown Savings Bank. Application for advice as to payment of assets.

Lucien F. Burpee, for Watertown Savings Bank and its receiver. Michael J. Byrne, for Emma J. Mattoon, executrix. Francis P. Guilfoile, for Emil C. Margraff.

RORABACK, J. In this case the superior court for Litchfield county has reserved for the advice of this court the questions of law arising upon an agreed statement of facts. The receiver of the defendant bank, being ready to close his receivership, has on hand several thousand dollars for distribution, which certain persons, formerly depositors of the savings bank, claim should be distributed to them. Certain other persons, who were sureties on the bond of a defaulting treasurer of the bank, and who have been compelled to pay a larger sum to the receiver than remains for distribution, also claim that the money should be paid to them. The receiver, therefore, asks in what manner and to whom he should distribute the money.

The facts agreed upon pertinent to this inquiry are substantially as follows: "On or before September 10, 1905, and before the appointment of the receiver, the savings bank had suspended business, had collected its assets, had called upon its depositors to send in their deposit books, and had paid to them the balance of their deposits, but without any interest since July 1, 1903. These payments were entered on each depositor's book, and the book returned to him; but no interest was paid, computed, or entered upon the depositors' books after July 1, 1903. After the appointment of the receiver on January 12, 1906, the superior court limited the usual time for exhibition of claims against said bank, and within that time nearly all of the depositors presented to the receiver their deposit books in the same condition as to entries hereinbefore described; that is, with no interest computed or entered on these books after July 1, 1903. 'No claim was presented by any one in any other form, and no claim for any interest or for any stated amount was expressly made by any one.' Meantime an action was begun and prosecuted against the defaulting treasurer and his bondsmen, and final judgment secured against the treasurer for \$13,011.37, and against the bondsmen, 'jointly and severally, for the sum of \$10,000, or so much thereof as shall be necessary to satisfy any deficiency unsatisfied by said treasurer upon said judgment against him, with costs.' This judgment was rendered in the superior court June 15, 1905, and affirmed by this court December 15, 1905. The defaulting treasurer's property was foreclosed and sold by the receiver in June, 1907, and that of the bondsmen between September, 1907, and April 1, 1908. Property worth about \$8,500 was taken from the bondsmen, but the judgment still remains unsatisfied to the amount of \$1,000. The

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

bond furnished by the defaulting treasurer and his sureties, as required by statute, was in the sum of \$10,000, and conditioned that the treasurer should well and faithfully perform all the duties of his office, and should fully account for the funds of the bank placed in his keeping."

The advice of this court is sought upon the following questions: (1) Whether the depositors had properly presented their claims upon their deposits since July 1, 1903. (2) If these claims were properly presented, how should the receiver distribute the balance on hand? (3) Are the sureties on the bond of the defaulting treasurer entitled to this balance, or any portion thereof?

When the receiver was appointed in January, 1906, the depositors' books showed that they had been paid the full amount of their deposits, with interest thereon up to July 1, 1903, and that no interest or dividends had accrued to them after that time. In February, 1906, the superior court for Litchfield county limited a time for the exhibition of claims against said bank, of which the receiver gave notice to all of its depositors. In pursuance of said notice nearly all of the depositors delivered to the receiver their deposit books, showing the true condition of their accounts with the bank. It is quite clear that the depositors, by such a presentation, were not claiming the principal of their deposits, as these had been fully paid. Actuated by a purpose to make a claim for this loss of income and profits, the depositors presented to the receiver their deposit books as a claim against said bank. At this time it needed no computation or investigation for the receiver to ascertain that the depositors had received no income or return for their money for almost two years. Although these claims were not made in the form which would have been used by an experienced attorney, yet we think they embodied a claim made by the depositors for a just proportion of the balance of the income and profits, if any, derived from the business conducted by the bank. If the claims lacked certainty as to amount, the presentations in question placed in the hands of the receiver information which enabled him to understand the existence and character of the demands made by the depositors. It has long been settled by our decisions and practice that a formal presentation of a claim to an executor or administrator is not necessary. The language of our statute for many years has been that the creditor shall "exhibit his claim." It is not enough that the executor has in some casual way learned of the existence of the debt. It must be brought to his knowledge by some action of the claimant that the claim is held against the estate. *Pratt v. Stoner*, 78 Conn. 312, 313, 61 Atl. 1009; *Cothren's Appeal*, 59 Conn. 549, 22 Atl. 297; *Brown & Bros. v. Brown*, 56 Conn. 249-251, 14 Atl. 718, 7 Am. St. Rep. 307. From the facts disclosed by the finding, we feel

warranted in reaching the conclusion that a sufficient presentation of these claims was made.

The Watertown Savings Bank was duly chartered under the laws of this state in 1893. The object of this institution is set forth in section 3 of its charter, which provides that: "All deposits of money received by said corporation shall be used and improved to the best advantage, by loaning and investing the same in a manner not inconsistent with the laws of this state, and said corporation may dispose of the same as the interests of said corporation may require, and the income or profits thereof shall be applied as dividends among the persons making the deposits, their executors, and administrators, in just proportion, with such reasonable deduction as may be chargeable thereon." These are all the provisions of the charter which relate to the question now under consideration. It is to be noticed that there is no capital stock, and there are no stockholders who are entitled to receive profits from the business. It is clear that all these belong to the depositors, and nothing can properly be deducted therefrom except the reasonable expenses of transacting the business. The sums of money which the defaulting treasurer withdrew were taken out of the deposits received by the bank, and the income and profits derived therefrom by loans and investments. They all belonged to the depositors. This money, which the receiver now has for distribution, has all the characteristics of the money which it replaced. Like the original deposits and their income or profits, it must be applied under the charter of the bank as above quoted. *Price v. Society for Savings*, 64 Conn. 362-366, 30 Atl. 139, 42 Am. St. Rep. 198; *Bunnell v. Collinsville Savings Society*, 38 Conn. 203-206, 9 Am. Rep. 380; *Morristown Institution for Savings v. Roberts*, 42 N. J. Eq. 496, 8 Atl. 315; *Huntington v. Savings Bank*, 96 U. S. 388, 24 L. Ed. 777.

Counsel for the bondsmen point to sections 3440 and 3441 of the General Statutes of 1902, which provide:

"The net income of any savings bank, in excess of one-eighth of one per cent. of its deposits, actually earned during the six months last preceding, and no more, may be semiannually divided among its depositors. No dividend shall exceed a rate of four per cent. per annum, except as provided in section 3441.

"No savings bank shall make any dividend, except as provided in section 3440, until its surplus shall have accumulated to an amount equal to three per cent. of its deposits. Such surplus shall be kept as a contingent fund; but no savings bank shall carry to its contingent fund more than ten per cent. of its deposits; and any surplus beyond that amount shall be divided among the depositors entitled to such dividends, in sums of not less than one per cent. of its deposits."

It is claimed that: "Since the savings bank is the creature of statute, there is no other legal means or method of making disposition of its funds, save strictly as provided by statute. The liability, legal or equitable, of the savings bank to its depositor, is a fixed and constant relation, that does not vary, whether the bank is or is not solvent." It is also said "that the purpose of the surplus is to protect the depositor; but the law gives to the depositor no way of reaching the surplus. Indeed, our courts seem to sustain the view that the end and purpose of the deposits is to keep up the surplus." It is true that the profits or income of savings banks are not all payable at the same time or in the same way, and that they may be held by the bank as a fund until they have reached a specified amount. This is for the sole purpose of protecting depositors against unforeseen contingencies. There is nothing in these statutes which militates against the general proposition that the income or profits of savings banks belong to the depositors and are a part of the deposits. In the end it is the general spirit and purpose of the charters of savings banks and the laws of this state that depositors, or their representatives, are entitled to all the pecuniary benefits arising from the deposits, less the reasonable expenses that may be chargeable thereon.

It is a little difficult to understand upon what theory these bondsmen rely to sustain their claim for this money now in the hands of the receiver. No principle was suggested upon which such a claim can be supported. The treasurer had taken from the bank money belonging to its depositors. These claimants were sureties upon his bond. In an action against the defaulting treasurer and his bondsmen, judgment was rendered against these claimants for any deficiency which the principal failed to satisfy, not exceeding \$10,-

000. This judgment, when recovered, was an asset of the bank as much as any loan or other investment. There was no person who had any right to this fund to which these claimants have in any way been subrogated. It is a familiar principle that "the equity of subrogation is one which the surety is entitled to exercise against the debtor, but it does not give him the right to control the action of the creditor." Bispham's Principles of Equity, § 338. Special circumstances may take the case out of this general rule, and give the surety a right to require the creditor to look to certain liens before calling upon the surety. No such conditions exist in the present case. It is manifest that the depositors in this bank have not received that part of the income which was appropriated by the treasurer and which was theirs according to law. When the receiver was appointed they had the right to claim it and demand that this income be paid out of the assets of the bank which he collected. By sustaining the claim of the sureties upon the bond, the depositors would be deprived of their just proportion of the dividends from the income or profits arising from the business conducted by the bank under its charter. The sureties upon the bond have, therefore, no pecuniary interest in the money now held by the receiver and no right to the relief they ask.

The superior court is advised that all such depositors, who made presentation of their claims as set forth in the finding, made a lawful exhibition of such claims; that the receiver should distribute the balance of money (after paying just charges) now in his hands to such depositors as have presented their claims in the manner above indicated; and that the sureties on the bond are not entitled to any portion of the balance of the money now in the hands of the receiver. The other Judges concurred.

(29 R. I. 305)

COOK v. LEWIS, Justice, et al.

(Supreme Court of Rhode Island. Nov. 5, 1908.)

**CRIMINAL LAW (§ 207\*)—JURISDICTION—JUSTICES OF THE PEACE—APPOINTMENTS.**

The appointment by a justice of the district court of a justice of the peace of a town to take bail and issue warrants returnable to the district court is a continuous appointment, and a new appointment is not necessary at the termination of the term of the justice of the peace, when the same is renewed, or at the expiration of the term of the justice of the district court, when the same is renewed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 207.\*]

Petition for writ of prohibition by George H. Cook against Nathan B. Lewis, justice of the district court of the Second judicial district, and another. Heard on petition and answer. Petition denied and dismissed.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Harry C. Curtis and Frederick C. Olney, for petitioner. Clarence A. Aldrich, for respondent. George H. Huddy, Jr., for complainant in district court.

DUBOIS, J. This is a petition for a writ of prohibition, and was heard upon petition and answer.

The petition reads as follows:

"Your petitioner respectfully represents that on the 19th day of August, A. D. 1908, John G. Cross, of the town of Narragansett, in the county of Washington, in the state of Rhode Island, complained to William Sleeman, Esq., justice of the peace, erroneously alleged to be authorized to issue warrants returnable to the district court of the Second judicial district, in the county of Washington and state of Rhode Island. That your petitioner, at said town, in said county, on the 17th day of August, A. D. 1908, and on divers days and times between July 1, A. D. 1908, and the date of said complaint, with force and arms did keep and suffer to be kept a building, place, and tenement used and occupied for the purpose of gambling and playing at games of chance for money and other valuable considerations, and did then and there keep, exhibit, and suffer to be kept and exhibited upon his premises and under his control certain gambling implements and apparatus, to wit, a certain roulette wheel and three slot machines, to be used in gambling and playing at games of chance for money and other valuable considerations, against the statute and the peace and dignity of the state. That thereupon said William Sleeman, justice of the peace, issued his warrant directed to the sheriff, his deputy, or either of the town sergeants or constables in the county of Washington, commanding them in the name of the state forthwith to apprehend the body of your petitioner, and have before the

district court of the Second judicial district, or some other lawful authority, to be dealt with relating to the premises as the law and justice should appertain. That your petitioner was thereupon placed under arrest, and was compelled by said William Sleeman, justice of the peace, to recognize to appear before the district court of the Second judicial district on the 24th day of August, A. D. 1908. That on said 24th day of August, A. D. 1908, your petitioner appeared before Nathan B. Lewis, justice of the district court of the Second judicial district, refused to plead to said complaint, and said cause was continued until September 7, A. D. 1908. That on the 29th day of August, A. D. 1908, your petitioner filed in the district court of the Second judicial district a plea to the jurisdiction of the court, averring that William Sleeman, justice of the peace, was not authorized to issue warrants returnable to said district court. That, to wit, on the 21st day of September, A. D. 1908, complainant demurred to said plea to the jurisdiction and said demurrer was sustained. That said Nathan B. Lewis, justice of said court, ruled that he had jurisdiction under and by virtue of said complaint and warrant, and your petitioner, protesting, was ordered to appear, plead, recognize, and make defense. That William Sleeman, justice of the peace, was not on the 19th day of August, A. D. 1908, authorized to issue warrants returnable to the district court of the Second judicial district. That no record of the appointment of William Sleeman as a justice of the peace authorized on the 19th day of August, A. D. 1908, to issue warrants returnable to the district court of the Second judicial district, appeared in the records of the district court of said district. That on the 19th day of August, A. D. 1908, no appointment of William Sleeman as justice of the peace authorized to issue warrants returnable to the district court of the Second judicial district was certified by the justice of said court to the Secretary of State. That the justice of the district court of the Second judicial district had not issued his warrant under the seal of said court by which William Sleeman, justice of the peace, was on the 19th day of August, A. D. 1908, authorized to issue warrants returnable to the district court of the Second judicial district.

"Wherefore your petitioner prays a remedy by a writ of prohibition, to be issued out of and under the seal of this honorable court, directed to Nathan B. Lewis, justice of the district court of the Second judicial district, and the district court of the Second judicial district, prohibiting him and it from taking any further cognizance of your petitioner by virtue of said complaint and warrant, and also from further proceeding thereunder, and that a citation be issued, directed to Nathan B. Lewis, justice of the district court of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
70 A.—68

Second judicial district, ordering him to appear, at a time to be fixed, to show cause, if any he may have, why a writ of prohibition should not be granted as prayed in said petition, and in the meantime staying proceedings under said complaint."

And the answer is of the tenor following:

"This respondent, for answer to the petition in this case, or to so much and such parts thereof as he deems it material or necessary to answer, answering says: That as justice of the district court of the Second judicial district, on the 1st day of February, 1905, he appointed said William Sleeman, of the town of Narragansett, in said judicial district, who was then and ever since has been a qualified justice of the peace within said town, a justice of the peace authorized to take bail in all complaints bailable before said district court, and, in default of bail, to commit to jail in the same county all respondents arrested on such complaints, and did then and there authorize the said William Sleeman so appointed by him to issue warrants returnable to said district court for any offense for which by law a justice or a clerk of a district court might issue a warrant, except that said William Sleeman was not authorized to issue search warrants for any purpose, and did then and there record in the records of said district court such appointment, and also certified the same to the Secretary of State, and did also then and there issue to said William Sleeman a warrant or commission under the seal of said court authorizing him, the said William Sleeman, to perform the duties hereinbefore specified. That said William Sleeman continued from the time of such appointment until and after the 29th day of August, A. D. 1908, to be a qualified justice of the peace of said town of Narragansett, and by virtue of said appointment continued from time to time during all of said period to issue warrants returnable to said district court. That on the 24th day of August, A. D. 1908, the said George H. Cook appeared generally and by attorney before said district court and asked for a continuance of said complaint, and on the 29th day of August, A. D. 1908, by his attorneys, Harry C. Curtis and Frederick O. Olney, filed a paper purporting to be a plea to the jurisdiction of said court in said complaint. That on the 21st day of September, A. D. 1908, said George H. Cook, on being arraigned before this respondent, as justice of said district court, in open session of said court, upon the complaint referred to in said petition, pleaded not guilty to the charge contained therein and was ordered to enter into recognizance for his appearance before said court on the 5th day of October, A. D. 1908, and did then and there give such recognizance in the sum of \$1,000, with Thomas L. Greene as surety, and at the time of the filing of the petition in this case was held under such recognizance. That subsequently,

to wit, on the 23d day of September, A. D. 1908, said George H. Cook filed a motion in said district court for leave to withdraw his plea of not guilty aforesaid, and also on the same date filed a motion to quash said complaint, which said motions have not been heard or acted upon by said court. The respondent files herewith copies of all the papers showing the proceedings in said complaint so pending before said district court, and makes the same a part of this answer."

The petitioner asserts that the following questions are raised in this proceeding: "Whether justices of the peace have authority to issue warrants unless expressly authorized by statute; and, if authority is delegated by the justice of the district court, when such authority terminates?" While it is claimed in behalf of the respondents that the questions raised are as follows: "(1) Will prohibition lie in this case? (2) Was any reappointment of said William Sleeman by said justice of the district court necessary to enable him to exercise the duties of said office? (3) If he properly should have been so reappointed, was he notwithstanding on the 19th day of August, 1908, an officer de facto to issue warrants? (4) The petitioner is now held by said district court, not upon the warrant issued by said William Sleeman, but upon the recognizance taken by the justice of said district court on the 21st day of September, 1908; and, the court having jurisdiction of the subject-matter, should the writ issue?"

It appears that said respondent, Nathan B. Lewis, on the 1st day of February, 1905, was and ever since has been justice of the district court of the Second judicial district in this state, and that on said 1st day of February, 1905, William Sleeman was and ever since has been a duly qualified justice of the peace for the town of Narragansett; that on said 1st day of February, 1905, said William Sleeman was by said justice duly appointed a justice of the peace to take bail and authorized to issue warrants, and such authority has never been revoked by said justice. The facts bring the case clearly within the rule laid down by this court in *State v. Chappell*, 26 R. I. 375, 58 Atl. 1009. As Nathan B. Lewis was on the 1st day of February, 1905, justice of the district court of the Second judicial district, and has ever since continuously held said office, and as William Sleeman was on said 1st day of February, 1905, a duly qualified justice of the peace of the town of Narragansett, in said district, and has ever since continuously held said office, both offices are continuous, and no new appointment of said justice of the peace to take bail or to issue warrants was necessary, either at the expiration of a term as justice of the peace, when the latter was renewed, or at the expiration of the term of the justice of the district court, when the same was renewed so long as the appointment of said justice

of the peace to take bail and to issue warrants is not revoked.

This decision renders it unnecessary to consider the other questions presented.

The petition is therefore denied and dismissed.

#### BRITT v. LEWIS et al.

(Supreme Court of Rhode Island. Nov. 5, 1908.)

Petition for a writ of prohibition by William J. Britt against Nathan B. Lewis, justice of the district court of the Second judicial district, and another. Denied.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Harry C. Curtis and Frederick C. Olney, for petitioner. Clarence A. Aldrich, for respondent. George H. Huddy, Jr., for complainant in district court.

PER CURIAM. For the reasons given in Cook v. Lewis et al., 70 Atl. 1041, the petition is denied and dismissed.

#### ALMEDA v. E. R. RANDALL & CO.

(Supreme Court of Rhode Island. Nov. 2, 1908.)

PLEADING (§ 217\*)—DEMURRER—ATTACHES TO FIRST SUBSTANTIAL DEFECT.

A demurrer searches the record, and attaches ultimately upon the first substantial defect in the pleadings; and where an amended declaration was filed, and defendant pleaded limitations thereto, to which plaintiff demurred, the sufficiency of the amended declaration was raised.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 540-548; Dec. Dig. § 217.\*]

Exceptions from Superior Court, Providence and Bristol Counties.

Action by Frank Almeda against E. R. Randall & Co. A demurrer to a plea to the amended declaration was overruled, and plaintiff excepts. Court will hear arguments on the sufficiency of the amended declaration.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Charles R. Easton, for plaintiff. Waterman, Curran & Hunt (Lewis A. Waterman, of counsel), for defendant.

PER CURIAM. Under the rule announced in Ralston v. Taylor, 20 R. I. 284, 38 Atl. 980, 39 L. R. A. 246, a demurrer searches the record and attaches ultimately upon the first substantial defect in the pleadings. It becomes necessary, therefore, to determine as to the sufficiency of the plaintiff's amended declaration. The court will hear arguments on that question.

#### VENBUVR v. LAFAYETTE WORSTED MILLS.

(Supreme Court of Rhode Island. Nov. 6, 1908.)

Exceptions from Superior Court, Providence and Bristol Counties.

Personal injury action by Llievin Venbuvr, a minor, by his next friend, against the Lafayette Worsted Mills. After a verdict for plaintiff, defendant was granted a new trial, and plaintiff excepted. Exceptions overruled, and case remitted for a new trial.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Waterman, Curran & Hunt (Lewis A. Waterman, of counsel), for plaintiff. Vincent, Ross & Barnefield, Alexander L. Churchill, and Adelpard Archambault, for defendant.

PER CURIAM. A careful consideration of the transcript of evidence and rescript of the superior court upon the defendant's motion for a new trial convinces us of the correctness of the finding of said court in granting said motion.

The plaintiff's exceptions are therefore overruled, and the case is remitted to the superior court for a new trial.

(81 Conn. 310)

#### McWILLIAMS et al. v. McNAMARA.

(Supreme Court of Errors of Connecticut. Oct. 29, 1908.)

1. APPEAL AND ERROR (§ 633\*)—PRESENTATION IN LOWER COURT—APPLICATION TO RECTIFY APPEAL.

Under the direct provisions of Gen. St. 1902, § 801, an application to the Supreme Court to rectify an appeal will not be entertained, unless the party making it has, previous to notice thereof to the other party, requested the court allowing the appeal to make the desired correction; and, unless application is first made below, it will not be allowed in the appellate court, even though no answer to it was filed as required by Practice Book, p. 270, § 14.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 653.\*]

2. APPEAL AND ERROR (§ 719\*)—REVIEW—RULINGS NOT APPEALED FROM.

Where appellant did not appeal from an instruction as to the effect of a deed, its correctness will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2975; Dec. Dig. § 719.\*]

3. DEEDS (§ 135\*)—PROPERTY CONVEYED—GRANT OF USE AND DOMINION.

A grant of the rents, issues, and profit of land is a grant of the land itself, and a grant of the use and dominion over land carries the land itself.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 135.\*]

4. DEEDS (§ 109\*)—CONSTRUCTION—PREMISES CONVEYED—RIGHT OF WAY RESERVED—EVIDENCE.

In trespass for removing partitions in the basement of a building, one-half of which defendant's grantor conveyed to plaintiff's grantor, with certain reservations in the basement and cellar, evidence held to show that the property above the main floor was to be divided by the north and south line, through the center of the brick wall in the cellar, and the basement and cellar should be divided east and west, and



the grantor should have the use and occupancy of the north basement and cellar, and the grantee the sole use and occupancy of the middle basement and cellar, subject to a right of way to the grantor's cellars.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 109.\*]

**5. EASEMENTS (§ 44\*)—RESERVATION—CONSTRUCTION—RIGHTS RESERVED—"THESE CONVEYED PREMISES."**

Where a deed conveying the west half of a building also gave the grantee the sole use and occupancy of the middle basement and cellar, the basement and cellar being divided into three parts by east and west partitions, but reserved the right to pass through "these conveyed premises" to the grantor's remaining part of the building, the phrase "these conveyed premises," included the east middle basement and cellar, so that the grantor could pass through that part as well as the other parts conveyed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 98-100; Dec. Dig. § 44.\*]

**6. EASEMENTS (§ 14\*)—CONSTRUCTION—RESERVATION—VALIDITY—RESERVATION OUT OF EXCLUSIVE USE.**

Where a deed conveyed a part of a building, and the sole use, occupancy, and improvement of another part to the grantee, his heirs, etc., the grantor could reserve a right of way through the part to which the exclusive use and occupancy was granted, as well as out of the fee of the land, had that been conveyed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 40; Dec. Dig. § 14.\*]

**7. EASEMENTS (§ 69\*)—RESERVATION—CONSTRUCTION.**

In trespass for removing certain partitions in the basement of a building, one-half of which was conveyed to plaintiff, together with certain parts of the cellar and basement, the grantor reserving the right to pass through the conveyed premises to his remaining part of the building, the location of the way reserved, as claimed by plaintiff, held to be the natural and convenient way, and the one contemplated by the parties.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 69.\*]

**8. EASEMENTS (§ 71\*)—CONSTRUCTION—RIGHT OF WAY—LOCATION—QUESTIONS FOR JURY.**

The location of a right of way reserved in a deed is for the court, and should not be left to the jury.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 71.\*]

**9. APPEAL AND ERROR (§ 1062\*)—HARMLESS ERROR—SUBMISSION OF ISSUES TO JURY.**

Error, in submitting a question to the jury, is harmless, where the jury find correctly.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.\*]

Appeal from Court of Common Pleas, New London County; Walter C. Noyes, Judge.

Action in the nature of a trespass by John McWilliams and others against John R. McNamara. From a judgment for plaintiffs, defendant appeals. Affirmed.

William H. Shields and Donald G. Perkins, for appellant. Gardiner Greene, for appellees.

THAYER, J. An application to rectify the appeal under Gen. St. 1902, § 801, by striking certain words from, and by adding certain words and paragraphs to, the court's

finding of facts has been filed in this court by the appellant. An affidavit of counsel that all the facts stated in the application are true is annexed to the application. No answer to the application, as required by section 14, page 270, of the Practice Book, has been filed. The appellant insists that the appeal should therefore, as a matter of course, be rectified in accordance with the application under Rule 14. The appellant claims that the application should not be entertained, but should be dismissed, for several reasons. The first is because it shows no previous application to the trial judge to rectify. The statute is explicit that an application of this kind shall not be entertained by this court, unless the party making it has, previous to the notice thereof to the opposite party, requested the court or judge allowing the appeal to make the correction applied for. It is important that this should be done, as the correction asked for, if proper, would presumably be made by the trial judge on such request, and a trial of the question of fact in this court would thus be avoided. As such request of the trial judge does not appear to have been made, the application cannot be entertained, and is dismissed upon the first ground stated by the appellees. It is unnecessary to consider the others.

The parties are agreed as to the following facts: In 1850 one Daniel B. Miner was the owner of a lot of land in the city of Norwich, on the southeast corner of Main and Ferry streets, with a brick block of two buildings standing thereon. The main floor of said block was adapted for, and has always been used for, stores fronting on Main street. Under said Main street floor there was a basement, and beneath the basement a cellar, each of which extended under the whole block. A brick wall extended through the cellar from north to south, and a stone wall extended through it from east to west. In these walls there were openings, permitting access from one part of the cellar to the others. The basement was divided into three parts fronting on Ferry street, called the north, middle, and south basements, respectively. This division was made by a brick wall, in which there were no openings, standing upon said stone wall through the cellar, and by a board partition 19 feet northerly of the brick partition. As Ferry street runs southerly from Main street, the level of the ground falls away, the street level at the south end of the block being considerably lower than at the street corner. The basement floor at the southwest corner was on a level with Ferry street. On December 23, 1850, said D. B. Miner conveyed to his brother Erastus P. Miner the western half of said block, with such reservations and privileges as are herein stated. The description of the premises, so far as this case is affect-

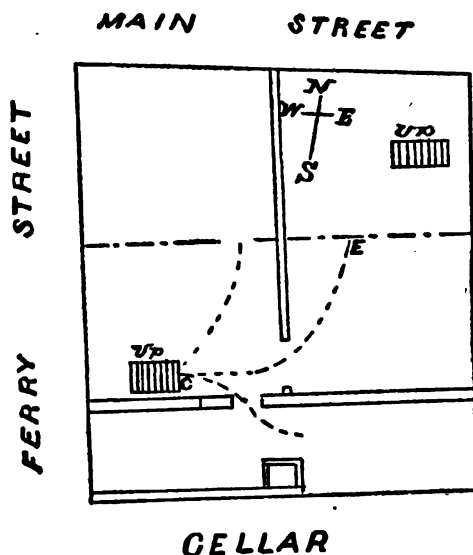
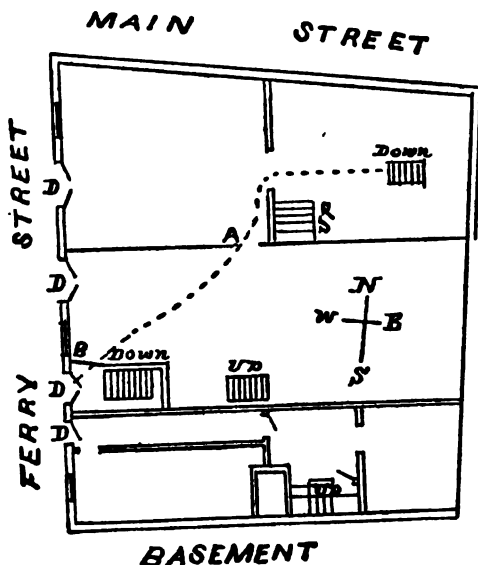
\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed thereby, was as follows: "Beginning at the corner of said brick building on the corner of said Main and Ferry streets; thence south 85° east twenty-four feet abutting northerly on said Main street, to the center of the front of the brick block of buildings lately erected by E. P. Miner & Co.; thence south 1° east along the center of the dividing wall in the cellar of said brick block of buildings, abutting easterly on my remaining part of said brick block of buildings, fifty-one feet and four inches to land of David Congdon; thence south 89° west twenty-four feet abutting southerly on said Congdon's land to said Ferry street; thence north 1° west fifty-four feet abutting westerly on said Ferry street to the place of beginning. And it is hereby understood and agreed that the said Erastus P. Miner his heirs and assigns forever shall have the sole use, occupancy and improvement of so much of the basement and cellar under it, of the remaining part of mine, the said Daniel B. Miner's said brick block of buildings, as is contained in the following description, viz.: Beginning at a point on the easterly side of said Ferry street twenty-two feet southerly from the northwest corner of these conveyed premises; thence easterly at right angles with said Ferry street as the wood partition in said basement now stands, to the easterly basement wall of my remaining part of said brick block of buildings; thence southerly by said basement wall nineteen feet to a brick partition wall; thence westerly by said brick partition wall to sd. Ferry street; thence northerly by the easterly line of said Ferry street nineteen feet to the place of beginning. And it is also further understood and agreed that I the said Daniel B. Miner do hereby reserve to myself my heirs and assigns forever, the sole use, occupancy and improvement of so much of the basement and cellar under it, of these conveyed premises as is contained in the following description, viz.: Beginning at the northwest corner of these conveyed premises at the corner of said Main & Ferry streets; thence easterly on the line of the north basement wall twenty-four feet to the dividing wall before mentioned; thence southerly on the line of this said dividing wall to the wood partition in said basement, before mentioned thence westerly on the line of sd. wood partition twenty-four feet to said Ferry street; thence northerly on the easterly line of said Ferry street twenty-two feet to the place of beginning. And it is also understood and agreed that I the said Daniel B. Miner do hereby reserve to myself, my heirs and assigns forever the right to pass and repass through these conveyed premises to the cellars in my remaining part at all times and for all purposes, at the second door in the basement north from the southwest corner of said buildings on said Ferry street." In 1904 the property and rights in said block which remained in said D. B. Miner after this conveyance be-

came vested in the defendant, and all the property and rights conveyed to said E. P. Miner by said deed became vested in the plaintiff in 1905. At the time of said conveyance there was no wall or partition of any kind extending from Ferry street through the cellar to the east wall of the building, except the stone wall before mentioned, and no other ever existed there until the property passed to the defendant. In 1906 he erected a partition in the cellar, extending from Ferry street to the east wall of the building underneath the board partition in the basement mentioned in the Miner deed. There were, at the date of the conveyance, four doors opening into the basement from Ferry street, one into the north basement, two into the middle basement, and one into the south basement. The second door north from the southwest corner of the building entered the middle basement slightly above the level of the street. Inside this door was a landing, and from this landing a flight of stone steps led down to the cellar. This landing and the opening to the stairs was not fenced in until after the plaintiffs acquired the property, and it was thus possible to pass from the landing to other parts of the middle basement. After the plaintiffs purchased the property, they fenced in this landing and opening. In the east end of the north basement there was a flight of stairs, entered through a trapdoor, leading down to the cellar. After the erection of the fence by the plaintiffs the defendant entered the second door, and cut the fence down, and after the plaintiffs has replaced it, he again entered and cut it down. He also cut a doorway through the wooden partition which separated the northwest basement from the west middle basement. This action is brought for these alleged trespasses.

The defendant justified, under the claim that he had, under the Miner deed, a right of way to his northeast cellar by crossing the middle basement to the north basement, and thence through the north basement and down the stairs through the trapdoor to the cellar. The plaintiffs claimed that his only right of way to the northeast cellar was down the stone steps to the cellar, and thence through the east middle cellar. The parties upon the trial were at issue as to whether there was originally a door or opening in the wood partition separating the north from the middle basement. The defendant claimed that there was such a door as a part of the original construction, and had always continued until the plaintiffs bought the property. The plaintiffs claimed that there was never a door or opening there until as late as 1891, when one Otis, who was then a tenant of both basements, obtained permission to make an opening between them, which at the termination of his tenancy was permanently closed. Evidence was offered as to the existence or nonexistence of such opening. The situation may be better

understood by a reference to diagrams of the basement and cellar in the margin.



The disputed doorway cut through the wood partition between the north and middle basements is at A. The fence which was cut down was at B. The broken line running through the cellar from west to east represents the partition between the cellars built by the defendant after he acquired the property. The dotted line in the basement represents the claimed right of way under which the defendant justifies. The dotted line C E from the foot of the stairs in the cellar plan indicates the line of the defendant's right of way to the northeast cellar as claimed by the plaintiffs.

The defendant requested the court to instruct the jury that it was for the court to construe the deed relating to the right of way and determine the meaning of the same. He also requested an instruction that the words "these conveyed premises" in the reservation of the right of way in the Miner deed mean the land and building thereon constituting the west half of the brick block, and do not include or mean the portion of the cellar under the east half of the block, of which the sole use, occupancy, and improvement were granted to Erastus P. Miner in said deed, and that the right reserved to pass and repass through "these conveyed premises" does not reserve or include the right to go through the center cellar under the east half of the brick block, and that under the deed the defendant had the right to enter at the second door named, and pass and repass for all purposes from said door through the basement in the most convenient way to and through the opening in the wood partition, and so to the northeast corner basement in his own building, and thereon through the trapdoor and stairway to the northeast cellar, and that this was the only way which, under the right reserved, he could take to said cellar. The court instructed the jury that the construction of the deed was for the court; that the deed conveyed to E. P. Miner the west half of the brick block, with the exception of the northwest cellar and basement, and with the exception of certain rights, one of them being the right in question, and also conveyed to him the middle eastern cellar and basement. As to the reservation of the right of way, the jury were told that the court did not construe it, as claimed by the defendant, as only reserving a right of way from the door at Ferry street across the plaintiffs' basement to the defendant's own premises and cellar, but that it could as well refer to a way down the cellar stairs through the plaintiffs' rear cellar, and thence to the defendant's cellar, and that the deed reversed a way between two places, namely, the outside door and the northeast cellar, without specifically defining its location. The court left it for the jury to determine from the evidence whether the location of the way was that claimed by the defendant, across the plaintiffs' middle basement, and instructed them that, if they did not find that to be its location, the verdict should be for the plaintiffs.

The defendant has not appealed from the instruction wherein the jury were told that the deed conveyed the east middle cellar to the grantee Erastus P. Miner. We are not called upon, therefore, to inquire into its correctness. "A grant of the rents, issues, and profits of a tract of land is a grant of the land itself. If the grant be of the user of and dominion over land it carries the land itself." 3 Washburn Real Property (3d Ed.) p. 333. It is apparent from the transaction

and the situation of the property that the parties intended that the property above the main floor should be divided by the north and south line through the center of the brick wall in the cellar, and that the basement and cellar should be divided from east to west, and that the grantor, his heirs, and assigns should have the sole use, occupancy, and improvement of the north basement and cellar, and that E. P. Miner, his heirs, and assigns should have the sole use and occupancy of the middle basement and cellar, subject to a right of way to D. B. Miner's three cellars. The language of the reservation was used with this intent in the minds of the parties, and we think that the words "these conveyed premises" in the reservation included the east middle cellar and basement, whether the deed conveyed the land or only granted an easement therein. The right of way, therefore, could as well be over the east middle cellar as any other part of the conveyed premises. The grantor could reserve his right of way out of the exclusive use and occupancy of the east middle cellar as well as out of the fee of the land, if that were conveyed. The defendant claimed that the court should have instructed the jury as to the location of the way. There was only one contested fact bearing upon the question, namely, whether there was, at the time of the conveyance between the Miners, a door or opening at A through the partition between the middle and northwest basements. In view of the admitted facts this fact was of no importance. The way over the middle basement would not reach the northeast cellar, or the stairs leading thereto. The grantor must, after having crossed the plaintiffs' basement, pass through the northwest basement, and then the northeast basement to the trapdoor, and thence down the stairs to reach the cellar. This is neither a natural nor convenient way. The door and stone steps leading to the cellar from Ferry street was manifestly the way provided for reaching the cellar when the building was built. From the foot of the stairs each of the six cellars, or compartments of the cellar, could be reached. This was the natural and convenient way to each of the cellars and must have been the one contemplated by the parties to the deed. We think, therefore, that the court, regardless of the contested fact, should have instructed the jury that the location of the way reserved in the deed was as claimed by the plaintiffs. But in failing to do so, and leaving it for the jury to determine the location, the charge was too favorable to the defendant. The jury, having found for the plaintiffs, reached the same result that would have been reached had such a verdict been directed. There is therefore no occasion to consider the other questions raised on the appeal.

There is no error.

(104 Me. 39)  
DENIS v. LEWISTON, B. & B. ST. RY. CO.  
(two cases).

(Supreme Judicial Court of Maine. Feb. 26, 1906.)  
1. STREET RAILROADS (§ 81\*) — TRAVELERS WITH TEAMS—RELATIVE RIGHTS.

Those operating street cars and travelers with teams have equal rights on the highway, and the rights of each class must be exercised with due regard to the rights of the other; proper consideration being given to the difference in motive power and to the fact that the cars run on a fixed track and rapidly acquire a greater momentum. All who have occasion to use the highways, whether by the old or new modes of travel, are governed by the same rule of reasonable use and reasonable care.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 81\*.]

2. STREET RAILROADS (§ 81\*)—APPROACHING STREET JUNCTIONS—DUTY TO HAVE CAR UNDER CONTROL.

In view of the frequency with which teams in the ordinary course of travel and traffic must pass across a street railway at public street junctions, the motorman of a car when approaching such junctions is required to exercise due care and vigilance, according to the exigencies of the situation, to have his car under such control, in anticipation of the crossing of teams, that it may be stopped at a junction in season to prevent a collision with teams that may suddenly turn to drive over the track.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 176; Dec. Dig. § 81\*.]

3. STREET RAILROADS (§ 98\*)—COLLISION WITH PERSON ON TRACK—DUTY TO LOOK AND LISTEN.

While it cannot be declared as a matter of law that it is negligence per se for a traveler to cross the tracks of a street railway without first looking and listening for an approaching car, yet he is required to exercise all reasonable and ordinary care, prudence, and vigilance to avoid collision with a car; and the exercise of this degree of care may impose upon him in many situations the duty to look and listen for an approaching car before attempting to cross the track. He must do for his own safety, and for the safety of the passengers in a car, what ordinarily, careful, and prudent persons are accustomed to do under like circumstances.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 208; Dec. Dig. § 98\*.]

4. STREET RAILROADS (§ 98\*)—COLLISION WITH PERSON ON TRACK—DUTY TO LOOK AND LISTEN.

Whether or not the failure of a traveler to look and listen, when about to cross a street railway track, is to be deemed negligence, must be determined by all the facts and circumstances disclosed by the evidence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 208; Dec. Dig. § 98\*.]

5. NEGLIGENCE (§ 89\*)—IMPUTED NEGLIGENCE—HUSBAND AND WIFE—COLLISION WITH PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

It does not necessarily follow that a wife who is riding with her husband, and who is herself in the exercise of reasonable care, is legally responsible for the negligence of her husband as to acts over which she has no control.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 132; Dec. Dig. § 89\*.]

6. NEGLIGENCE (§ 89\*)—IMPUTED NEGLIGENCE—HUSBAND AND WIFE—COLLISION WITH PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

Where a wife was riding with her husband, who was an experienced and competent driver,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

along a street in which was a street railway, and the wife had nothing to do about driving the horse, and did not make any suggestions about the railroad track or the cars, and neither assumed nor felt any responsibility for the management and control of the team, but deferred entirely to the judgment and experience of her husband, and the team collided with a street car, the collision being caused in part by the contributory negligence of the husband, and the wife sustained personal injuries and brought suit against the street railway company to recover damages for such injuries and the verdict was for the wife, *held*, that the jury did not commit a manifest error in finding that the wife was not justly chargeable with culpable negligence for failing to look or listen for an approaching car or for any other acts of omission or commission on her part connected with the drive.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 132; Dec. Dig. § 89.\*]

**7. STREET RAILROADS (§ 114\*)—COLLISIONS WITH PERSONS ON TRACK—EVIDENCE—SUFFICIENCY.**

In the cases at bar, which were actions by a plaintiff husband and a plaintiff wife to recover damages for personal injuries sustained by them caused by the collision of their team in which they were riding with a street railway car and the verdict was for the plaintiff in each action, *held*: (1) That the defendant railway company was negligent in the management of its car. (2) That the plaintiff husband was guilty of contributory negligence, and that the verdict in his favor must be set aside. (3) That the plaintiff wife was not guilty of contributory negligence, and that the verdict in her favor be sustained.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.\*]

(Official.)

On motion from Supreme Judicial Court, Androscoggin County.

Two actions on the case against the Lewiston, Brunswick & Bath Street Railway Company, one by Joseph Denls for injuries to the person and property, and the other by Josephine Denls for injuries to the person alone. Verdict for plaintiff in each case, and defendant moves to set the same aside. Motion sustained as to Joseph Denls, and overruled as to Josephine Denls.

Argued before EMERY, C. J., and WHITEHOUSE, STROUT, SAVAGE, SPEAR, and CORNISH, JJ.

Harry Manser and Enoch Foster, for plaintiffs. Wm. H. Newell, for defendant.

**WHITEHOUSE, J.** The plaintiffs in these two actions are husband and wife, and each recovered a verdict for injuries received from a collision of their team with the defendant's car at the junctions of Main and Pettengill streets, in Lewiston. The two cases arose from the same state of facts, and were tried together upon the same evidence. They come to the law court on motions to have the verdicts set aside as against the evidence.

The following uncontroverted facts appeared in evidence:

The plaintiffs resided in Auburn, and on the evening of March 4, 1907, with their little daughter, six years of age, rode over onto Main street, in Lewiston, with a horse and sleigh, to the house of Henry Brooks, situated on the south side of the street, arriving there soon after 8 o'clock. They remained there until about a quarter before nine, when they started with their horse and sleigh to drive down Main street onto Pettengill street for the purpose of calling at the house of Frank Brooks, who lived on that street.

Opposite the residence of George Bearce is a curve in Main street, and for a distance of 72 rods from that curve down to the center of Pettengill street at its junction with Main the railroad track, as well as the street, runs in a straight line and on a descending grade of 3 per cent. practically all the way. The railroad track is located on the south side of Main street, very near the sidewalk and across the mouth of Pettengill street, which enters, but does not intersect Main street. The driveway just below the house of Henry Brooks, from which the plaintiffs started to drive down to Pettengill street, is 40 rods below the curve in Main street above mentioned, and 32 rods above the center of Pettengill street. There was a side track or turn-out 330 feet long opposite the house of Henry Brooks, and, although it was not in use at that season of the year, the trolley and track switches remained in place. The night was quite dark, but an electric arc light was located on the north side of Main street, opposite the mouth of Pettengill street, and was shining on the evening in question. The section of Main street mentioned is a residential portion of the city, and the street was illuminated to some extent by the artificial lights in the dwelling houses situated on both sides of the street.

On this line of railway the cars run from the head of Lisbon street up Main street two miles to the State Fair Grounds, and return, making the four miles in 20 minutes, including all stops and changes. It also appeared that a short time before the running schedule had been shortened from 30 minutes to 20 minutes.

When the plaintiffs left the house of Henry Brooks that evening, as above stated, and went down Main street toward Pettengill street, the car was on its return trip from the Fair Grounds, and went down behind the plaintiffs' team. Denls was driving down the street "not quite in the center," but nearer the railroad track, traveling at the rate of about six miles an hour, and when he had turned to go into Pettengill street, and the horse had passed substantially across the track, the defendant's car struck the team, threw out the occupants, and carried them some distance beyond Pettengill street, caus-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing the injuries complained of in the plaintiffs' writs.

1. It is alleged in the plaintiffs' declarations, and contended in argument, that the evidence warranted the jury in finding that at the time in question the defendant's car was negligently run at an unreasonable and dangerous rate of speed on the descending grade of Main street toward the junctions with Pettengill street, and that due care was not exercised by the motorman to have his car under such control as it approached the junctions that he would be able to stop it in season to avoid a collision with the plaintiffs' team in the event that the latter should be turned and driven across the track into Pettengill street.

It has been seen that the schedule time on this trip involved an average speed of 12 miles an hour. This rate was necessarily diminished somewhat in taking the trolley switch near the house of Henry Brooks, but the remaining distance of 25 rods from the lower end of the switch to Pettengill street was on a descending grade. When the plaintiffs came out of the driveway at the Brooks house onto the railroad track, their view was unobstructed for a distance of 40 rods up to the curve in the street above mentioned, and they both testify that they looked up the track to see if the car was coming, and that none was in sight at that time. Traveling at the rate of six miles an hour, they only required one minute to traverse the distance of 32 rods to Pettengill street. But the team was overtaken by the car, and, if the latter had not reached the curve at the time, the plaintiffs started, it must have run at the rate of about 14 miles an hour in order to traverse the distance of 72 rods during the one minute required for the team to travel 32 rods.

The great momentum which the car had acquired when it reached the crossing, as shown by the distance covered by it after the collision, tends strongly to support the conclusion that it had attained a high rate of speed. The motorman states that he reversed the power when about 30 feet distant from the crossing as soon as he saw the plaintiffs turn to cross the track, and the witnesses for the defense agree that this was the most effective means of stopping the car. Although there is a sharp conflict of testimony in regard to the exact distance traversed by the car after the collision, there was evidence which would have authorized the jury to find that the injured plaintiffs and the sleigh were carried by the car 110 feet beyond the crossing.

The motorman also admits that he saw the plaintiffs' team when the car was 25 rods distant from the crossing, and it is established by the weight of evidence that he immediately commenced sounding the gong to warn the driver of the plaintiffs' team. There is no evidence, however, that the speed of the car was slackened until the

power was reversed 30 feet from the crossing. It is suggested on the part of the defense that the plaintiffs paid no attention to the sounding of the gong, and gave no indication of their purpose to cross the track at Pettengill street, and hence that there was no occasion to moderate the speed of the car. But it is not in controversy that the street was so well lighted by the lights in the dwelling houses, the arc light opposite the mouth of Pettengill street, and by the headlight of the car that the team was plainly visible to the motorman, and the color of the horse distinguishable. The evidence warranted the jury in finding that, by reason of the jingling of the sleigh bells, the sound of the gong was not heard by the plaintiffs, and that, by the exercise of reasonable care and vigilance, the motorman might have drawn the inference from their conduct that the gong was not heard by them. In the exercise of due care, he would have seen that they were driving along near the railroad in ignorance of the rapidly approaching car, and he should have considered that, if they intended to cross the track at Pettengill street, they could not reasonably be expected to show any indication of their purpose until they arrived at a point so near the junction that with the speed at which the car was then running it would not be possible, with any agencies at his command, to stop it in season to prevent a collision if the team in fact attempted to cross.

The law governing the rights and duties of the proprietors of street railways and travelers with ordinary teams in their relations to each other has been so critically examined and fully considered, both upon reason and authority, in the recent decisions of this court, that no extended discussion of the rules applicable to the case at bar is here required. *Flewelling v. Railroad*, 89 Me. 585, 36 Atl. 1056; *Atwood v. Railway Co.*, 91 Me. 399, 40 Atl. 67; *Fairbanks v. Railway Co.*, 95 Me. 78, 49 Atl. 421; *Warren v. Railway Co.*, 95 Me. 115, 49 Atl. 609; *Robinson v. Street Railway*, 99 Me. 47, 58 Atl. 57; *Butler v. Street Railway*, 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267; *Marden v. Street Railway*, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476.

According to the well-settled law of this state, those operating street cars and travelers with teams have equal rights on the highway, and the rights of each class must be exercised with due regard to the rights of the other; proper consideration being given to the difference in motive power and to the fact that the cars must run on a fixed track, and rapidly acquire a greater momentum. All who have occasion to use the highway, whether by the old or new modes of travel, are governed by the same rule of reasonable use and reasonable care. But a distinction is recognized, both by reason and authority between the degree of caution and

vigilance to be exercised by street cars while running along the street between the crossings and that required when approaching such crossings. It is now held with a substantial unanimity of judicial opinion that, in view of the frequency with which teams in the ordinary course of travel and traffic must pass across the railway at public street junctions, the motorman of a car when approaching these junctions is required to exercise due care and vigilance, according to the exigencies of the situation, to have his car under such control, in anticipation of the crossing of teams, that it may be stopped at the junction in season to prevent a collision with teams that may suddenly turn to drive over the track. *Marden v. Street Railway*, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476, and cases cited.

In the case at bar the jury must have reached the conclusion that the defendant's servants in charge of the car at the time in question failed to exercise that degree of vigilance and precaution in slackening the speed of the car and keeping it under control that the plain exigencies of the situation required; and, after a patient study of the physical situation and the conduct of the parties, this court does not feel warranted in saying that the finding of the jury was so manifestly wrong that it must be set aside.

2. But the plaintiffs were not entitled to recover simply upon proof of defendant's negligence. It was incumbent upon them to go further, and show that there was no want of ordinary care on their own part which contributed as a proximate cause of the injury.

The jury must have found that the plaintiffs were not guilty of any negligence in the management of the team, but in the opinion of the court this finding of the jury was unmistakably wrong as to the plaintiff Joseph Denis.

It is true that the established rule respecting steam railroads, that it is negligence per se for a person to cross the track without first looking and listening for a coming train, has been repeatedly held by this court to be inapplicable to the crossing of the tracks of a street railway in a public street where the cars do not enjoy the exclusive right of way. It cannot be declared as a matter of law that it is negligence per se for a traveler to cross the tracks of a street railway without first looking and listening for an approaching car. But, before crossing a street railway, the traveler is required to exercise all reasonable and ordinary care, prudence, and vigilance to avoid a collision with a street car, and, in exercising this degree of care, he may be required as a matter of fact in many situations to look and listen for an approaching car before attempting to cross the track. He must do for his own safety and for the safety of the passengers in the car what ordinarily,

careful, thoughtful, and prudent persons are accustomed to do under like circumstances. Whether his failure to look and listen before crossing is to be deemed negligence must be determined upon all the facts and circumstances disclosed by the evidence. *Fairbanks v. Railway Co.*, 95 Me. 78, 49 Atl. 421; *Warren v. Railway Co.*, 95 Me. 115, 49 Atl. 609; *Butler v. Street Railway*, 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267; *Marden v. Street Railway*, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476.

The plaintiff Joseph Denis had previously lived on Pettengill street, and for years had been familiar with the running of the cars on Main street, and, as he admits in his testimony, "knew they were liable to go back and forth at any time." He appears to have apprehended that a car might be approaching at the time he came out of the driveway of Henry Brooks; for he states that before crossing the track there he looked up the street to see if a car was coming, and discovered none. But he must have known that the speed of a car between the street crossings on such descending grade would probably be more than twice that of his team, and that he was liable to be overtaken by it before reaching Pettengill street. He should have considered that the jingling of his sleigh bells was liable to prevent him from hearing the sound of the gong and other noises of an approaching car. But the car must have come around the curve 40 rods above the Brooks house within a few seconds after the plaintiff started down the street. If he had stopped his team and listened, the sound of the approaching car must have been heard by him. If he had turned his head and glanced up the track, the headlight of the rapidly approaching car would have appeared to his unobstructed vision. He did neither of these things, but, with an absence of caution and freedom from anxiety difficult to explain or comprehend, he drove down to Pettengill street, and, without stopping to listen or turning to look, he deliberately attempted to cross the track. True, he says he was looking ahead and thinking it more probable that a car might be coming up the track, but, seeing none ahead of him, he might reasonably have apprehended the approach of one behind him. Did he do for his own safety, the safety of his wife and child, and the passengers on the car all that ordinarily prudent travelers usually do under like circumstances? It is the opinion of the court that in this respect there was a failure of duty on his part, and that he must be deemed guilty of contributory negligence.

3. But the contributory negligence of the injured party that will prevent a recovery must have contributed as a proximate cause of the injury. *Atwood v. Railway Co.*, 91 Me. 405, 40 Atl. 67. The plaintiff may have been negligent and his negligence may have afforded an occasion or opportunity for an

injury which is caused by a defendant's subsequent and independent negligence, but such negligence on the part of a plaintiff will not prevent a recovery. *Ward v. Railroad Co.*, 96 Me. 145, 51 Atl. 947.

But the facts in this case are materially different from those in the last named cases, and the rule there applied is not applicable here. In each of those cases the plaintiff as the result of his own prior negligence was in a passive condition of peril as obvious to the defendant's servants as that of a person lying on the track unconscious from intoxication or sleep. By the exercise of ordinary vigilance and precaution, the defendant in those cases might have avoided the collision, and its failure to exercise such precaution was deemed the proximate cause of the injury, for the reason that it was negligence subsequent to that of the plaintiff and independent of it.

In the case at bar the defendant's negligence cannot be deemed subsequent to and independent of the plaintiff's contributory negligence, and the doctrine of prior and subsequent negligences does not apply. The defendant's negligence was contemporaneous and concurrent with the plaintiff's, and not subsequent to it. The plaintiff's negligence actively continued from its commencement to the moment of the collision. The situation was analogous to that in *Butler v. Street Railway*, 99 Me. 160, 58 Atl. 779, 105 Am. St. Rep. 267. As stated by the court in that case, the defendant's negligence "operated to produce the result in connection with the plaintiff's negligence and not independently of it. The plaintiff's negligence was operative to the last moment, and contributed to the injury as a proximate cause."

The verdict in favor of Joseph Denis was not authorized by the evidence, and must therefore be set aside.

4. It is contended in behalf of the defendant that the verdict in favor of the wife, Josephine Denis, should also be set aside, not because the negligence of her husband was legally imputable to her, for the doctrine of imputable negligence was expressly rejected by this court in *State v. B. & M. Railroad*, 80 Me. 430, 15 Atl. 36, but for the alleged reason that she herself was guilty of negligence which contributed as a proximate cause of the injury. But, as observed by this court in *Whitman v. Fisher*, 98 Me. 577, 57 Atl. 896: "It does not by any means necessarily follow that a wife who is riding with her husband, and who is herself in the exercise of reasonable care, is legally responsible for the negligence of her husband as to acts over which she has no control." *Shultz v. Old Colony Street Ry. Co.*, 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 507, 118 Am. St. Rep. 502. Joseph Denis, the driver of the team, was a man 37 years old, who was familiar with the running of

the cars over this route. He owned the team which he was driving, and it is not questioned that he was an experienced and competent driver. The wife testifies that she had nothing to do about driving the horse—she was "afraid"—and that she did tell her husband anything about driving the horse, or make any suggestions about the railroad track or the cars. It is true that she looked up the track when they started from the Brooks house, presumably on account of some remark of her husband, but it satisfactorily appears from all of the evidence that she neither assumed nor felt any responsibility for the management and control of the team, but deferred entirely to the judgment and experience of her husband. She appears to have been a woman in feeble condition, this being the first time she had been out of doors since the birth of her last child a month before. She and her husband occupied the whole of the seat in the sleigh, and the little girl six years old sat on her parents' knees, her mother holding her cape over her to protect her from the cold.

Upon consideration, therefore, of all the facts and circumstances, it is the opinion of the court that the jury did not commit a manifest error in finding that the plaintiff Josephine Denis was not justly chargeable with culpable negligence for failing to look or listen for an approaching car or for any other acts of omission or commission on her part connected with the drive that evening.

The entries must accordingly be as follows:

In the case of Joseph Denis:

Motion for new trial sustained.

In the case of Josephine Denis:

Motion for a new trial overruled.

(222 Pa. 184)

### THOMAS v. BORDEN.

(Supreme Court of Pennsylvania. June 23, 1908.)

#### 1. APPEAL AND ERROR (§ 575\*)—DISMISSAL—GROUNDS—FAILURE TO CERTIFY TESTIMONY.

Where the notes of testimony in an equity case have not been certified by either the official stenographer or the trial judge, the appeal may be quashed.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 575.\*]

#### 2. APPEAL AND ERROR (§ 267\*)—DECISIONS REVIEWABLE—FINALITY.

The dismissal of a bill without hearing evidence from defendant, under equity rule 68, is not a basis for an assignment of error, as such action does not become final until made so by the court in passing on exceptions to it.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 267.\*]

#### 3. EQUITY (§ 368\*)—DISMISSAL OF BILL—REMEDY.

The dismissal of a bill without hearing evidence from defendant, under equity rule 68, is in the nature of a nonsuit at law; and, if error is committed in granting such a motion, it is not to be corrected by entering a decree for



plaintiff, but by setting aside the dismissal and reinstating the bill with a procedendo.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 775; Dec. Dig. § 368.\*]

**4. INJUNCTION (§ 119\*)—SUBJECTS OF PROTECTION—AGREEMENT NOT TO ENGAGE IN BUSINESS.**

On a bill to restrain the breach of an agreement not to engage in a certain business for a stipulated period, an averment in the answer that the written agreement had been rescinded, and an oral agreement substituted, in which there was no such restriction, is responsive; and, if not overcome by proof, the bill is properly dismissed.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 119.\*]

**5. INJUNCTION (§ 61\*)—SUBJECTS OF PROTECTION—AGREEMENT NOT TO ENGAGE IN BUSINESS.**

A claim for an injunction to restrain the breach of an agreement not to engage in the business of extracting teeth by the use of nitrous oxide gas, or any other method invented and used exclusively by complainant, is without foundation, where such method of extracting teeth was neither invented nor used exclusively by complainant.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 61.\*]

**Appeal from Court of Common Pleas, Philadelphia County.**

Bill for an injunction by John D. Thomas against Walter A. Borden. Decree for defendant dismissing the bill, and complainant appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

George Wharton Pepper, Henry J. Scott, A. Culver Boyd, and John G. Johnson, for appellant. Alex. Simpson, Jr., and Smithers & Lank, for appellee.

BROWN, J. That there may be an end to these proceedings, and that the appellant may know his bill was properly dismissed, we have concluded not to quash his appeal, though there are good reasons for doing so. The notes of testimony have not been certified by either the official stenographer or the trial judge. When the plaintiff closed his case on the hearing below, the following decree was made by the trial judge: "And now, December 3, 1907, the trial judge, upon the close of complainant's evidence, being of opinion that the case made in the bill has not been sustained, hereby orders and decrees that the bill in equity filed in this case be dismissed at plaintiff's costs." This dismissal of the bill, without hearing evidence on the part of the defendant, was under equity rule 68, and the effect of it was a nonsuit at law, but neither the decree of the trial judge, nor the action of the court in banc on what counsel for appellant term the "exceptions" to it, is assigned as error. The first assignment is simply, "The learned court erred in dismissing the plaintiff's bill." We have nothing before us to show that the court dismissed the bill. The trial judge

dismissed it, but his action did not become final until made so by the court in passing upon exceptions to it. The other assignment, alleging error by the court in not entering a decree in favor of the plaintiff, is bad. When the plaintiff closed his case the defendant's motion was in the nature of an application for a nonsuit on the law side of the court, and, if error is committed in granting such a motion, it is not to be corrected by entering a decree for the plaintiff, but by setting aside the dismissal of the bill and reinstating it with a procedendo.

On January 1, 1903, the appellant and appellee entered into a written agreement of copartnership for the practice of dentistry for a period of five years, unless sooner terminated by the death of either, "or otherwise." The clause in the agreement which the appellant seeks to have specifically enforced by this bill is as follows: "Said Walter A. Borden agrees that he will not during the continuance of this agreement or any extension thereof, or within five years after the termination thereof, or of any extension thereof, without the written consent of the said John D. Thomas, carry on or practice either in his own name, or as assistant to, or partner of, or associated with any one else the business of extracting teeth by the use of nitrous oxide gas, or any other method invented and used exclusively by said John D. Thomas, in the city of Philadelphia; and that he will not in any event, or at any time, or in any place, use or refer to the name of the said John D. Thomas, or of the Colton Dental Association, or to his business relations with said John D. Thomas." That portion of the clause covenanting that the appellee will not use or refer to the name of John D. Thomas, or of the Colton Dental Association, or his business relations with the appellant, is no longer in the case, as it was the subject of a stipulation between the parties on the trial. The prayer of the appellant is for an injunction to restrain the appellee "from carrying on or practicing, either in his own name, or as assistant to, or partner of or associate with any one else, the business of extracting teeth by the use of nitrous oxide gas or anesthesia, at any time prior to January 1, 1913." The bill avers that on August 20, 1907, the appellee notified the appellant in writing that he would terminate the agreement of January 1, 1903, at the expiration of 30 days from said date; that said notice was given without any legal cause or reason; that the appellee accepted said notice, and the agreement became terminated on September 19, 1907. This averment, in substance, is that the agreement of January 1, 1903, had continued up to September 19, 1907.

In the tenth paragraph of his answer the appellee sets forth that about October 1, 1905, he personally served upon the appellant

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the following notice: "My Dear Dr. Thomas: Owing to the many objectionable changes made by you and your habits professionally and personally during the last two years that have become unbearable for me, I wish to notify you that thirty days from to-day (October 1, 1905), I will separate myself from copartnership that has existed between us since January 1/03. Very truly yours, W. A. Borden." To this notice the following reply was received by the defendant, in which there is an erroneous reference to his letter as being of the 29th: "10/12/05. My Dear Dr. Borden: Referring to yours of the 29th, will say that I accept the proposition, and that our associations will cease upon October 31st. Very truly yours, J. D. Thomas." Following this, there is a further averment that, pursuant to the above two notices, the agreement of January 1, 1903, was terminated, and, at the earnest request of the appellant, the appellee made a new verbal agreement with him, as follows: "After October 31, 1905, I should assume entire charge of the business, except at such times as he saw fit to be present; that the partnership was to be upon the basis of my receiving 30 per cent. of the gross receipts, plus \$15 for each week during which the plaintiff should be absent, I to forward his share of the receipts to wherever he might be, if away, keep the books, collect accounts, and pay bills out of the income, and generally supervise the business, he to pay the rent of the house and maintain the offices and pay the help." A further averment is that no period was agreed upon as to the continuance of the new partnership, which went into effect on November 1, 1905, "and no other terms, except the above, were agreed upon." Here is a distinct averment in the answer, not only of the termination of the agreement of January 1, 1903, but of a rescission of it by the parties to it, and the formation of a new partnership upon new terms, which did not include the provision which the appellant would now have enforced. This is responsive to the bill, because it avers continued relations between the appellant and the appellee up to September 19, 1907, under the agreement of January 1, 1903. If this was so, and the terms of that agreement were of an enforceable kind, the appellant was entitled to his prayer, but if the agreement of 1903 had terminated nearly two years before, and a new one substituted for it, containing no covenant by the appellee that he would not engage in the business of extracting teeth by the use of nitrous oxide gas, or any other method invented or used exclusively by the appellant, the injunction was properly refused. The answer is further responsive, because it states the particulars of the transaction charged and inquired into by the bill. *Eaton's Appeal*, 66 Pa. 483; *Merritt v. Brown*, 19 N. J. Eq. 288. No witness was called by

the appellant to overcome this part of the answer, and the first reason given by counsel for appellee for dismissing the appeal is sustained. As it is sufficient, others which might be given need not be stated. No reasons were given by the learned trial judge for his decree at the time he made it, but, in an opinion filed since this appeal was taken, he properly holds that, if the plaintiff stands upon the words of the agreement of January 1, 1903 (which is of a kind to be strictly construed), forbidding the appellee from engaging in "the business of extracting teeth by the use of nitrous oxide gas or any other method invented and used exclusively by said John D. Thomas," the claim to an injunction is without foundation, as the method of extracting teeth by the use of nitrous oxide gas was neither invented nor used exclusively by the appellant.

Appeal dismissed, at appellant's costs.

(223 Pa. 156)

#### CANOLE v. ALLEN et ux.

(Supreme Court of Pennsylvania. June 23, 1908.)

#### 1. APPEAL AND ERROR (§ 719\*)—REVIEW—ERRORS NOT ASSIGNED.

Ordinarily the Supreme Court is not concerned to inquire into errors not specifically assigned; and, where the record shows departure from established rules and procedure, affecting only the rights of the parties to the action, and no specific complaint is made with reference thereto, the Supreme Court will assume that the departure was made by mutual consent.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2968; Dec. Dig. § 719.\*]

#### 2. APPEAL AND ERROR (§ 719\*)—REVIEW—ERRORS NOT ASSIGNED.

Where a departure from established rules and procedure is in clear disregard of recognized public policy, or in violation of statute, the Supreme Court will take notice of the error whether assigned or not, and will take notice of such an error as permitting a husband to testify against his wife, though not assigned as error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2974; Dec. Dig. § 719.\*]

#### 3. WITNESSES (§ 36\*)—COMPETENCY—HUSBAND AND WIFE.

Act May 23, 1887 (P. L. 159) § 5, is more than confirmatory of the common-law rule that husband and wife are incompetent to testify against each other, and forbids either of them to testify against the other.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 79, 125; Dec. Dig. § 36.\*]

#### 4. WITNESSES (§ 62\*)—COMPETENCY—HUSBAND AND WIFE.

Connivance by the parties cannot evade Act May 23, 1887 (P. L. 159) § 5, providing that neither the husband nor wife shall be permitted to testify against the other, nor can indulgence by the court.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 177; Dec. Dig. § 62.\*]

#### 5. WITNESSES (§ 52\*)—COMPETENCY—HUSBAND AND WIFE.

Under Act May 23, 1887 (P. L. 159) § 5, providing that neither the husband nor wife shall be permitted to testify against the other, it was error, in trespass against a husband and wife,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to permit the husband to be called by plaintiff as for cross-examination, and to testify that he was acting as his wife's agent in the commission of the trespass, where his participation was not questioned, and the sole object was to involve the wife.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 52.\*]

**6. WITNESSES (§ 52\*)—COMPETENCY—EVIDENCE OF HUSBAND.**

In trespass against a husband and wife for the wrongful removal of a building erected by them on plaintiff's lot under a mistaken belief as to title, the husband was called by plaintiff, as for cross-examination, and testified that the lot with the building on it was worth seven times the value of the lot without the building. *Held* that, though such testimony might be regarded as an admission by the husband and conclusive against himself, it was inadmissible as against the wife, and did not authorize directing a verdict against her.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 52.\*]

**7. DAMAGES (§ 208\*)—EVIDENCE—QUESTIONS FOR JURY.**

In an action against a husband and wife to recover damages for the alleged wrongful removal of a dwelling house from plaintiff's land, where the only evidence as to damage was absolutely incompetent, and, if considered as an admission by the husband and conclusive against him as against his wife, was but an expression of opinion, it was reversible error to direct a verdict and not to submit the question of damages as to the wife to a jury.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 208.\*]

Mitchell, C. J., dissenting.

Appeal from Court of Common Pleas, Luzerne County.

Trespass by John F. Canole against Walter J. Allen and wife for damages for the wrongful removal of a dwelling house from plaintiff's land. Judgment for plaintiff for \$2,300, and defendants appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

M. J. Mulhall and John McGahren, for appellants. John T. Lenahan and James L. Lenahan, for appellee.

STEWART, J. This controversy has its origin in a disputed title to a lot of ground at Harvey's Lake. The appellants, Walter A. Allen and Jennie A., his wife, were in possession of the lot, claiming under a tax title in the wife's name. Trusting, unwisely as it turned out, in the sufficiency of this title, they proceeded to erect a building on the lot, the husband actively participating in and superintending the work. Before the foundations had been completed, Canole, the appellee, learning that work was being done by some one on the lot, went to the premises and there had an interview with the husband, in the course of which he asserted his ownership, and warned Allen against proceeding further with the building. The Allens proceeded notwithstanding

to complete the building. After its completion Canole brought ejectment. He was successful in the court below, and in the Superior Court on appeal taken. A writ of habere facias followed, and re-entry was made thereunder. But the two-story frame dwelling which the Allens had built upon the lot, and which Canole saw when he last visited the premises, was then missing. As soon as the record in the ejectment suit had been returned from the Superior Court, Walter A. Allen, the husband, with an expedition that frustrated the injunction process which the plaintiff had invoked, had moved the building bodily from its foundations over upon an adjoining lot. Thereupon the plaintiff, possession of the lot having been restored to him, began the present action to recover damages.

The case as tried in the court below presents some very peculiar features, which are but feebly disclosed in the assignments of error. Ordinarily we are not concerned to inquire into errors committed on the trial of a case not specifically assigned for review. Where the record of a case shows departure from established rules and procedure, affecting only the rights of the parties to the action, and no specific complaint is made with respect thereto, we assume that the departure was made by and with mutual consent—*conventio legem vincit*. Not so, however, where the departure manifests a clear disregard of recognized public policy, or is in violation of express statutory provisions. Restrictions so imposed are not subject to the pleasure of the parties or the power of the courts. In such case this court will take notice of the error whether assigned or not. The present case serves as an example. While involving questions both of law and fact, it was tried by the court just as though there had been a written submission filed dispensing with the jury. The trial judge determined what the facts of the case were, and the only office performed by the jury was to return perfunctorily the verdict which he directed. This fact is without special significance, except in connection with a single assignment to be considered later, and is referred to here only that the method observed on the trial may be the better understood. The action was trespass against the husband and wife jointly. The wife was not present when the trespass was committed. A recovery against her could be allowed, of course, only as it was shown that the husband who committed the trespass was in so doing the wife's agent. The whole case against the wife turned upon the question of the husband's agency. To establish it, the plaintiff called the husband to the stand to testify as under cross-examination; and was permitted to show by him that in removing the building from the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff's lot he was acting for the wife as her authorized agent. Outside the testimony of the husband, elicited in the manner stated, there was not a particle of evidence that the wife had any part in the removal of the building, or had any knowledge that it had been removed. Indeed, the husband was the only witness called by the plaintiff. He rested the whole case, in all its parts, upon the enforced testimony of this single witness. On such evidence a recovery against the wife was not only permitted, but was ordered by the judge; and that too for an amount more than seven times as great as the value of the plaintiff's lot.

The evidence was admitted under objection; but its admission, strange to say, is not assigned as an error. The error is too plain and palpable to escape notice even without an assignment to bring it to our attention; and, since it involves a most serious transgression of a fundamental policy which has endured as long as our jurisprudence, and which, instead of suffering impairment or modification by reason of changed conditions, has been reinforced by legislation, it becomes our duty not only to notice it, but reprobate it. At common law husband and wife are incompetent to testify against each other. This rule has never been relaxed; on the contrary, it has been reinforced, and guarded from invasion by statutory enactment. Our act of May 23, 1887 (P. L. 158), defining competency, is more than confirmatory of the common-law rule. It declares in express terms that neither shall be permitted to testify against the other, a prohibition of which both the parties to the suit and the trial judge as well are bound to take notice. Connivance by the parties cannot evade it, nor can indulgence by the court. The language of the act is: "Nor shall husband or wife be competent or permitted to testify against each other." Section 5. It is unnecessary to note the exceptions to this provision. We are here considering a case where the husband was called for no other purpose than to testify against his wife. The purpose was as manifest as though it had been avowed. The fact that he was called by the plaintiff may not have been conclusive as to the purpose, since the right of the plaintiff to call him as under cross-examination to elicit testimony affecting only himself may be conceded. But his participation in the removal of the building was not questioned. The whole object of the case was to involve the wife and make her estate liable. Having shown by the witness that he had removed the building, the examination should have been halted right there. Nothing he testified to on this subject gave rise to any inference of the wife's participation. His examination was allowed to proceed in the most direct and positive way to establish as

an independent fact the husband's agency for the wife.

There are cases, notably *Ballentine v. White*, 77 Pa. 20, where it is held that where either husband or wife is called to testify for the other, if upon cross-examination a fact is elicited adverse to the party calling, such fact may properly be considered in the case, since this was a necessary risk incident to the right to call. But the distinction between these cases and the one we are considering is wide and plain. Here the witness was not called by the wife to testify in her behalf, but adversely, and as under cross-examination. This was allowed because he was a party. Suppose he had not been a party, could the plaintiff have made him a witness against the wife? Certainly not. How then does the fact that he was a codefendant alter the case? In no respect at all, except that the plaintiff, in calling him, could not be regarded as accrediting him, and was at liberty to conduct the examination as though it were a cross-examination. The disability to testify against the wife must be the same in either case. In allowing this examination of the witness to establish the wife's participation in the trespass, serious error was committed. But this was not the full extent of the error. We have said that the plaintiff's whole case was made to rest upon the testimony of the husband. The other important feature was the amount recoverable; the trespass having been established. The husband was cross-examined with reference to it, and there is not a syllable of evidence on the subject of damages, except what was enforced out of him by this method. He testified that the value of plaintiff's lot immediately after removal of the house he had erected was \$350; that the value of the lot with the house upon it was \$2,650. Upon this testimony, and this alone, the trial judge directed the jury to return a verdict for the plaintiff for \$2,300, the actual difference. The admission of this evidence was quite as flagrant a disregard of the law as was that with respect to the matter of agency. It was directed against the wife, and its only purpose was to charge her estate.

It is in connection with this feature of the case that we have the only assignment of error that can be sustained, and, indeed, the only one that touches even remotely upon the real error. The plaintiff submitted the following point: "Under the undisputed evidence in the case, the verdict must be for the plaintiff and against the defendant for the sum of \$2,300." The affirmance of this point constitutes the fifth assignment of error. It hardly calls for discussion. Not only was the evidence on which it rested wholly and absolutely incompetent, as against the wife, but even were it otherwise, if the evidence had come from a competent source, its consideration would have

been for the jury. While it may be regarded as an admission by the husband, and therefore conclusive against himself, requiring no submission, as against the wife it was but an expression of an opinion. The fact that defendant offered nothing against it did not establish it as a matter of law for the court to so declare. It is nothing to the purpose to say that the result would not have been different had the case been submitted. How are we to know it would not, except as we assume that the jury would have given the same credit to the witness as did the judge, and put the same construction upon his language? These are considerations peculiarly and exclusively for the jury. Besides, it is not a question of result, but of method in reaching a result. There is only one correct method when the testimony is oral, and especially in cases where damages are to be liquidated, and that is through the deliberate action of the jury. True, the defendant did not specifically ask that the question of damages should be submitted. Such fact has been allowed in some cases to avert reversal; but this is not a case which calls for any effort to save it through any relaxation of established rules. The law gave to this plaintiff the ownership of the house which the defendant built on his lot unwittingly. Assuming that it was removed by these defendants, after they learned of their mistake, they are answerable to the extent of the injury they have done the plaintiff's freehold by removing the improvements they themselves had built thereon. The trial judge determined this injury to be more than seven times the value of the plaintiff's lot and required the jury by their verdict to say the same. If the plaintiff is actually entitled to recover this sum, let it be so determined in the only regular way by the unfettered and deliberate action of a jury.

The sixth assignment of error is sustained.

Judgment reversed, and a venire facias de novo awarded.

MITCHELL, C. J., dissents.

(75 N. H. 580)

STEVENS v. STEVENS et al.

(Supreme Court of New Hampshire. Hillsborough. Oct. 9, 1908.)

GIFTS (§ 49\*)—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding that sums paid by a trustee to cestuis que trust in excess of 6 per cent. interest on the trust fund constituted a gift.

[Ed. Note.—For other cases, see Gifts, Dec. Dig. § 49.\*]

Exception from Superior Court, Hillsborough County.

Action by Calvin A. Stevens, trustee, against Helen L. Stevens and another. From a judgment for defendants, plaintiff brings exception. Exception overruled.

George D. Beattys, for plaintiff. George B. French, for defendants.

MEMORANDUM. Probate appeal. The appellant received the fund in controversy as trustee under the will of William Stevens. He did not invest the fund, but commingled it with his own estate, and paid over from time to time various sums to the cestuis que trustent, who were entitled to the income. The sums so paid exceeded 6 per cent. interest on the fund, for which the trustee consented to be charged. It was found that the excess was a gift from the trustee to the beneficiaries. The trustee excepted to this finding, upon the ground that there was no evidence to support it. As such evidence was found in the manner in which the trust was conducted for a long period and from the relations of the parties, and in letters and oral admissions of the trustee, the order was:

Exception overruled.

PEASLEE, J., did not sit.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**BRIGHTMAN BROS. v. GEORGE M. GRIFFIN & CO.**

(Supreme Court of Rhode Island. Nov. 13, 1908. On Rehearing, Nov. 16, 1908.)

**SALES (§ 33\*)—IMPLIED AGREEMENT.**

Plaintiffs, having contracted as one firm to deliver poultry to defendant, can recover as another firm any sum due for poultry consigned by such other firm, but cannot recover on the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 60; Dec. Dig. § 33.\*]

Exceptions from Superior Court, Providence and Bristol Counties.

Action by Everett Brightman and another, partners as Brightman Bros., against George M. Griffin & Co. From a verdict for plaintiffs, defendants bring exceptions. Exceptions sustained, and case remitted for new trial.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

William M. P. Bowen, for plaintiffs. Littlefield & Barrows, for defendants.

**PER CURIAM.** It appears that the plaintiffs, Everett Brightman and Everett L. Manchester, were copartners together in two firms, one doing business in Maysville, Ky., and styled "E. Brightman & Co.," and the other, called "Brightman Bros.," having its place of business in Hillsboro, Ohio, about 40 miles distant from Maysville; that, by telegraph, on the 16th day of November, 1905, the defendants entered into a contract with the firm of E. Brightman & Co., of Maysville, Ky., to purchase from them 10 tons of turkeys at 21 cents a pound; that on the same day, which was the day before the telegram closing the contract with E. Brightman & Co. had been received by them at Maysville, Ky., Brightman Bros., by their agent at Hillsboro, shipped a consignment of turkeys and chickens to the defendants from Hillsboro, Ohio, and afterwards continued from time to time to ship turkeys to them until the defendants telegraphed to them to send no more on account of the poor quality of the goods shipped. E. Brightman & Co. never shipped any goods to the defendants under their contract with them, and have not brought suit for breach of their said contract. Brightman Bros. have brought suit for breach of defendants' contract with the firm of E. Brightman & Co., and not for goods sold by their own firm to the defendants. The plaintiffs are entitled to recover from the defendants any amount they may be able to prove is due them under their consignment contract with the defendants; but the verdict is evidently not founded upon such consideration, and is clearly against the evidence.

The defendants' exception on that ground is therefore sustained, and the case is remitted to the superior court for a new trial.

**On Rehearing.**

The entire correspondence justified the defendants in believing that there were two distinct firms, and therefore in treating the contracts as they did. Take, for instance, the following statements in the invoices accompanying the goods shipped: "Mr. E. L. Manchester and Mr. Everett Brightman have assured us that they had arranged with you to fully protect us, as turkeys are costing high here, as we have very strong competition." And again: "We are informed by E. Brightman & Co., Maysville, Ky., that they have made deal with you for our turks."

There is nothing in the motion for reargument that has not been fully considered, and the motion is denied.

**ROGERS v. MANN.**

(Supreme Court of Rhode Island. Nov. 13, 1908.)

**1. HIGHWAYS (§ 184\*)—INJURIES TO TRAVELERS—COLLISIONS—NEGLIGENCE—QUESTION FOR JURY.**

Evidence held to support a finding that a collision between a traveler in a buggy on a public highway and an automobile was due to the negligence of the operator of the automobile.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 184.\*]

**2. DAMAGES (§ 131\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.**

Where a traveler on a highway, struck by an automobile, was rendered unconscious for half an hour, and sustained an injury to his knee and stomach, necessitating his remaining in bed for five days under a physician's care, and causing him to have pain in his knee in damp weather, and trouble with his back, a verdict for \$1,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357, 358, 369; Dec. Dig. § 131.\*]

Exceptions from Superior Court, Kent County.

Action of trespass on the case for negligence by Walter Rogers against Edward T. Mann. There was a verdict for plaintiff for \$1,500, which was reduced to \$1,000, and defendant brings exceptions. Overruled.

Plaintiff, while driving on a public road, stopped his horse, and defendant, operating an automobile, traveling behind him in the same direction, collided with plaintiff, throwing him onto the macadam road, rendering him unconscious for half an hour, badly injuring his knee, and also causing injuries to his stomach and cutting his face. On his arrival home he had to be assisted to bed, where he remained for five days under a physician's care, and for three days was unable to get out of the house. His knee continued to pain him in damp weather, and his back also continued to trouble him. The testimony as to the accident is as follows:

According to the plaintiff's direct testimony, on the 27th day of August, 1907, at about a quarter of 9 in the night, he was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

traveling on the old Warwick road alone with his horse and an open buggy from Providence on his way home in the town of Warwick. It was dark. When within approximately 200 yards from the Spring Green schoolhouse he stopped his team on the right-hand side of the traveled part of the road for a short time (might be a minute) to put a blanket over some bottles in the bottom of his buggy to keep them from rolling, and while in that position his buggy was struck by an automobile belonging to and operated by the defendant, who was then traveling behind him on the right-hand side of the road and in the same direction the plaintiff was going. He was thrown onto the ground, and his knees, stomach, and back hurt. After the accident he walked with assistance to the Hotel Willows, near that place, and some three hours later was carried home by the defendant. On cross-examination plaintiff testified that he was familiar with the road where the accident happened; that he had traveled over it about every two or three days in the week; that it is a much frequented and traveled highway with carriages and automobiles; that there were lights along that road probably 150 yards apart, but he had no light on his carriage; that he did not look to see if there were any teams or automobiles coming, nor did he give any warning that he was there.

The defendant testified, in substance, that he knew the old Warwick road thoroughly; that at the time of the accident he was traveling with his automobile on that road from Providence to his summer home in Warwick, as had been his custom for four years; that he did not see the plaintiff's team until he got so close to it he could not stop in time to avoid the collision; that when plaintiff's team was discovered he threw his brake so quickly that it stalled his machine; that the plaintiff, after the collision, in trying to get from his buggy, fell from it, and told the defendant he was drunk; that plaintiff was in the bottom of his buggy, and he adjudged him to be asleep. The defendant was familiar with the running of an automobile, and says he was going on right-hand side of road at rate of about seven or eight miles an hour; that he was looking ahead of him all the time, to see if there were any teams in the way. His automobile was lighted with two lights. The road at the place of the accident was macadamized about 25 feet wide, level, and nearly straight. There were electric lights on poles along the roadway placed about 600 feet apart. The electric lights furnished light only about 20 feet each side of the poles. The defendant had passed about 50 feet beyond the rays of one of those electric lights when he hit the plaintiff's buggy. It was so dark when defendant got out of the rays of the electric light that he did not see plaintiff. The defendant said, "As you

come up to one of the electric light poles, the glare of the light in your eyes, and pass under it, it is very dark after it, a good deal more so than if there was no light there," and the lights on the automobile were not enough to overcome that difficulty. Plaintiff said he had no business standing where he was, and the blame was his own, and not defendant's.

A witness who had had experience in running automobiles over old Warwick road after dark testified as to blinding effect on eyesight in passing under rays of electric lights by the roadside. Another witness testified that after one had ridden up to one of those lights it was almost impossible to see anything after passing out of that light until you get quite a little way into the shadow again. It had the same effect on eyesight as passing from a lighted room into a very dark place. He had passed under these lights in a carriage probably three nights in a week during the summer time. There were no houses near place of accident, and nothing to cause defendant to think a team might be stopped there for any purpose. The automobile brakes were in good working order. In running the automobile at the rate of seven or eight miles an hour, the defendant could stop it within space of three or four feet. The plaintiff also stated, shortly after the accident, that no one was to blame for it but himself. He made practically a like statement to another at the hotel before leaving the place that night.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

P. Henry Quinn, for plaintiff. Charles E. Salisbury, for defendant.

PER CURIAM. There is testimony which warranted the jury in finding that the collision, in which the plaintiff was injured, was the result of the defendant's negligence. In view of the condition of the plaintiff's back and knee, the damages, reduced by the plaintiff in accordance with the decision of the superior court, are not now excessive.

The defendant's exceptions are therefore overruled, and the case is remitted to the superior court for judgment on the verdict so reduced.

#### BETZ v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Nov. 14, 1908.)

CARRIERS (§ 347\*)—STREET RAILROADS—PASSENGERS—CONTRIBUTORY NEGLIGENCE—RIDING ON RUNNING BOARD—JURY QUESTION.

Whether a street railway passenger was guilty of contributory negligence in riding on the running board when injured was a question of fact.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1379; Dec. Dig. § 347.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Exceptions from Superior Court, Providence and Bristol Counties.

Personal injury action by Toby Betz against the Rhode Island Company. From a verdict for plaintiff, defendant brings exceptions. Exceptions overruled, and case remitted for judgment.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

John P. Beagan and John J. Richards, for plaintiff. Joseph C. Sweeney and Clifford Whipple, for defendant.

**PER CURIAM.** The accident was the result of the negligence of the defendant's motorman in causing the car controlled by him to overtake and collide with a milk wagon as a result of excessive speed in the circumstances. Whether the plaintiff was guilty of contributory negligence in riding on the running board of the car at the time of the accident is a question of fact, which the jury properly decided in the negative. The damages awarded by the jury, after deducting the amount remitted by the plaintiff under the direction of the superior court, do not appear to us to be so clearly excessive as to warrant our interference on that account.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict for \$1,200.

#### BLACKMAR et ux. v. RHODES.

(Supreme Court of Rhode Island. Nov. 11, 1908.)

Appeal from Superior Court, Providence and Bristol Counties.

Suit by George A. Blackmar and wife against John C. Rhodes. Decree of dismissal, and complainants appeal. Dismissed, decree affirmed, and cause remanded.

Argued before DUBOIS, JOHNSON, PARKHURST, and BLODGETT, JJ.

Page & Page, for complainants. Nathan W. Littlefield, for respondent.

**PER CURIAM.** Careful examination of the transcript of testimony and rescript of the superior court fails to disclose any error on the part of said court in its conclusions of law and fact.

The appeal is therefore dismissed, and the decree appealed from is affirmed, and the cause is remanded to the superior court for further proceedings.

#### STAPLES v. MAYMON.

(Supreme Court of Rhode Island. Nov. 14, 1908.)

Exceptions from Superior Court, Providence and Bristol Counties.

Action by Oliver Staples against Thomas B. Maymon. A demurrer to the declaration was sustained, and plaintiff excepts. Exceptions overruled, and case remitted.

Argued before DUBOIS, JOHNSON, PARKHURST, and BLODGETT, JJ.

Page & Cushing, for plaintiff. Charles R. Easton, for defendant.

**PER CURIAM.** We find no error in the ruling of the superior court sustaining the defendant's demurrer to the plaintiff's declaration.

The plaintiff's exceptions are therefore overruled, and the case is remitted to the superior court for further proceedings.

(81 Vt. 456)

#### STATE v. RICKER.

(Supreme Court of Vermont. Orange. Oct. 30, 1908.)

##### FALSE PRETENSES (§ 26\*)—INFORMATION.

An information charged that defendant unlawfully, etc., falsely pretended to prosecutor that H. had mailed to defendant, "as his" (defendant's) property, a check for \$1,500 at such a time that, by the regular course of mail, it would be delivered at about 5 o'clock that afternoon, that defendant knew that the check had not been so mailed, and that he made such pretenses fraudulently, and with intent to induce prosecutor to deliver to him sheep of the value of \$1,200, with intent to defraud prosecutor thereof, which he did by such means, etc. *Held*, that the information sufficiently charged that defendant represented that the check was his property, and was not defective for failure to allege the check to be of value, and that it was to be delivered to prosecutor, he having been cheated by the pretense that the check had been mailed.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 31; Dec. Dig. § 26.\*]

Exceptions from Orange County Court; Eleazer L. Waterman, Judge.

Information against B. Frank Ricker, for obtaining goods under false pretenses. Demurrer to information overruled, and defendant brings exceptions. Affirmed and remanded.

Argued before ROWELL, C. J., and MUNSON and WATSON, JJ., and MILES, Superior Judge.

March M. Wilson, State's Atty., for the State. David Conant, for respondent.

**ROWELL, C. J.** This is an information for false pretenses. It alleges, with time and place, that the respondent unlawfully, knowingly, and designedly falsely pretended to one Rowell, of Randolph, Vt., that one Hollis, of Boston, Mass., had already mailed to him (the respondent) as his (the respondent's) property such a company's check for \$1,500 at such a time that, by the regular course of mail, it would be delivered at said Randolph at or about 5 o'clock in the afternoon of that same day; that the respondent then and there knew that said check was not mailed from Boston, and would not be delivered at Randolph, as he pretended; that he made said pretenses and representations fraudulently, with intent to induce said Rowell to deliver to him a large number of sheep of great value, to wit, of the value of \$1,200, and with intent to defraud said Rowell thereof; that by means of said false pretenses and representations the respondent



then and there induced said Rowell to deliver said sheep to him, and so obtained possession thereof, and converted the same to his own use; that, except for the use of said false pretenses, the respondent could not have obtained said sheep from said Rowell; and that the respondent in such manner, by his false pretenses, defrauded said Rowell out of said sheep. It is objected on demurrer that the information is bad, and said that the real and only question is whether its allegations sufficiently and certainly charge the respondent with falsely pretending and representing that he had this property and owned it, so as to amount to a false representation that he was worth so much money, was in a sound pecuniary condition, or had any particular property. On this question it is urged that the words "as his (the said Ricker's) property," used in the information, do not imply that the respondent pretended or represented that he owned the check; and if they do, it is not alleged that he represented it to be of any value, nor that it should be delivered to Rowell; that while those words imply that the check was mailed to the respondent, they also imply that there was some condition or circumstance that showed it was not his property. But the representation was that Hollis had already mailed the check to the respondent as his (the respondent's) property, the natural meaning of which is that it was his property, and subject to his control and use as such. The want of an allegation that the respondent represented the check to be of value, and that it was to be delivered to Rowell, is immaterial; for Rowell was cheated by the false pretense that the check had been mailed, which was well adapted to induce him to part with his sheep as he did, and is enough, having been made designedly and with intent to defraud, as alleged.

Judgment affirmed, and cause remanded.

(81 Vt. 454)

#### STATE v. STEVENS.

(Supreme Court of Vermont. Lamolle. Oct. 24, 1908.)

##### 1. CRIMINAL LAW (§ 719\*)—TRIAL—ARGUMENT OF ATTORNEY.

In an prosecution for cruelty to animals consisting of shooting a cow, a statement of the state's attorney in argument that the defense had produced no witnesses that visited the farm of S. until two or three weeks or two months after the shooting, until after prosecution at J. on a certain date referred to, which appeared from the testimony, was not objectionable as outside the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.\*]

##### 2. CRIMINAL LAW (§ 730\*)—STATEMENT OF ATTORNEY—PREJUDICE.

Where, on an objection to a statement of the state's attorney, the court ruled that the statement might be discarded and allowed the

exception, defendant could not have been prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.\*]

##### 3. INDICTMENT AND INFORMATION (§ 125\*)—DUPLICITY—DIFFERENT ACTS—SINGLE OFFENSE.

It is not necessarily duplicity to charge in a single count of an information the commission of the same offense upon two or more persons or animals.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 392; Dec. Dig. § 125.\*]

##### 4. CRIMINAL LAW (§ 970\*)—DUPLICITY—EJECTION—TIME.

An objection to an information for duplicity cannot be taken advantage of by motion in arrest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2453; Dec. Dig. § 970.\*]

Exceptions from Lamolle County Court; Seneca Haselton, Judge.

Mark Stevens was convicted of cruelty to animals, and he brings exceptions. Overruled.

The statement of the state's attorney made in argument to the jury referred to in the opinion was as follows: "The defense has produced no witnesses that visited the farm of Mr. Stevens until two or three weeks or two months after the shooting of the cow until after prosecution at Jeffersonville, the 6th of February. To this argument the respondent asked to be allowed an exception. The court then said, speaking to Mr. Tracy: 'You may proceed, and the defense may except later if they desire.'" Upon objection being interposed, the court ruled: "The statement of Mr. Tracy may be discarded." And the respondent asked an exception. The court said: "Exception allowed for what it is worth."

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

W. E. Tracy, State's Atty., for the State. M. P. Maurice and R. W. Hulburd, for respondent.

MUNSON, J. The statement made in argument by the state's attorney, and excepted to by respondent's counsel, had reference to what appeared from the testimony, and not to anything outside the case. If the statement was erroneous, no harm can have come from it, for the taking of the exception must have advised the jury that its accuracy was questioned, and the court's remark to them on allowing the exception was a plain direction, not to rely upon it. This was in effect leaving a disputed matter to the recollection of the jury, if not again brought to their attention. If considered important, respondent's counsel could have had the minutes of testimony examined, and any error corrected at the close of the argument.

The respondent moved in arrest on the ground of duplicity. The claimed duplicity

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lies in charging in a single count the commission of the same offense upon several animals. Some things done to two or more are properly alleged as constituting but one offense, for instance, assaulting two persons at the same time (*Commonwealth v. O'Brien*, 107 Mass. 208); administering poison to several persons by the same act (*Ben v. State*, 22 Ala. 9, 58 Am. Dec. 234); overloading two horses harnessed to the same load (*Blish. Dir. & Forms*, §§ 347, 348; *Blish. St. Cr.* § 1121). But it is not necessary to inquire whether the matter charged here is one that may be thus alleged. If the information is insufficient in this respect, the objection comes too late; for duplicity cannot be taken advantage of by motion in arrest. 1 *Blish. New Cr. Pro.* §§ 442, 443; *State v. Johnson*, 8 Hill (S. C.) 1; *People v. Garnett*, 29 Cal. 622; *Kilbourn v. State*, 9 Conn. 560.

Exceptions overruled, and execution of sentence ordered.

(*11 Vt. 443*)

### OTIS v. TOWN OF BRIDPORT.

(Supreme Court of Vermont. General Term. Nov. 2, 1908.)

#### 1. ANIMALS (§ 88\*)—SHEEP KILLED BY DOGS—TOWN'S LIABILITY—DUTY OF SELECTMEN.

*Pub. St.* 1906, § 5639, provides that whoever suffers a loss by the killing of his sheep by dogs may inform one of the selectmen of the town in which the damage was done, who shall determine whether it was done by dogs, and, if so, appraise the amount and return a certificate thereof to the selectmen, and section 5644 declares that, on the selectmen's failure to perform such duty, the sheep owner may recover the loss of the town. *Held*, that a selectman's certificate reciting that he had considered the evidence presented to him and was unable to determine whether any sheep had been killed or not, etc., and was therefore unable to say that any damage had been done to plaintiff's sheep by dogs in the town or to appraise any damages resulting therefrom, was not a performance of the selectmen's duty, which was to decide one way or the other, and hence the owner's right of action against the town accrued by the terms of the statute.

[*Ed. Note.*—For other cases, see *Animals*, Dec. Dig. § 88.\*]

#### 2. APPEAL AND ERROR (§ 1064\*) — INSTRUCTIONS—PREJUDICE.

Where, in an action against a town for the value of sheep killed by dogs, defendant's evidence showed that its selectman failed to perform his duty to determine whether the damage had been done by dogs, and the court should therefore have submitted the case on the general issue only, the town was not prejudiced by an instruction that, if the selectman notified did not make a full, fair, and honest investigation, he did not perform his duty, and plaintiff could recover if he made out his case in other respects.

[*Ed. Note.*—For other cases, see *Appeal and Error*, Dec. Dig. § 1064.\*]

#### 3. APPEAL AND ERROR (§ 1067\*) — INSTRUCTIONS—PREJUDICE.

Where a selectman called to determine a loss of sheep killed by dogs failed to decide the matter at all, but returned a certificate that he was unable to determine the claim, defendant

town in an action for the loss sustained was not prejudiced by the court's omission to charge that the burden was on plaintiff to make out his case before the selectmen.

[*Ed. Note.*—For other cases, see *Appeal and Error*, Dec. Dig. § 1067.\*]

#### 4. ANIMALS (§ 88\*)—SHEEP KILLED BY DOGS—LIABILITY OF TOWN—ACTIONS—INSTRUCTIONS.

Where a selectman notified of the killing of plaintiff's sheep by dogs certified that he was unable to determine whether the sheep were killed by dogs or the loss sustained, and thereby failed to perform his duty, the court in an action against the town properly refused to charge that the selectman was entitled to an opportunity to view the carcasses of the sheep, and examine the premises, and that the jury could consider the removal of the carcasses and the failure to notify the selectmen for a week as suspicious circumstances, in determining whether the sheep were killed by dogs or not, in case they found that the selectmen had not properly performed their duties.

[*Ed. Note.*—For other cases, see *Animals*, Dec. Dig. § 88.\*]

Exceptions from Addison County Court; George M. Powers, Judge.

Action by Charles W. Otis against the town of Bridport. Verdict for plaintiff, and defendant brings exceptions. Affirmed.

The following are the instructions requested by the defendant, and referred to at the end of the opinion as having been refused:

"(1) The jury are instructed that if one of the selectmen of defendant town of Bridport, upon being informed by the plaintiff that some of his sheep had been maimed or killed by dogs within the limits of the defendant town, proceeded to the premises where the damage was done and determined that no damage had been done by dogs within the limits of said town to any sheep owned by the plaintiff, then the selectmen fully performed the duties incumbent upon them and the said town of Bridport in the premises, and, the statute not having provided for any action except upon the failure of the selectmen to perform their duties, you will bring in a verdict for the defendant.

"(2) That the statute contemplates that the selectmen to whom the notice of the killing of sheep by dogs is given shall have the opportunity of viewing the carcasses of the sheep, and of determining from an examination of the same and of the premises where the damage was claimed to have been done whether said sheep were killed by dogs or not before said sheep are removed or disturbed, and that the removing of said carcasses and a failure for about a week to notify the selectmen or selectman of a town in which the damage was done are suspicious circumstances, proper to be taken into consideration by the selectmen in determining whether the said sheep were killed by dogs or not, and proper to be taken into consideration by you in determining the same question, in case the selectmen of the town have

not fully performed their duties in the matter.

"(3) That the burden is upon the plaintiff of making out his case by a fair balance of the proof, and that this same burden rested upon him of making out his case when he called Mr. Stone as a selectman of Bridport to view the premises and carcasses.

"(4) That, the pasture being partly in Bridport and partly in Cornwall, the sheep last seen in the early evening on the high ground near the highway in Cornwall, where they were accustomed to spend the nights, all the dogs in the neighborhood being located in Cornwall to the east or easterly, northeasterly or southeasterly of where twelve of the sheep were found, and the remaining sheep found dead or dying in Cornwall, a ditch lying just west and a fence just south of where the twelve sheep were found, are circumstances all tending to show that the sheep were driven into Bridport from the high ground of Cornwall, and are circumstances tending to show that the maiming or killing of the sheep or both may have occurred in Cornwall before the sheep fled ahead of the dogs into the Bridport part of the pasture to die."

"(5) The jury are instructed that if one of the selectmen of the defendant town, upon being informed by the plaintiff that some of his sheep had been maimed or killed by dogs within the limits of the town of Bridport, proceeded to the premises where the damage was done, and reported to the board of selectmen of said town that he was utterly unable from the evidence presented to find and determine that any damage had been done by dogs to any sheep owned by the plaintiff within the limits of said town, then the selectmen fully performed the duties incumbent upon them and the said town of Bridport in the premises, if in the December following they, as a board, acting on said report, determined that no damage had been done by dogs to plaintiff's sheep within defendant town, and, the statute not having provided for any action except upon the failure of the selectmen to perform their duties, you will bring in a verdict for the defendant."

Argued before ROWELL, C. J., and MUNSON and WATSON, JJ., and MILES, Superior Judge.

Wm. H. Bliss, for plaintiff. Chas. I. Button and James B. Donoway, for defendant.

ROWELL, C. J. This is debt founded on Pub. St. 1906, § 5644, to recover for sheep killed by dogs in the defendant town. Section 5639 provides that whoever suffers loss by the killing of his sheep by dogs may inform one of the selectmen of the town in which the damage was done, who shall proceed to the premises where it was done, and determine whether it was done by dogs, and, if so, that he shall appraise the amount

thereof, and return a certificate of the amount to the selectmen of the town. Section 5644 provides that, upon failure of the selectman to perform his duty in this respect, the party suffering the loss may recover it of the town in an action of debt founded thereon. The defendant pleaded nil debit, and gave notice thereunder that it would prove and rely upon in defense the performance of his duty by the selectman. Under the notice the defendant offered in evidence a certificate that the selectman returned to the board of selectmen, wherein he stated that, after looking the premises over, and carefully considering the evidence presented to him by the plaintiff, etc., he was utterly unable to determine whether any sheep had been killed or not, and, if any had been killed, whether they had been killed in Bridport or not; and, if any had been killed in Bridport, whether they were killed by dogs or not, and that, therefore, he was unable to say that any damage had been done to plaintiff's sheep by dogs in said town; and that he was unable to appraise any damage resulting from said alleged killing of sheep, and that there was no evidence presented from which he could have appraised the damage had any been shown. The court excluded the certificate, to which the defendant excepted. The exclusion was right, for the certificate showed the determination of nothing except the selectman's inability to determine whether any of the things before him for decision were true or not, thereby leaving them as much open and at large as they were before, whereas it was his duty to decide them one way or the other, failing which he failed to perform his duty, whereupon an action of debt accrued to the plaintiff by the very terms of the statute. But notwithstanding the exclusion of the certificate, the defendant introduced oral testimony tending to show substantially the same as the certificate showed.

The court charged the jury that, if the selectman who was notified and went to the premises made a full, fair, and an honest investigation, he performed his duty, and the plaintiff could not recover. But, if he did not make such investigation, he did not perform his duty, and the plaintiff could recover, if his case was made out in other respects. The defendant claims that this was error. But, if it was, it favored the defendant, for its testimony did not tend to show that the selectman performed his duty, but only that he did not perform it, and therefore showed no defense to the action on the ground of performance, and the court should have so ruled, and put the case to the jury on the general issue only.

It is unnecessary to say anything about what the court charged as to the duty of the board of selectmen in December, for there were no facts before the board that imposed any duty upon it in respect of the matter.

The court charged as requested that the burden was on the plaintiff to make out his case before the jury, but it did not charge, as requested, that the burden was on him to make out his case before the selectman who went to the premises. But, if the burden was on him and he did not discharge it, he was not thereby defeated; for in that case it was the duty of the selectman to decide against him, which he did not do, but omitted to decide at all, and thereby failed to perform his duty. So the defendant was not harmed by the omission of the court to charge as requested in this respect. The defendant made several other requests to charge, all of which were refused, and rightly, for none of them were sound in view of the evidence.

Judgment affirmed.

(81 Vt. 487)

**LARRAWAY v. TILLOTSON.**

(Supreme Court of Vermont. Lamolle. Oct. 31, 1906.)

**1. LANDLORD AND TENANT (§ 239\*)—LEASE—CONSTRUCTION—LANDLORD'S LIEN—SALE OF PRODUCE.**

A lease provided that the lessor should receive one-half of all the produce of the farm as soon as sold, until the entire cash rent was paid, and reserved to the lessor a lien on the same for the payment of rent. A subsequent clause required the lessee to leave as much hay on the farm as when he took possession, and provided that he should pay at the rate of \$5 a ton for any deficiency, and receive from the landlord at the same rate for any excess. *Held*, that the lease reserved to the lessor the power of sale of the produce of the farm until the rent was paid in full, together with a lien thereon.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 975; Dec. Dig. § 239.\*]

**2. LANDLORD AND TENANT (§ 239\*)—LIEN ON CROPS—EFFECT.**

Where the lease of a farm reserved a lien on the produce to the landlord with a power of sale to secure payment of rent, the landlord acquired the sole property in the produce until the lien was satisfied.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 975; Dec. Dig. § 239.\*]

**3. LANDLORD AND TENANT (§ 252\*) — LANDLORD'S LIEN—VALIDITY—PURCHASERS FROM TENANT—NOTICE.**

The landlord's lien on the produce of a farm to secure rent reserved in the lease is valid, not only between the parties, but as against purchasers of the produce from the tenant without notice.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1022-1023; Dec. Dig. § 252.\*]

Exceptions from Lamolle County Court; Seneca Haselton, Judge.

Trover action by Frank Larraway against L. E. Tillotson. Trial by the court on an agreed statement of facts. Judgment for defendant, and plaintiff brings exceptions. Sustained. Judgment reversed and rendered for plaintiff.

The fifth clause of the lease referred to is as follows: "The said Root is to leave as much hay on the said farm as when he took possession October 10, 1906, but, in case there is more hay than when said Root took possession, then the said Larraway is to pay the said Root \$5 per ton for all that it runs over, and, in case there is not so much hay, then the said Root is to pay the said Larraway the sum of \$5 per ton for all that it is short."

W. E. Tracy, for plaintiff. M. P. Maurice, for defendant.

TYLER, J. This case was tried in the court below upon the following agreed facts: "The plaintiff, Larraway, leased a farm and stock to one John Root under a written lease, which is herewith submitted. During the spring of 1907 the tenant manufactured sugar on the farm, and sold it to the defendant to the amount of \$71, and the defendant paid him for it. The defendant had no notice of the terms of the lease, except as they were to be obtained from a record of the lease in the town clerk's office in Waterville, nor had he any other notice or knowledge of the existence of the lease nor that Root was the plaintiff's tenant. No notice or demand was made by the plaintiff on the defendant of the plaintiff's claim as indicated by the lease until the last of May, 1907. The defendant refused to return the sugar to the plaintiff or pay him therefor. Root has not paid the rental on the farm as specified in the lease, at least, to the amount of \$53.49." The lease, which was for one year and is referred to and made part of the agreed statement, provided that the lessee should pay the lessor \$150 as rental for the term of one year, as follows: The lessor should receive one-half of all the income, increase, products, and produce of every kind raised upon the farm as soon as the same was sold until the \$150 was paid. He reserved a lien upon the same for the payment of the rent and for the faithful performance of the contract. It is true, as the defendant contends, that the fair implication from the fifth clause in the lease, considered by itself, is that the lessee was to have the power of sale of the products of the farm; but that clause and the one reserving a lien must be considered together, and a construction must not be given the former clause that will invalidate the latter. Full effect must be given to both, and, giving them such effect, we hold that the power of sale was retained by the lessor until such time as the rent was fully paid and the other conditions of the lease were performed.

As to the effect of the lien, it is not necessary to look beyond our own decisions for authority. In *Smith v. Atkins*, 18 Vt. 461, the condition of the lease was: "That the crops were to be and remain the sole property of the plaintiff as a lien and security for the payment of the rents." In *Baxter v. Bush*,

29 Vt. 465, 70 Am. Dec. 429, the condition was: "That the plaintiff shall have a full lien on the crops of that year as security for the payment of the rents." The court held that there was no difference in principle between the two cases; that in each case the plaintiff was to have the sole property in the crops as a lien. It is well settled that a lien reserved in a lease on crops to be raised places the sole ownership in the lessor until all the conditions and provisions of the lease have been fully complied with. In such cases the reservation of the lien amounts in law to a retention by the lessor of the title to the property. Such a lien is valid, not only between the parties, but as to third persons. In this view notice to the defendant of the plaintiff's title was not essential. It was held in *Buswell v. Marshall*, 51 Vt. 87; that the rights of a lessor, through a lien reserved in the lease, to crops raised on premises demised for a term of years, are not, as against attaching creditors of the lessee, affected by defective registration or want of acknowledgment of the lease.

Judgment reversed, and judgment for the plaintiff to recover \$53.49.

(51 Vt. 490)

#### In re MEADON'S ESTATE.

(Supreme Court of Vermont. Rutland. Oct. 30, 1908.)

#### TAXATION (§ 868\*)—COLLATERAL INHERITANCE TAX—ASSESSMENT—STATUTES—CONSTRUCTION.

Pub. St. 1906, § 822, imposes a collateral inheritance tax of 5 per cent. on legacies, except as otherwise provided, and section 824 declares that, if a tax is lawfully paid on a legacy to another state or government, the legatee shall only be required to pay the amount of such part of the tax, imposed by section 822, as will make the entire tax in both states equal to 5 per cent. of the total value of the legacy. Section 825 declares that no rebate shall be allowed under such sections until competent evidence, showing the amount paid to such other state or government, the date of payment, the rate, valuation of the property, and brief description thereof, is presented to the probate court. *Held*, that the rebate was only allowable on so much as had been actually paid elsewhere, and did not include a discount from the tax paid in another state, allowed there for prompt payment.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 868.\*]

Appeal from Probate Court, Rutland County; Wm. M. Taylor, Judge.

Judicial settlement of the estate of Nancy M. Meadon, deceased. On petition for the determination of a collateral inheritance tax. From a judgment affirming a judgment of the probate court in favor of the estate, the state appeals. Reversed and rendered.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Clarke C. Flitts, Atty. Gen., and Hale K. Darling, for the State. Lawrence & Lawrence and B. L. Stafford, for appellee.

WATSON, J. A collateral inheritance tax of 5 per cent. of the value in money of the legacy or distributive share on which it is based, except as otherwise provided, is required by statute to be paid to the state. Pub. St. 1906, § 822. One modification of this provision is that, if an inheritance transfer, succession, legacy, or a similar tax has been lawfully paid to another state, or to a government other than the United States, for or on account of a legacy, distributive share, or a part thereof, decreed, etc., by a probate court of this state to a legatee or heir liable to the tax imposed by that section, such legatee or heir shall be liable to pay to this state, under the provisions of that section, only such part of the tax therein imposed as will make the entire tax, both within and without this state, based on such portion of a legacy or distributive share taxed in such other state or government, equal to 5 per cent. of the total value thereof, to be determined as provided in the chapter of the statute relating to such taxes. Pub. St. § 824. In the case at bar a portion of the estate, decreed by the probate court in this state subject to the payment of the 5 per cent. collateral inheritance tax, had been lawfully subjected to the payment of a transfer tax to the state of New York. The statute of that state provides for such a tax of 5 per centum upon the clear market value of the property, except as otherwise prescribed, and that if such tax is paid within six months from the accrual thereof, a discount of 5 per centum shall be allowed and deducted therefrom. The tax there imposed was paid by the executor of the estate within such six months, and a discount of 5 per centum was allowed and deducted accordingly. The sole question here is, whether the amount of the tax as there imposed, or only the amount actually paid, is to be rebated from the amount of the tax imposed by the law of this state. Section 825 provides: "No rebate from the full amount of the tax required by the third preceding section shall be allowed under the provisions of the preceding section, unless an official receipt or other competent evidence, showing the amount so paid to such other state or government, the date of payment, the rate, the valuation of the property upon which such tax was computed and a brief description thereof, is presented to the probate court." The fact that the statute thus in express terms requires such official receipt or other evidence to show the amount so paid to such other state or government, and is silent respecting the amount of the tax there imposed, although from other data required to be shown it may be ascertained by computation, makes it clear that the intent of the Legislature was to allow in rebate only so much as has lawfully thus been actually paid elsewhere, and the statute is so construed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Judgment reversed, and judgment for the state, to recover \$45.43, and interest thereon since August 31, 1907, together with costs of appeal. To be certified to the probate court.

(81 Conn. 325)

### WHITE v. AVERY.

(Supreme Court of Errors of Connecticut. Nov. 11, 1908.)

#### 1. PLEADING (§ 217\*)—DEMURRER—EFFECT.

On demurrer, the court considers the whole record and gives judgment for the party who, on the whole, appears entitled thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 540, 541; Dec. Dig. § 217.\*]

#### 2. PLEADING (§ 214\*)—DEMURRER—ADMISSIONS.

Where, in a suit for cutting timber, the writ described the land, and the trees which were the subject-matter of the controversy, a demurrer to a petition by defendant for a new trial for newly discovered evidence did not admit the allegation therein that defendant had used all possible means up to and at the time of the trial to ascertain a description of the land, and the number of trees that had been cut thereon; it also appearing that more than five years had elapsed between the commencement of the suit and the rendition of judgment.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 214.\*]

#### 3. NEW TRIAL (§ 162\*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

To entitle a party to a new trial for newly discovered evidence, it is indispensable that he should have been diligent in his efforts to fully prepare his cause for trial, and, if the newly discovered evidence could have been discovered with reasonable diligence, a new trial will not be granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 210; Dec. Dig. § 102.\*]

#### 4. NEW TRIAL (§ 102\*)—NEWLY DISCOVERED EVIDENCE—NEGLIGENCE.

Suit was brought against petitioner on November 13, 1901, for cutting timber on land described in the writ, which also stated the number and size of the trees claimed to have been cut, etc. Shortly thereafter petitioner had a surveyor run the lines, and make a map of the land, but took no steps for more than five years and until after the judgment to examine the lot and count the stumps of the trees cut, and determine their number. *Held*, that the fact that plaintiff's title to the land was shown by parol proof of a lost deed was not a sufficient excuse for petitioner's failure to make an examination of the premises before trial, and that he was therefore not entitled to a new trial for alleged newly discovered evidence that a subsequent count of the stumps showed the cutting of a less number of trees than that for which plaintiff recovered.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 212; Dec. Dig. § 102.\*]

Appeal from Superior Court, New London County; Silas A. Robinson, Judge.

Action by Sherwood G. Avery against Charles E. White. Judgment for plaintiff. From an order sustaining a demurrer to defendant's petition for a new trial for newly discovered evidence, he appeals. Affirmed.

George W. Meloney, for appellant. William H. Shields and Donald G. Perkins, for appellee.

RORABACK, J. The rules and principles which govern in applications for new trials are well settled in this state, and have been recently and fully set forth. *Gannon v. State*, 75 Conn. 578, 577, 578, 579, 54 Atl. 199.

The petition in this case avers, that "on November 13, 1901, this defendant brought suit against this plaintiff, returnable before the superior court for the county of New London aforesaid on the first Tuesday of December, A. D. 1901, claiming that between October 28, 1901, and November 13, 1901, without the license of the said Avery, the said White by his workmen and servants and teams entered upon land of the said Avery, described in said writ, and cut, destroyed, and carried away and injured 31 trees over one foot in diameter, 34 trees one foot in diameter, and 390 trees under one foot in diameter, and claiming damages therefor. \* \* \* On December 11, 1906, in the superior court for said county of New London, trial was had of said cause upon issue joined on the answer of this plaintiff before a jury, and a verdict was rendered against this plaintiff for \$585 damages, which was accepted by the court, and judgment rendered thereon." At and up to the time of the trial this plaintiff has used all possible means of determining what the land was which was so claimed by the said Avery upon which it was claimed this plaintiff had so cut said trees, but was unable so to do because the land records of the town of Bozrah, in which town said land was situated, did not show the title thereto in the said Avery, or what said land was on which said trees were claimed to be cut, but upon trial it was proved by said Avery that said land had been conveyed to him by a deed which had been lost, and had never been recorded, and this was the first time that this plaintiff had any knowledge of said deed, or had any opportunity of ascertaining how many trees had been cut upon the land in question. The testimony in the former trial and the newly discovered testimony also appear in full in the proceedings for a new trial. The newly discovered evidence upon which the petitioner relies is as follows: "This plaintiff, also S. Arnold Peckham, of Willimantic, Conn., J. Calvin Brown, of Willimantic, Conn., Charles E. Pitcher, civil engineer, of Norwich, Conn., and ——— Pitcher, of Norwich, Conn., together on December 22, 1906, personally inspected the land in question, and in the presence of all said witnesses the said Charles E. Pitcher, civil engineer, from information obtained from said lost deed upon the trial, pointed out and showed the exact location of the lines of said land, as claimed by the said Avery, and then and there all said persons on personal inspection counted all trees up to that time cut upon said land, and all said witnesses will testify that on said last named day no more than 241 trees of two inches in di-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ameter, and no more had been cut on said land within six years before the day last aforesaid." This petition was demurred to on several grounds, the substance of which may be stated as follows. Because it appears from the said petition that the evidence is not newly discovered, it could have been discovered by the use of due diligence, and that the evidence is merely cumulative in its character. This demurrer was sustained for the reasons therein set forth.

The petitioner's claim that the demurrer admits the allegations of his petition "that he used all possible means up to and at the time of the trial of ascertaining a description of the land upon which it was claimed that said trees had been cut, and the number of trees that had been cut thereon," is hardly tenable. On demurrer the court considers the whole record, and gives judgment for the party who, on the whole, appears to be entitled to it. A demurrer does not admit any averment contradicting what before appears certain on the record. Notwithstanding the allegations in the petition that the petitioner before trial used all possible means of ascertaining a description of the land and trees in question, it further appears that the writ in the former suit contained a description of the land and of the trees which were the subject-matter of that controversy. In this connection it is also important to note that it further appears that the suit in the former action was commenced November 13, 1901, and that judgment was not rendered therein until December 11, 1906, and that no effort was made to obtain this evidence until December 26, 1906. To entitle a party to a new trial for newly discovered evidence, it is indispensable that he should have been diligent in his efforts fully to prepare his cause for trial; and, if the new evidence relied upon could have been known with reasonable diligence, a new trial will not be granted. *N. & W. R. R. Co. v. Cahill*, 18 Conn. 493; *Waller v. Graves*, 20 Conn. 305, 309; *Travelers' Ins. Co. v. Savage*, 43 Conn. 181. The proposed new evidence at once discloses the facility with which it might have been procured. This evidence consists of the testimony of five witnesses who state that on December 22, 1906, they made an examination of the lot in question and counted the stumps of the trees alleged to have been cut, and that there were no more than 241 trees of two inches in diameter cut upon said lot within six years. The petitioner knew, when the action was commenced in 1901, that Mr. Avery claimed that he had cut and carried away from his land described in the writ 31 trees over one foot in diameter, 34 trees one foot in diameter, and 390 trees under one foot in diameter. The stumps upon this lot were in existence and could have been seen and counted by any one making an examination of the land at any time from

November, 1901, to the trial in December, 1906. The fact that title to the land in question was shown by parol proof of a lost deed cannot be accepted as a sufficient excuse in not making an examination of the premises before trial. As already stated, it appears that the writ issued upon the commencement of the former suit in 1901 described the land of Mr. Avery upon which it was claimed the petitioner had cut a certain number of trees of different dimensions. It further appears from the testimony given in the first trial that the petitioner in the latter part of October, 1901, was informed of the location of this wood lot and had pointed out to him the boundaries thereof; that shortly after Mr. Avery had commenced suit in November, 1901, Mr. White employed a surveyor who ran the lines and made a map of the land in question. The writ served upon the petitioner furnished a description of the property in controversy, and the number and size of the trees claimed to have been cut thereon. The boundary of this property had been pointed out and a survey made. The petitioner neglected for five years to take any steps to procure this evidence until after judgment had been rendered against him. It is quite clear that the petitioner was fairly put upon inquiry to find this alleged newly discovered evidence long before trial, and it is a little difficult to understand why during the long period given for preparation he should not have looked for this evidence where he now claims to have found it after the trial. Such conduct can hardly be said to be reasonable diligence. It cannot even be called diligence.

There is no error. In this opinion the other Judges concur.

(104 Me. 49)

HASLAM v. JORDAN et al. (two cases).

(Supreme Judicial Court of Maine. March 2, 1908.)

1. DEEDS (§ 14\*)—EVIDENCE (§ 419\*)—CONSIDERATION—SEISIN—REFERENCE.

As between the parties to a deed, no consideration is necessary, and the only effect of the consideration clause in a deed is to estop the grantor from alleging that the deed was executed without consideration. For every other purpose the consideration may be varied or explained by parol proof.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 23-25; *Dec. Dig.* § 14;\* *Evidence*, Cent. Dig. §§ 1912-1917; *Dec. Dig.* § 419.\*]

2. EVIDENCE (§ 390\*)—PAROL EVIDENCE.

While parol evidence is not admissible to alter, control, or contradict a deed, yet for the purpose of showing the character of the grantee's seisin such evidence is admissible to show the external circumstances and the relation of the parties to each other and to the transaction, from which may be inferred the effect of the deed. Such evidence does not in any way tend to control or alter the deed.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1719-1728; *Dec. Dig.* § 390.\*]

\*For other cases see same topic and section NUMBER in *Dec. & Am. Digs.* 1907 to date, & *Reporter Indexes*

### 3. ESTOPPEL (§ 47\*) — BY DEED — AFTER-ACQUIRED TITLE.

When a grantor conveys land to a grantee without consideration and the grantee at the same time, without consideration, and as a part of the same transaction whereby the grantor conveyed the land to him, reconveys the land to the grantor, a momentary seisin only vests in the first grantee, and he does not become invested with any title which inures to the benefit of one to whom he has made a prior conveyance of the same land by mortgage deed of warranty.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 115; Dec. Dig. § 47.\*]

### 4. REFERENCE (§ 99\*) — REPORT — CONSTRUCTION.

Although a referee in his report has expressly stated that in awarding judgment he exercised the powers of an equity court, yet the law court cannot be bound to adopt and enforce the statement that he exercised equity powers in arriving at a result when it appears from the evidence and rescript filed by him that his powers as referee authorized him to declare precisely the same result, and therefore the assertion that he acted in equity must be treated as surplusage.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 99.\*]

(Official.)

Exceptions from Supreme Judicial Court, Hancock County, at Law.

Action by Washington Haslam against W. B. Jordan and by the same plaintiff against Clarinda M. Jordan and others. Findings for plaintiff in each action, and defendants except. Exceptions overruled.

Two real actions, one against the administrator of the estate of Gilman Jordan and the other against the heirs of the said Gilman Jordan, brought for the recovery of certain land. Both actions were referred with the right to except regarding matters of law.

The referee found for the plaintiff in each action, and with his report filed a rescript presenting the questions of law reserved by the defendants. The material parts of the rescript appear in the opinion.

When the report of the referee was offered, the same against the objections of the defendants was accepted. The defendants then took exceptions to the order accepting the report.

So much of the rescript filed by the referee as does not appear in the opinion is as follows:

"Both parties derive title from Albion S. Jellison. The record title of plaintiffs is as follows:

"(1) Albion S. Jellison to A. F. Burnham by deed of mortgage dated October 21, 1876, recorded October 23, 1876.

"(2) Albion S. Jellison to A. F. Burnham by deed of quitclaim dated December 20, 1876, recorded December 23, 1876.

"(3) A. F. Burnham to Eliza I. Jordan by deed of quitclaim dated August 9, 1879, recorded August 11, 1879.

"(4) Eliza I. Jordan to Albion S. Jellison

by deed of quitclaim dated August 9, 1879, recorded August 11, 1879.

"(5) Albion S. Jellison back to Eliza I. Jordan by deed of warranty dated August 9, 1879, recorded August 11, 1879.

"(6) Eliza I. Jordan to Charles E. Dunham by deed of mortgage dated August 9, 1879, recorded August 11, 1879. This mortgage was later discharged.

"(7) Eliza I. Jordan to S. B. Giles by warranty deed from June 27, 1885, recorded August 7, 1885.

"(8) S. B. Giles to Wellington Haslam, plaintiff, by deed dated July 17, 1891, recorded September 14, 1891.

"The defendants' record title is as follows:

"(1) Albion S. Jellison to Gilman Jordan by mortgage deed of warranty dated August 1, 1877, recorded August 2, 1877.

"(2) Gilman Jordan to defendants, heirs and administratrix by descent."

Memorandum: The justice ruling in these cases at nisi prius did not sit during the argument thereof at the law court, being disqualified under the provisions of Rev. St. c. 79, § 42.

Argued before WHITEHOUSE, STROUT, SPEAR, and CORNISH, JJ.

John A. Peters, for plaintiff. Oscar F. Fellows, for defendants.

SPEAR, J. These cases are both real actions, which were referred "with leave to except regarding matters of law." The report of the referee, presenting the exceptions taken at the trial, was offered against objection and ordered to be accepted. To this order the defendant excepted. Both actions are for the recovery of the same parcel of land, both parties deriving their title from the same grantor. The record title of the plaintiff is in a direct line through mesne conveyances from Albion S. Jellison. The defendant's record title is from Albion S. Jellison to Gilman Jordan by mortgage deed of warranty dated August 1, 1877, recorded August 2, 1877, and from Gilman Jordan to defendants' heirs and administratrix by descent. It appears that Albion S. Jellison on August 1, 1877, had no title in the premises conveyed to Gilman Jordan. The referee rendered judgment for the plaintiff in each case, and with his report filed the following rescript presenting the questions of law reserved by the defendants: "It is to be noted that at the date of the deed Albion S. Jellison to Gilman Jordan (the ancestor of the defendants) on August 1, 1877, the grantor, Albion S. Jellison, had no title, he having previously conveyed the land to A. F. Burnham by deed dated December 26, 1876. It follows that at the time no title passed by this deed to the defendant's ancestor, Gilman Jordan.



"It is to be further noted, however, that subsequent to his conveyance to Gilman Jordan by warranty deed of mortgage dated August 1, 1877, Albion S. Jellison, the grantor in that deed, received from Eliza I. Jordan, the then owner, a deed of quitclaim dated August 9, 1879. No. 4 in plaintiff's chain of title.

"The defendants claim that this after-acquired title in Albion S. Jellison at once passed to their ancestor, Gilman Jordan, under the familiar rule that an after-acquired title by a grantor in a warranty deed inures to his grantee by way of estoppel, and to save circuity of action.

"The plaintiff claims that the rule does not apply under the facts of this case.

"Against the objection of the defendants, I received the oral testimony of Albion S. Jellison (under whom defendants claim) to the following effect: The deed to him from Eliza I. Jordan dated August 9, 1879, was prepared and executed in the office of A. F. Burnham, an attorney. At the same time the deed back from him to Eliza I. Jordan (deed No. 5 in plaintiff's chain of title) was also prepared and executed by him. Also at the same time the mortgage deed from Eliza I. Jordan to Chas. E. Dunham was prepared and executed. He, Albion S. Jellison, paid nothing for the conveyance to him from Eliza I. Jordan, and he received nothing for his conveyance back to her.

"Apart from the testimony of Albion S. Jellison I find the three deeds bear the same date, were recorded the same day, and were filed for record at the same hour and minute, viz., August 11, 1879, at 5:15 p. m.

"I am satisfied that the conveyance by Eliza I. Jordan to Albion S. Jellison, which the defendants claim operated to vest the title in Jellison's prior grantee Gilman Jordan, was made to him merely in trust to reconvey to Eliza I. Jordan, which trust he immediately executed. He did not take any beneficial interest under the conveyance to him, and none passed to his prior grantee Gilman Jordan. I do not think the rule relied upon by the defendants governs this case. If any title passed to Albion S. Jellison, it was a naked legal title only, which he could have been compelled in equity to release to Eliza I. Jordan, the beneficiary, or to her grantees.

"As referee, and under Rev. St. c. 84, § 21, I exercise the power of an equity court, and award judgment in both cases for the plaintiff. Since, however, in my opinion the question of title could have been fully determined in one suit, I award costs in one suit only."

There is no controversy, nor could there be any, with respect to the facts found by the referee, but the defendants contend that in the state of the pleadings governing the trial of the case before the referee the oral testimony of Albion S. Jellison was inadmissible, and that, for this reason, the report

should not have been accepted. If admissible under the rules of law, there can be no question that the ruling accepting the report of the referee should be sustained. *Gammon v. Freeman*, 31 Me. 243; *Kelley v. Jenness et al.*, 50 Me. 455, 79 Am. Dec. 623; *Wark v. Willard*, 13 N. H. 389; *Runlet v. Otis*, 2 N. H. 167; *Marsh v. Rice*, 1 N. H. 167.

We think the evidence was admissible. Nothing is better established than the defendant's contention that written contracts cannot be altered or controlled by parol evidence, but such is not the effect of the testimony admitted. It does not alter, control, or contradict the deed from Eliza I. Jordan to Albion S. Jellison whose seisin the defendant claims inured to his benefit. It rather tends to show the external circumstances and the relation of the parties to each other and to the transaction, from which may be inferred the effect of the deed. The evidence that the three deeds spoken of in the referee's report were prepared and executed at the same time in the office of a certain attorney does not in any way tend to control or alter the deeds, nor does the evidence that no consideration was paid. As between the parties to a deed no consideration is necessary. *Labree v. Carleton*, 53 Me. 211. The only effect on the consideration clause in a deed is to estop the grantor from alleging that it was executed without consideration. For every other purpose the consideration may be varied or explained by parol proof. *Tolman v. Ward*, 86 Me. 303, 29 Atl. 1081, 41 Am. St. Rep. 556. Under these rules of law, it is apparent that the evidence admitted does not have the effect of denying that Jellison was seised, but was competent for the purpose of showing the character of his seisin.

Upon this point *Hadlock v. Bulfinch*, 31 Me. 246, a case involving an action of dower, is apposite. The court say: "It is insisted that the defendant is estopped to deny the seisin of the husband, as he holds the estate by a title derived from him. While he may not be permitted to deny that the husband was seised, he may be permitted to show the character of that seisin, and, if it was not such, that his widow would be entitled to dower."

There is a striking analogy in all its phases between the case at bar and *Pomeroy v. Lattin*, 15 Gray (Mass.) 435. This was a writ of entry for the foreclosure of a mortgage, the same form of action as in the cases before us, involving the question whether two or more deeds made simultaneously could be regarded as one transaction, in order to carry out the intention and secure all the rights of the parties concerned. Chief Justice Shaw in the opinion said: "In regard to the evidence offered and rejected, we are not prepared to say that some of it might not be objectionable, and contrary to the rule of law,

as admitting parol evidence to alter or control written agreements and contracts. But we think that the internal evidence from the deeds themselves, together with evidence of external circumstances, showing the relations of the parties to each other, to explain and give effect to their language, which is admissible, are sufficient in the present case to establish all the facts on which our conclusion in matters of law are placed."

If we apply this rule to the case at bar, it will then appear that we have admitted only the internal evidence from the deeds themselves, all bearing the same date and being recorded at the same instant, and the evidence of the external circumstances showing the relation of the parties to the transaction and to each other.

From this evidence it is a legitimate inference that the transfer and the retransfer between Jordan and Jellison were but a single transaction, vesting in Jellison only a momentary seisin, what Chancellor Kent has termed "a transitory seisin for an instant"; that, no consideration having been paid, it was the intention to vest such seisin in Jellison for the purpose of accomplishing a retransfer; and that he took no beneficial interest under the conveyance.

The questions which have arisen under claims for dower afford good illustration of this doctrine. In all such instances it has been held that a seisin in transitu to serve a particular purpose will not entitle the widow to dower in contravention of such purpose. *Gammon v. Freeman*, 31 Me. 243; *Wallace v. Slisby et al.*, 42 N. J. Law, 1.

Jellison, therefore, while seised under the deeds for the purpose of retransfer, was not beneficially seised, even for a moment, and did not as prior grantor become invested with any title that inured to the benefit of the defendant.

We are of opinion that the evidence admitted was competent under the pleadings, and that it was not necessary to change the form of action from law to equity, in order to enable the referee to proceed with the determination of the case.

In his report, however, he expressly stated in awarding judgment that he exercised the powers of an equity court. But this court in the discharge of the grave duty of determining the rights of parties cannot be bound to adopt and enforce the statement in the report of a referee that he exercised equity powers in arriving at a result, when it appears from the evidence and the re-script filed by him that his powers as referee authorized him to declare precisely the same result. The assertion in the report that he acted in equity must be treated as surplusage, as it was competent for him to do all that he did, acting in his capacity as referee regardless of any proceedings in equity.

Exceptions overruled.

(104 Me. 17.)

## STUART v. CHAPMAN.

### SAME v. ANDREWS.

(Supreme Judicial Court of Maine. Feb. 25. 1908.)

#### 1. STATUTES (§ 255\*)—ENACTMENT—PRESUMPTIONS—NUMBERING.

The numbering of statutes is not a legislative act, but it is purely a ministerial act performed by executive officers in the office of the Secretary of State, and no presumption as to the order of time in which statutes were passed can arise from their numbering.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 255.\*]

#### 2. STATUTES (§ 26\*)—ENACTMENT—APPROVAL BY GOVERNOR.

The approval of the Governor is the last legislative act which breathes the breath of life into a statute, and makes it a part of the laws of the state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 28; Dec. Dig. § 26.\*]

#### 3. STATUTES (§ 255\*)—ENACTMENT—APPROVAL BY GOVERNOR.

Nothing appearing to the contrary, statutes approved on the same day are presumed to have been approved contemporaneously.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 255.\*]

#### 4. STATUTES (§ 225\*)—CONSTRUCTION.

Statutes in pari materia are to be construed together so as to ascertain, and carry out the legislative will.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 303; Dec. Dig. § 225.\*]

#### 5. STATUTES (§ 225\*)—AMENDMENT—CONSTRUCTION.

Rev. St. 1903, c. 114, § 23, was amended by Pub. Laws 1905, p. 137, c. 131, and Pub. Laws 1905, p. 144, c. 134. Both of the amendatory acts were approved by the Governor the same day. *Held*, that these two acts must be construed together, and Rev. St. 1903, c. 114, § 23, is to be read as amended by both acts, with the words stricken out by chapter 131 and the words inserted by chapter 134.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 303; Dec. Dig. § 225.\*]

#### 6. FALSE IMPRISONMENT (§ 7\*)—DISCLOSURE COMMISSIONER—ACTS WITHOUT JURISDICTION.

When a disclosure commissioner does not act within the limits of his jurisdiction, he is answerable in law for what he does without those limits and wholly outside of his powers and duties.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 17-28; Dec. Dig. § 7.\*]

#### 7. FALSE IMPRISONMENT (§ 7\*)—DISCLOSURE COMMISSIONER—ACTS WITHOUT JURISDICTION.

When a disclosure commissioner, acting in a disclosure matter, without jurisdiction, refuses the execution debtor the benefit of the oath provided by Rev. St. 1903, c. 114, § 55, and indorses upon the execution the certificate required by Rev. St. 1903, c. 114, § 38, and annexes to the execution the capias required by said section 38, and such debtor is arrested and committed to jail on such capias and execution, such disclosure commissioner is liable in an action for false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 17-28; Dec. Dig. § 7.\*]

### 8. FALSE IMPRISONMENT (§ 7\*)—UNLAWFUL ACTS—RATIFICATION.

When an execution debtor has been committed to jail on a capias annexed to an execution by a disclosure commissioner who acted without jurisdiction in the matter, and the execution creditor sends to the keeper of the jail money to pay for the support of the execution debtor while in jail, and states to such keeper that more money will be sent for that purpose, if necessary, it is an approval, adoption, and ratification of the unlawful acts of the disclosure commissioner, and makes such execution creditor liable in an action for false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 45-61; Dec. Dig. § 7.\*]

### 9. TORTS (§ 22\*)—JOINT TORT-FEASORS—LIABILITIES.

Each wrongdoer is liable for the whole amount of an injury sustained, although a plaintiff can have but one satisfaction.

Rush v. Buckley, 100 Me. 322, 61 Atl. 774, 70 L. R. A. 464, distinguished.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 29; Dec. Dig. § 22.\*]

(Official.)

Emery, C. J., and Whitehouse and Strout, JJ., dissenting.

Agreed Statement from Supreme Judicial Court, Somerset County.

Action by Charles C. Stuart against George M. Chapman, and by the same against Henry F. Andrews. Actions for false imprisonment. Submitted on agreed statements of fact. Judgments for plaintiff.

The agreed statement of facts in the first-named case is as follows:

"On November 9, 1905, one Henry F. Andrews, a resident of Bangor, in the county of Penobscot, applied, through his attorney, H. H. Patten, also a resident of Bangor, to the defendant, a disclosure commissioner within and for the county of Somerset, duly qualified as such, for a subpoena summoning the plaintiff before the defendant as said commissioner to make, on oath, a full and true disclosure of all his business and property affairs. Said Henry F. Andrews was then the owner of an execution against the plaintiff, of which 'Exhibit A' (omitted from this report) hereto attached is a copy.

"Acting on said petition, the defendant issued under his hand and seal as said commissioner a subpoena commanding the plaintiff to appear before him at his office in Fairfield in said county of Somerset on November 15, 1905, at 10 o'clock in the forenoon, to make on oath a full and true disclosure of all his business and property affairs. At said time and place the plaintiff appeared before said Chapman for disclosure, but on examination was refused the benefit of the oath. On the afternoon of that day, the defendant issued the capias, of which 'Exhibit B' (omitted from this report) hereto attached is a copy, and attached to the execution the certificate, of which 'Exhibit C' (omitted from this report) hereto attached is a copy.

"The capias was delivered to William W. Nye, of said Fairfield, a deputy sheriff for

said county of Somerset, who arrested the plaintiff at about 2 o'clock that afternoon, detaining him in the town lock-up at Fairfield until 8 o'clock that evening, when he was committed to the county jail at Skowhegan. 'Exhibit D' (omitted from this report) hereto attached is a copy of the return of said William W. Nye.

"Immediately on being committed to jail, the plaintiff procured counsel relative to his discharge, and a petition for habeas corpus was at once presented to A. M. Spear, a justice of the Supreme Judicial Court of Maine. On this petition, the plaintiff was discharged from custody the following Tuesday, the 21st of November, 1905, having been confined in Somerset jail since his commitment thereto, with the exception of the day at Augusta, when the hearing on habeas corpus occurred, when he was in the custody of the sheriff, but not in jail. From the order of Judge Spear discharging the respondent, the defendant appealed to the law court, where the case was argued by counsel orally, the appeal being finally dismissed.

"The plaintiff is, and was at the date of the disclosure proceedings above referred to, a resident of St. Albans, in the county of Somerset. Both the said Henry F. Andrews and his attorney are, and were at the date of said disclosure proceedings, residents of Bangor, in the county of Penobscot. The town of Fairfield is not the shire town of the county of Somerset.

"Plaintiff is engaged in the business of sawing lumber in the said town of St. Albans, and has a wife and one daughter, nine years of age. Plaintiff's expense in procuring his release on habeas corpus, including counsel fees, was approximately \$80.

"If upon the foregoing facts the plaintiff is entitled to recover, damages are to be assessed by this court; if not, judgment to be for the defendant."

The agreed statement in the second named case alleges that "on November 9, 1905, the defendant, being the owner of the execution of which 'Exhibit A' (omitted from this report) hereto attached, is a copy, running against the plaintiff, applied in writing to George M. Chapman, Esq., of Fairfield, a disclosure commissioner within and for said county of Somerset, duly qualified as such, for a subpoena summoning the plaintiff before said Chapman as said commissioner to make, on oath, a full and true disclosure of all his business and property affairs," and then, in substance, recites the facts alleged in the first aforesaid agreed statement, and, in addition thereto, contains the following paragraph:

"During the confinement of the plaintiff in the Skowhegan jail, the defendant sent to the keeper thereof money to pay for the support of the plaintiff in said jail, at the same time stating to said keeper that more

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

money would be forthcoming if needed." Stipulations same as in the first aforesaid agreed statement.

Memorandum: Chapters 131, 134, pp. 137, 144, Pub. Laws 1905, were repealed by chapter 2, p. 4, Pub. Laws 1907, and section 23, c. 114, Rev. St., was amended by said chapter 2 so as to read as follows:

"Sec. 23. Such magistrate shall thereupon issue under his hand and seal a subpoena to the debtor, commanding him to appear before such magistrate within said county, in the town in which the debtor, the petitioner or his attorney, resides, and in case there is no such magistrate in the town where the debtor, the petitioner or his attorney resides, then in the town where there is such a magistrate nearest to the place of residence of the debtor, the petitioner or his attorney, at a time and place therein named, to make full and true disclosure, on oath, of all his business and property affairs. The application shall be annexed to the subpoena. No application or subpoena shall be deemed incorrect for want of form only, or for circumstantial errors or mistakes, when the person and the case can be rightly understood. Such errors and mistakes may be amended on application of either party."

Note: The opinion in this case was prepared by Mr. Justice Powers while he was a member of the bench, but was not announced until several months after his resignation.

Argued before EMERY, C. J., and SAVAGE, POWERS, PEABODY, SPEAR, KING, WHITEHOUSE, and STROUT, JJ.

Gould & Lawrence, for plaintiff. H. H. Patten, for defendants.

POWERS, J. Actions of trespass for false imprisonment.

November 9, 1905, defendant Andrews, a resident of Bangor, in Penobscot county, and the owner of an execution against the plaintiff, applied, through his attorney, who was also a resident of Bangor, to the defendant Chapman, a disclosure commissioner for the county of Somerset, for a subpoena summoning the plaintiff, a resident of St. Albans, in the county of Somerset, before said commissioner to make, on oath, a full and true disclosure of all his business and property affairs. Thereupon the commissioner issued a subpoena commanding the plaintiff to appear before him at his office in Fairfield, in the county of Somerset, on November 15, 1905, at 10 a. m. At that time and place the plaintiff appeared, but upon examination was refused the benefit of the oath. The commissioner thereafter indorsed upon the execution the certificate, and annexed to the execution the capias required by Rev. St. c. 114, § 38. The plaintiff was arrested and committed to jail on said capias and execution, and there remained until discharged on habeas corpus six days later.

No question is raised as to the regularity of the proceedings, except in one particular. The plaintiff contends that under the provisions of Rev. St. c. 114, § 23, as amended by chapter 131, p. 137, Pub. Laws 1905, the commissioner had no power to summon him to a disclosure at Fairfield, a town in which neither the debtor, the petitioner, nor his attorney resided, and which was not the shire town of Somerset county. As said section stood prior to its amendment, it provided that "where plaintiff or his attorney of record resides in one county and the defendant in another the debtor may be commanded to appear before such magistrate in any town in the county where the defendant resides." By said chapter 131, approved March 22, 1905, said section 23 was amended by striking out the words above quoted so that said section as amended would read, so far as relates to the question here involved, as follows:

"Sec. 23. Such magistrate shall thereupon issue under his hand and seal a subpoena to the debtor, commanding him to appear before such magistrate within said county, in the town in which the debtor, the petitioner or his attorney, resides, or in the shire town of said county, at a time and place therein named, to make full and true disclosure, on oath, of all his business and property affairs."

It is obvious that, if this statute controls, the plaintiff's contention cannot be gainsaid. The defendants, however, say that chapter 131, p. 137, Laws 1905, was repealed by chapter 134, p. 144, of the Laws of that year, which was also approved on the same day as chapter 131. Chapter 134 amended said section 23 by inserting after the word "county" in the "fifth" (fourth) line the words "and any town in which regular sessions of the Supreme Judicial Court are held, shall be considered a shire town for the purpose of this act so that said section as amended shall read as follows:" Then followed a recital of section 23, with the above definition of a shire town following the word "county" in the fourth line, but in all other respects the same as before amendment, and containing, therefore, the words stricken from the section by said chapter 131.

It is a familiar principle of statutory construction that a statute providing that a certain section of a prior act shall be amended "so as to read as follows" repeals by necessary implication all of the section of the prior act which is not re-enacted. Accordingly the defendants contend that chapter 134, being the last expression of the legislative will, must be deemed to be a substitute for all previous enactments, including chapter 131, and the only one which has the force of law. If the premise is sound, namely, that chapter 131 is a prior act within the meaning of the principle above stated, the conclusion claimed logically follows. The rule invoked has heretofore been applied in cases of statutes enacted at different dates. In the case

at bar the two statutes under consideration were approved upon the same day, and went into effect the same moment of time. It is true that one bears a later or larger number than the other. The numbering of a statute, however, is not a legislative act. The Legislature never undertakes to supervise or control it in any way. It is purely a ministerial act, performed by executive officers in the office of the Secretary of State, when the laws of the session are collected and published after the Legislature adjourns. No presumption as to the order of time in which statutes were passed can arise from their numbering. The last legislative act is the approval of the Governor. When approved, and not till then, they become existing acts. *Palmer v. Hixon*, 74 Me. 447. There is nothing to show when this was done, except that they were both approved on the same day. It is urged by the plaintiff that the legislative journals show that chapter 134 was introduced into the Legislature several days before chapter 131, and that, while both acts had their final passage on the same day, chapter 134 appears before chapter 131 in the list of bills passed and sent to the Governor for approval. We cannot regard this as of any special significance, because they were still incomplete statutes. The approval of the Governor was the last legislative act which breathed the breath of life into these statutes, and made them a part of the laws of the state. Moreover, as said by this court in *Weeks v. Smith et al.*, 81 Me. 547, 18 Atl. 327: "No man should be required to hunt through the journals of a Legislature to determine whether a statute, properly certified by the Speaker of the House and President of the Senate and approved by the Governor, is a statute or not."

Nothing appearing to the contrary, statutes approved on the same day are presumed to have been approved contemporaneously. *Harrington v. Harrington*, 53 Vt. 649. This rule, easy to understand and simple in its application, allows statutes, which, like those under consideration, are in pari materia, to be construed together so as to ascertain and carry out the legislative will, that primary rule of statutory interpretation to which all others, including that so strenuously invoked by the defendants, are but corollaries. It avoids the absurdity of holding that the Legislature, whose proceedings are presumed to be conducted with wisdom and deliberation, enacted and repealed a statute upon the same day; or that the House and Senate gravely and solemnly passed through all their several stages two inconsistent acts, either one of which would repeal the other, and sent them at the same time to the Governor, intending that, and that alone, should become a law of the land to which he happened last to affix his signature.

It is perfectly evident that the Legislature intended to make two amendments to section

23. This it did by two separate acts, each one of which in reciting the section as amended necessarily recited it as though the other act did not exist, because such other act had not become a law and non sequitur that it ever would become one. Both, however, finally by the approval of the Governor became statutes of the state at the same time. There is nothing inconsistent in the two amendments; one defining a shire town and the other striking out that part of the old statute which, where the plaintiff or his attorney resided in one county and the debtor in another, allowed the debtor to be cited for a disclosure in any town in the county in which the debtor resided. Force and effect can, and therefore should, be given to both amendments, and both must stand as statutes of the state. Section 23 reads, as thus amended by both statutes, with the words stricken out by chapter 131 and the words inserted by chapter 134. We apprehend that no man can have any doubt that this is precisely what the Legislature intended to accomplish. The means it adopted were appropriate to the end, and we know of no iron rule of statutory interpretation which, under the circumstances of this case, must render its efforts abortive.

The defendant Chapman was a disclosure commissioner for Somerset county. When holding his court in the shire town of the county, he had jurisdiction over the persons of all debtors within the county, and power to hear and determine all disclosure cases of such debtors. When holding it in any other town in the county, he had jurisdiction over the person of such debtors only as resided in said town, or of debtors whose creditors or their attorneys resided in said town, and to hear and determine only such disclosure cases as those in which these jurisdictional facts were shown to exist. Neither the debtor, creditor, nor his attorney resided in Fairfield, where the disclosure commissioner held his court. He had no power to hear and determine the case, no jurisdiction over the debtor's person, and no authority to issue a capias commanding his arrest and commitment to jail; and for so doing he is liable. The case at bar is clearly distinguishable from *Rush v. Buckley*, 100 Me. 322, 61 Atl. 774, 70 L. R. A. 464, where a magistrate who had the power to hear and determine cases of the general class to which the proceeding in question belonged was held not liable for ordering the commitment of the plaintiff whom he had found guilty of an offense created by a valid city ordinance. It more nearly resembles *Stilphen v. Ulmer*, 88 Me. 211, 33 Atl. 980, where a trial justice of Knox county issued a warrant commanding the arrest of the plaintiff for an offense alleged to have been committed in Lincoln county. The disclosure commissioner was acting illegally, without any authority to hear or determine disclosure cases like the one in question,

where neither the debtor, creditor, nor his attorney resided in the town where he held his court, and without any jurisdiction over the person of the debtor. All this appeared by the undisputed facts recited by himself in the capias which he issued and which he himself delivered to the officer. He was not acting within the limits of his jurisdiction, and must therefore answer for what he did without those limits and wholly outside of his duties and powers.

In regard to the liability of the defendant Andrews, it does not appear that he ordered the arrest or commitment, but the case does disclose that he approved, adopted, and ratified those acts by sending to the keeper of the jail where the plaintiff was confined money to pay for the support of the plaintiff in jail, and stated to the keeper that more money would be forthcoming if needed for that purpose. By so doing he made himself as liable for the arrest and unlawful detention as if he had ordered them in the first instance. "It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable." *Dempsey v. Chambers*, 154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. Rep. 249. In the case at bar the defendant Andrews, by furnishing the money for the plaintiff's board in jail, not only ratified the arrest and commitment as acts done in his behalf, but such conduct on his part necessarily resulted in prolonging the plaintiff's confinement in jail, and such was his purpose in furnishing the money and offering to furnish more. Here is something more than a mere failure to disavow the wrongful act of an agent, as in *Tucker v. Jerris*, 75 Me. 184. The intention to affirm is clear. He is presumed to have known the law, and, if he did not in fact know that the imprisonment was unlawful, an examination of the papers upon which his debtor was committed would have shown it. In any event, in furnishing the money necessary to insure his debtor's continued deprivation of liberty he acted at his peril, and, it proving unlawful, he must now abide the consequences.

The plaintiff's expense in procuring his release on habeas corpus was \$80, and he was confined in jail from November 15th to November 21st. He is entitled to some compensation beyond this for the disgrace and mental suffering which would naturally follow from his imprisonment.

Each wrongdoer is liable for the whole amount of the injury sustained, although the plaintiff can have but one satisfaction.

In each case:

Judgment for the plaintiff for \$100.

EMERY, C. J., and WHITEHOUSE and STROUT, JJ., dissent.

(75 N. H. 67)

# GODSOE v. DODGE CLOTHESPIN CO.

(Supreme Court of New Hampshire. Grafton. Oct. 6, 1908.)

## 1. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—ACTION—QUESTION FOR JURY.

In an action by a servant, injured while using a dangerous method of removing obstructions from concealed saws, which method he had been accustomed to use in the presence of his superior, whether his superior had seen him use the dangerous method *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 286.\*]

## 2. MASTER AND SERVANT (§ 153\*)—WARNING AND INSTRUCTING SERVANT—DANGEROUS METHODS—INEXPERIENCED EMPLOYÉ.

Where a master allows a 16 year old servant to gain his only instruction as to removing obstructions from inclosed saws, in the operation of which there was a concealed danger, by observing others, and he had seen his superiors use their hands for the purpose, and had adopted that method, and used it in their presence, and had not been told, and did not know that the method was improper or forbidden, the master cannot avoid liability for the servant's resultant injury, on the ground that it could not have reasonably anticipated his act.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 314-317; Dec. Dig. § 153.\*]

## 3. MASTER AND SERVANT (§ 285\*)—INJURY TO SERVANT—ACTION—QUESTION FOR JURY—CAUSE OF ACCIDENT.

In an action by a servant for injuries to his hand while trying to remove an obstruction from inclosed saws, where the only evidence as to the cause of the injury was that it might have been caused by the end of an edging, touching one of the saws, flying up and hitting it and drawing in the servant's hand, it was for the jury to say whether the known, existing, and sufficient cause produced the typical result of such a cause, which was shown to have followed.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 285.\*]

Exceptions from Superior Court, Grafton County; Pike, Judge.

Personal injury action by Ernest Godsoe against the Dodge Clothespin Company. Verdict for plaintiff, and case transferred from the superior court, on defendant's exception to the denial of a motion for a nonsuit. Exceptions overruled.

Shannon & Tilton and Burleigh & Adams, for plaintiff. Alvin F. Wentworth, for defendant.

PEASLEE, J. The plaintiff was injured by catching his hand on some concealed saws, while employed in removing obstructions therefrom. There were two other safe ways to do the work, but the plaintiff, a boy of 16, had seen it done in this way by his superiors on several occasions, had himself so done it in the presence of his superiors, and had never been told, and did not know, that the method was improper, or that it was forbidden. He had no instruction, except that gained by observation, and believed that he

was proceeding to do the work in a safe and proper manner. The defendant's exception to the case as drawn by the presiding justice and detailed above must be overruled. The testimony of the plaintiff that, at one time, when he did the work in this way, McNamara (his superior) was near him and looking his way warranted the submission to the jury of the question whether McNamara saw the transaction. The fact that McNamara, when called as a witness by the defendant, denied the occurrence merely raised an issue of fact on the conflicting evidence. In its contention that it could not have reasonably anticipated the plaintiff's act the defendant falls to take into account the fact (as it must here be assumed to be) that a part of the boy's instruction had been that this was one of the ways to remove obstructions. Having allowed him to be so instructed, and having done nothing to remedy the erroneous teaching, the defendant cannot now say that it had no occasion to anticipate that the instruction would be followed. In these respects the case differs radically from *Morrison v. Fibre Co.*, 70 N. H. 406, 47 Atl. 412, 85 Am. St. Rep. 634. The case also differs from the other authorities relied upon by the defendant (*Hicks v. Paper Co.*, 74 N. H. 154, 65 Atl. 1075; *O'Hare v. Company*, 71 N. H. 104, 51 Atl. 257, 93 Am. St. Rep. 499; *Collins v. Car Co.*, 68 N. H. 196, 38 Atl. 1047), in that in the present case there was a concealed danger that the edgings might catch on the second of the inclosed saws and so draw the operator's hand onto the first saw. The fact that this danger was a concealed one distinguishes the case from the last two authorities; and the fact that it was known to the defendant, and unknown to the plaintiff, shows that the statement in *Hicks v. Paper Co.*, supra, that the defendant could not tell him anything he did not know of the dangers is not applicable to this case.

It is further urged that it is a mere conjecture how the accident happened. The plaintiff testified that, as he tried to remove the obstruction, his hand was drawn onto the first saw by some unknown force. The defendant's witness McNamara testified that, if the end of an edging touched the second saw, "it might fly up and hit the saw, and snap his hand in there." No other cause being shown, it was plainly a question for the jury whether the known, existing, and sufficient cause produced the typical result of such a cause, which was shown to have followed.

The defendant's nine other exceptions to the case as drawn are entirely without merit. The case as prepared by the presiding justice is supported by the evidence, and complies strictly with the rule of this court that it "should state succinctly all facts necessary for a decision of the questions of law transferred." Rule 3. When this has been done,

the record ought not to be incumbered with frivolous exceptions, accompanied by a mass of undigested evidence.

Exceptions overruled. All concurred.

(75 N. H. 36)

ROBERTS v. ROWE et al.

(Supreme Court of New Hampshire. Belknap. Oct. 6, 1908.)

PAYMENT (§ 18\*)—OBLIGATION OF THIRD PARTY—ACTION.

It is no defense to an action for the price of coal sold by plaintiff to defendants that, after plaintiff learned that the notes taken by him for the price were the notes of a corporation, instead of those of defendants, as he supposed, he attempted to enforce them in equity against the corporation; the case being the same as though he knew the facts when he took the notes, but had not taken them in settlement of his claim. In which case, the corporation having before delivery of the notes promised to pay for the coal, though making the promise to defendants, plaintiff could enforce it in equity.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 78-85; Dec. Dig. § 18.\*]

Exceptions from Superior Court, Belknap County; Peaslee, Judge.

Assumpsit by John L. Roberts against Fred B. Rowe and others. Verdict for plaintiff, and defendants excepted. Exceptions overruled.

The defendants bought the coal in November, 1903, being then partners under the firm name of the Laconia Dyeworks. Soon afterward a corporation was formed, known as the Laconia Dyeworks Company, which took over all the partnership property, and agreed to pay all the firm's debts. There was no marked change in the management of the business. Two months after the corporation was organized, the plaintiff took two notes of the corporation for the debt in suit. He supposed he was taking the defendants' notes, indorsed them in the ordinary way, and discounted them at the Laconia National Bank. The corporation failed in June, 1905, and shortly afterward the plaintiff learned that the notes were given by the corporation, and had not been paid. Four months after the corporation was petitioned into bankruptcy, the bank brought a bill in equity against the company and its stockholders, to enforce collection of the notes, and the next day the plaintiff begun this suit. The defendants offered to prove that the bill in equity was brought in the plaintiff's interest, and excepted to a ruling that that would not constitute a defense to the present action.

Frank M. Beckford, for plaintiff. Walter S. Peaslee and Charles B. Hibbard, for defendants.

YOUNG, J. Notwithstanding it would be a defense, if the bank sued Roberts on the notes, to show that the bank neglected to notify him of the maker's default, the defend-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ants cannot be heard to complain because he refuses to make it. The only question raised by the exception is whether it is a defense to this action to show that the plaintiff, after learning that the notes were not the defendants', attempted to enforce them against the corporation. The case does not stand any differently than it would if the plaintiff had known the facts when he took the notes, but had not taken them in settlement of his claim against the defendants; for the corporation promised to pay for the coal before the notes were given, and notwithstanding this promise was made to the defendants, the plaintiff can enforce it in equity against the corporation. *Sanders v. Insurance Co.*, 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688. It is therefore no answer to this suit to show that Roberts is the real plaintiff in the bill in equity.

Exception overruled.

PEASLEE, J., did not sit. The others concurred.

(75 N. H. 33)

#### CITY OF MANCHESTER v. DUGGAN.

(Supreme Court of New Hampshire. Rockingham. Oct. 6, 1908.)

##### 1. EJECTMENT (§ 106\*)—EVIDENCE—NONSUIT.

Evidence that plaintiff's ancestor in title acquired a deed about 1840 to a farm including the locus in quo, that subsequent grantees had been in possession and cultivated it, and that, after the deed to plaintiff, defendant paid plaintiff rent for the occupation of the locus, was sufficient to justify the denial of a nonsuit in ejectment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 308; Dec. Dig. § 106.\*]

##### 2. TRIAL (§ 412\*)—CURING ERROR—EVIDENCE.

Error, if any, in admitting evidence of the assessment to defendant of the buildings on certain land in controversy as showing ownership, was cured by an instruction that the assessments in question were not evidence that the land belonged to W., and not to defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 974-977; Dec. Dig. § 412.\*]

##### 3. TRIAL (§ 412\*)—EXCEPTION—WAIVER.

Asking for and obtaining an instruction that certain tax assessments were not evidence that the land in controversy belonged to W., and not to defendant, constituted a waiver of defendant's exception to the admission of such assessments as proof of title to the land.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 412.\*]

##### 4. TRIAL (§ 412\*)—ADMISSION OF EVIDENCE—CURE.

Where the only relevancy of certain tax assessments, according to defendant's claim, was to show that the land in controversy belonged to W., and not to defendant, for which purpose defendant claimed it was incompetent, and the court charged at defendant's request that the assessments were no evidence that the land was W.'s, and not defendant's, the evidence was not prejudicial to defendant, in that it impressed on the jury the fact that the assessors had for years determined that defendant did not own the land.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 412.\*]

##### 5. APPEAL AND ERROR (§ 842\*)—REVIEW—QUESTIONS OF FACT FOR TRIAL COURT.

Whether the jury in fact considered certain evidence which had been withdrawn in reaching a verdict was for the determination of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 842.\*]

##### 6. APPEAL AND ERROR (§ 901\*)—BURDEN OF SHOWING ERROR.

The burden is on the excepting party to point out the error committed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3670; Dec. Dig. § 901.\*]

##### 7. ADVERSE POSSESSION (§ 116\*)—INSTRUCTIONS.

Where defendant was only entitled to a verdict on proof that he had held the land adversely for 20 years, a requested charge authorizing a verdict for defendant on the mere finding that he had not recognized plaintiff's title in the land was properly refused.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 116.\*]

Exceptions from Superior Court, Rockingham County; Wallace, Chief Justice.

Writ of entry by the city of Manchester against Joseph S. Duggan. Verdict for plaintiff, and the case was transferred from superior court on exceptions. Exceptions overruled. Judgment on verdict.

The land in question is a small lot on the shore of Massabesic Lake, with a small cottage upon it, built by one Eaton about 1873. The plaintiff claimed title by deed, and the evidence relied upon tended to prove the following facts: The land in controversy was a part of the farm of Edward P. Offutt, and was in his possession in 1873 and thereafter until his death in 1881 or 1882, under title he obtained from one Morrill about 1840. February 1, 1882, Offutt's heirs conveyed the land to Charles Williams, who was in possession of it until 1899, and whose heirs conveyed it to the city of Manchester on December 18, 1903. In 1897 or 1898 the defendant paid rent for the land to Williams. In 1904 the city demanded \$25 of the defendant as rent for the land for one year, which he paid about a week after the demand. The possession upon which the defendant relied was not adverse, and was of the cottage only, and not of the land. The defendant claimed title by adverse possession, and the evidence upon which he relied tended to show that the land was in the possession of Henry J. Eaton from 1872 until about 1880, and in the possession of the defendant since the latter date, claiming under Eaton, that the possession was adverse, and that the rent paid by the defendant was for another parcel of land, known as the "McAllister lot." Subject to the defendant's exception, the plaintiff introduced in evidence tax records of the town of Auburn, where the land is situated, which showed a tax assessed against the defendant and his grantors on "buildings on Williams' land" for a series of years prior to the date of the writ. The plaintiff claimed title under Wil-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



llams. There was no evidence that the defendant knew of these entries, except that he and his predecessors in title paid the taxes in question and some of the tax receipts given them were for tax "on the cottage." At the defendant's request the jury were instructed as follows: "The fact, if it was a fact, that the tax assessors of Auburn described this property of Duggan's as a building on Williams' land, is no evidence whatever that the land was Williams' and not Duggan's." The defendant excepted to a denial of his request for the following instruction: "I instruct you that if the defendant paid rent to Williams or to the city on the lot designated as the McAllister lot, and refused to pay rent on or in respect to the parcel he now claims, and always understood that he was paying this rent only on the McAllister lot, then this payment was not a waiver of the statute or a recognition of the plaintiff's title, and your verdict will be for the defendant." The defendant also excepted to the denial of his motions for a nonsuit and the direction of a verdict in his favor.

Burnham, Brown, Jones & Warren, for plaintiff. Taggart, Tuttle, Burroughs & Wyman and David W. Perkins, for defendant.

**WALKER, J.** The finding of the court that the evidence tended to sustain the plaintiff's theory of title to the land in question is supported by an examination of the evidence. If the assessors' books showing how the tax was assessed against the defendant are excluded as incompetent and prejudicial, what remains would support a verdict for the plaintiff. If believed, it would prove that the plaintiff's ancestor in title acquired a deed of a farm in the '40's, known as the "Offutt farm," which included the locus, that the subsequent grantees had been in possession of it and cultivated it, and that, after the deed to the plaintiff, the defendant paid rent to the plaintiff for the occupation of the locus. The motion for a nonsuit was properly denied.

If it could not be legally found from the evidence of the assessments that the defendant was not the owner of the land, this error was cured, when, at the request of the defendant, the court charged that the assessment of the property as a building on "Williams' land" was "no evidence whatever that the land was Williams' and not Duggan's." Asking for and obtaining that instruction amounted to a waiver of his exception to the evidence. So far as its competency to prove title was concerned, it was expressly excluded from the consideration of the jury, and the presumption is that they did not consider it as evidence of title. The effect of the successful request was the same upon the motion for a nonsuit as evidence afterward introduced by a defendant which cures the alleged defect.

But it is said the evidence was prejudicial because it impressed upon the minds of the jury the fact that the assessors had for some years determined that the defendant owned merely the building. But, in view of the positive instruction, it is not apparent how the evidence was prejudicial. Its only relevancy, according to the defendant, was to show that "this was Williams' land." The jury were told, in effect, to give it no weight whatever upon the only point in the case it was calculated to have a bearing upon. If the jury had been told that the evidence was stricken out and that they could not consider it for any purpose, it is not plain how its effect would be more effectually removed than it was by the instruction which was given. Whether the jury in fact considered it in reaching a verdict is a question for the determination of the superior court. *Lee v. Dow*, 73 N. H. 101, 59 Atl. 374. As the burden is on the excepting party to point out the error committed, the defendant fails. *Kendall v. Flanders*, 72 N. H. 11, 12, 54 Atl. 235; *Stanleys v. Whitchee*, 73 N. H. 152, 59 Atl. 984.

The defendant's second request for instructions was properly denied. If the defendant did not pay rent to the plaintiff on the lot in question, but on another lot, and always understood the transaction in that way, it does not follow that he was entitled to a verdict. While he may not have recognized the plaintiff's title, or waived any rights he supposed he had to the land, he could not succeed against the true owner without proving to the satisfaction of the jury that he had been in the open, adverse, and exclusive possession of the premises for 20 years at least. The requested instruction was too broad, and authorized a verdict for the defendant upon the mere finding that he had not recognized the plaintiff's title. That would have been manifest error.

Exceptions overruled. Judgment on the verdict.

**PEASLEE, J.**, did not sit. The others concurred.

(75 N. H. 50)

#### STATE v. SILVERMAN.

(Supreme Court of New Hampshire. Merrimack. Oct. 6, 1908.)

##### 1. WORDS AND PHRASES—"DEALER."

A person whose business is to buy and sell is a "dealer."

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 2, pp. 1859-1862.]

##### 2. LICENSES (§ 16\*)—JUNK DEALERS—STATUTES—CONSTRUCTION—"DEALER."

Where accused was licensed as a dealer in junk in M., and, though he had no place of business in A., and no license to deal in junk in that town, bought junk there for cash, carried it to M., and there sold it in the course of his business in M., he was a "dealer" in A., within

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Pub. St. 1901, c. 124, § 4, providing that any dealer in such articles without a license, in any town having adopted the provisions of the act, shall be fined, etc.; the word, "dealer" not being used in a restricted sense, which would require an act of selling, as well as purchase, but sufficiently describing one who bought with the intention of selling again.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 16.\*]

Transferred from Superior Court, Merrimack County.

Samuel Silverman was convicted of dealing in junk in Allentown without a license. Case transferred from superior court, on agreed statement of facts. Conviction sustained. Appeal dismissed.

The defendant was licensed as a dealer in junk in Manchester. He had no place of business in Allentown, and no license from the selectmen of that town, in which chapter 124, Pub. St. 1901, is in force. May 23, 1908, he bought, and attempted to buy, in Allentown old junk, old metal, etc., of several adults originally offering such materials for sale, collected the junk as he bought it, and at once took it to Manchester for sale to wholesale dealers there. The persons of whom he bought were not regular customers. He did not sell or barter in Allentown, and had no intention of selling or bartering in that town, any of the junk purchased there, but bought, and intended to buy, only of the owners for cash. His purpose was to do business in Allentown by there dealing directly with parties originally offering junk, etc., for sale, and by purchasing and collecting the same and removing it at once to Manchester for sale to dealers there; and in this way he did business regularly in Allentown.

Arthur W. Thompson and Edmund S. Cook, for the State. Taggart, Tuttle, Burroughs & Wyman, for defendant.

PARSONS, C. J. The only question argued is whether the respondent is a dealer in old junk, old metals, etc., in Allentown, within the meaning of section 4, chapter 124, Pub. St. 1901, which provides that any person who shall be a dealer in such articles without a license, in any town which has adopted the provisions of the act, shall be fined and imprisoned. The respondent is a dealer. His business is to buy and sell. *State v. Cohen*, 73 N. H. 543, 546, 63 Atl. 923, whether he is, within the meaning of the act, a dealer in Allentown where he buys, or in Manchester where he sells, or in neither, because of the different territorial location of the acts which constitute him a dealer, depends upon whether the acts done by him in either place are within the mischief at which the statute is aimed. *King v. Commissioners*, 2 D. & H. 381. The inquiry, therefore, is whether the subject sought to be controlled is the buying and selling in the same town, the selling of junk, or the business of purchasing it from

all who may offer it for sale. The purpose of the act has been recently considered. *State v. Cohen*, 73 N. H. 543, 63 Atl. 923; *Silverman v. Gagnon*, 74 N. H. 502, 69 Atl. 886. In the former case it was said (page 545 of 73 N. H., and page 929 of 63 Atl.) that "the statute was intended principally to protect the public against the evils resulting from the crime of larceny, by providing facilities for tracing the stolen property and restoring it to its owner and for the detection and punishment of the thief." And in the latter case, in which the respondent sought to compel the selectmen of Allentown to issue him a license, it was said (page 504 of 74 N. H., and page 887 of 69 Atl.): "Under Silverman's method of doing business, if he were licensed in Allentown, he might drive into a sparsely settled part of the town, where there is little direct police supervision, fill his wagon with stolen property, and quickly remove it beyond the jurisdiction of the town police, thus rendering it more difficult for them to trace and identify the stolen goods, and to apprehend the thief, than it would be if the dealer had a business habitation in the town. The secrecy with which he would carry on the traffic in the town would tend to encourage some of the evils which the statute was intended to prevent or discourage."

The regulations of the statute relate to purchases of junk by dealers therein, and by keepers of shops for the purchase and sale of such materials. They are prohibited from purchasing from any minor under the age of 16 without the written consent of his parent or guardian, and are required to keep a record of all articles obtained by them of any minor, and of certain specified articles purchased of any person, and of the name and residence of the person offering the same for sale. Pub. St. 1901, c. 124, §§ 2, 3. There are no restrictions upon the sale by such dealers or shopkeepers, and no record of the transaction is required. The sale of junk by any person is not prohibited or regulated. It is the purchase from individuals and the commingling of the purchases into a single mass of such material which unsupervised would render the tracing of stolen goods difficult. As the regulation of the statute is directed at the buying portion of the business of a dealer, it must have been intended that the carrying on of that part of the business in a town should be governed by the act. It is not probable that the word "dealer" was used in a restricted or technical sense which would require the act of selling, which is left unregulated, to be done in the same town as the act of buying, which is the concern of the law. To so construe the statute would be to defeat its purpose. One who buys with the intention of selling is a dealer within the meaning of the act, and his buying for such purpose constitutes the dealing the statute intended to regulate. The respondent, mak-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing a regular business of buying junk in Allenstown, with the intention of selling the same, deals and is a dealer in junk, under the law. *Commonwealth v. Hood*, 183 Mass. 196, 66 N. E. 722. As it appears that the respondent is regularly engaged in the business in Allenstown, and the acts complained of were done in carrying on that business, it is unnecessary to consider whether a single purchase, or purchases of particular individuals, or of a single kind of waste material, would constitute one a dealer within the meaning of the law. *Commonwealth v. Ringold*, 182 Mass. 308, 65 N. E. 374; *Johnson v. Hudson*, 11 East, 180.

Whether the respondent's method of business would bring him within the prohibitions of the statute as amended by chapter 73, p. 74, Laws 1907, regardless of whether he is to be considered a "dealer" in Allenstown, is a question not raised and not considered.

Conviction sustained. Appeal dismissed. All concurred.

(75 N. H. 59)

# CHARRIER v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Merrimack. Oct. 6, 1908.)

## 1. TRIAL (§ 165\*)—MOTION FOR NONSUIT—CONSTRUCTION OF EVIDENCE.

In considering questions raised by defendant's motions for a nonsuit and a verdict, plaintiff is entitled to the most favorable construction of the evidence that can be given it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 374; Dec. Dig. § 165.\*]

## 2. MASTER AND SERVANT (§ 217\*)—INJURY TO SERVANT—ASSUMED RISK.

Plaintiff, while assisting other workmen to push a coke car into a car shop in the ordinary manner, where it was to be repaired, was crushed between the moving car and one of the doors of the shops, which stood open parallel with the car. The car was wider than ordinary cars on which plaintiff was accustomed to work, so that, without plaintiff's knowledge, there was not sufficient room to pass between the side of the car and the door. Plaintiff was not warned of the danger, and had no opportunity to ascertain it, his attention being occupied in endeavoring to avoid obstacles in his path, and he did not discover the danger until he was caught between the car and the door. *Held*, that plaintiff did not assume the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 217.\*]

## 3. MASTER AND SERVANT (§ 150\*)—INJURIES TO SERVANT—NEGLIGENCE—DUTY TO WARN.

Where defendant railroad company knew that its employes in its shops customarily passed between cars they were pushing into the shops and the shop door, and that such custom was dangerous when followed in the operation of an ore car of extra width, defendant was negligent in not giving warning of such danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 297-306; Dec. Dig. § 150.\*]

## 4. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—EVIDENCE—FINDING.

In an action for injuries to a servant, evidence *held* to justify a finding that defendants should have anticipated that plaintiff would

take a position at the side of a car in assisting to push it into the car shops in the usual manner, that his clothes might catch thereon, and that he would be injured, in the absence of a warning, by coming in contact with the door of the shops because of the extra width of the car.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 278.\*]

## 5. MASTER AND SERVANT (§ 129\*)—INJURIES TO SERVANT—CONDITION—PROXIMATE CAUSE.

Where plaintiff, without being warned of the extra width of a car he was assisting to push into a car shop, took a position at the side of the car, and was injured by coming in contact with the shop door, the fact that plaintiff's clothing caught on the car just before he struck the door was a mere condition, on which the cause of the accident acted to produce the injury, and was not the proximate cause thereof.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 257-263; Dec. Dig. § 129.\*]

## 6. TRIAL (§ 118\*)—ARGUMENT OF COUNSEL.

Plaintiff's counsel read to the jury, from the minutes of his argument, a statement that it was the duty of a master to furnish the servant with a safe place in which to work, with safe appliances, etc., and that the servant was not bound to inspect or see whether the master's duty in such respect had been performed, but that he was entitled to assume that the place furnished was safe, and that the master had done its duty. *Held*, that such statement was a mere general proposition of law, and unobjectionable.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 290-292; Dec. Dig. § 118.\*]

## 7. TRIAL (§ 121\*)—ARGUMENT OF COUNSEL.

Plaintiff's counsel in argument stated that defendant's assistant foreman had full knowledge of the circumstances, knew the width of the door of defendant's shops, and the width of the car plaintiff was assisting to push into the shops when he was injured, and knew that it was his duty to warn the men that the car was extra wide, and that they would get pinched on the side. *Held*, that such argument was not objectionable; it being correct so far as it contained matter of law, and being supported by the evidence so far as it stated facts.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 294-297; Dec. Dig. § 121.\*]

## 8. MASTER AND SERVANT (§ 150\*)—INJURIES TO SERVANT—FOREMAN—DUTY TO WARN.

Where defendant's assistant foreman assigned plaintiff to do the particular work he was doing when he was injured, and such assistant had long been in defendant's employ, and knew, or should have known, that plaintiff could not pass safely into defendant's shops at the side of the extra wide car he was pushing when injured, such assistant's knowledge was defendant's knowledge, and it was his duty to warn plaintiff of the danger, if a warning was necessary.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 299; Dec. Dig. § 150.\*]

## 9. MASTER AND SERVANT (§ 295\*)—INJURY TO SERVANT—MISLEADING INSTRUCTIONS.

An instruction that a servant had not assumed a risk if he was ignorant of the danger was not misleading, because it did not contain the necessary qualification "unless plaintiff could have discovered the danger by the exercise of ordinary care," where such requirement was repeatedly included in the general charge.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.\*]

Parsons, C. J., and Young, J., dissenting.

\*For other cases see same topic and section NUMBER

in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Transferred from Superior Court, Merrimack County.

Action by Francois Charrier against the Boston & Maine Railroad for personal injuries. Verdict for plaintiff, and the case was transferred from the superior court on defendant's exceptions. Overruled.

The plaintiff was injured while at work as a car repairer in the defendants' shops at Concord. At the time of the accident he was 62 years old, and had been employed by the defendants for 6 years. For the last 4 years of this period he worked on track No. 8, which enters the south end of the repair shop in the center of a space 10 feet and 7 inches wide, when the doors at that entrance are open, and over which cars are pushed into the shop to be repaired. At the time the plaintiff was injured he was engaged, with others, in pushing a coke car over track No. 8 into the shop. He had taken a position on the easterly side of the car, about 4 feet from its southerly end, and, with hands under the sill of the car and head down, was pushing with his left shoulder against the third hinge upon the car door. It was necessary for him to bend over in order to keep his shoulder against the iron. The other men had their "heads down to push, to get down to it, to get hold of it." While occupying this position and pushing the car, the plaintiff was crushed between the moving car and the easterly door. The door was 2½ inches thick, and opened outwardly against a post. When open it was immovable, and nearly parallel with the track, the space being slightly wider at the outer edge of the door. The car which the plaintiff was pushing was 9 feet and 4 or 5 inches wide. Coke cars upon which he had previously worked, and which were similar in appearance to the one in question, varied in width from 8 feet and 2 inches to 8 feet and 8 inches; and, in pushing them into the shop, the plaintiff and his fellow-workmen had commonly passed between the sides of the cars and the doorway. The plaintiff was not aware that the car he was pushing was wider than ordinary coke cars he had worked on, and nobody informed him. He did not know the danger of attempting to pass between the side of the car and the door, and nobody warned him. The car which the plaintiff was pushing had to be moved from 40 to 60 feet before reaching the shop. When the plaintiff began to push, he intended to go through the doorway at the side of the car, according to his usual custom. Near the track, and about 30 feet from the door of the shop, was a small wooden horse and an old car sill. The sill was about 20 inches from the nearest track and 8 inches from the side of the car, one end of it resting upon the horse, and the other on the ground at a point about 18 inches from the door. A fellow workman was pushing in front of the plaintiff, and on the same side of the car.

As the car neared the horse, this man stepped aside, while the plaintiff passed over the horse, and, with his legs astride the sill, continued to push the car toward the shop. Before the man in front left his position, the plaintiff could not see the door of the shop, so as to judge the distance between it and the car, and afterward his position was such, and his attention was so taken up with avoiding the timber and nails which laid beside the track that he did not observe it. The plaintiff's clothing became fastened to the car so that he could not extricate himself; and, as to the time when he learned of this fact, the evidence was conflicting. The defendants' motions for a nonsuit and the direction of a verdict in their favor were denied, and they excepted.

During the argument for the plaintiff counsel said: "My brother read a little law which didn't apply. I will read some that does, and the court will give you some more; and this law is law the state over, case after case, week in and week out, and court in and court out. It is the duty of the master—in this case the railroad—to furnish the servant a safe place in which to work, with safe appliances. The servant is not bound to inspect, or to see whether the master's duty in this particular has been performed or not, but he can assume that the master has furnished him a safe place in which to work, and proceed with the work upon the presumption that the master has done his duty; and that is the law of this state. Your honor, that is *Thompson v. Bartlett*, *Hayward & Co.*, 71 N. H. 174, 51 Atl. 633, 93 Am. St. Rep. 504." Counsel for the defendants here interposed an exception to the reading, whereupon the plaintiff's counsel said: "I am reading from a part of my written minutes of this argument, and you can except or not." Later in his argument counsel for the plaintiff said: "Abbott [the assistant foreman] had a full knowledge of all the circumstances. He knew the width of the door there. He knew the width of the car. When they started it in, he knew, or ought to have known. It was his duty to tell the men, 'Boys, look out; this is a wide car. Don't get pinched on the side.'" To these remarks the defendants excepted. The defendants also excepted to a portion of the charge quoted in the opinion, and to the following instruction: "If the defendants' assistant foreman, Abbott, knew, or by ordinary care could have known, of the danger to Charrier of being caught between the car and side of the doorway, the law holds the defendants to have had the same knowledge."

Martin & Howe, for plaintiff. Mitchell, Foster & Lake, for defendants.

BINGHAM, J. In considering the questions raised by the defendants' motions for a nonsuit and a verdict, the plaintiff is entitled to the most favorable construction of

the evidence that can be given it. *Stevens v. Company*, 73 N. H. 159, 163, 60 Atl. 848, 70 L. R. A. 119. When so construed, it appears that the coke cars, upon which the plaintiff had worked prior to his injury, the measurements of which were known to him, did not exceed 8 feet 8 inches in width, and that some of them were not wider than 8 feet 2 inches; that the space between such cars and the shop door, in which a man would have to walk in pushing them into the shop over track No. 6, was anywhere from 11½ to 17½ inches; that the plaintiff and other workmen had customarily pushed these cars into the shop over this track, and in doing so had safely passed between the car and the door; that the defendants also had other coke cars which were similar in appearance, but which were in fact about a foot wider than those upon which the plaintiff had worked; that he was not aware of these facts, and no one had informed him that the car upon which he was set to work at this time belonged to that class; that he had no opportunity to measure its width, and that during a part of the brief interval he was pushing the car, his view of the shop door was obstructed by a workman, and the balance of the time his work required him to take such a position, and his attention was so preoccupied in endeavoring to avoid obstacles in his path beside the track, that he did not learn of the danger to which he was subjected until he was caught between the car and the door. It also appears that the defendants knew, or ought to have known, that it was customary for the men, in pushing cars into the shop, to pass between the car and the door; and that they knew, or ought to have known, of the extra width of this car and the danger to be encountered in pushing it into the shop by one standing at its side, and failed to inform the plaintiff of it. Under these circumstances reasonable men might properly conclude that the defendants were negligent in not informing the plaintiff of the danger, that he exercised the care of a reasonably prudent man in doing what he did, and that he did not know and appreciate the danger to which he was subjected and assume the risk of injury.

The defendants, however, contend that the plaintiff knew the space between the car and the door was insufficient to permit him to pass in safety, and that he learned of this fact, and of the fact that his clothes had become attached to the car, at the time he passed over the horse. But if it be conceded that there was evidence from which these facts could have been found, the jury, as reasonable men, were not bound to take this view of the case, and their verdict clearly demonstrates that they did not. It is also urged that the plaintiff could have avoided being injured after he reached the door, had it not been for the fact that his clothes had become attached to the car; that his injury

was due solely to this circumstance, the occurrence of which he assumed as a risk incident to his employment. Whether the plaintiff could have avoided being injured after he reached the shop door had his clothing not become attached to the car is clearly a question of fact. But if upon the evidence the jury should have found that the plaintiff could have avoided being injured had his clothes not become attached, and also should have found that he assumed the risk of injury from his clothes becoming attached to disabled coke cars of the standard width (8 feet and 8 inches) while pushing them into the shop, it cannot be said, as matter of law, in view of the plaintiff's lack of information, that he assumed the risk of being injured upon a car of greater width (9 feet and 5 inches), which rendered his entrance into the shop in the customary way dangerous. The solution of the matter rather is that the jury were justified in finding that the defendants ought to have anticipated that the plaintiff would take a position at the side of the car, that his clothes would become attached, and that he would be injured. It is apparent that, if the defendants had warned him of the danger, he could have provided against it by taking a different position upon the car, or by taking some other precaution, and that their failure to do so was properly found to be the legal cause of his injury. The fact that his clothing became attached to the car was, under the circumstances here presented, a mere condition, upon which the cause acted to produce the plaintiff's injury. *Harriman v. Moore*, 74 N. H. 277, 281, 67 Atl. 225; *Brown v. Railroad*, 73 N. H. 568, 573, 578. 64 Atl. 194; *Ela v. Cable Co.*, 71 N. H. 1, 3, 4, 51 Atl. 281. The passage read by the plaintiff's counsel from the minutes of his argument was a statement of a general proposition of law governing the relation of master and servant, and did not introduce into the case any evidentiary matter which could not be, or had not been, proved. Counsel may properly state his view of the law applicable to the facts, as claimed by him to be proved, and this is all that was done in this instance. *Olney v. Railroad*, 73 N. H. 85, 59 Atl. 387. If this statement was erroneous as a proposition of law, it does not appear that the court, either expressly or tacitly, confirmed it; and, where such is the case, a verdict will not be disturbed. *Story v. Railroad*, 70 N. H. 364, 376, 48 Atl. 288; *Dow v. Company*, 68 N. H. 59, 31 Atl. 22.

The second exception to the argument of the plaintiff's counsel is also without merit. So far as the statement excepted to was one of fact, it was supported by the evidence, and so far as it was matter of law, it was correct. Abbott was the representative of the company who assigned the plaintiff to do this particular work. He had long been in the employ of the company, knew the width of the car and the door, and knew, or ought to have known, that the plaintiff could not

safely pass into the shop at the side of the car. His knowledge was the company's knowledge, and, as its representative in charge of the work, it was his duty to warn the plaintiff of the danger, if a warning was necessary. *Jaques v. Company*, 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824; *Lintott v. Company*, 69 N. H. 628, 632, 44 Atl. 98; *Lapelle v. Company*, 71 N. H. 346, 51 Atl. 1068. What is said about this exception applies to the one taken to the last request of the plaintiff, which the court gave in his charge to the jury. In both the action of the court was right.

Upon the question of assumed risk the jury were instructed at length, and in the most painstaking manner, the burden of the instruction being that the plaintiff, upon entering the defendants' employment, assumed the risk of injury from all dangers of which he knew, or which ordinary care would reveal to him, that if he knew, or ought to have known of the danger of being caught between this car and the door, and appreciated the risk when he had the opportunity of free choice, he could not recover, but that if he did not know of it and did not appreciate it until it was too late to get away from the danger, then he did not assume it. No exception was taken to this charge, but one was taken to a special instruction which was given at the plaintiff's request, as follows: "I have told you he did not assume the risk if he did not know of it in season to avoid it. If, as soon as he did see the danger and appreciate it, he was in such a situation that he could not avoid it, why then, of course, he did not assume it, and was not in fault." The first objection urged is that the first sentence in this instruction does not contain the qualification, "or if by the exercise of ordinary care he would have discovered it." It is true that this qualification is essential to a complete statement of the legal proposition; but, as it had been given over and over again in the general charge, we do not think the jury could have been misled by its omission from this sentence. *Saucier v. Spinning Mills*, 72 N. H. 292, 56 Atl. 545. The balance of the instruction is correct. *Olney v. Railroad*, 71 N. H. 427, 431, 52 Atl. 1097; *English v. Amidon*, 72 N. H. 301, 302, 303, 56 Atl. 548. Exceptions overruled.

PARSONS, C. J., and YOUNG, J., dissented. The others concurred.

(75 N. H. 38)

#### DAME v. WOOD.

(Supreme Court of New Hampshire. Belknap. Oct. 6, 1908.)

#### 1. FIXTURES (§ 4\*)—INSTALLATION OF APPLIANCES—INTENT—DESTRUCTION—OWNER'S LIABILITY.

The test of defendant's liability to a contractor for labor and material furnished in installing a heating plant destroyed before completion is whether the different units of the

plant became a part of defendant's land when put in place, depending upon the intent of the parties.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. § 3; Dec. Dig. § 4.\*]

#### 2. FIXTURES (§ 85\*)—INSTALLATION OF APPLIANCES—DESTRUCTION—OWNER'S LIABILITY—QUESTION OF FACT.

In an action by a contractor to recover for labor and material furnished in installing a heating plant destroyed before completed, the question whether the different units of the plant became a part of the owner's land when put in place is a question of fact, but not necessarily a jury question.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. § 76; Dec. Dig. § 35.\*]

#### 3. FIXTURES (§ 27\*)—CONVERSION INTO REALTY—AGREEMENTS—PART PERFORMANCE—LIABILITIES.

In an action to recover for labor and material for a heating plant destroyed by fire before completion, where the evidence showed that it was understood by the parties that, as fast as any portion had been set in its proper place, it was not thereafter to be removed, but became part of defendant's real estate, and it was of the character called for by the contract, defendant was liable therefor.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. § 5; Dec. Dig. § 27.\*]

#### 4. CONTRACTS (§ 319\*)—RIGHTS ON PARTIAL PERFORMANCE.

A contractor who has furnished labor and material in installing a heating plant destroyed before completed can recover from the owner the value of the labor and material furnished, measured by the terms of the contract, where the units of the plant became a part of the owner's land when put in place; the measure of recovery not being limited to the benefit to the owner by the labor and material furnished.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1493-1507; Dec. Dig. § 319.\*]

#### 5. INTEREST (§ 13\*)—RIGHT TO.

Generally, when no time is fixed for the payment of a debt, it is payable on demand and bears interest thereafter, and hence the test whether the claim carries interest before reduced to judgment is whether payment is due.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 25; Dec. Dig. § 13.\*]

Exceptions from Superior Court, Belknap County; Stone, Judge.

Action by George F. Dame against Horace H. Wood. Transferred from the superior court on defendant's exceptions on verdict for plaintiff. Exceptions overruled.

See, also, 74 N. H. 212, 66 Atl. 484.

The plaintiff contracted with the defendant to put into the latter's house a heating apparatus, consisting of a boiler, radiators, piping, and other appliances and fixtures, and the defendant agreed to pay \$587.90 upon the completion of the work. When the plaintiff had affixed to the realty materials of the value of \$466.38 by an expenditure of labor amounting to \$46.80, the building and its contents were destroyed by fire. The defendant excepted to the denial of his motions for a nonsuit and the direction of a verdict in his favor, and to the refusal of the court to give certain requested instructions. The defendant objected to an allowance of in-

terest on the ground that the action was for unliquidated damages. A verdict having been returned for the amount of the plaintiff's damages, it was agreed that interest thereon should be computed from the date of the writ, or from the date of judgment, in accordance with the decision of the Supreme Court.

Walter S. Peaslee and Cox & Fowler, for plaintiff. Stephen S. Jewett, for defendant.

**YOUNG, J.** The first time this case was before the court it was said the plaintiff could not recover unless he showed that the parties must have understood the heating apparatus was to be accepted from day to day as the work progressed. *Dame v. Woods*, 78 N. H. 222, 224, 60 Atl. 744, 70 L. R. A. 133. What must be intended by this is that he can recover if he shows that the boiler, radiators, and piping became a part of the defendant's real estate at the time they were put in place; for the theory of that decision is that the plaintiff cannot recover unless he proves he has conferred a benefit on the defendant. The only possible way to do that is to show that so much of the heating apparatus as was put in place before the fire was the defendant's property, because he neither has used nor can use it for the purpose for which it was intended. Therefore the test of the defendant's liability is to inquire whether the different units that went to make up the heating plant became a part of the defendant's real estate when they were put in place. This depends on the intention of the parties (*Dana v. Burke*, 62 N. H. 627, 629), and is clearly a question of fact; but it does not follow that its determination raises an issue for the jury. Both parties testified that they understood, "at the time the contract was made and thereafter, that from day to day as the work progressed, as fast as any portion of the boiler, piping, and radiators had been set up and connected in its proper place, it was not thereafter to be removed." They understood that, when any part of the heating apparatus was put in place, it was affixed to the defendant's real estate and became his property if it was what the contract called for; that is, the parties testified that their intention as to when the different parts of the heating plant should become the property of the defendant was just what the court, in the first opinion, said it could be found to be, if it was found "that the removal of the boiler, radiators, and piping before they were destroyed by fire was not reasonably possible." The defendant does not contend that the parts of the heating plant which had been installed were not what the contract called for. Consequently the plaintiff is entitled to recover the value of the labor done and materials provided at the time of the fire, measured in the terms of the contract. *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713.

The next question to be considered is the exception to the court's refusal to instruct the jury that the measure of damages was the amount the defendant was benefited by what the plaintiff had done. Although this may be sound as an abstract legal proposition, it was not error for the court to refuse to give it. As has been seen, the plaintiff was entitled to recover such a part of the contract price as the work and materials he had done and furnished was of the work and materials he agreed to perform and provide. This seems to have been the theory on which the question of damages was submitted to the jury.

The only other question to be considered is that of interest. It is the general rule that, when no time is fixed for the payment of money due and owing, it is payable on demand, and bears interest from and after a demand made. *Morrill v. Weeks*, 70 N. H. 178, 181, 46 Atl. 32. Consequently the test to determine whether a claim carries interest before it is reduced to a judgment is not to inquire whether it is liquidated, but whether it is due; for interest is given as damages for the failure to pay money at the time it is due. *Wright v. Company*, 75 N. H. —, 70 Atl. 290.

Exceptions overruled.

**PARSONS, C. J.**, was in doubt. The others concurred.

(75 N. H. 73)

**HOBBS v. GEORGE W. BLANCHARD & SONS CO.**

(Supreme Court of New Hampshire. Coos. Oct. 8, 1908.)

1. **EXPLOSIVES (§ 8\*) — NEGLIGENCE — EVIDENCE—SUFFICIENCY.**

Evidence held insufficient to show that dynamite was so placed that a child could come in contact with it after his presence on the premises was known.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. §§ 4, 5; Dec. Dig. § 8\*]

2. **WITNESSES (§ 409\*)—CONTRADICTION — EFFECT OF TESTIMONY.**

An answer in a deposition contradicting witness' subsequent statement destroyed the contradicted statement, but was not positive evidence of the contradicting facts.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1283; Dec. Dig. § 409\*]

3. **EVIDENCE (§ 586\*) — WEIGHT — NEGATIVE TESTIMONY.**

Testimony that men working on premises did not see dynamite is of no practical weight on an issue as to when dynamite was placed there.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2433; Dec. Dig. § 586\*]

4. **EVIDENCE (§ 595\*)—REMOTE INFERENCES.**

In an action for injury caused by a negligent placing of dynamite, an inference as to what the man who handled it did on a certain day is too remote to be considered.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2444; Dec. Dig. § 595\*]

# 5. TRIAL (§ 252\*)—UNSUSTAINED ISSUES—SUBMISSION.

It is error to submit issues not sustained by evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 596; Dec. Dig. § 252.\*]

# 6. NEGLIGENCE (§ 33\*)—INJURY TO TRESPASSERS—LIABILITY.

In the absence of intentional injury, the owner or possessor of land is not liable to trespassers except in the case of active intervention; not being liable for a mere antecedent condition of the premises.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 45; Dec. Dig. § 33.\*]

# 7. EXPLOSIVES (§ 8\*)—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence in an action for death of a child who exploded dynamite in a lumber camp held to sustain a finding of an implied invitation to him to visit the premises.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.\*]

# 8. EXPLOSIVES (§ 8\*)—NEGLIGENCE—JURY QUESTION.

Whether a lumber company was negligent toward a child killed by an explosion of dynamite on the company's premises held a question for the jury.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.\*]

# 9. EXPLOSIVES (§ 8\*)—INJURIES—CONTRIBUTORY NEGLIGENCE—MOTION FOR NONSUIT.

Where, under the evidence in an action for death of a child killed by an explosion of defendant's dynamite, it appeared as probable that the explosion was caused by his intentionally striking the dynamite as that he came in contact with it accidentally, defendant's motion for a nonsuit should have been granted unless plaintiff might recover on either view of the facts; and hence it must be assumed that the child intentionally struck the blow causing the explosion, not including an assumption that he intentionally exploded the dynamite, or that he intermeddled with what he knew he ought to let alone.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.\*]

# 10. EXPLOSIVES (§ 8\*)—NEGLIGENCE—ACTIONS—NONSUIT.

In an action for death of a child who exploded defendant company's dynamite, that defendant could go to the jury in a suit to recover the value of the exploded dynamite based on the child's negligence does not show its right to a nonsuit based on the theory that the child was guilty of contributory negligence; it being essential to such right that in the supposed case the company would be entitled to recover as a matter of law.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.\*]

# 11. EXPLOSIVES (§ 8\*)—INJURIES—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Under the evidence in an action for death of a child who exploded dynamite on defendant's premises, held a jury question whether his act was a trespass or negligent, or whether it was a reasonable and lawful enjoyment of a permission to be upon the premises, and to act as a boy naturally would in his surroundings.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.\*]

Transferred from Superior Court, Coos County; Pike, Judge.

Action by N. W. Hobbs, administrator, against the George W. Blanchard & Sons Company. Transferred from the superior

court on defendant's exceptions on verdict for plaintiff. Verdict set aside, and exception to denial of motion for nonsuit overruled.

See, also, 65 Atl. 382.

Case for negligently killing the plaintiff's intestate, a boy 14 years old. Trial by jury and verdict for the plaintiff. Transferred on the defendant's exceptions to the denial of its motions for a nonsuit and that a verdict be directed for it upon each issue tried. The case is that heretofore reported (74 N. H. 116, 65 Atl. 382), and was submitted to the jury upon two issues as to the defendant's negligence: (1) That it carelessly put the dynamite near the camp door after it knew the plaintiff's intestate was on the premises; (2) that, having reasonable grounds to apprehend that trespassers would thereafter come upon the premises, it created an unnecessary and extraordinary hazard, not required for the reasonable prosecution of its business. It also appeared that it was as probable that the boy exploded the dynamite by intentionally striking it, as by accidentally coming in contact with it.

Henry F. Hollis, Thomas H. Madigan, Jr., and Edmund Sullivan, for plaintiff. Drew, Jordan, Shurtleff & Morris and Rich & Marble, for defendant.

PEASLEE, J. It is not necessary to review the decision that putting the dynamite where the deceased could come in contact with it, after his presence on the premises was known, would be active intervention within the rule as heretofore applied in this state. *Hobbs v. Company*, 74 N. H. 116, 65 Atl. 382. Conceding that it would be, there was no sufficient evidence to establish the fact. Lacombe (the man who handled the dynamite) was called as a witness for the plaintiff, and denied that he put the dynamite there at the time alleged. The plaintiff was then allowed to contradict the witness by using a deposition in which he testified that he did put it there at that time. The effect of the deposition as evidence was merely to destroy the contradicted statement. It was not positive evidence of the contradicting facts. *Lydston v. Company*, 75 N. H. —, 70 Atl. 385, and authorities cited. There was no other direct evidence on this question, and the case rests upon the surrounding circumstances. It was the practice and the defendant's rule to leave the dynamite in a safe place. It was not seen by the men in camp, but its position was a little away from the path behind a tree. There was some contradiction in Lacombe's story of how he used his time the morning before the accident. From this it is argued that it is not likely that Lacombe left the dynamite there Saturday, in violation of his habit and of the rule, and to the danger of the men in camp, who would have seen it if it had been there over Sunday. It is fur-



ther urged that Lacombe's unsatisfactory story of what he did Monday could be found to be a fabrication, and that he was, in fact, engaged in blasting. On the other hand, it is argued that violation of habit and rule was as likely to occur on Monday as on Saturday, that the dynamite was partly concealed, and that as, Lacombe did many kinds of work, it might as well be inferred that he did one thing as another in the time which he did not account for. There is in this evidence no substantial preponderance in the plaintiff's favor. Habit and rule were as much violated by leaving the dynamite there on one day as on the other. The evidence that the men did not see it there is of no practical weight. The inference as to what Lacombe was doing Monday is too remote to be considered. It is quite similar to that in *Cole v. Boardman*, 63 N. H. 580, 581, 4 Atl. 572, 575. "This would be an inference from an unauthorized inference—one presumption resting on another that rests on nothing. The law of evidence requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on groundless inferences." There being no sufficient evidence of active intervention, the submission of that issue to the jury was error, for which the verdict must be set aside.

The plaintiff was also permitted to go to the jury upon the theory that the defendant was liable to trespassers for unusual and dangerous antecedent acts which the ordinarily prudent man would not have done in the prosecution of the same business. Authority for this proposition was evidently thought to be found in the opinion in this case. *Hobbs v. Company*, 74 N. H. 116, 120, 121, 65 Atl. 382. But, according to the former decisions in this state, the rule of the common law is otherwise; and the true interpretation of the opinion is in harmony with those decisions. The rule is elaborately stated by Judge Jeremiah Smith in 11 *Harvard Law Review*, 349 et seq. "To adults entering without permission the landowner owes some legal duties. He is under a duty not to intentionally inflict harm upon a trespasser, save when he is exercising within legal limits the rights of defense and expulsion. He is also, by the better view, under a duty to avoid harming the trespasser by negligent acts which result in actively bringing force to bear upon the trespasser. In other words, he is under a duty to use care not to harm the trespasser by bringing force to bear upon him. It is a mooted question whether this duty is confined to cases where the presence of the trespasser is known to the landowner. Some authorities hold that the owner may, in special circumstances, be under a duty to use care to ascertain whether trespassers are present before he sets in motion a force which would be likely to endanger any such persons if within reach. But the alleged duty, if admitted, is material

only when it is sought to make the landowner liable for actively bringing force to bear upon the trespasser. On the other hand, the landowner is under no duty to have his land in safe condition for adult trespassers to enter upon. The law does not oblige him to keep his premises in repair for the benefit of a trespasser. The latter has ordinarily no remedy for harm happening to him from the nature of the property on which he intrudes. He takes the risk of the condition of the premises. It is not negligence in a landowner to use his land for his own convenience in a manner which may occasion danger to a future trespasser thereon. It is no breach of duty to a trespasser 'that a man's premises were in a dangerous state of disorder, whatever the consequences to the former.' Nor is there any obligation to warn trespassers of dangers not readily apparent (assuming, of course, that the dangers were not prepared with intent to harm trespassers)." And after considering liability for active intervention, as contrasted with that for mere condition of premises, he says (page 344): "The first case is that of a known, present and immediate danger, one which is imminent and reasonably certain to result in harm, unless the owner then and there does, or omits to do, some act, the doing or omitting of which would avoid the danger. In the second case the danger may be said to exist chiefly in anticipation. It depends on the course of future events, upon circumstances as yet unknown and fortuitous. In the first case the duty imposed upon the landowner involves simply a temporary, generally only a momentary, interruption of his user; requires only temporary precautions; does not include a duty to put the premises in such condition as to prevent the recurrence of similar emergencies in the future; but merely requires the use of care in a present and known emergency. In the second case the duty sought to be established is to guard against future dangers. It must frequently involve permanent changes in the mode of user, sometimes necessitating such expense and trouble as would be practically prohibitive of certain modes of user, and in some cases compelling the abandonment of all profitable use." His conclusion that in the second case supposed the landowner owes no duty to the trespasser is supported by all that has been decided, and by practically all that has been said on the subject by the court of this state. The first case in which the question arose was that of a child trespasser injured by the dangerous condition of the premises trespassed upon. It was decided that, "for injuries received by strangers upon his premises through his want of care, he [the landowner] is liable only to those who may at the time be there by invitation, by license express or implied, or upon legitimate errand." *Clark v. Manchester*, 62 N. H. 577 (1883).

Three years later (1886) the same rule was applied to a child trespasser who was at

tracted to and injured upon an unlocked turntable. "A trespasser ordinarily assumes all risk of danger from the condition of the premises; and, to recover for an injury happening to him, he must show that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger." *Frost v. Railroad*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 398. Shortly after these cases were decided others were presented which illustrate another phase of the situation. The *Clark* and *Frost* Cases related to the condition of premises only. The next case dealt with active intervention, and the condition of premises was not involved. It was held to be the defendant's duty to use ordinary care to discover the presence of the deceased, and the fact as to whether he was a trespasser or a licensee was said to be immaterial except as evidence bearing on the amount of watchfulness that could reasonably be required. *Felch v. Railroad*, 66 N. H. 318, 29 Atl. 557 (1890). The opinion merely states the rule of law, and recourse must be had to the next case to learn its limitations. *Mitchell v. Railroad*, 68 N. H. 96, 34 Atl. 674 (1894), was a suit to recover for negligently running an engine upon the plaintiff. One defense set up was that the plaintiff was a trespasser. The court said: "If the plaintiff was a trespasser, his misconduct would not relieve the defendants from their obligation to do him no injury that by ordinary care could be avoided. They were responsible for culpable ignorance of his dangerous situation, as well as for negligence in any other particular. *Nashua, etc., Co. v. Railroad*, 62 N. H. 159, 162-164; *Felch v. Railroad*, 66 N. H. 318, 320, 29 Atl. 557. The doctrine of *Clark v. Manchester*, 62 N. H. 577, and *Frost v. Railroad*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 398, has no application. What is there said is to be read in the light of the facts under consideration. There is a broad difference between the case of a trespasser meeting with an injury by reason of the dangerous condition of the defendant's premises and that of an injury caused by the defendant's active intervention." Chief Justice Doe and Judge Blodgett dissented upon the ground that the charge probably gave the jury to understand that the defendant's duty toward the plaintiff was the same whether he was or was not a trespasser. In 1897 the case of a trespasser injured by the continued operation of machinery in a mill was decided adversely to the plaintiff. *Buch v. Company*, 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163. The opinion further explains the landowners' duty to a trespasser: "They are bound to abstain from any other or further intentional or negligent acts of personal violence—bound to inflict upon him by means of their own active intervention no injury which by due care they can avoid. They are

not bound to warn him against hidden or secret dangers arising from the condition of the premises, \* \* \* or to protect him against any injury that may arise from his own acts or those of other persons. In short, if they do nothing, let him entirely alone, in no manner interfere with him, he can have no cause of action against them for any injury that he may receive. On the contrary, he is liable to them for any damage that he by his unlawful meddling may cause them or their property."

Up to this time the distinction between the two lines of cases seems to have been carefully observed. In 1898 they were contrasted one with the other, and the suggestion was made that the decisions in the *Felch* Case and the *Mitchell* Case—that there was a duty to anticipate (to some extent) the trespasser's presence, so as not to actively do him injury—were contrary to the doctrine of the other cases. *Shea v. Railroad*, 69 N. H. 361, 41 Atl. 774. While this deduction was erroneous, it did not affect the result in that case, as it was one of active intervention, and no evidence was found to allow the plaintiff to go to the jury. In the following year (1899) recovery by a trespasser upon a claim as to condition of premises only was denied in two cases. *Leavitt v. Company*, 69 N. H. 597, 45 Atl. 558; *Casista v. Railroad*, 69 N. H. 649, 45 Atl. 712. *Davis v. Railroad*, 70 N. H. 519, 49 Atl. 108 (1900), applies the correct rule, in substance, though with some changes in terminology. It was then thought that the *Shea* Case had somewhat extended the rule as to a duty to anticipate the presence of trespassers. But, bearing in mind that the *Shea* Case was one of active intervention, it becomes apparent that what was said concerning duty as to condition of premises was not a part of the decision of the question presented. The rule of the *Mitchell* and *Shea* Cases "does not mean that the defendants were bound to ascertain and take precautions in reference to the plaintiff's possible or chance presence in a dangerous situation upon their premises, but that they were required not to actively injure him if circumstances existed that warranted their anticipating his presence in such a situation as a probable occurrence." *Myers v. Railroad*, 72 N. H. 175, 55 Atl. 892. The case of *Carney v. Railroad*, 72 N. H. 364, 370, 57 Atl. 218, goes to the extreme verge of the law in holding that a trespasser whose presence there was no duty to anticipate might recover if there was a negligent failure to look out for other persons, whereby the plaintiff's presence was not discovered, as it would have been if the defendant's duty to third persons had been performed. *McGill v. Company*, 70 N. H. 125, 127, 46 Atl. 684, 85 Am. St. Rep. 618; *Hughes v. Railroad*, 71 N. H. 279, 284, 51 Atl. 1070, 93 Am. St. Rep. 518. But, however that may be, as the case is one of active intervention, it is not an authority

against the usual rule as to condition of premises merely.

In *Minot v. Railroad*, 73 N. H. 317, 61 Atl. 509, it is said that "reasonable men might also find that, having reason to anticipate a human being might be in a position to be seriously injured by the action contemplated, men of ordinary prudence, having regard to their general obligation to so conduct their lawful business as not to injure others, would not set in motion forces which might have that result without taking some precaution to prevent it." The case was a typical one of active intervention, and the phrase "their general obligation to so conduct their lawful business as not to injure others" is to be understood as applying to the case in hand. It was said of contemplated action, as related to persons already in a situation to be injured by the forces about to be set in motion. It cannot mean that the principle enunciated creates a legal duty under all circumstances. "The maxim that a man must use his property so as not to incommode his neighbor only applies to neighbors who do not interfere with it or enter upon it. *Knight v. Abert*, 6 Pa. 472, 47 Am. Dec. 478. To hold the owner liable for consequential damages happening to trespassers from the lawful and beneficial use of his own land would be an unreasonable restriction of his enjoyment of it." *Frost v. Railroad*, 64 N. H. 220, 222, 9 Atl. 790, 10 Am. St. Rep. 396. *Brown v. Railroad*, 73 N. H. 568, 573, 64 Atl. 194, was another case of actively bringing force to bear upon the trespasser, and the decision is put on that ground. The same line of reasoning is adopted in *Duggan v. Railroad*, 74 N. H. 250, 66 Atl. 829. In *Hughes v. Railroad*, 71 N. H. 279, 51 Atl. 1070, 93 Am. St. Rep. 518, it is said that, upon certain evidence, it could not be inferred that the use of the premises "was unnecessary or improper." Page 285 of 71 N. H., page 1071 of 51 Atl. (93 Am. St. Rep. 518). It might be thought that there was here a suggestion that from evidence of unnecessary or improper use it could be found that the injury was "intentionally or wantonly inflicted." Page 284 of 71 N. H., page 1070 of 51 Atl. (93 Am. St. Rep. 518). The decision is put upon the ground that, when "conducting their lawful business in a manner which there was no offer to prove was illegal or improper," the defendants were not liable to a trespasser. What was said is not to be taken as laying down a rule or making a suggestion that the landowner is liable to trespassers in an action for negligence based upon the condition of his premises. It was carefully guarded at the outset as merely an answer to the plaintiff's claim. "It is claimed that 'throwing away poisons or explosives is an altogether different case.' \* \* \* The claim is understood to stand upon the ground that, though a landowner is not liable for failure to take active measures for the protection of

trespassers according to the authorities above cited, he is liable for injuries intentionally or wantonly inflicted." Page 284 of 71 N. H., page 1070 of 51 Atl. (93 Am. St. Rep. 518).

It will be seen that every case in this state has attempted to follow the principles enunciated by Judge Smith. If expressions susceptible of a different construction are to be found in some opinions, yet, taken as a whole, they form a consistent body of authorities. In the absence of intentional injury, the landowner (or possessor) is not liable to trespassers except in the case of active intervention. A mere condition of his promises, previously created, cannot be made the basis for such a liability. If the former opinion in this case is capable of a construction which is a departure from the established law of the state, it is manifest that no such application of the language used was intended. It limits the proposition to "dangers created at the time," to "creating upon the land a concealed danger," to performing "at the time an unnecessary affirmative act." The court was merely elaborating the principle which is "otherwise expressed when it is said that the landowner is not liable to a trespasser or bare licensee for the careless use of his land in the absence of his active intervention. See 11 Harv. Law Rev. 349, 360-366; *Hobbs v. Company*, 74 N. H. 116, 121, 65 Atl. 382, 384."

It is not necessary to now consider whether the theory that contributory negligence or other fault of the plaintiff is a defense to actions sounding in negligence, while such contributing fault is not a defense when the injury was intentionally inflicted (*Cunningham v. Company*, 74 N. H. 435, 69 Atl. 120), underlies the rule expressed in the terms "active intervention" and "actively bringing force to bear." Whether the true limit of a trespasser's right to recover lies along the line of actual intent in the infliction of the injury upon him, or whether the more liberal rule heretofore applied in this state is the correct one, the result in the present case is the same. In neither view is the possessor of land liable to trespassers because at some time prior to their entry he carelessly, but in good faith and for no evil purpose, created a dangerous situation upon his premises.

There was in the present case no evidence either of intentional injury or of active intervention, and the plaintiff cannot recover unless the deceased was rightfully upon the premises. Upon the former transfer of the case it was held that there was no evidence from which an implied invitation could be found. The test to determine when an invitation may be implied is thus stated by Chief Justice Bigelow: "There are cases where houses or lands are so situated, or their mode of occupation and use is such, that the owner or occupant is not absolved from all care for the safety of those who

come upon the premises, but where the law imposes on him an obligation or duty to provide for their security against accident and injury. \* \* \* The general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurements, or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. "The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but, if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use." *Sweeny v. Railroad*, 10 Allen (Mass.) 368, 373, 374, 87 Am. Dec. 644; *Nolan v. Traction Co.*, 74 N. J. Law, 559, 65 Atl. 992. "The proof necessary to sustain an action of this aspect must be found in the circumstances of the particular case. In such cases, if there be evidence tending to show inducement or invitation, it becomes a question of fact for the jury whether the conditions exist under which a legal duty is imposed upon the owner of the premises to exercise care for the plaintiff's safety." *Phillips v. Library Co.*, 55 N. J. Law, 307, 315, 27 Atl. 478, 481. When, as a matter of habit and as an incident to the way business is carried on, customers wait about a creamery for an hour, it is not inappropriate to say that they are there by the owner's invitation. *True v. Creamery*, 72 N. H. 154, 156, 55 Atl. 898. Applying these principles to the proof produced at the trial, it appears that there was substantial evidence of implied invitation. The defendant maintained several small communities in the township of Success, at one time provided a school at one of them, and allowed the dwellers there to freely visit from one household to another. Dances were held there, and a short time before the accident a considerable number of outsiders visited this camp. There was also testimony that visitors came to Camp No. 38

"once in a while." A lumber camp is not a prison, a fort, or a pesthouse. It is the home provided by the employer for his employees. Unless the evidence is to be disregarded, it must be acknowledged that the social instinct of humanity has some existence even among the persons who inhabit lumber camps. The camp and its environs were not the defendant's in the exclusive sense that the mill was the property (or possession) of the Amory Company, the turntable that of the railroad, or the reservoir that of the city of Manchester. Having established such a place of human abode, it could be found that the defendant impliedly invited visitors to come there to such an extent as would be reasonable, considering the station in life of the parties interested. While it could not be found that the men had authority to invite a visitor because of their positions in charge of the work, or because the presence of such invitee would directly promote the defendant's business, it could be found that they had such authority from the fact that the defendant undertook to there maintain for them a place of abode. If it should be found that the invitation to the boy was a reasonable exercise of the implied authority to have visitors at the camp, it is evident that there would be ample ground for finding that the defendant was negligent as to such invitees. *True v. Creamery*, 72 N. H. 154, 55 Atl. 898; *Stevens v. Company*, 73 N. H. 159, 60 Atl. 848, 70 L. R. A. 119. Because there was sufficient evidence of invitation and of negligence as to invitees, the plaintiff was entitled to go to the jury upon the issue of the defendant's fault.

The conduct of the deceased remains to be considered. It now appears to be as probable that the explosion was caused by his intentionally striking the dynamite as by his coming in contact with it accidentally. As the case is now presented, the defendant's motion for a nonsuit should have been granted unless the plaintiff might recover on either view of the facts. *Wright v. Railroad*, 74 N. H. 128, 65 Atl. 687, 8 L. R. A. (N. S.) 832. It must be assumed, therefore, that the boy intentionally struck the blow which resulted in the explosion of the dynamite. But this does not include an assumption that he intentionally exploded dynamite, or that he intermeddled with what he knew he ought to let alone. There was evidence that he was ignorant of the appearance and properties of the explosive, and that he might have mistaken it for a bundle of small sticks, such as would be scattered promiscuously about on premises like these. It is said that the test to determine whether the boy's acts bar a recovery by his administrator is to ascertain whether the defendant could recover from him the value of the exploded dynamite. If this is a correct statement of the law, it is but saying, in other words, that the test is whether the boy was doing an illegal act. The things

permitted were legal acts. Things not permitted were illegal. The crux of the matter is: What acts were reasonably included in the tacit permission given him to enjoy his visit on the premises? As has been said, it is not a question of ownership. It is one of reasonably using things one has a right to use to some extent. That the decedent had some right upon the premises could be found from the facts as to the nature of the place and the knowledge of the defendant's agents. The question, then, is not one between a rightful possessor and an unexpected intruder, but one concerning the relative rights of two parties, each in some degree able to justify his presence upon the premises.

It is not enough to sustain the present motion for a nonsuit to show that the defendant, in its suit to recover the value of the exploded dynamite, could go to the jury. The state of the evidence must be such that in the supposed case a verdict would be directed for the plaintiff company as matter of law. If in that case the defendant might go to the jury, so may the plaintiff in the case at bar. Applying this test to the conduct of the deceased, the conclusion is irresistible that it might be found that his act was not wrongful. Like any self-reliant backwoods boy, he had gathered the available material to construct a sled. He had some old barrel staves and a hammer, and was searching for nails. While presumably busied about this avocation, he exploded the dynamite which had been negligently left exposed near the camp door. Whether he did this entirely by accident, or by putting his staves upon it when driving nails, or even by striking it intentionally as he might strike any of the surrounding brushwood, it might reasonably be found that his act was one included in his permission to be in contact with the defendant's possessions. It was an act that might reasonably have been foreseen, and that without any element of malice or even of mischief on the part of the boy. If a nugget of gold, closely resembling the cobblestones near the camp, had been left lying among them, and it had been lost because the boy (not being able to distinguish it from other cobblestones) threw it at an inquisitive hedgehog, it would be a strange rule of law which would direct that a verdict be ordered for the plaintiff in the company's suit to recover the concealed value of the nugget. *Taylor v. Jones*, 42 N. H. 25, 32. The evidence warranted the submission to the jury of the question whether the boy's act was either a trespass or negligent, or whether it was a reasonable and lawful enjoyment of a permission to be upon the premises and to act as a boy naturally would in reference to his surroundings.

Verdict set aside. Exception to the denial of the motion for a nonsuit overruled. All concurred.

(223 Pa. 152)

## WALSH v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. June 23, 1908.)

## 1. RAILROADS (§ 327\*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

The duty of being observant and careful in crossing a railroad track does not cease with the mere act of stopping, looking, and listening at some point at a safe distance from the track, but continues so long thereafter as danger is reasonably to be apprehended.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.\*]

## 2. RAILROADS (§ 327\*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

The original act of stopping, looking, and listening at a railroad crossing cannot operate to relieve the injured party of contributory negligence, if between the point where he stops and the tracks the situation affords opportunity to discover an approaching train, and injury results because of a disregard of such opportunity.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1051; Dec. Dig. § 327.\*]

## 3. RAILROADS (§ 327\*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

Where plaintiff was accustomed to cross railroad tracks, at the point at which she was run down, both in daytime and at night, and was familiar with the conditions existing, and instead of advancing slowly and carefully from the point at which she stopped to look and listen, she started at a trot, passing a point 35 feet from the track, from which she could have seen an approaching train at a distance of 740 feet, and attempted to cross the track with the train in full sight, with its headlight lighted, and with an arc light overhead at the crossing, she was guilty of contributory negligence barring recovery for the injuries sustained.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.\*]

Appeal from Court of Common Pleas, Luzerne County.

Trespass by William P. Walsh, executor of the estate of Mary Hayden, deceased, to recover for personal injuries against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

James L. Lenahan and Joseph A. Mulhern, for appellant. John McGahren and H. W. Palmer, for appellee.

STEWART, J. Mrs. Mary Hayden, the original plaintiff in the case—deceased since the result in the lower court was reached—a widow of about middle age, was injured by a passing train while attempting to cross the tracks of the defendant company in an open wagon, she herself driving, at a public crossing in the city of Wilkesbarre. The accident occurred about 7:30 of a September evening. The plaintiff was engaged in farming, and in marketing her products had long been accustomed to cross the tracks of the railroad at this point, both in daytime and at night. She admitted to being perfectly familiar with the conditions and surroundings there exist-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing. She testified that on this particular occasion, before attempting to drive across the tracks, she stopped at a point 20 feet distant from the first track, which was a switch or siding, and 41 feet from the center of the track beyond, on which the collision occurred, and that she there looked and listened for the approaching train. From the point where she stopped an unobstructed view of the tracks is afforded for a distance of 440 feet. The view enlarges with nearer approach to the tracks, until at a distance of 10 feet from the track on which the plaintiff was injured it takes in nearly 1,000 feet. The plaintiff having testified that she stopped, looked, and listened, but neither heard nor saw any indication of an approaching train, she was asked, "Then what did you do?" Her answer was: "Well, I took the line, give the horse a little whip, and she go, and I come over all right in the first track." Her examination proceeded: "Q. That is the switch? A. Railroad track anyway. Q. First track you went over all right? A. Railroad tracks, and before I come to second, I guess I pretty near over, I see lights on the engine coming. After that I know nothing more any more myself." Upon cross-examination her testimony with respect to this matter was as follows: "Q. When you were going across this track that the train was on, just before you were struck, how was the horse going, walking or trotting? A. Trotting. Q. Was he trotting or walking when he crossed there? A. He go quick, you know. Q. Then he was trotting; that is, running? A. Not very fast. Q. But he was on a slow jog or trot—the horse was going along trotting? A. Yes, sir; fast, not slow. Q. When he was going across the switch—you know where the switch is? A. Yes, sir. Q. And then he trotted along, did he, after you struck him with the whip the horse jogged along? A. He go, you know, I go on. Q. Fast? A. So middle fast. Q. Then you didn't stop any more until the train struck him, did you? A. I come over all right in the first track. I pretty near over the second track, I looked up this way, see the light of the engine, and as soon as I see the light from the engine I been gone. I know nothing more any more after."

The duty of being observant and careful in crossing the track of a railroad does not cease with the mere act of stopping, looking, and listening at some point at a safe distance from the track, but continues so long thereafter as danger is reasonably to be apprehended which by proper care can be avoided. One may not determine for himself that point of observation, and because there he neither sees nor hears warning, advance heedlessly upon the tracks of the railroad, without incurring responsibility for any disaster that may ensue. The duty to be observant continues so long as danger threatens. If between the point where the party stops and

the tracks of a railroad the situation affords opportunity to discover an approaching train, and injury results because of disregard of such opportunity, the original act of stopping cannot operate to relieve the injured party of contributory negligence. *Muckinhaupt v. Erie Railroad Co.*, 196 Pa. 213, 46 Atl. 364. It is unquestioned that, had this plaintiff looked at a point 35 feet from the center of the track on which the collision occurred, she could have seen the approaching engine at a distance of 740 feet from her. Instead of advancing slowly and carefully from the point where she says she stopped, she started at a trot, passing the point of wider view, and, as her counsel puts it, committed herself to the act of crossing the tracks, continuing as she proceeded at the same rapid rate. Now, notwithstanding she says that she continued to look and listen as she advanced, and failed to see the train approach, and however earnestly and honestly she believed she had done so, her statement to this effect is simply incredible. Had she looked at any time after starting from her point of observation, she must have seen the train as it approached. She clearly and distinctly testified that she saw or heard nothing until the moment her wagon was struck; that she looked up, saw the headlight, and instantly was struck. The evidence admits of no other conclusion than that expressed by the learned trial judge in giving binding instructions in favor of the defendant: Either seeing the train, the plaintiff thought she had opportunity to get across and ventured, or that, with the train in full sight, with its headlight lighted, and with an arc light overhead at the crossing, and with every opportunity to see, if she had looked, she did not look. In either case her contributory negligence would be so apparent that it became the duty of the court, under the admitted facts, to give binding instructions for the defendant. The case is governed by the principle announced in *Carroll v. Penna. Railroad Co.*, 12 Weekly Notes Cas. 348, and so often since repeated that it is unnecessary to cite the cases supporting.

Judgment affirmed.

(222 Pa. 248)

**LEHIGH & N. E. R. CO. v. HANHAUSER**  
et al.

(Supreme Court of Pennsylvania. Oct. 5, 1908.)

**1. COURTS (§ 481\*)—JURISDICTION—JUDGMENT OF ANOTHER COURT—CONTROL.**

A judgment had been entered by a contractor against a railroad company and other railroads were brought in as terre tenants on scire facias proceedings under Act April 4, 1862 (P. L. 235). *Held*, that the court of common pleas of another county sitting in equity had no jurisdiction of a bill by a railroad company, successor of the terre tenants, averring such judgment to be a cloud on complainant's title in the county and to restrain the holders of the judgment from making any levy thereunder on complainant's property, as the situs of the prop-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

erty in no way affects the question of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1279; Dec. Dig. § 481.\*]

## 2. JUDGMENT (§ 292\*)—TRANSFER—JURISDICTION.

Where a judgment is transferred to a second county, the courts thereof have no jurisdiction to question its validity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 572; Dec. Dig. § 292.\*]

## 3. EXECUTION (§ 65\*) — ISSUE TO ANOTHER COUNTY—CONTROL.

Where a *fi. fa.* issues from a court in which a judgment is entered to the sheriff of another county, the courts of the latter county have no control thereof

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 65.\*]

Appeal from Court of Common Pleas, Northampton County.

Bill by the Lehigh & New England Railroad Company against George Hanhauser and William C. Mayne. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Edward J. Fox, James W. Fox, and Wm. Y. C. Anderson, for appellant. Chester N. Farr, Jr., H. J. Steele, and William A. Glasgow, Jr., for appellees.

BROWN, J. If the appellant be entitled to the relief prayed for in its bill, the court below was not the place to go for it. On March 22, 1887, James Clarke recovered a judgment in the court of common pleas No. 3 of Philadelphia county against the Pennsylvania & New England Railroad Company. Upon this judgment various writs of *scire facias* were issued from time to time, and on October 24, 1906, judgment was entered against the original defendant and certain railroad companies summoned as terre tenants for \$96,922.42. The appellant, as the successor of these terre tenants, avers in its bill that this judgment is a cloud upon its title to rights, property, franchises and assets within the county of Northampton, and prays that it be decreed to be not a lien upon the same and for an injunction to restrain the holders thereof from making, or causing to be made, by virtue of it, any levy upon the said rights, property, franchises, and assets. The cloud which the appellant alleges rests upon its title to property in Northampton county, and which it would have removed therefrom, is a judgment entered in one of the courts of Philadelphia county against the Pennsylvania & New England Railroad Company and five terre tenants. That judgment was not taken against the appellant as a terre tenant, but, even if it had been, it would not be a lien against any of its property outside of Philadelphia county. As no property outside of that county is affected by the entry of the judgment

there, it cannot rest as a cloud upon any property of the appellant in Northampton county; and, if it should be transferred to that county under the act of April 18, 1840 (P. L. 410), its court of common pleas would have no right to inquire into the validity, merits, or effect thereof. *King v. Nimick et al.*, 34 Pa. 297. One court cannot modify, disregard, or set aside the judgment of any other court of co-ordinate jurisdiction. *Doyle v. Commonwealth*, 107 Pa. 20. A judgment entered on an exemplification of the record does not become a judgment in the common interpretation of the word in the county to which it is transferred. The judgment on the exemplification is but the record evidence of the existence of the judgment in the county in which it was obtained, and the court to which it is transferred has no power over it save for lien and execution and cannot inquire into its validity or make orders affecting its operation. All inquiries into the effect of a judgment as establishing the rights of a plaintiff under it must be made to the court that pronounced it. *Nelson v. Guffey*, 131 Pa. 273, 18 Atl. 1073.

If the validity and effect of the judgment in Philadelphia county cannot be inquired into and passed upon by the court of common pleas of Northampton county, if transferred into that county, much less can that court say what may be done with or under a writ of execution on it directed by the common pleas of Philadelphia county under statutory authority to the sheriff of Northampton county. In executing such a process the sheriff of that county would become, for the time being, the officer of the Philadelphia court, to which alone he would make return, and in the execution of his writ the court of his own county would have no more control over him or the writ, or the holders of the judgment on which the same issued, than it would have over a United States marshal with a writ of *fi. fa.* in his hands, or over the plaintiffs therein in their attempt to enforce their rights under their judgment in the federal court. As to this the learned chancellor below, in his opinion sustaining the demurrer to the bill, properly and well said: "If a testatum *fi. fa.* had been issued, and the present bill had been filed, exactly the same case would be presented as was presented in *Nelson v. Guffey*, 131 Pa. 273, 18 Atl. 1073, where it was held: 'It is error in the court of the county to which such testatum *fi. fa.* is directed to proceed by bill in equity filed by the defendant to enjoin the plaintiff from prosecuting its enforcement.' The subject-matter or thing in controversy is this judgment of the court of common pleas No. 3 for the county of Philadelphia. It is immaterial that our process would be directed to the defendants in the present case. The effect of our decree would be an interference with a proposed action of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the defendants in the court of common pleas No. 3 for the county of Philadelphia, where all the parties to the present suit, as appears by the bill, are interested, either as the successor of terre tenants, who have had judgments entered against them, or as a party to the suit still pending in that court upon the same judgment, to recover against the present plaintiff as a terre tenant. The jurisdiction of the court of common pleas No. 3 for the county of Philadelphia is ample to protect the present plaintiff upon the same allegations, if application is made to it, either on the law or equity side." To this we cannot profitably add anything, except to say that not only public policy, but the settled authorities will not permit any interference by any other court with the judgment entered or directed to be entered by the common pleas of Philadelphia county, or with the process which the Legislature directs may go out upon it from that court.

One of the contentions of the appellant is that the situs of the property controls the question of jurisdiction in this case. As jurisdiction over those holding the judgment may be obtained by a proceeding in equity in Philadelphia county, the location of the property in Northampton county is immaterial. *Schmaltz v. York Mfg. Co.*, 204 Pa. 1, 53 Atl. 522, 59 L. R. A. 907, 93 Am. St. Rep. 782; *Clark v. Clark*, 180 Pa. 186, 36 Atl. 747; *Clad v. Paist*, 181 Pa. 148, 37 Atl. 194; *Kendall v. Coke Co.*, 182 Pa. 1, 37 Atl. 823, 61 Am. St. Rep. 688.

The decree of the court below is affirmed, at appellant's costs.

(222 Pa. 190)

SCHMUCK v. HARTMAN et al.

(Supreme Court of Pennsylvania. June 23, 1908.)

1. TAXATION (§ 495\*)—ASSESSMENT—RIGHT TO APPEAL.

Though no right of appeal from a judgment in favor of a taxpayer against a tax assessment is given by statute, the Supreme Court, by reason of its general jurisdiction to examine and correct all errors of the lower courts, will treat an appeal as a certiorari, and correct any error on the face of the record.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 889; Dec. Dig. § 495.\*]

2. COURTS (§ 242\*)—SUPREME COURT—NATURE AND GROUNDS OF APPELLATE JURISDICTION.

As Act May 22, 1722 (1 Smith's Laws, p. 131), granted such powers to the Supreme Court as "the justices of the Court of King's Bench, Common Pleas, and Exchequer, or any of them possessed," Act June 16, 1836 (P. L. 784), referring to the "heretofore" powers of the courts, is to be understood as referring to the general common-law powers of those courts so far as they are unimpaired by the state and national Constitutions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 718, 719; Dec. Dig. § 242.\*]

3. COURTS (§ 242\*)—SUPREME COURT—GROUNDS OF APPELLATE JURISDICTION.

The judicial authority of the Supreme Court extends to the review and correction of all

proceedings of all inferior courts, except where such review is expressly excluded by statute, and it may issue all sorts of process, and use and adopt all sorts of legal forms necessary to give effect to such supervisory authority.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 718, 719; Dec. Dig. § 242.\*]

4. TAXATION (§ 2\*)—NATURE AND GROUNDS OF LIABILITY.

All taxation is statutory, and, while it is the duty of every citizen to bear his just proportion of public expense, he cannot be compelled to do so except as provided by statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 2; Dec. Dig. § 2.\*]

5. TAXATION (§ 1\*)—NATURE AND GROUNDS OF LIABILITY.

Liability to pay taxes arises from no contractual relation between the taxable and the taxing power, and cannot be enforced by common-law proceedings, unless the statute so provides.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1; Dec. Dig. § 1.\*]

6. TAXATION (§ 467\*)—ASSESSMENT—FAILURE TO MAKE RETURN.

The taxing authorities cannot assess a taxpayer who has neglected to make a return for a particular year after the expiration of that year.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 835; Dec. Dig. § 467.\*]

7. TAXATION (§ 467\*)—ASSESSMENT—FALSE RETURN.

The taxing authorities cannot assess a taxpayer who makes an insufficient and false return for a particular year after the expiration of that year, but the only remedy is to ascertain the liability of the taxpayer in the manner pointed out by Act June 1, 1889 (P. L. 425, §§ 11, 12, providing that failure to assess or to make return shall not relieve the owner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 835; Dec. Dig. § 467.\*]

Appeal from Court of Common Pleas, York County.

The board of revision of taxes of York county having affirmed the action of the county commissioners raising the valuation of the personal property of Henry M. Schmuck, he appealed to the court of common pleas. That court entered judgment in favor of Schmuck, and the county commissioners appeal. Affirmed.

The following statement of facts was made by Wanner, J., of the court below:

"This is an appeal by Henry M. Schmuck from the decision of the board of revision of taxes of York county, Pa., in affirming the action of the county commissioners of said county, who on December 28, 1907, raised the valuation of his personal property for purposes of state taxation for a period of 32 years immediately preceding, to wit, from 1876 to 1907, inclusive. This was done under the supposed authority of sections 11 and 12 of the act of assembly of June 1, 1889 (P. L. 425), because the appellant during that period had not returned to the assessor certain sums of money which he then had invested in mortgages in the state of Ohio. The appellant had fully paid all the state



taxes assessed against him each year during the period above mentioned. The county commissioners, having discovered that these returns were too low, and that the appellant had thereby escaped taxation on a larger sum of money, raised his taxable valuation from the several sums returned by him to the aggregate amounts of said Ohio mortgages as actually held by him, during the several years in question, as follows:

Year	Original	Return	Raised	Valuation
1876	.....	No return	.....	\$ 30,000
1877	.....	No return	.....	30,000
1878	.....	No return	.....	59,000
1879	.....	No return	.....	70,440
1880	.....	No return	.....	73,040
1881	.....	No return	.....	80,040
1882	.....	No return	.....	86,040
1883	.....	No return	.....	109,540
1884	.....	No return	.....	133,040
1885	.....	\$4,080	.....	133,160
1886	.....	4,080	.....	146,660
1887	.....	4,080	.....	172,220
1888	.....	4,700	.....	199,300
1889	.....	4,700	.....	236,400
1890	.....	5,100	.....	233,840
1891	.....	5,000	.....	256,040
1892	.....	5,000	.....	262,740
1893	.....	5,000	.....	293,640
1894	.....	5,000	.....	391,900
1895	.....	5,000	.....	485,433
1896	.....	5,000	.....	537,613
1897	.....	5,000	.....	571,763
1898	.....	5,000	.....	649,433
1899	.....	6,400	.....	781,258
1900	.....	6,800	.....	799,125
1901	.....	5,900	.....	842,115
1902	.....	5,600	.....	828,590
1903	.....	5,000	.....	804,590
1904	.....	5,000	.....	824,875
1905	.....	5,000	.....	812,325
1906	.....	6,000	.....	802,200
1907	.....	6,000	.....	727,020

"It is contended on behalf of the appellant that this action of the commissioners was illegal. That it was unwarranted by the act of assembly of 1889, and that after the payment of his taxes as regularly assessed, and after the expiration of the year for which they were assessed, it was too late to raise the appellant's valuation, or to reassess him."

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

John R. Geyer, John E. Fox, and H. C. Brenneman, County Solicitor, for appellants. J. S. Black, C. E. Ehrehart, and V. K. Keesey, for appellee.

BROWN, J. No right of appeal from the action of the court below is given by any statute, and counsel for appellants frankly admit that one does not lie. But for nearly 200 years the "general jurisdiction of this court has been declared by statute to extend to the examination and correction of 'all and all manner of error of the justices, magistrates, and courts of the commonwealth, in the process, proceedings, judgments, and decrees, as well in criminal as in civil proceedings, \* \* \* and to minister justice to all persons as full and ample to all intents and purposes as the said court has heretofore had power to do under the Con-

stitution and laws of the commonwealth.' Such are part of the words of the act of 1836. Act June 16, 1836 (P. L. 784). In the old act of May 22, 1722 (1 Smith's Laws, p. 131) the powers granted were such as 'the justices of the Court of King's Bench, Common Pleas, and Exchequer, or any of them possessed.' When, therefore, the act of 1836 refers itself to the 'heretofore' powers of the courts, the general common-law powers of the three principal courts of Westminster Hall, so far as they are unimpaired by our Constitutions, state and national, are to be understood by the reference." Chase v. Miller, 41 Pa. 403. "The judicial authority of this court extends to the review and correction of all proceedings of all inferior courts, except where such review is expressly excluded by statute, in accordance with the Constitution; and we may issue all sorts of process, and use and adopt all sorts of legal forms that are necessary to give effect to this supervisory authority." Gosline v. Place, 32 Pa. 520. The motion to quash is overruled, but, treating the appeal as a certiorari, the record is brought up for review, and, if it discloses error by the court below in denying to the appellants a legal right under admitted facts, such error must be corrected. From 1876 to 1884, inclusive, Henry M. Schmuck made no return of his personal property liable to state tax. From 1885 to 1907, inclusive, he did make returns, starting in 1885 with \$4,080, and gradually increasing them until the one for 1907 reached \$6,000. Late in that year the county commissioners, having learned that for 32 years the appellee had either failed to make any return or had falsely returned his personal property liable to a state tax, made assessments or reassessments against him for each year from 1876 to 1907. That made for the year 1876 was for \$30,000, and down to and including 1884 they varied from that amount to \$133,040. From 1885 the reassessments varied from \$133,160, the lowest, to \$824,875, the highest.

The appellee has undoubtedly withheld from the commonwealth a large sum which he ought to have paid for taxes, and his moral duty unquestionably now is to pay it, but he cannot be compelled to perform that duty unless there is a right in the commonwealth to enforce it as a legal one. All taxation is statutory, and, while it is the duty of every citizen to bear his just proportion of the burden of supporting national, state and local government, he cannot be compelled to do so except in a way provided by a statute. Liability to pay taxes arises from no contractual relation between the taxable and the taxing power, and cannot be enforced by common-law proceedings unless a statute so provides. They can be collected in no other way than that pointed out by the statute, and cannot be collected until they have first been assessed according to the statute. Are the assessments and reassessments made by

the appellants sanctioned by any statute? If they are not, they are void. No act of assembly authorizes an assessment of a state tax on personal property after the expiration of the year in which it ought to have been assessed and the taxable ought to have paid it; and yet this is what the appellants did for the years from 1876 to 1884. They do not pretend that there was authority for this in any statute that had been passed up to 1885, and, as to these original assessments made by them 31 years after the first one ought to have been made and 23 years after the one for 1884 should have been made, nothing more need be said. From 1885 to 1907 the appellee regularly made returns to the assessors. For these assessments, upon which he paid taxes each year, the appellants would now substitute reassessments as a basis for the collection by the commonwealth of a large sum of money from the appellee. For this extraordinary proceeding they must point to some statutory authority, for it can exist nowhere else. It is no answer that the appellee defrauded the state and ought now to be compelled to pay, for, whatever may be the moral aspect of the case, it is his right when, at this late day, the appellants would impose taxes upon him, which, if ever due, ought to have been imposed years ago, to ask for and be shown the statute under which they would now compel him to pay.

By the acts of 1885 (Act June 30, 1885 [P. L. 193]) and 1889 (Act June 1, 1889 [P. L. 420]) the commonwealth undertook to protect itself from the failure of a taxable to make a proper return, and, if it did not sufficiently do so, it is not his fault. The returns made by the appellee from 1885 are to be regarded as false, for he did not return during that period all of his personal property liable to state tax. In now undertaking to reassess him for these 23 years, the appellants insist that they have authority to do so under section 1 of the act of 1889 (P. L. 420), which provides that no failure to assess or return personal property shall discharge the owner or holder thereof from liability therefor to the commonwealth. The act of 1889 was not retrospective, but, aside from this, Schmuck made a return in each year from 1885 to 1907. If he had not, his liability to the commonwealth would, of course, have continued under the first section of the act of 1880; but in each year from 1889 to 1907 that liability was to be fixed by the county commissioners in the way pointed out by section 5 of the act. If the returns made were false, the liability of the appellee was to be ascertained in the way pointed out by sections 11 and 12 of the act. No other mode appears in that act or any other for fixing the liability of a taxable who makes a false return, and no other, therefore, exists. The mode pointed out in the act of 1889 for

fixing liability to the commonwealth, either upon a failure to make a return or upon a false return, must be pursued each year, for in each year the tax is to be assessed and paid. What was attempted by the appellants here was attempted in Williamson's Estate, 153 Pa. 508, 26 Atl. 246. In 1888 Williamson failed to make any return of his personal property to the assessors. They estimated his taxable personal estate at \$45,000 and assessed him with that amount. The board of revision of taxes added 50 per cent. by way of penalty, and the assessment, as corrected and revised by them, was \$67,500. The taxes on this were paid. Two or three months after their payment, and in the following year, Williamson died, the inventory of his estate showing personal property amounting to \$2,500,000. In April 1888—six months after he should have made his return in 1887—the board of revision of taxes made a new assessment, without the intervention of the assessors, fixing the amount of the personal estate at \$2,500,000 and adding a penalty of 50 per cent. This court held that the second assessment was improper and void, and that the county of Philadelphia, having received the whole amount of the tax under the first assessment, could recover nothing more from the estate. In the course of his opinion Mr. Justice Williams said: "If the decedent had made a false return and so misled the board, a very different question would be raised. He simply declined to give any information." Upon this these appellants lay great stress, but it is to be regarded as mere obiter dictum. The question of a false return was not in that case. If it had been, this court would have been compelled to hold that the only remedy the state has for a false return is the one which is provided by itself in the eleventh and twelfth sections of the act of 1889, and no other can be pursued.

Taxation is purely for the Legislature. The judiciary can enforce it only as the Legislature directs it to be enforced. For cases like the present additional legislation is manifestly needed, but, until it is enacted, the commonwealth must submit. Appeal dismissed, at appellants' costs.

(222 Pa. 214)

COMMONWEALTH v. HARVEY et al.  
(Supreme Court of Pennsylvania. June 23, 1908.)

1. BAIL (§ 77\*)—JUDGMENT OF FORFEITURE—CONCLUSIVENESS.

A decree of forfeiture of a recognizance by the court of quarter sessions is conclusive in proceedings in the common pleas.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 379, 403; Dec. Dig. § 77.\*]

2. BAIL (§ 84\*)—ACTION ON BOND—DEFENSES.

The court of common pleas did not err in refusing to exercise the discretion given it by

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the act of December 9, 1783 (2 Smith's Laws, p. 86), to moderate or remit recognizances forfeited in the courts of quarter sessions, where the ground of relief was that defendant remained in court until the indictment against him was ignored by the grand jury, and that it had been the uniform practice in the court of quarter sessions to regard the report of a grand jury ignoring an indictment as ipso facto a discharge of defendant, and to treat an entry upon the records of the court in such action by the grand jury as leave for him to depart, but it was not averred that leave was given him to depart, and the case was continued to the next term with leave to the district attorney to submit it again to a grand jury.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 84.\*]

### 3. BAIL (§ 84\*)—ACTION ON BOND—DEFENSES.

An averment in an affidavit of defense to an action on a forfeited recognizance that it was the uniform practice in the court of quarter sessions to regard the report of a grand jury ignoring an indictment as ipso facto a discharge of defendant, and to treat an entry upon the records of the court of such action by the grand jury as leave for him to depart, might be considered by the court of common pleas as a reason for moderating or remitting the forfeiture, but it was not required to do so.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 84.\*]

Appeal from Court of Common Pleas, Dauphin County.

Assumpsit on a recognizance by the commonwealth against Frank Harvey and the Title Guaranty & Trust Company of Scranton. Judgment for plaintiff, and the company appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Hargest & Hargest and Trautman & Llewellyn, for appellant. John Fox Weiss, W. H. Middleton, and W. H. Musser, for appellee.

**BROWN, J.** The appellant entered into a recognizance for the appearance of Frank Harvey at the January term, 1906, of the court of quarter sessions of Dauphin county. It was forfeited, and in this suit upon it the question of its breach cannot be raised. The court of quarter sessions' decree of forfeiture is conclusive in the proceedings in the common pleas. *Shriver v. Commonwealth*, 2 Rawle, 206; *Rhoads v. Commonwealth*, 15 Pa. 272; *Pierson v. Commonwealth*, 3 Grant Cas. 314; *Commonwealth v. Basendorf*, 153 Pa. 459, 25 Atl. 779. By the act of December 9, 1783 (2 Smith's Laws, p. 86), the courts of common pleas are empowered to levy, moderate, or remit recognizances forfeited in the courts of quarter sessions "on hearing the circumstances of the case according to equity and their legal discretion"; and this court may hear appeals from orders or judgments of said courts on such forfeited recognizances. The affidavit of defense in this case is but an appeal to the discretion of the court below to remit the forfeiture of the recognizance. No legal defense is set up in it, and the court committed no error in refusing to

exercise the discretion given by the act of 1783. The condition of the recognizance was that Harvey would appear and "not depart the said court without leave." His failure to appear or his departure after appearing without leave of court to go was a breach of it. "The mere appearance of a defendant and then departing without such leave clearly does not release the surety. *Commonwealth v. Coleman*, 2 Metc. (Ky.) 382; *Star v. Commonwealth*, 7 Dana (Ky.) 243; *State v. Gorley*, 2 Iowa, 52; *Humphrey v. Kasson*, 26 Vt. 760. It is the express condition of the recognizance that he shall appear and not depart the court without leave. It is at all times in the discretion of the court, at any stage of a criminal trial, to call the defendant and forfeit his recognizance. *People v. Petry*, 2 Hill. (N. Y.) 523; *People v. Blankman*, 17 Wend. (N. Y.) 252; *Gildersleeve v. People*, 10 Barb. (N. Y.) 35; *Wilson v. State*, 6 Blackf. (Ind.) 212; *State v. Stout*, 11 N. J. Law, 124; *Mishler v. Commonwealth*, 62 Pa. 55, 1 Am. Rep. 377.

The appeal of the defendant below to the discretion of the court to give it some measure of relief is based upon an averment that on the second day of the court, when the bill of indictment against Harvey was presented to and ignored by the grand jury, he was present and remained in court until the following day, ready to answer the charge that had been preferred against him and any other that might be preferred, but that the uniform and unbroken practice in the court of quarter sessions of the county was to regard the report of a grand jury ignoring a bill of indictment as ipso facto a discharge of the defendant, and to treat an entry upon the records of the court of such action by the grand jury as leave for him to depart. The uniform and unbroken practice in the court of quarter sessions is not a question in this proceeding by the commonwealth to recover for the use of the county on a recognizance actually forfeited. The averment as to such practice might have been taken into consideration by the court below as a reason for exercising its legal discretion in moderating or remitting the forfeiture, but it was not required to do so. Though the affidavit of defense avers Harvey's appearance in court and his remaining there until the third day, there is no averment that leave ever was given him to depart. On the contrary, it rather appears, not only that such leave was not given, but, if it had been asked for, would have been refused. The admission in the affidavit of defense is that on January 11, 1906—the fourth day of the term—the case was continued to the next term, with leave to the district attorney to submit it again to a grand jury. The prosecution against Harvey was not concluded when the bill against him was ignored. It was still

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

under the control of the court, and was formally continued for action upon it by a subsequent grand jury. The defendant had not been acquitted, and in the interval he was to remain in the custody of the court and not depart without leave, for that was the condition of his recognizance. Until such leave was obtained, there was no exoneration for his bail.

Judgment affirmed.

(222 Pa. 232)

JACKSON et al. v. THOMSON et al.

(Supreme Court of Pennsylvania. Oct. 5, 1908.)

**1. TRUSTS (§ 357\*)—FOLLOWING TRUST PROPERTY—FRAUD OF TRUSTEE.**

Testamentary trustees conveyed land under power of sale to an attorney, who knew that the intent was to provide for the payment of the individual debts of the trustees, and was in consideration of the grantee's payment of such debts. *Held*, that the deed was void as to the share of the beneficiaries other than the trustees themselves.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 543; Dec. Dig. § 357.\*]

**2. TRUSTS (§ 356\*)—CONSTRUCTIVE TRUST.**

Where trustees convey the trust property for the purpose of paying their own debts to the knowledge of the grantee, the grantee becomes a trustee *ex maleficio* as to the parties wronged.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 529; Dec. Dig. § 356.\*]

**3. TRUSTS (§ 197\*)—FOLLOWING TRUST PROPERTY—ESTOPPEL.**

Where testamentary trustees convey the trust estate in which they have an interest to pay their individual debts and the grantee has knowledge thereof, the trustees cannot set up their own wrong for the purpose of invalidating the deed as to their individual interests.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 255; Dec. Dig. § 197.\*]

Appeal from Court of Common Pleas, Sullivan County.

Action by W. W. Jackson and Blanche W. Sturdevant and others against Rush J. Thomson and others. From the judgment, both parties appeal. Both appeals dismissed, and judgment affirmed.

Plaintiffs presented this point:

"(1) That under all the evidence in this case the verdict must be for the plaintiffs for the land described in the writ, and whatever mesne profits the jury may find the plaintiffs entitled to as damages for the use and occupation of said land by the defendants. Answer: This point is refused. This would be directing you to find for the plaintiffs for the whole undivided one-third, which would be contradictory of what we have already instructed you. We say you should find for the plaintiffs against Mr. Thomson for three-fifteenths of the land and for that proportion of the mesne profits, but it is for you to say whether there shall be recovery for more than that against him."

Defendants presented these points:

"That there is not sufficient evidence in

the case of any breach of trust or fraud on the part of the executors of the last will and testament of George D. Jackson, deceased, in making the conveyance to the defendant Rush J. Thomson of the land in suit on July 9, 1897, and that Rush J. Thomson and the Citizens' National Bank of Towanda, Pa., or either of them, participated in such fraud or breach of trust, to warrant the court in decreeing a reconveyance or submitting the question of the validity of said conveyance to the jury. Answer: Refused."

"(4) That under all the evidence in the case the plaintiffs are not entitled to recover. Answer: Refused.

"(5) That under all the evidence in the case the verdict should be for the defendants. Answer: Refused, except as to the defendant Gunton."

The verdict of the jury was in favor of the plaintiffs and against the defendant Rush J. Thomson for three-fifths of the land described in the writ, being the undivided three-fifteenths of the tract of land described in the writ, and the sum of \$24,055.35, in favor of the plaintiffs and against the defendant Rush J. Thomson for mesne profits. The judgment was entered against the defendant Rush J. Thomson, and in favor of the plaintiffs for the sum of \$24,055.35, with costs, and in favor of the plaintiffs for three-fifths of the land described in the writ, being the undivided three-fifteenths of the tract of land described in said writ.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Frank W. Wheaton, Rodney A. Mercur, and I. McPherson, for Rush J. Thomson. Seth T. McCormick, E. J. Mullen, and Alphonsus Walsh, for W. W. Jackson and others.

BROWN, J. George D. Jackson at the time of his death, November 23, 1879, was the owner of an undivided third interest in the land which is the subject of this ejectment. By his will, admitted to probate December 15, 1879, he devised his real estate to his executors in trust, with power to sell, and provided that "by and with the money or moneys proceeding from such sale or sales, or moneys in hand at the time of my decease, or collections made from debts and obligations due me in the first place to pay or discharge all of my just debts, and after such debts are fully paid then the residue and remainder of my estate shall be for the sole use and benefit of my dear wife as long as she shall live, and after her decease then to be divided equally share and share alike, amongst my children, viz.: Mary B., wife of J. W. Young, George C. Jackson, Alice E., wife of Thomas Irving, Willie W. Jackson, and Blanche Winnifred Jackson. But my wife may in her discretion, if she thinks best, and any of my said children need it, advance

such sums to them or any of them as she thinks advisable, so as to be within the amount that would be coming to them as their share after her death, and which amounts so advanced shall be taken and deducted from their share to which that child would be entitled on the final settlement of my estate." On May 17, 1889, George C. Jackson, one of the sons, conveyed to his mother all of his interest in the estate of his father, and on February 5, 1898, W. W. Jackson, the other son, assigned his interest to her. On July 9, 1897, Bernice W. Jackson and George C. Jackson, as executors of George D. Jackson, conveyed his one-third interest in the land in controversy to Rush J. Thomson for the nominal consideration of \$1. By deed dated April 12, 1890, Bernice W. Jackson, Mary B. Young, Alice E. Irving, and Blanche W. Sturdevant, formerly Jackson, conveyed to Bernice W. Jackson, W. W. Jackson, and Blanche W. Sturdevant, in trust, all of their interest in the real estate of the said George D. Jackson not theretofore sold by the executors, for the purpose, as expressed in said deed, of carrying out the will of the testator without an administrator in the event of the death of the said Bernice W. Jackson; the surviving executor, George C. Jackson, having died December 25, 1898. By this deed the trustees were empowered to sell or lease the real estate and hold the proceeds for the sole use of Bernice W. Jackson during her life, and after her decease, to divide the same between the said Mary B. Young, Alice E. Irving, Blanche W. Sturdevant, and Ida G. Jackson, the latter having been named by the parties in interest as one of the beneficiaries in the said deed of trust. If there was a conversion under the direction to the executors to sell, this deed, as was properly held by the learned judge below, reconverted into real estate so much of the land of the testator as had not been sold. This ejectionment was brought by the surviving trustees in the deed of trust, W. W. Jackson, administrator d. b. n. c. t. a. of the estate of George D. Jackson, deceased, Mary B. Young, Alice E. Irving, Blanche W. Sturdevant, three of the children of the testator, and Ida Greene Jackson, and they seek to recover upon two grounds: (1) Thomson procured the deed from the executors by taking advantage of the confidence reposed in him by them as their relative, attorney, and confidential adviser; and (2) the consideration for it was the individual indebtedness of the executors due to Thomson or assumed by him. As to this second ground, there was no conflict of testimony. Thomson admitted that the consideration included some individual indebtedness of George C. Jackson and \$8,100 of individual indebtedness of the two executors to the Citizens' National Bank of Towanda. Under a charge entirely free from error and couched in clear language, the jury found that Thomson had not taken advantage of any confidential relation existing

between him and the executors, and that finding is binding upon us, though it might very fairly have been different under the evidence. It eliminates the only question of fact in the case. As a matter of law, the jury were instructed that, if they should find the deed had not been procured by Thomson through an abuse of confidence, it was nevertheless void as to the three-fifths of the testator's interest devised to his three daughters, and a verdict was directed against him as to them. As to the other two interests, a verdict was directed in his favor. No recovery was permitted against Gunton, as he was an innocent purchaser or lessee under Thomson. From the judgment on the verdict, plaintiffs and Thomson have appealed.

The single question before us is the correctness of the court's direction of the verdict. When Thomson and the executors were negotiating, it was manifestly on his own admission for the purpose of providing for the payment of their individual indebtedness, and when he took the deed from them he took it, at least in part, in consideration of his payment or assumption of such indebtedness. If he had not been a member of the bar, the law would presume that he knew he was taking from them a deed which they had not authority to execute and that in executing it they were attempting to divert trust funds under their control to their own individual use; but he was a lawyer of nearly 40 years' experience at the time, and it requires more than ordinary judicial patience to bear with him when he asks that the deed be declared to be good as to the three daughters and devisees of the testator, who had no part in its execution, and who will be grossly wronged by it, if permitted to stand as a valid title. As to them no sale was made, and the deed is utterly void in Thomson's hands, for he took it with full knowledge that the executors or trustees had no authority to affect the interests of the three daughters by it, and was an active participant in the attempted fraud upon them. One of his contentions on this appeal, apparently not raised in the court below, is that the deed ought to be sustained because the moneys received by the executors were used to make advances to one of the children of the testator. It is a sufficient answer to this to say that George C. Jackson had parted with his entire interest in the estate more than eight years before, and he had, therefore, no right to receive any advancements at the time the deed was made and have the same deducted from his share on the final settlement of the estate. Thomson admitted that he paid George a part of the consideration money for the deed. His testimony as to this is as follows: "Q. Did George C. Jackson get any money from the bank, about the time this conveyance in question was made, that was a part of the consideration of it. A. I think he did. Q. He got some money, cash, in addition to the

judgments and matters that were paid for him? A: Yes, sir; that is my recollection. I think there was one check, one or more checks, paid right to him. Q. Do you know what use he made of that money? A. No; I don't. I can't tell you that. Yes; I think I can. I think he deposited it in bank, but what he did with it after that I can't tell you." This branch of the case is dismissed with the following from the court's instructions to the jury: "There is a well-settled rule of law which forbids executors from converting property of an estate they represent to their own use. They cannot, therefore, pledge or sell it for their individual indebtedness. When they do so to one who has knowledge that such use of the estate property is being made, such transfer may be voided by the persons to whom the property really belongs; that is, by the heirs or devisees. In such case the executors and the persons acquiring the property are equally culpable. If land is the subject of such a transaction, the one to whom it is thus conveyed, having knowledge of the illegal transaction, does not take a good title as against the persons thereby wronged. \* \* \*

The applicability of this rule of law to the case on trial we will now make known to you. The undivided one-third interest in this 102-acre tract of land belonged to George D. Jackson. The legal title thereto passed by his will to his executors in trust, as we have already explained. The executors held that title for the purpose expressed in the will. They were the trustees of the devisees, and the beneficial interest in this land belonged to such devisees. When the executors assumed their duties as such, they were bound to act in good faith towards those devisees. If the executors conveyed this interest in this land to Mr. Thomson in payment of, or as security for, their individual indebtedness to him or others, they committed a breach of trust. If he took the conveyance with that understanding and agreement, he was equally engaged in wrongdoing. Under such circumstances the transaction would be in violation of the rights of such persons having an interest in the land, as did not join in the conveyance; and it is immaterial whether it was part of that bargain that the deed to Mr. Thomson was also to secure an indebtedness of George D. Jackson's estate. In this respect the transaction was indivisible, and, if fraudulent in part, it is, as to the parties defrauded, wholly invalid. The taint of fraud in converting the trust property to the individual use of the executors, so far as innocent devisees are concerned, would attach to the instrument as a whole and destroy its efficacy as a transfer of their beneficial interest in the land. If this deed was taken by Mr. Thomson as security for, or in payment of, the individual debts of the executors, he is, as

to the parties thereby wronged, a trustee ex maleficio. On this point there is no conflict of testimony. Mr. Thomson has testified, and therefore admits, that in the consideration passing from him to the executors for the deed for the 102-acre tract, and the other conveyances then obtained by him, there was included some individual indebtedness of George C. Jackson, to which reference has been made."

As to the interests devised to the two sons, George C. and W. W. Jackson, and by them conveyed to their mother, a different situation is presented. Whatever interest in the land was held by George C. Jackson or his mother on July 9, 1897, either could have sold and conveyed to Thomson. They were sui juris, and could have done as they pleased with their own. If other persons had been named as executors, they could have agreed that such executors should convey their interests to another, and, when they themselves as executors made the conveyance, they must be regarded as having intended to convey whatever interests they owned. Thereafter neither of them could impeach the validity of the conveyance as to any interest owned at that time or subsequently acquired by them or either of them. They had testamentary authority to sell, and neither of them as individuals could subsequently question their own exercise of it. Their conveyance, so far as it affected their interests, contravened no public policy. It was totally void in the hands of their grantee only as to the three-fifteenths of the land owned by the daughters, and the fraud attempted upon them has not been consummated, for the deed is still in Thomson's hands.

As to the remaining two-fifths, neither Bernice W. Jackson nor George C. Jackson, if living, would be heard in alleging fraud as a ground for avoiding their deed. As they executed it, they were bound by it, and where they placed themselves the law left them (*Bredin's Appeal*, 92 Pa. 241, 37 Am. Rep. 677); and those now representing them are in no better situation. In such a case the maxim, "*Nemo allegans suam turpitudinem audiendus est*," is in full force, and Thomson is permitted to say, "*In pari delicto melior est conditio possidentis*."

All of the assignments of error are overruled, both appeals are dismissed, and the judgment is affirmed.

(222 Pa. 253)

RIELLY v. STEPHENSON et al.

(Supreme Court of Pennsylvania. Oct. 5, 1908.)

1. WATERS AND WATER COURSES (§ 116\*)—SURFACE WATER — RIGHTS OF ADJOINING OWNERS.

While the owner of a city lot in improving the same may shut out surface water from his lot without preventing it from flowing over the adjacent land or leading it to a sewer, he

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

may not through negligence do unnecessary damage to the land of adjoining owners, nor obstruct a natural channel, nor one that has acquired the character of an easement, nor discharge surface water in a body on adjoining land.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 127-134; Dec. Dig. § 116.\*]

**2. WATERS AND WATER COURSES (§ 116\*)—SURFACE WATERS — RIGHTS OF ADJOINING OWNERS.**

Plaintiff and defendant owned adjoining lots on a paved street. The land was on a hillside, and the surface water from rains ran over both lots from the rear to the front. Defendant raised the grade of his lot, but did not change the character of the flow of the surface water, except that the water which had previously spread over the surface of both lots now ran over plaintiff's lot. There was no evidence of negligence, or that defendant had closed up any channel. *Held*, that he was not liable to plaintiff for damages caused by the increased flow of water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 127; Dec. Dig. § 116.\*]

Appeal from Court of Common Pleas, Luzerne County.

Bill by Cornelius M. Rielly against Joseph Stephenson and Helen Stephenson. Decree for plaintiff, and defendants appeal. Reversed.

The court entered a final decree as follows: "Now, February 8, 1908, this cause came on to be further heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz.: That the said defendants be forthwith required to make provision by adequate and sufficient means for the flow and passage of surface water which naturally passed into and over the same before they improved their said lot in such a way as not to cause damage or injury to the property of plaintiff."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

M. J. Mulhall and W. L. Raeder, for appellants. John McGahren, for appellee.

MITCHELL, C. J. The parties own adjoining lots on an opened and paved street in the city of Wilkes-Barre. The land was on a sloping hillside so that the surface drainage from rain, etc., ran over both lots from the rear to the front. The defendant improved his lot first, and in so doing raised the grade in parts. He did not change the character or direction of the flow nor add to the volume of it, except that in consequence of the raised grade the water which had previously spread over the surface of both lots now ran over plaintiff's. It was a natural and inevitable result of the defendant's improvement of his lot, and it is not charged that it was negligently done. It was averred in the bill that defendant's lot

had a dip or hollow which made a natural channel through which the water from plaintiff's lot was accustomed to flow, and that this had been filled up. But the court below expressly refused to find that there had been a channel, and the evidence would not have sustained a finding of such fact. The land in its natural state was uneven with occasional depressions, in which the water would collect temporarily and then gradually drain off. There was nothing that could properly be called a channel.

The learned judge below found all the facts in favor of the defendants, including the following:

"(3) The land, of which both lots are a portion, was originally undulating land used for farm purposes, and it has been laid out in building lots and streets for many years.

"(4) The opening and grading of streets, the construction of sewers, and the erection of buildings in the natural expansion of the city, adjacent to the plaintiff's and defendants' lots, have changed the surface of the land as it existed in a state of nature. \* \* \*

"(7) The opening of Jones street and Essex Lane, and the erection of buildings thereon, changed and increased the natural flow of the surface water on the land adjacent to the plaintiff's and defendants' properties."

He also found as matter of law "that the defendants had the right to grade their lot in the manner described without regard to the natural drainage of the locality." But he added the qualification that "in doing so, however, the owner of a lot must take care of the drainage of the surface water by means of artificial appliances so as not to injure or damage the other or adjacent landholders." The correctness or error of this rule is the question in the case.

The ruling of the learned judge below was made in deference to the language and supposed decision of Kennedy, J., in *Bentz v. Armstrong*, 8 Watts & S. 40, 42 Am. Dec. 265, and the cases of *Davidson v. Sanders*, 1 Pa. Super. Ct. 432, and *McMahon v. Thornton*, 5 Pa. Super. Ct. 495, which were based upon it. But the decision in *Bentz v. Armstrong* was upon a much narrower point, and the language of Justice Kennedy has been extended to apply to a state of fact to which it was never applicable. The plaintiff in that case claimed the right to turn the rain water which fell upon his lot, and also the water of a spring on his lot, on to the lot of defendant. The latter placed an obstruction on his own lot which turned the water back on the plaintiff's lot. The trial judge charged the jury that the plaintiff had established his right to an easement. On this point the case was reversed; Kennedy, J., saying: "It does not appear to us that any facts have been testified to going in the slightest degree to establish the plaintiff's right to an easement such as he claims in this case." That

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is the whole extent of the actual case decided. But Justice Kennedy then proceeds to discuss a feature of the case that had evidently been argued, and his language is certainly as favorable to the defendants in the present case as to the plaintiff: "In the purchase of lots of ground laid out and sold for the purpose of building up towns or cities thereon, it has ever been understood, and such has been the practice and usage, too, that the natural formation of the surface will, and indeed must, necessarily, undergo a change in the construction of buildings and other improvements that are designed and intended to be made. In doing this it would seem to be right that the common benefit and convenience of the respective owners of adjoining lots should be consulted and attended to, but certainly no one ought to be restrained from improving his lot in such a manner as to make it answer the purpose for which it was laid out, sold, and purchased, if practicable, without overreaching upon his neighbor's lot. He ought to be permitted to form and regulate the surface of it as he pleases, either by excavating or filling up, as may be requisite to the convenience and enjoyment of it, taking care, however, not to produce any detriment or injury to his neighbor in the occupation or enjoyment of his adjoining lot." So far this is sound law and in accordance with all the decisions. But when the learned justice adds: "It is of great importance that the water from each lot arising from rain or other cause should be conducted by the owner or occupier thereof, if he wishes to have it removed, directly from it to a sewer or other place appropriate for the receipt and discharge of the same, and not be turned or let on to an adjoining lot, \* \* \* and it appears to me to be the duty of the owner of each lot if he improves it to do it in such way, if practicable, as to lead and conduct the water that happens to fall upon it, off in the way mentioned." This is mere dictum not authorized by sound general principles and not consistent with the rules previously established in the same opinion.

The owners of lots in cities and towns buy and own with the manifest condition that the natural or existing surface is liable to be changed by the progress of municipal development. All such owners have equal rights neither lessened nor increased by priority of improvement, and the primary right of each owner is to protect himself and his lot from loss or inconvenience from the flow of surface water. The owner at the foot of

the slope is under no obligation to allow his lot to continue as a reservoir for the surplus water of the neighborhood. He may shut it out by grading or otherwise, and the fact that thereby he may incidentally increase the flow on the adjoining lot neither makes him answerable in damages nor affects the adjoining owner's right in his turn to shut out the original, plus the increased flow on his lot. The owner cannot be coerced as to time or manner of improvement by risk of having put upon him the burden of providing for the flow upon others. Some things, of course, he may not do. He may not proceed negligently so as to do unnecessary damage to others. But, so far as he acts upon his right to protect his enjoyment of his own property, any incidental loss to his neighbor is *damnum absque injuria*. It is clearly settled, however, first, that he may not obstruct a natural channel for the flow of the water, or a channel that has acquired the character of an easement; and, secondly, he may not gather surface water into a body and discharge it on the adjoining land. His right is to shut out the invading water, as a common enemy, for the protection of his own land. Notwithstanding the dictum in *Bentz v. Armstrong*, and the questionable application of it in a few later cases, these principles are fundamental, and have never been successfully questioned. The latest case on the subject is *Strauss v. Allentown*, 215 Pa. 96, 63 Atl. 1073, in which it was sought to charge a municipality with damages for loss of value of land by increased flow of water from the change of surface conditions. It was practically conceded throughout the case that an individual owner would not be answerable, and it was held that the municipality was equally exempt from liability from increased flow of water incidental to surface changes in the course of municipal development. The qualification applied in this case that the right of the owner to shut out the surface flow from his lot is accompanied by an obligation to prevent it from flowing over the adjacent land and to lead it by artificial or other means to a sewer or other avenue of escape is totally irreconcilable with the conceded right of protection of his lot already discussed, and is not sustained by authority or on general principles. The cases in New Jersey, Connecticut, and Massachusetts which have considered this exact question are uniformly against any such obligation.

Decree reversed and bill directed to be dismissed, with costs.



## MEMORANDUM DECISIONS.

(74 N. J. E. 451)

**ALBERT v. HAEBERLY.** (Court of Errors and Appeals of New Jersey. June 15, 1908.) Appeal from Court of Chancery. Action by Amelia Albert against Emily B. R. Haeberly. Decree for complainant, and defendant appeals. Affirmed. Garrison & Voorhees, for appellant. Bourgeois & Sooy, for respondent.

**PER CURIAM.** This cause was heard before the late Vice Chancellor Grey, who expressed the view that the case was governed by the same legal principles that this court applied in a former litigation between the same parties. *Albert v. Haeberly*, 68 N. J. Eq. 664, 61 Atl. 380, 111 Am. St. Rep. 652. We concur in that view, and the decree under review should therefore be affirmed, with costs.

(74 N. J. E. 455)

**ATLANTIC CITY GAS & WATER CO. v. CONSUMERS' GAS & FUEL CO. et al.** (Court of Errors and Appeals of New Jersey. June 15, 1908.) Appeal from Court of Chancery. Bill by the Atlantic City Gas & Water Company against the Consumers' Gas & Fuel Company and others for an injunction. A preliminary injunction was denied (70 N. J. Eq. 536, 61 Atl. 750), and on final hearing the dismissal of the bill was advised (65 Atl. 1119), and complainant appeals. Affirmed. Thompson & Cole, for appellant. Charles L. Corbin, for respondents.

**PER CURIAM.** This was an injunction bill. An application for a preliminary injunction was heard by Vice Chancellor Bergen, who denied it for reasons expressed by him in an opinion reported in 70 N. J. Eq. 536, 61 Atl. 750. The cause was afterwards submitted on final hearing to Vice Chancellor Leaming upon the same testimony. He concurred in the views of Vice Chancellor Bergen, and advised the dismissal of the bill of complaint. We likewise concur, and the decree of dismissal should be affirmed, with costs.

(74 N. J. L. 597)

**BELLEVILLE LAND & IMPROVEMENT CO. v. ATLAS MFG. CO.** (Court of Errors and Appeals of New Jersey. Jan. 2, 1907.) Error to Supreme Court. James E. Howell, for plaintiff in error. Chauncey G. Parker, for defendant in error.

**PER CURIAM.** The judgment brought up by this writ of error is affirmed, on the grounds stated in the opinion of Mr. Justice Garrison, in the Supreme Court (no opinion on file).

(74 N. J. E. 452)

**BERGEN v. ROGERS.** (Court of Errors and Appeals of New Jersey. June 15, 1908.) Appeal from Court of Chancery. Bill by George J. Bergen, receiver, against John I. Rogers. From a decree of the Court of Chancery, dismissing the bill, advised by Vice Chancellor Garrison (67 Atl. 290), complainant appeals. Affirmed. Wilson, Carr & Stackhouse, for appellant. John I. Rogers, pro se.

**PER CURIAM.** The decree under review herein should be affirmed, for the reasons set forth in the opinion delivered by Vice Chancellor Garrison in the court below. 67 Atl. 290.

(74 N. J. L. 685)

**BURNS et al. v. ECKERT.** (Court of Errors and Appeals of New Jersey. Feb. 2, 1907.) Error to the Supreme Court. Thomas F. Noon-

an, for plaintiff in error. Howard R. Cruse, for defendants in error.

**PER CURIAM.** The judgment in this cause is affirmed, for the reason given in the per curiam opinion of the Supreme Court (no opinion on file).

(75 N. J. L. 940)

**BURNS v. LEHIGH VALLEY R. CO.** (Court of Errors and Appeals of New Jersey. March 9, 1908.) Error to Supreme Court. Action by Edward Burns against the Lehigh Valley Railroad Company. From a judgment of the Supreme Court (65 Atl. 186), affirming a judgment for plaintiff, defendant brings error. Affirmed. Geo. S. Hobart, for plaintiff in error.

**PER CURIAM.** The judgment under review will be affirmed, for the reasons stated by Pitney, J., in the opinion filed in the court below.

(73 N. J. E. 741)

**BURRELL v. MIDDLETON et ux.** (Court of Errors and Appeals of New Jersey. March 2, 1908.) Appeal from Court of Chancery. Action by William B. M. Burrell against Melbourne F. Middleton and wife. From an order (65 Atl. 978) denying a preliminary injunction, plaintiff appeals. Affirmed. E. A. Armstrong, for appellant. John W. Wescott, for respondents.

**PER CURIAM.** The order under review herein should be affirmed, with costs, for the reasons set forth in the opinion of Vice Chancellor Leaming.

(74 N. J. L. 593, 594)

**CLARK v. ATLANTIC CITY R. CO.** (Court of Errors and Appeals of New Jersey. Feb. 2, 1907.) Error to Supreme Court. J. Willard Morgan and Clarence L. Cole, for plaintiff in error. John W. Wescott and Ralph W. E. Donges, for defendant in error.

**PER CURIAM.** The judgment in this cause is affirmed, for the reasons given in the opinion of Mr. Justice Dixon in the Supreme Court (no opinion on file).

(75 N. J. L. 939)

**DURRELL v. MAYOR, ETC., OF CITY OF WOODBURY.** (Court of Errors and Appeals of New Jersey. March 9, 1908.) Error to Supreme Court. Certiorari by Edward H. Durrell to the mayor and council of the city of Woodbury to review an order confirming an assessment. Judgment in the Supreme Court (65 Atl. 198) confirming the assessment, and plaintiff brings error. Affirmed. Lewis Starr, for plaintiff in error. A. H. Swackhamer, for defendant in error.

**PER CURIAM.** The judgment under review will be affirmed, for the reasons stated by Trenchard, J., in the opinion filed in the court below.

(74 N. J. L. 599)

**FARNSWORTH v. MILLER et al.** (Court of Errors and Appeals of New Jersey. Jan. 2, 1907.) Error to Supreme Court. John J. Crandall, for plaintiff in error. John C. Reed, for defendants in error.

**PER CURIAM.** The judgment of the Supreme Court is affirmed, for the reasons given in the memorandum opinion of Mr. Justice Fort in that court. 60 Atl. 1100.

**FEINBERG v. FEINBERG.** (Court of Errors and Appeals of New Jersey. June 15,

1908.) Appeal from Court of Chancery. Suit by Hazer Feinberg, against Annie Feinberg. From an order of the Court of Chancery, advised by Vice Chancellor Leaming (66 Atl. 810), petitioner appeals. Affirmed. A. J. King, for appellant. Matthew Jefferson and John W. Wescott, for respondent.

PER CURIAM. By decree of the Court of Chancery the parties herein were divorced. The custody of their child, Sylvia, was awarded to the respondent until the further order of the court, and the petitioner was decreed to pay to the respondent \$3 per week for the support of the child from the date of the decree until the further order of the court. The order now under review was made about two years later, upon petitioner's application, and modifies the decree, so as to relieve him from the payment of money for the support of the child from the date of this order until further order of the court. Because it does not go further, and relieve him from the payment from the date of the decree until the making of the modifying order, petitioner appeals to this court. We concur with the view expressed by Vice Chancellor Leaming upon this point, and the order under review will therefore be affirmed, with costs.

(75 N. J. L. 939)

HAGEMAN v. NORTH JERSEY ST. RY. CO. (Court of Errors and Appeals of New Jersey. March 2, 1908.) Error to Supreme Court. Action by John V. Hageman against the North Jersey Street Railway Company. From a judgment (65 Atl. 834), reversing a judgment for plaintiff, plaintiff brings error. Affirmed. Albert C. Pedrick, for plaintiff in error. Hobart Tuttle, for defendant in error.

PER CURIAM. The judgment under review herein will be affirmed, for the reasons set forth in the opinion of Mr. Justice Garretson in the Supreme Court.

(74 N. J. E. 447)

In re JONES' ESTATE. (Court of Errors and Appeals of New Jersey. June 15, 1908.) Appeal from Prerogative Court. Application for assessment of collateral inheritance tax against certain legatees under the will of John J. Jones, deceased. From a decree granting an exemption to certain religious association legatees (67 Atl. 1035), the comptroller appeals. Affirmed. Robert H. McCarter, Atty. Gen., and William R. Barricklo, for appellant. Collins & Corbin, for respondents.

PER CURIAM. The decree under review herein should be affirmed, for the reasons expressed in the opinion of Vice Ordinary Bergen. 67 Atl. 1035.

(75 N. J. L. 942)

OCEAN CITY LAND CO. v. OCEAN CITY et al. (Court of Errors and Appeals of New Jersey. March 2, 1908.) Error to Supreme Court. Certiorari by the Ocean City Land Company against Ocean City and the Ocean City Association to review an attempt to modify a dedication of streets to public use. From a judgment (63 Atl. 1112) setting aside the ordinance, defendants bring error. Affirmed. Bleakly & Stockwell, for plaintiffs in error. Bourgeois & Sooy, for defendant in error.

PER CURIAM. The judgment in this case will be affirmed, for the reasons set forth in the opinion of Mr. Justice Garretson in the Supreme Court.

(74 N. J. E. 460)

PIERCE et al. v. OLD DOMINION COPPER MINING & SMELTING CO. et al. (Court of Errors and Appeals of New Jersey. June 15, 1908.) Appeal from Court of Chancery. Suit by John H. Pierce and others

against the Old Dominion Copper Mining & Smelting Company and others. From a decree for defendants, advised by Vice Chancellor Stevenson, whose opinion is reported in 65 Atl. 1005, complainants appeal. Affirmed. Edward M. Collie and Bennet Van Syckel, for appellants. Collins & Corbin, for respondents.

PER CURIAM. Upon the filing of the bill of complaint herein application was made for an injunction and for the appointment of a receiver. Both applications were denied, for reasons set forth in an opinion delivered by Vice Chancellor Stevenson, reported in 87 N. J. Eq. 309, 58 Atl. 319. Answers having been filed, the cause proceeded to final hearing, whereupon a decree was made dismissing the bill, without prejudice to the rights of the complainant herein to file a bill to restrain the Old Dominion Copper Mining & Smelting Company and its directors from diverting, misapplying, or mismanaging the so-called "segregated assets," described in the bill of complaint, and from carrying out any contracts which the complainants may have a right to declare void. See second opinion of Vice Chancellor Stevenson, reported in 65 Atl. 1005. We concur in the views expressed by the learned Vice Chancellor, so far as they are pertinent to the questions raised by the present appeal, and the decree under review should therefore be affirmed, with costs.

(73 N. J. E. 742)

RAMSEY v. PERTH AMBOY SHIPBUILDING & ENGINEERING CO. VOORHEES v. UNITED STATES. (Court of Errors and Appeals of New Jersey. March 2, 1908.) Appeal from Court of Chancery. Suit by Allen L. Ramsey against the Perth Amboy Shipbuilding & Engineering Company. From a decree (65 Atl. 461) by the Vice Chancellor, reversing the disallowance of claim of the United States by Willard F. Voorhees, receiver of the shipbuilding company, the receiver appeals. Affirmed. Adrian Lyon and Frank P. McDermott, for appellant. John B. Vreeland, U. S. Atty., and Harrison P. Lindabury, for respondent.

PER CURIAM. The decree under review will be affirmed, for the reasons set forth in the opinion delivered in the Court of Chancery by Vice Chancellor Stevens.

(73 N. J. E. 738)

SCHLICHER et al. v. KEELER et al. (Court of Errors and Appeals of New Jersey. March 2, 1908.) Appeal from Court of Chancery. Chancery suit by Mary E. Schlicher and another against Charles H. Keeler and others. From a decree advised by Vice Chancellor Bergen (62 Atl. 4), complainants appeal. Affirmed. Alan H. Strong, for appellants. Charles C. Hommann, for respondents George Keeler and wife. John V. B. Wicoff, for respondent Charles Keeler.

PER CURIAM. The decree under review herein will be affirmed, for the reasons expressed in the opinion delivered by Vice Chancellor Bergen in the Court of Chancery.

(76 N. J. L. 584)

SMITH v. WEAVER. (Court of Errors and Appeals of New Jersey. June 15, 1908.) Error to Supreme Court. Certiorari by Josephine T. Weaver against Ella Etta Smith. From an order discharging a rule to show cause why a judgment on bond and warrant of attorney should not be set aside (66 Atl. 941), prosecutor brings error. Affirmed. John J. Crandall, for plaintiff in error.

PER CURIAM. The judgment under review should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court. 66 Atl. 941.

**STATE v. PLEHM.** (Court of Errors and Appeals of New Jersey. March 2, 1908.) Error to Supreme Court. Hermann Plehm was convicted of burning a certain building and its contents with intent to prejudice the insurer, and brings error. Affirmed. Peter W. Stagg, for plaintiff in error. Ernest Koester, for the State.

**PER CURIAM.** Plehm was convicted in the Bergen quarter sessions upon an indictment charging him with the burning of a certain building and its contents, that were insured against fire, with intent to prejudice the insurance company. He sued out a writ of error from the Supreme Court, and in that court the conviction was affirmed. The present writ of error brings the judgment of affirmance under review. Plaintiff in error relies upon alleged errors committed in the trial. Upon an examination of the record, we are unable to discover error. The judgment under review should therefore be affirmed.

**STATE v. ROSENBAUM.** (Court of Errors and Appeals of New Jersey. Nov. 26, 1906.) Error to Supreme Court. Harvey F. Carr, for plaintiff in error. F. Morse Archer, for the State.

**PER CURIAM.** The judgment brought here by this writ of error is affirmed, for the reasons given in the opinion in the Supreme Court (no opinion on file).

(76 N. J. L. 576)

**STATE v. SHARP.** (Court of Errors and Appeals of New Jersey. March 9, 1908.) Error to Supreme Court. Charles Sharp was convicted of crime, and from a judgment of the Supreme Court (66 Atl. 926), affirming the judgment of the trial court, he brings error. Affirmed. J. J. Crandall, for plaintiff in error. G. Arthur Bolte, for the State.

**PER CURIAM.** The judgment under review should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Reed in the Supreme Court.

**STATE v. STERN.** (Court of Errors and Appeals of New Jersey. Feb. 2, 1907.) Error to Supreme Court. Louis Hood, for plaintiff in error. Ernest Koester, prosecutor of pleas, for the State.

**PER CURIAM.** The judgment in this cause is affirmed, on the grounds stated in the per curiam opinion of the Supreme Court (no opinion on file).

(73 N. J. E. 748)

**STEELMAN v. WHEATON et al.** (Court of Errors and Appeals of New Jersey. June 15, 1908.) Appeal from Court of Chancery. Bill by Daniel Steelman, executor of Philip M. Wheaton, against Arabella Wheaton and May Steelman. From an order of the Court of Chancery striking out the bill for want of equity (66 Atl. 196), complainant and defendant Steelman appeal. Affirmed. Gaskill & Gaskill, for appellant executor. Herbert A. Drake, for appellant May Steelman. Bleakly & Stockwell, George H. Felice, and Gilbert Collins, for respondent.

**PER CURIAM.** These appeals are taken from an order of the Court of Chancery striking out the complainant's bill for want of equity. We concur in the views expressed in the opinion of Vice Chancellor Bergen, upon whose advice the order was made; but we must not be understood as conceding that the executor was entitled to relief in equity, even if his contentions and those of the appellant May Steelman as to the merits of the controversy were well founded. The order under review should be affirmed, with costs.

**STEVENSON v. MARKLEY et al.** (Court of Errors and Appeals of New Jersey. March 2, 1908.) Appeal from Court of Chancery. Suit by Richard G. Stevenson, administrator of Mary Markley, deceased, against Paul H. Markley and another, executors of Mary Josephine Markley, deceased. From an order of the Court of Chancery (66 Atl. 185), denying a motion to strike out the bill, defendants appeal. Affirmed. Herbert A. Drake and Howard M. Cooper, for appellants.

**PER CURIAM.** We agree with the Vice Chancellor that the statute of limitations does not bar the relief sought and that the facts set forth in the amended bill prima facie excuse the seeming laches of the complainant. These conclusions are well vindicated by his opinion. It was unnecessary to hold that the case was not one properly cognizable by the orphans' court. We prefer to express no opinion on this point, in view of the provisions of section 118 of the orphans' court act (P. L. 1893, p. 753), authorizing an executor or administrator of a deceased guardian to account in that court, and of section 116, authorizing a citation at the instance of any person interested in the estate. The Vice Chancellor assumed that the act concerning the action of account (Gen. St. p. 5) applied to a general guardian appointed by the orphans' court. In this court the stress of the appellant's argument rested upon that assumption. Its correctness is doubtful. In terms the act only authorizes such action against the executors or administrators of a guardian. It does not purport to extend the right of action against guardians themselves, which at common law was limited to guardians in socage. The sole object of the statute seems to have been to extend the right of action already existing against guardians in socage to their executors and administrators. It is a copy of St. 4 Anne, c. 16, § 27. It seems hardly likely that the Legislature could have meant the act to apply to guardians authorized by the statute originally passed December 16, 1784 (Pat. Rev. Laws, 59). That act gave the orphans' court thereby created full power and authority to hear and determine all disputes and controversies whatever respecting the allowance of the accounts of guardians, a provision quite inconsistent with the argument on the part of the appellant that an action of account lay against such guardians. The action of account was then already falling into disuse. The order appealed from should be affirmed, with costs.

**TONKS et al. v. MULLIN.** (Court of Errors and Appeals of New Jersey. March 2, 1908.) Error to Supreme Court. Action by Thomas Tonks and another against William F. Mullin. From a judgment for plaintiff, defendants bring error. Affirmed. Riker & Riker, for plaintiff in error. Pitney, Hardin & Skinner, for defendants in error.

**PER CURIAM.** An examination of the record discloses no error prejudicial to the plaintiff in error. The judgment under review should be affirmed.

**WALTER v. WESTINGHOUSE, CHURCH, KERR & Co.** (Court of Errors and Appeals of New Jersey. March 26, 1907.) On error to the Supreme Court. Lewis, Benson & Stevens, for plaintiffs in error. Raymond & Van Blarcom, for defendant in error.

**PER CURIAM.** The court being equally divided, the judgment below is affirmed.

For affirmance—GARRISON, FORT, PITNEY, SWAYZE, VROOM, GREEN, and GRAY, JJ.

For reversal—THE CHANCELLOR, and GARRETSON, HENDRICKSON, REED,

**TRENCHARD, BOGERT, and VREDENBURGH, JJ.**

(76 N. J. L. 574)

**WOLFF v. MEYER.** (Court of Errors and Appeals of New Jersey. June 15, 1908.) Error to Supreme Court. Action by David Wolff against Maud M. Meyer. Judgment for plaintiff (66 Atl. 959), and defendant brings error. Affirmed. John A. Kiernan and Clarence D. Meyer, for plaintiff in error. Samuel Koestler, for defendant in error.

**PER CURIAM.** The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Swayze in the Supreme Court.

**VOORHEES and VROOM, JJ., dissent.**

(221 Pa. 665)

**GRAY et al. v. MEADVILLE & C. S. S. RY. CO.** (Supreme Court of Pennsylvania. May 18, 1908.) Appeal from Court of Common Pleas, Crawford County. Three actions for personal injuries against the Meadville & Cambridge Springs Street Railway Company—one by Henry Noel; another by Mary Hickernell, by her father, Isaac Hickernell, and Isaac Hickernell; and another by Somner Gray. Judgment for plaintiffs, and defendant appeals. Reversed, with directions. Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

**PER CURIAM.** These cases arose out of the same accident as the case of Beckman v. Railway Co., 219 Pa. 26, 67 Atl. 983, and are governed by it. For the reasons there stated, the judgment in each case is reversed, and it is directed that judgment be entered for the defendant in each non obstanta verdicto.

**ADELSON v. KELLER et al.** (Supreme Court of Rhode Island. April 20, 1908.) Appeal from Superior Court. Bill by Elix Adelson against James C. Keller and others. From a decree for complainant, defendants appeal. Modified, and a decree ordered in accordance with the rescript. Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ. Clark Burdick, for complainant. John C. Burke and Julius L. Mitchell, for respondents.

**PER CURIAM.** The evidence supports the allegations of the bill of complaint and establishes the complainant's right to specific performance by the defendants of their agreement to sell and convey the land in question upon the terms set forth in the two papers in evidence, signed by them and the complainant, respectively. The decrees of the superior court contains an error as to the amount and terms of the mortgage. To this extent the appeal is sustained, and the counsel will present a draft decree for our approval in accordance with this rescript.

**KELLEY v. TOOMEY.** (Supreme Court of Rhode Island. March 13, 1908.) Exceptions from Superior Court. Action by Amelia M. Kelley against Neil Toomey. There was a judgment for plaintiff, and defendant excepts. Exceptions overruled. Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ. John W. Hogan and Philips S. Knauer, for plaintiff. Edward M. Sullivan, for defendant.

**PER CURIAM.** The evidence supports the decision of the superior court, establishing the plaintiff's averment of title by adverse possession. The defendant's exception is overruled, and the cause is remitted to the superior court for judgment on the decision.

**MAINE CREAMERY CO. v. REEVES.** (Supreme Court of Rhode Island. March 13, 1908.) Exceptions from Superior Court. Action by the Maine Creamery Company against D. W. Reeves. Motion for new trial on a verdict for plaintiff was denied, and defendant excepts. Exceptions overruled. Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ. Vincent, Boss & Barnesfield, for plaintiff. James A. Williams, for defendant.

**PER CURIAM.** The record presents rather a greater harmony in the evidence than is common in cases arising from horse trades. It fully supports the verdict of the jury. The defendant's exceptions are overruled, and the case is remitted to the superior court for judgment upon the verdict.

**METROPOLITAN LIFE INS. CO. v. ARMSTRONG et al.** (Supreme Court of Rhode Island. March 13, 1908.) Appeal from Superior Court. Bill of interpleader by the Metropolitan Life Insurance Company against Myers R. Armstrong, as administrator of the estate of William J. Greenville, Hattie J. Greenville, and others. From the decree, the named respondents appeal. Dismissed, and cause remanded. Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ. Adoniram J. Cushing, for complainant. Luke Kavanaugh, for respondent Butler. Julius L. Mitchell, for respondents Armstrong and Greenville.

**PER CURIAM.** We think the evidence sustains the decision of the superior court. The appeals are dismissed, and the decree of the superior court is affirmed, and the cause is remanded to the superior court for further proceedings.

(74 N. J. L. 793)

**BUMSTED v. HENRY.** (Court of Errors and Appeals of New Jersey. March Term, 1907.) Error to Supreme Court.

**PER CURIAM.** The judgment is affirmed, for the reasons stated in Decker v. Daudt (just decided) 67 Atl. 375.

**VAN DYKE et al. v. COLE.** (81 Vt. 379)

(Supreme Court of Vermont. Essex. November 25, 1908.)

**APPEAL AND ERROR (§ 832\*)—REHEARING.**

A rehearing will not be granted to give an opportunity to raise and present a new question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 322; Dec. Dig. § 832.]

On Rehearing. Petition refused. For former opinion see 70 Atl. 593.

**WATSON, J.** After this cause was heard and determined in this court, and final entry made, and after the same had been remanded and a mandate sent down, a petition was filed by the orators for a rehearing, under the provisions of sections 1313-1316 of the Public Statutes of 1906, and thus by force of the law of those sections the case was again transferred to this court. It appears from the petition that the orators seek, if a rehearing be granted, to present the constitutional question of the impairment of the obligation of contracts, claiming that the decision of this court impairs the obligation of the land contract involved, in that the court, it is claimed, failed to give force and effect particularly to the words therein, "at any time after such default," etc. It further appears from the petition, as the fact is, that this constitutional question was not raised before

this court when the hearing was had and that the orators now seek to raise it for the first time. In *State v. Franklin County Savings Bank & Trust Co.*, 74 Vt. 246, 52 Atl. 1069, a motion was made, after a decision had been rendered in this court, for a rehearing on the ground, as here, that the moving party desired to present a question in argument not before presented. It was held that a rehearing would not

be granted to give an opportunity to raise and present a new question, and the motion was overruled, but no further opinion was written. That case was prior to the enactment of the statute under which the present petition is brought, yet the holding is equally applicable when a rehearing is sought under this statute.

Rehearing refused, petition dismissed, and cause remanded.

END OF CASES IN VOL. 70.









